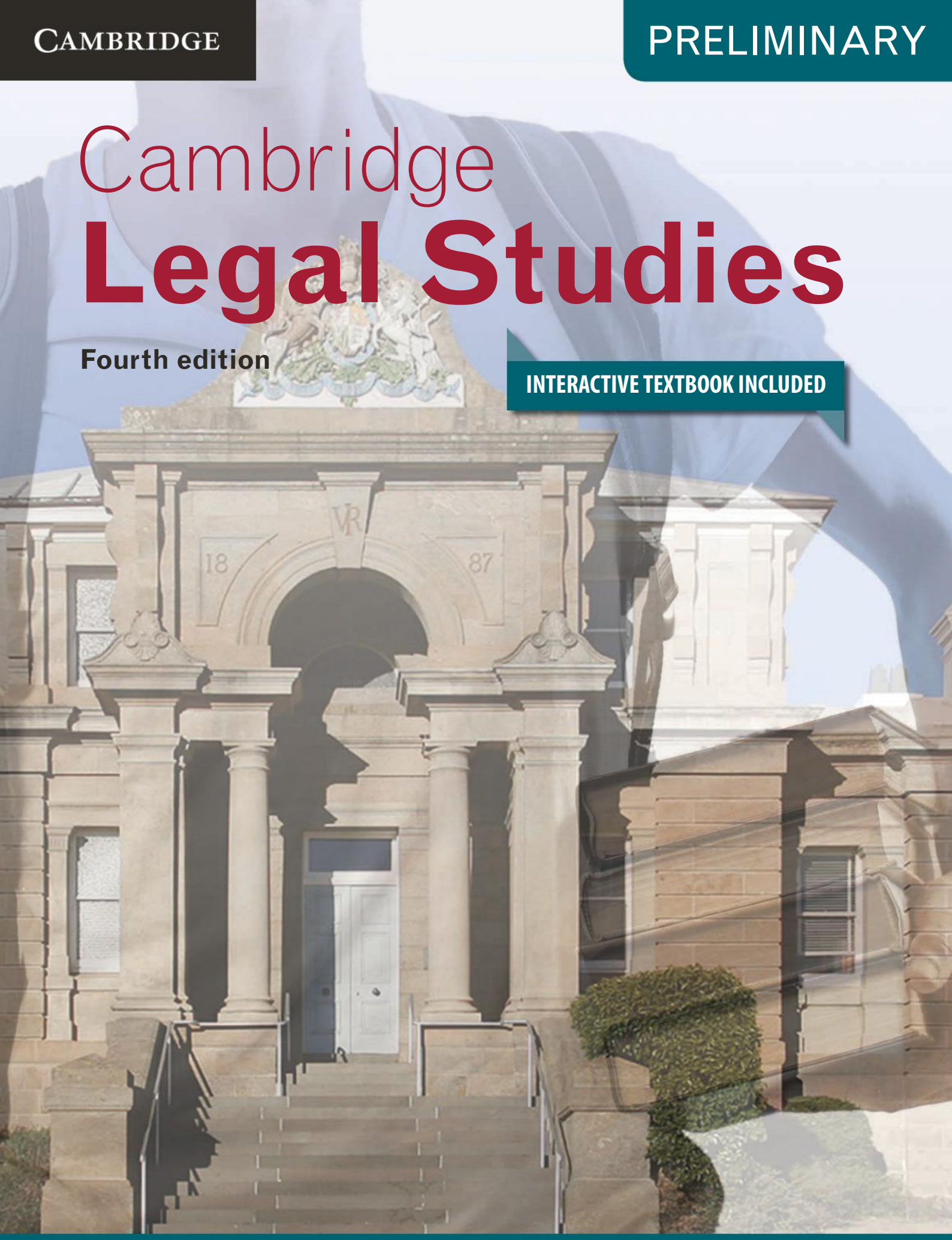
CAMBRIDGE
PRELIMINARY
Cambridge
Legal Studies
Fourth edition
INTERACTIVE TEXTBOOK INCLUDED
Paul Milgate, Kate Dally, Phil Webster,
Daryl Le Cornu, Tim Kelly

CAMBRIDGE UNIVERSITY PRESS

PRELIMINARY

Cambridge Legal Studies

Fourth edition

Paul Milgate, Kate Dally, Phil Webster
Daryl Le Cornu, Tim Kelly

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Please be aware that this publication may contain images of Aboriginal and Torres Strait Islander peoples now deceased. Several variations of Aboriginal and Torres Strait Islander terms and spellings may also appear; no disrespect is intended. Please note that the terms 'Indigenous Australians' and 'Aboriginal and Torres Strait Islander peoples' may be used interchangeably in this publication.

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Part II – The individual and the law

Part III – Law in practice

Issue 1: Groups or individuals suffering disadvantage

Issue 2: Events that highlight legal issues

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About the authors

Paul Milgate Dip Teach, BEd, Grad Cert in Theology and Masters in Educational Leadership is the Executive Officer to the Director of Schools at the Catholic Schools Office in Lismore. In the past he has been the Leader of Pedagogy and Head Teacher of the HSIE (Human Society and Its Environment) Faculty at Xavier Catholic College on the North Coast of NSW. He has extensive experience in Legal Studies, having taught it since its inception, and has assisted over many years in the planning and running of HSC study days on the North Coast.

Kate Dally BA DipEd is Head Teacher of Social Sciences at Auburn Girls High School in Sydney. She has extensive teaching experience, having taught Social Sciences for the past 25 years. Kate's experience also covers HSC marking in both Legal Studies and Business Studies. She has written for Success One Business Studies for a number of years.

Phil Webster BA DipEd MEd MACE is Head Teacher of HSIE at Mosman High. He has over 25 years' experience in HSIE as a teacher of Legal Studies, Society and Culture, and Business Studies, with a particular interest in the changing role of law in society. Phil is passionate about issues of human rights, indigenous affairs and justice in a rapidly changing world.

Dr Daryl Le Cornu BA(Hons) DipEd PhD has many years of experience teaching Legal Studies in high schools. He has a passion for teaching about human rights, the United Nations, global governance and nuclear disarmament. Daryl has also been involved in curriculum development in NSW for many years. Currently, he is a History Curriculum Lecturer at the ACU (Australian Catholic University), the Education Officer for the UNAA NSW (United Nations Association of Australia), President of the WCAA (World Citizens Association Australia) and is a member of the Board of ICAN Australia (International Campaign to Abolish Nuclear Weapons).

Tim Kelly BA DipEd DipLaw obtained his BA DipEd from the University of New South Wales in 1984 and completed his Diploma in Law from the Legal Practitioners Admissions Board in 1996. He began teaching Legal Studies in 1993 at St Mary's Maitland. Since 1998, Tim has been the HSIE Coordinator at St Mary's in Casino and is currently an Education Officer for the Lismore Catholic Schools Office. Tim is also a tutor in HSIE Curriculum Specialisation at Southern Cross University and is a recent HSC marker for Legal Studies.

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Tim Kelly

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The publishers

Introduction

To the student

Congratulations on choosing *Cambridge Legal Studies Preliminary Fourth Edition*. This edition has been updated to meet the changing processes of the legal system and the requirements of the current Stage 6 Legal Studies Syllabus in New South Wales.

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 who are able to think critically about the processes and institutions that shape their lives on a daily basis.

The rights people enjoy within democratic societies can at times be eroded by governments when electorates become apathetic about their 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 challenge the way you see the world and how you understand the concept of achieving justice through legal and non-legal means.

Cambridge Legal Studies Preliminary Fourth 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

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1 Student book – print

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Your purchase of the print book gives you access to the following digital resources on *Cambridge GO*.

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  - Seven complete additional chapters in Part III: Law in practice, covering a range of different issues.
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  An online version of the textbook with a further host of interactive features to enhance the teaching and learning experience. These include:
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  - drag-and-drop activities
  - auto-marked multiple-choice quizzes
  - additional **digital-only** chapters from the PDF textbook.
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  - additional resources.

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The Teacher Resource Package contains a wide range of materials to support students and teachers, with course, lesson and teaching plans, and assessment and homework preparation.

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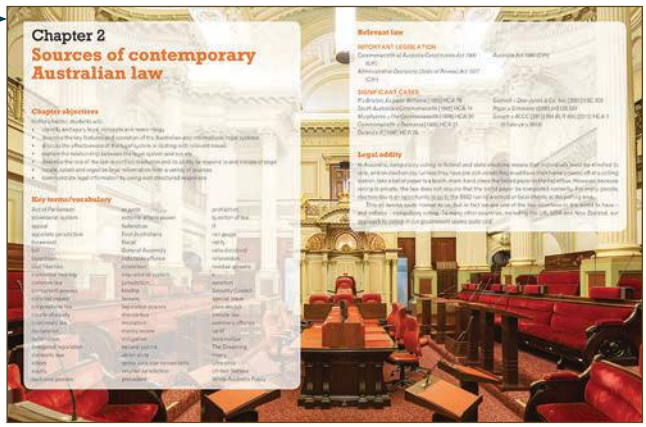
How to use this resource

Part and chapter openers

Each part and chapter of *Cambridge Legal Studies Preliminary* begins with an opener that contains:

- principal focus and themes and challenges from the Stage 6 Syllabus
- information relating to the HSC external examination
- chapter objectives
- key terms/vocabulary
- relevant law (including important legislation and significant cases)
- legal oddity.

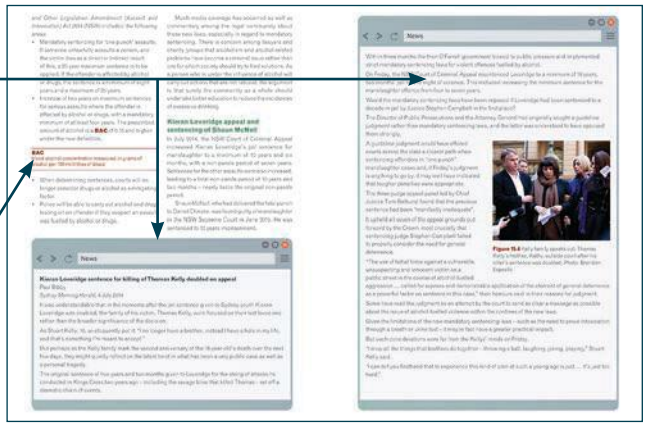


Media articles

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

Glossary terms

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



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.

Legal Links

In addition to the activities, there are a number of suggested links to internet resources and activities in each chapter. These will help you extend your knowledge and stay up to date with changes in the legal system.

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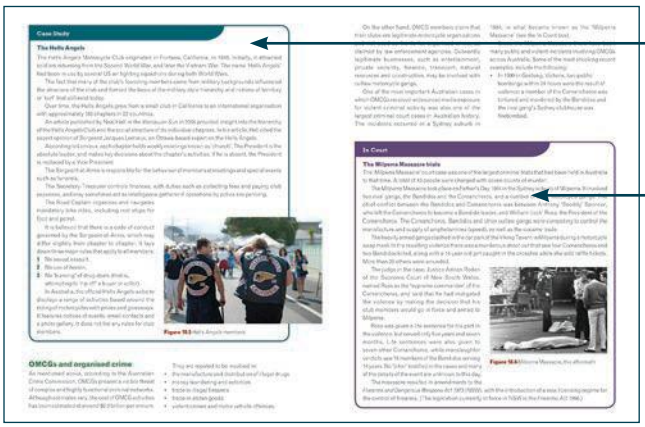
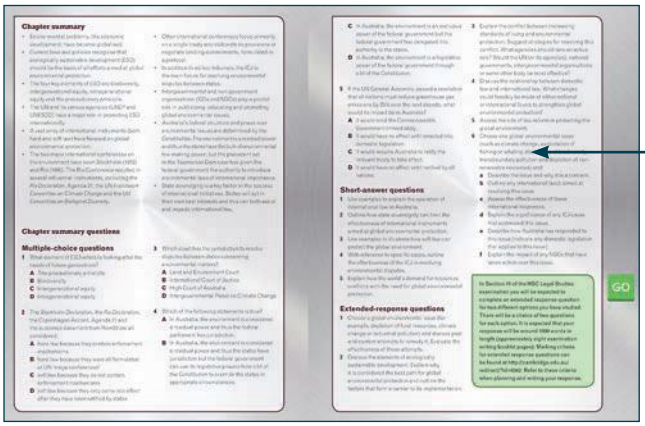


Case studies

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

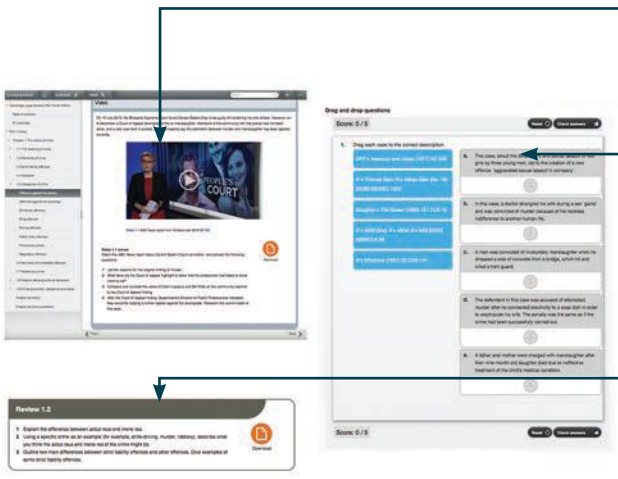
In Court

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.



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.



Video and audio

The interactive textbook contains video and audio items enrich the learning experience.

Interactive activities

Also included in the interactive textbook are automarked activities (e.g. 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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Glossary of key words

Syllabus outcomes, objectives, performance bands and examination questions have key words that state what students 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 Higher School Certificate documents. Using this glossary will help students and teachers 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

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

predict
suggest what may happen based on available information

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

recall
present remembered ideas, facts or experiences

recommend
provide reasons in favour

recount
retell a series of events

summarise
express the relevant details concisely

synthesise
putting together various elements to make a whole

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Part I
The legal system

40% of course time

Principal focus

Through examining law-making processes and institutions, students will gain an understanding of the nature and functions of the legal system.

Themes and challenges

- Why the law is necessary in the operation of our society
- How society depends on the rule of law
- How different jurisdictions and legal institutions interact
- How law reform and development reflect changes in society
- Factors that shape the Australian law and legal system

Chapters in this part

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Chapter 1
Basic legal concepts

Chapter objectives

In this chapter, students will:

- identify and apply legal concepts and terminology
- identify the changing nature of law
- describe the interrelationship between customs, rules and laws
- 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.

Key terms/vocabulary

access
anarchy
customary law
customs
doli incapax
equality
ethics
fairness
justice
law
legal system
natural justice
procedural fairness
rule of law
rules
sanction
state
tyranny
values

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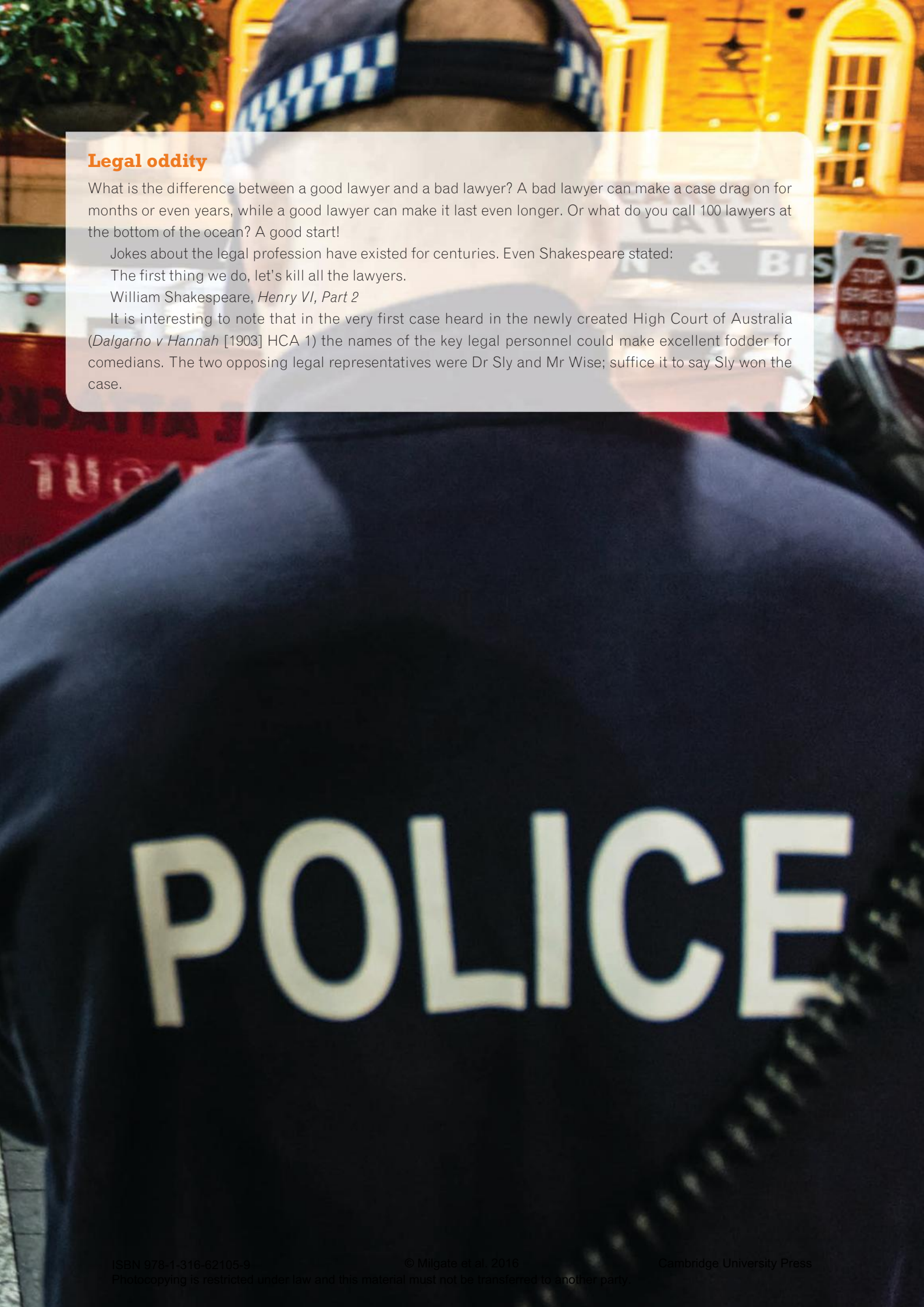

Legal oddity

What is the difference between a good lawyer and a bad lawyer? A bad lawyer can make a case drag on for months or even years, while a good lawyer can make it last even longer. Or what do you call 100 lawyers at the bottom of the ocean? A good start!

Jokes about the legal profession have existed for centuries. Even Shakespeare stated:

The first thing we do, let's kill all the lawyers.

William Shakespeare, *Henry VI, Part 2*

It is interesting to note that in the very first case heard in the newly created High Court of Australia (*Dalgarno v Hannah* [1903] HCA 1) the names of the key legal personnel could make excellent fodder for comedians. The two opposing legal representatives were Dr Sly and Mr Wise; suffice it to say Sly won the case.

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1.1 The meaning of law

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

In general terms, the law can be defined as a set of enforceable **rules** of conduct which 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.

law
a set of rules imposed on all members of a community, which 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

Despite the fact that it often seems to be playing catch-up, the law attempts to keep pace with our ever-changing society.

To understand how these rules (known in modern society as 'the law') came about, we also 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.

Figure 1.1 Laws today are imposed by the administrative institutions that govern a society, and there are consequences if they are breached.

Review 1.1

1 You belong to different communities whether they are a school, a sporting group or a religious organisation, for example. Think of one of the communities to which you belong and write down 3–4 rules of this group. How are these rules enforced? Why do you think group members follow these rules?
2 What other areas of law can you think of? List at least five.

Legal Links

View the NSW Bar Association website for easy-to-read information about the Australian legal system.

The State Library of NSW provides information on the history of the legal system in Australia, which can be accessed via http://cambridge.edu.au/redirect/?id=6487.

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 for a man

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Figure 1.2 Every culture has its own customs.

to shake hands when greeting a friend, whereas in 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. 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.

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

In many societies, most customary law is never written down, as is the case with Indigenous Australian customary law. In other societies, customary law is eventually recorded and transferred into written law in formal legal systems.

Rules

If you were to look in a dictionary or on the internet, you would find many definitions of the word 'rules'. Generally, rules refer to 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 the classroom. If these rules are broken, there is some form of punishment attached, enforceable by those involved in the making of the rules (e.g. suspension or detention). Rules can also be altered by these people in order to deal with changes in situations. This usually happens after consultation with the group members involved.

In a legal sense, rules form the basis of laws. However, rules can be changed quite 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

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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 security or the police, and they might incur a fine. The consequences of breaking rules are comparatively minor, despite the fact that it often shows a lack of consideration for others to go against these rules.

Laws allow and prohibit a whole variety of activities, from where rubbish should be placed to how we should treat 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 them.
6. Laws reflect rights and duties. This means that everyone in society has responsibilities to others, such as the duty to drive safely, and that everyone has the right to be treated in the same way by others.

In Australia today, the laws have been, and still are, mainly decided by elected government officials at local, state or 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 will look after all members of the group and, therefore, that any laws made will be fair, just and equitable. It is also expected that they will reflect traditional and current **ethics** and values. Although this represents the ideal situation, what is actually attainable may be another matter.

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

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'.

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 leaders of a group
a breach results in a prescribed sanction imposed by the courts	consequences of a breach at the discretion of the leader of a group

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Review 1.2

1. Identify any customs that exist in your day-to-day life. This may be within your favourite sport or even at your school. List the customs and share it with the class.
2. Explain how laws differ 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 differing standards of what is morally right or wrong. For this reason, laws will only cover those ethical values that are common to the majority or the dominant group. Over the past three decades, many groups have voiced their values and ethics in a public manner in an attempt to influence the law and the legal system. Examples (with varying degrees of success) are:

- The Mardi Gras (Sydney) – an internationally recognised annual event celebrating same-sex relationships. It started off as a protest march against the treatment of same-sex couples by the legal system and the lack of protection afforded to their relationships.
- In 2015, protests were held around Australia by a group called 'reclaim Australia' to highlight concerns about the loss of Australian values and the increasing acceptance of religion-based law such as sharia law. In response to this, another group who claimed to be against racism, rallied in protest as well. In Melbourne, when both groups met, violent clashes occurred. Protests such as these aim at getting the government to review current laws (or lack of them) and make appropriate changes.

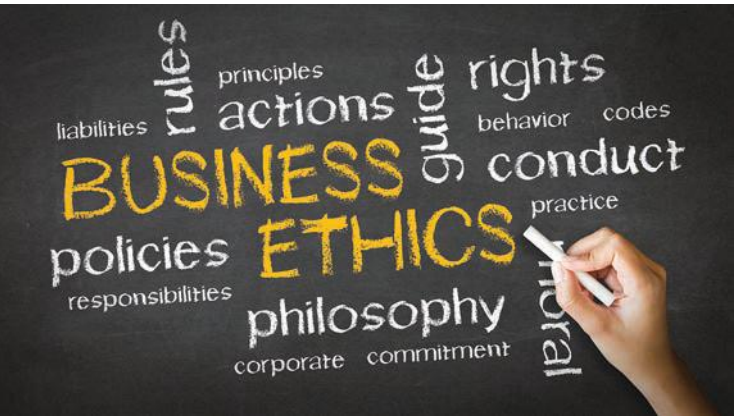

Figure 1.3 Ethics are the consideration of what is right and wrong.

What is meant by ethical behaviour?

Ethics and ethical behaviour are difficult things to define, especially since different people will have different ethical standards. Simply put, ethics is 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 the station stairs, but most people would carry out these actions as it is the right thing to do. Often ethical behaviour affects our integrity; that is, how we feel about ourselves and how others see us. For these reasons, most people will behave in an ethical (or moral) way and so laws do not have to be put in place to make it happen.

1.4 Characteristics of just laws

The concept of **justice** involves the fair and impartial treatment of all persons, especially under the law. In simple terms, justice can be seen as the continued effort to do the right 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 has the opportunity to put forward their point of view. A just law is one that allows everyone to receive fair treatment and outcomes, and ensures that human rights are recognised and respected.

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Figure 1.4 Justice should be fair and impartial.

This is not always an easy thing to do, as you will learn throughout the Legal Studies course.

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

1.5 The nature of justice

The system of courts (and those who work within the courts such as judges and legal practitioners), prosecutors and police in a country is often called 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 which allow us to distinguish good law from bad law. However, if all citizens do not 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 will be seen to be providing justifiable and appropriate outcomes.

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

Equality

Equality means that all people in a society are treated in the same way with respect to political, social and civil rights, and opportunities; 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. While the law strives for equality, it also takes into account people's different capacities (such as 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 10–14-year olds, the court will make an assessment as to whether the child can tell the difference between right and wrong, and this will influence the way in which the matter is handled.

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

Figure 1.5 A young person is often tried differently from that of an adult.

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Fairness

Fairness and justice are usually associated with each other. The difference is that the term '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 of its players, randomly selected, happen to be taller than those 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 knows anything about the teams or how tall the players are, Ann's winning of the bet may also be regarded as unfair – as a result of her having knowledge the others lacked.

In other words, even if it is sometimes possible for an opinion about what is fair to be justified or mistaken, there is no single social mechanism for deciding what is fair, or ensuring fairness.

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. But in order 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** refers to 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. In particular, women, financially disadvantaged people, people from non-English speaking backgrounds, people living with disability, Aboriginal and Torres Strait Islander peoples, and those who are institutionalised may experience difficulties in finding appropriate legal solutions.

1.6 Procedural fairness and the principles of natural justice

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.

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

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.

Figure 1.6 Everyone has the right to a fair trial.

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The assertion that 'justice should not only be done, but should be seen to be done' comes from the English case *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256. It was discovered that in a criminal trial in which McCarthy was convicted of dangerous driving, 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 on the basis of the possibility of bias.

Review 1.3

1 Why do we need laws?
2 Define the following basic legal notions. You can choose to use words, pictures or cartoons to define them:
   - **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. Are there any laws that you don't follow or believe in? Why is this?

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 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 who enforce the law; and the lawyers who represent and advise people on the law – are all 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

Why do people obey the law?

In general terms, 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 citizens 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 what actions are allowed and those that are not permitted. 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 people to resolve disputes, as they empower the police force and the courts to enforce and administer the law.

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

Figure 1.7 People sometimes disobey laws if they do not consider the penalty to be sufficiently harsh.

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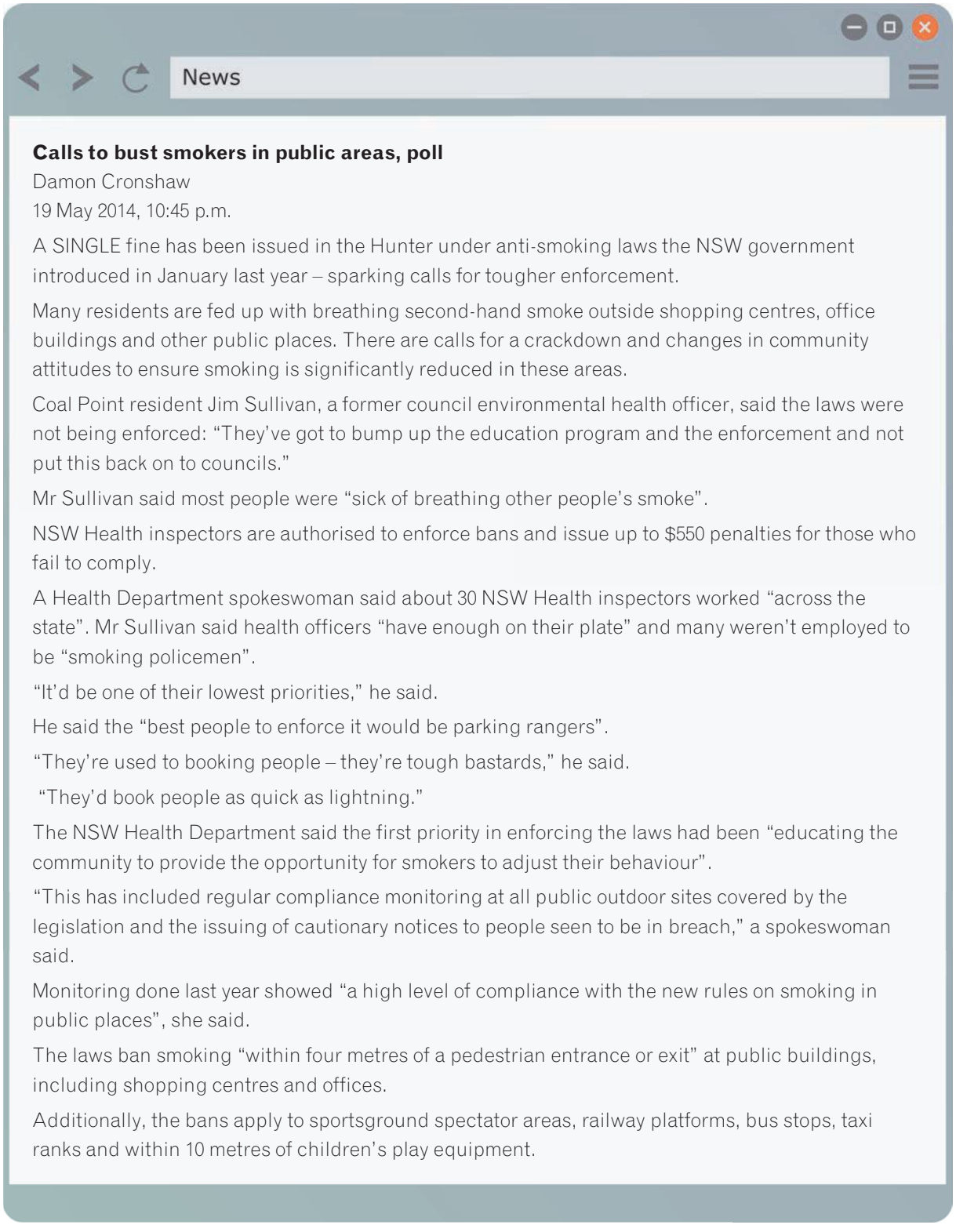
People will not follow rules if they do not agree with them or feel that the rules have no connection to them. This is especially so if the penalty attached to the rule is seen as inadequate. For example, think about the penalties attached to riding your bike or skateboard in areas where it is not permitted, 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. Some people believe that the law does not apply to them or that they will not be caught, and so do not comply with the law.



Calls to bust smokers in public areas, poll

Damon Cronshaw

19 May 2014, 10:45 p.m.

A SINGLE fine has been issued in the Hunter under anti-smoking laws the NSW government introduced in January last year – sparking calls for tougher enforcement.

Many residents are fed up with breathing second-hand smoke outside shopping centres, office buildings and other public places. There are calls for a crackdown and changes in community attitudes to ensure smoking is significantly reduced in these areas.

Coal Point resident Jim Sullivan, a former council environmental health officer, said the laws were not being enforced: "They've got to bump up the education program and the enforcement and not put this back on to councils."

Mr Sullivan said most people were "sick of breathing other people's smoke".

NSW Health inspectors are authorised to enforce bans and issue up to $550 penalties for those who fail to comply.

A Health Department spokeswoman said about 30 NSW Health inspectors worked "across the state". Mr Sullivan said health officers "have enough on their plate" and many weren't employed to be "smoking policemen".

"It'd be one of their lowest priorities," he said.

He said the "best people to enforce it would be parking rangers".

"They're used to booking people – they're tough bastards," he said.

"They'd book people as quick as lightning."

The NSW Health Department said the first priority in enforcing the laws had been "educating the community to provide the opportunity for smokers to adjust their behaviour".

"This has included regular compliance monitoring at all public outdoor sites covered by the legislation and the issuing of cautionary notices to people seen to be in breach," a spokeswoman said.

Monitoring done last year showed "a high level of compliance with the new rules on smoking in public places", she said.

The laws ban smoking "within four metres of a pedestrian entrance or exit" at public buildings, including shopping centres and offices.

Additionally, the bans apply to sportsground spectator areas, railway platforms, bus stops, taxi ranks and within 10 metres of children's play equipment.

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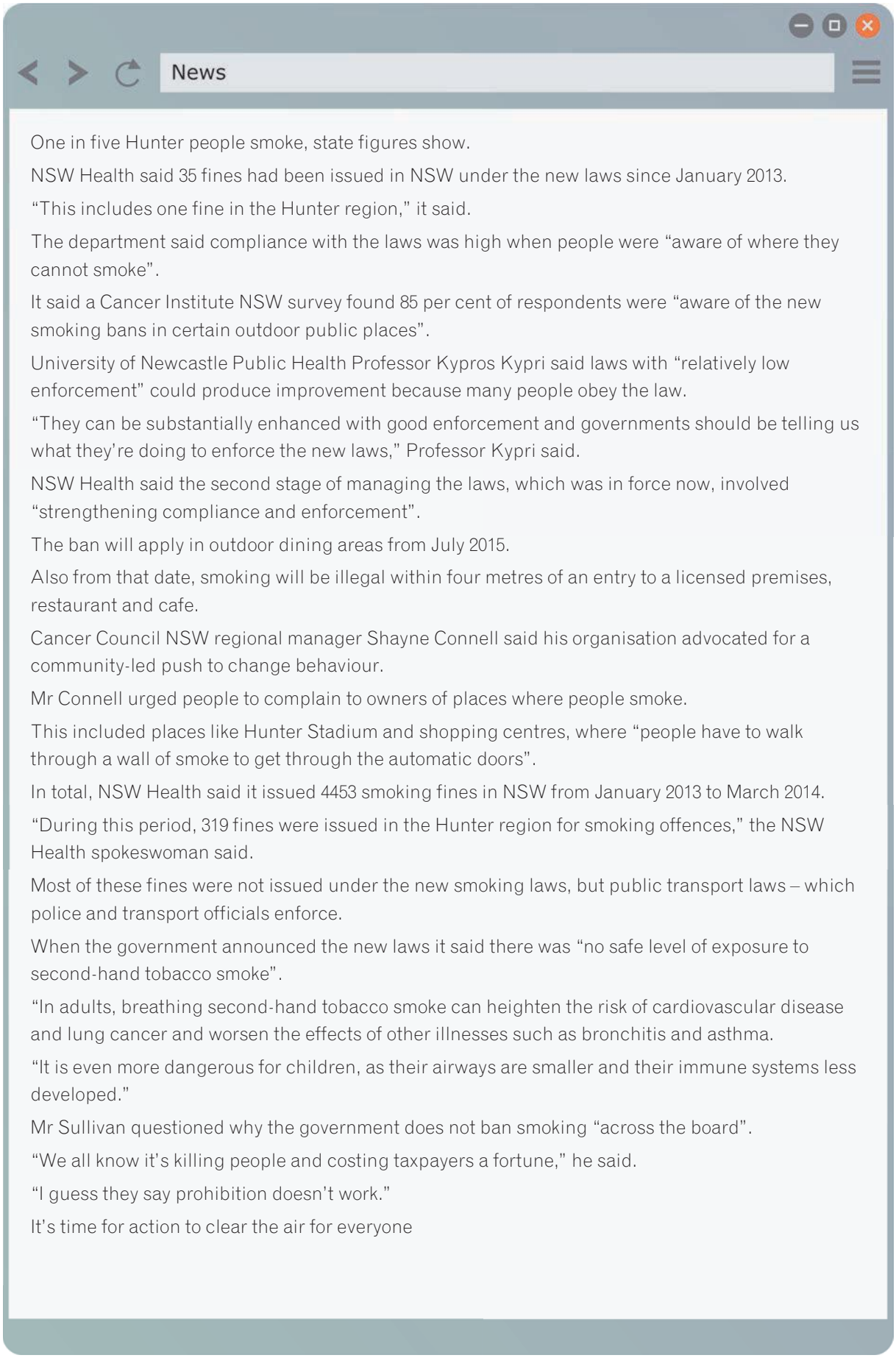

One in five Hunter people smoke, state figures show.

NSW Health said 35 fines had been issued in NSW under the new laws since January 2013.

"This includes one fine in the Hunter region," it said.

The department said compliance with the laws was high when people were "aware of where they cannot smoke".

It said a Cancer Institute NSW survey found 85 per cent of respondents were "aware of the new smoking bans in certain outdoor public places".

University of Newcastle Public Health Professor Kypros Kypri said laws with "relatively low enforcement" could produce improvement because many people obey the law.

"They can be substantially enhanced with good enforcement and governments should be telling us what they're doing to enforce the new laws," Professor Kypri said.

NSW Health said the second stage of managing the laws, which was in force now, involved "strengthening compliance and enforcement".

The ban will apply in outdoor dining areas from July 2015.

Also from that date, smoking will be illegal within four metres of an entry to a licensed premises, restaurant and cafe.

Cancer Council NSW regional manager Shayne Connell said his organisation advocated for a community-led push to change behaviour.

Mr Connell urged people to complain to owners of places where people smoke.

This included places like Hunter Stadium and shopping centres, where "people have to walk through a wall of smoke to get through the automatic doors".

In total, NSW Health said it issued 4453 smoking fines in NSW from January 2013 to March 2014.

"During this period, 319 fines were issued in the Hunter region for smoking offences," the NSW Health spokeswoman said.

Most of these fines were not issued under the new smoking laws, but public transport laws – which police and transport officials enforce.

When the government announced the new laws it said there was "no safe level of exposure to second-hand tobacco smoke".

"In adults, breathing second-hand tobacco smoke can heighten the risk of cardiovascular disease and lung cancer and worsen the effects of other illnesses such as bronchitis and asthma.

"It is even more dangerous for children, as their airways are smaller and their immune systems less developed."

Mr Sullivan questioned why the government does not ban smoking "across the board".

"We all know it's killing people and costing taxpayers a fortune," he said.

"I guess they say prohibition doesn't work."

It's time for action to clear the air for everyone

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As would be expected, however, 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.

In 2013, the New South Wales Government brought in legislation banning smoking in public places such as building entrances, bus stops and train stations, swimming pools and sporting grounds. The article on pages 11 and 12 is from 2014, highlighting the fact that if people do not think that the law is relevant to them or will be policed, and if there are not enough resources to police it, that law will be very difficult to enforce.

Review 1.4

Read the article 'Calls to bust smokers in public areas, poll' and then answer the following questions.

1. Explain why councils may not actually prosecute anyone for breaching these anti-smoking laws.
2. Why do you think people may not obey this law?
3. Does society need a stronger type of legislation? Write two paragraphs, one arguing in favour of the legislation and the other arguing against it.
4. Carry out some research to see if you can find a more recent media item about whether this law is working.

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?

anarchy
the absence of laws and government

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 of a society. Violence and widespread looting are two early indicators that a society or group is on the verge of anarchy.

While the majority of people believe that an absence of rules and laws leads to a disorganised, 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.

Research 1.1

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

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

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

These types of groups often protest at:

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

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Case study

Michael Brown shooting

In Ferguson, Missouri, USA, 18-year-old Michael Brown, an African-American, was shot on 9 August 2013 after an altercation with a white policeman. A series of events, including the desecration of a floral memorial, a lack of information and then the dropping of charges against the policeman, saw rising anger in the town among the African-American community and a number of riots ensued. The first riots occurred after the shooting and were inflamed by the lack of respect shown by police to the floral tribute. The violence between police and protesters was shown around the world and the official response was heavily criticised. Although matters settled down, the tension between police and citizens remained strong.

In September, the unrest flared again when another tribute was burned to the ground. The violence continued into November when a state of emergency was declared by the Governor of Missouri. This was a precautionary measure before the announcement that the Grand Jury had decided not to try the officer who did the shooting. Once again violence erupted between police and citizens and widespread looting occurred. The National Guard was sent in to quell the situation.

In March 2014, violence erupted again when the Ferguson police chief resigned. As many people felt that his handling of the situation had exacerbated the violence, they were angry that he had not been sacked earlier and that he would receive full benefits such as his superannuation. During the violence that occurred, two policemen were injured by bullets.

At the time of writing, an uneasy peace has settled over Ferguson with the Federal US Government looking at ways to remedy the situation.

Figure 1.8 Police using tear gas on rioters in Ferguson

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 prior to his arrest in 2003, Bashar al-Assad's presidency in Syria and Robert Mugabe's control of power in Zimbabwe.

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

Figure 1.9 Saddam Hussein was a known tyrant. When he died, many of his statues were pulled down.

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Chapter summary

- The law of a country has developed 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 has penalties attached for infringements of the law.
- People follow the law because it provides them with protection against wrongful behaviour.

Chapter summary questions

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 of the community.
- **B** Rules do not involve rights and responsibilities.
- **C** Rules are not enforceable.
- **D** Rules have nothing to do with ethics.

2 What is anarchy?
- **A** constant violence and disorder
- **B** the absence of law
- **C** wearing black clothes to break the rules
- **D** rebellion against the government

3 What are ethics?
- **A** allowing people to be different
- **B** a mix of equality and fairness
- **C** the principles that help us make decisions about right and wrong behaviour
- **D** 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** to divide power among all of the different groups in society
- **B** to provide stability for the ruling government
- **C** to maintain order in society
- **D** 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 What is the relationship between fairness, equality and justice?
6 Is law necessary? Justify your answer.
7 Why do people have different perceptions about the law?

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Chapter 2
Sources of contemporary Australian law

Chapter objectives

In this chapter, students 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.

Key terms/vocabulary

Act of Parliament
adversarial system
appeal
appellate jurisdiction
bicameral
bill
bipartisan
civil liberties
committal hearing
common law
concurrent powers
coronial inquest
corporations law
courts of equity
customary law
declaration
defamation
delegated legislation
domestic law
elders
equity
ex parte
exclusive powers
external affairs power
federation
First Australians
fiscal
General Assembly
indictable offence
injunction
inquisitorial system
jurisdiction
kinship
larceny
legislative powers
mandamus
mediation
merits review
mitigation
natural justice
obiter dicta
opinio juris sive necessitatis
original jurisdiction
precedent
prohibition
question of law
R
rail gauge
ratify
ratio decidendi
referendum
residual powers
s
sanction
Security Council
special leave
stare decisis
statute law
summary offence
tariff
terra nullius
The Dreaming
treaty
ultra vires
United Nations
White Australia Policy

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Relevant law

IMPORTANT LEGISLATION

Commonwealth of Australia Constitution Act 1900 (UK)
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Australia Act 1986 (Cth)

SIGNIFICANT CASES

R v Brislan; Ex parte Williams [1935] HCA 78
South Australia v Commonwealth [1942] HCA 14
Murphyores v The Commonwealth [1976] HCA 20
Commonwealth v Tasmania [1983] HCA 21
Osland v R [1998] HCA 75
Gutnick v Dow Jones & Co. Inc. [2001] VSC 305
Roper v Simmons (2005) 543 US 551
Google v ACCC [2013] 294 ALR 404; [2013] HCA 1 (6 February 2013)

Legal oddity

In Australia, compulsory voting in federal and state elections means that individuals must be enrolled to vote, and on election day (unless they have pre-poll voted) they must have their name crossed off at a polling station, take a ballot paper to a booth, mark it and place the folded paper in the ballot box. However, because voting is private, the law does not require that the ballot paper be completed correctly. For many people, election day is an opportunity to go to the BBQ run by a school or local charity at the polling area.

This all seems quite normal to us, but in fact we are one of the few countries in the world to have – and enforce – compulsory voting. To many other countries, including the UK, USA and New Zealand, our approach to voting in our government seems quite odd!

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2.1 Australia's legal heritage

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 below.

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

statute law
law made by parliament

The adversarial system of trial

The English system of law has heavily influenced Australian law and practice, including the way in which court cases are conducted. As a result, Australia uses 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 version of the other side. In theory, the defendant in a criminal trial does not have to prove anything, as he or she is assumed to be innocent until proven guilty. However, most people accused of a crime will retain the services of a legal team to highlight flaws in the prosecution's case.

Figure 2.1 A room in the High Court of Australia

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.

It is up to the defendant and their legal team to decide if they want to be heard by only a judge or a judge and jury. There are advantages of both as can be seen in the article on pages 19 and 20, in which a journalist sought the opinions of several legal experts.

adversarial system
a system of resolving legal conflicts, used in common law countries such as England and Australia, which 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 inquisitorial system

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 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 him or her.

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 could even call for outside testimony that had not been requested by either side.

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 which have civil legal systems rather than common law systems

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Judge or jury? Your life depends on this decision

news.com.au, November 14 2013

Here are the top ten things you should know.

The judge or panel of judges

A person accused of a serious crime may opt for a judge only trial, or a bench trial by a panel of judges if the case is complicated and dependent on complex scientific or legal dogma.

"If the issues in the case are so technical they would be hard for a jury to understand and with lots of expert witnesses, then the accused's legal team or the prosecution may opt for a judge only trial," said Pauline Wright, chair of the NSW Law Society's Criminal Law Committee.

Another reason may be that the accused is unlikely to get a fair trial because the case has been covered in the media and it would be in their interest to have a judge only trial because otherwise there may be a retrial.

If the accused opposes it, and opts to be tried by a jury of his or her peers, then the judge will allow a jury trial.

"In these circumstances, by their training a judge is less likely to be swayed by what has been reported in the media," Ms Wright said, although she warned a judge "might be perceived as being elite" and less in touch with grassroots issues and the community.

But eminent barrister, Ian Lloyd, QC, the former NSW Senior Crown Prosecutor, told news.com.au that choosing a judge only trial can increase a guilty person's chance of acquittal in certain circumstances.

"If I have a really sound case at law, I'd want a judge," Mr Lloyd said. "If I have a case running on the vibe I'd want a jury."

A jury trial

It's called a jury of your peers, 12 men and women chosen from the community.

They could be council rangers, homemakers, truck drivers, office workers, retirees, students, or from a range of backgrounds and professions.

They will not be members of the clergy, medical practitioners, dentists and pharmacists, fire, ambulance, rescue or other emergency services workers, who are all exempt from jury duty.

They also shouldn't be people with preconceived ideas about your case or about justice, but the truth is very different.

In jury selection, both the prosecution and the defence get the chance to reject candidates on the grounds they may be prejudiced against the accused.

Pauline Wright said jury trials were still "the preferred system" in all Australian states and "this ensures community participation in the administration of criminal law".

It is "fundamental to the age old thing that our guilt or innocence is judged by our peers rather than someone who might not be in touch with what the ordinary community is thinking."

But Ian Lloyd, QC, who has prosecuted prominent cases, including serial killer Ivan Milat, said "most jurors won't go into a court trial and say 'I have looked this up on the internet'.

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"But they all go and look it up on the internet, of course they do.

"And juries are swayed by many different factors which are not always logical or reasonable."

What sways juries

"Physical appearance, religious beliefs and race or ethnicity do sway juries," said Mr Lloyd, who now works in both Australia and Hong Kong as a defence barrister.

People of Middle Eastern background, members of bikie gangs and other groups which have been identified in the media as being associated with crime will find it hard to get a fair trial by jury.

"It may be unfair, but how people look and their ethnic background or religion is a factor," Mr Lloyd said.

"If you have a Lebanese Muslim client charged with drug manufacture, there's going to be a heavily weighted Anglo Saxon jury which will have little sympathy for the defendant, or an in-built bias against such a person."

Publicity and social media

Judges instruct juries not to read media coverage of a trial or take notice of gossip, or to discuss the trial with people outside the jury room.

"I think that's a big ask," Ian Lloyd, QC, said.

"I think juries are instinctively going to read the media.

"It's only natural for them to be inquisitive and we all know in reality this is what they do, so you have to take that into account when making the choice between a judge or jury trial."

When to go for a judge only or bench trial – Case 1

When there is "any element of possible prejudice against your client because of race or ethnicity, religious beliefs, or the nature of the crime", opt for a judge only trial, Ian Lloyd, QC, said.

"Anything which may engender intense public disapproval of your client, choose a judge only.

"I make these decisions every day.

"Again if you have a person on a drug charge and they are of Lebanese background, this is the choice you would make."

Judge only trial – Case 2

Ian Lloyd, QC, says if the prosecution had an "extremely weak" case against the accused, then "for judge only" is the best choice.

"It may be a weak circumstantial case, or a case dependent on a single identification witness," he said.

"I have found over the years, the common experience is a judge is trained as a lawyer and by his training and experience finds it relatively easy to decide whether a person is guilty or not guilty beyond reasonable doubt.

"In the case of a jury trial, judges are almost excluded from explaining to juries what reasonable doubt [means].

"Judges understand the phrase [juries] don't."

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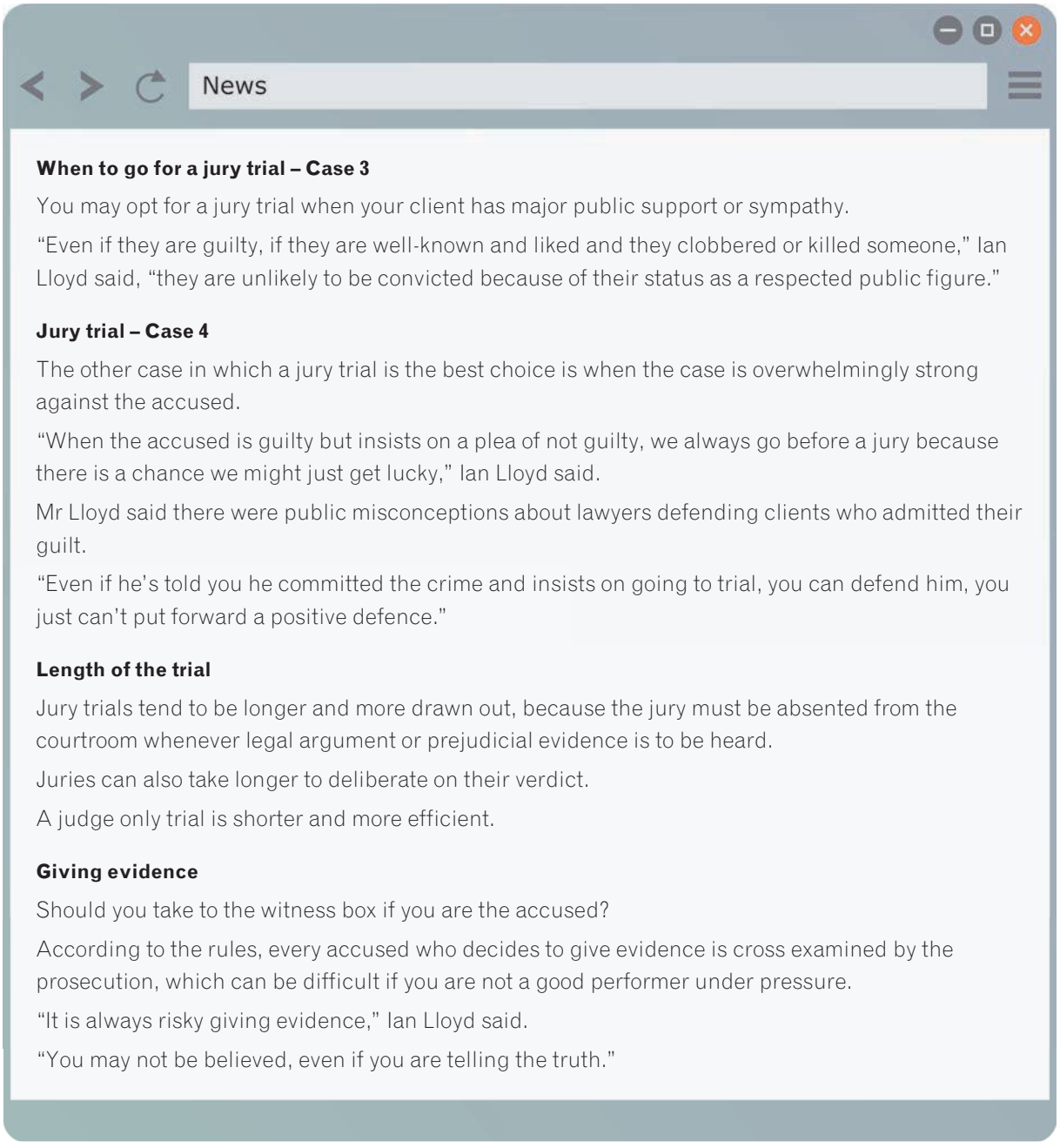

When to go for a jury trial – Case 3

You may opt for a jury trial when your client has major public support or sympathy.

"Even if they are guilty, if they are well-known and liked and they clobbered or killed someone," Ian Lloyd said, "they are unlikely to be convicted because of their status as a respected public figure."

Jury trial – Case 4

The other case in which a jury trial is the best choice is when the case is overwhelmingly strong against the accused.

"When the accused is guilty but insists on a plea of not guilty, we always go before a jury because there is a chance we might just get lucky," Ian Lloyd said.

Mr Lloyd said there were public misconceptions about lawyers defending clients who admitted their guilt.

"Even if he's told you he committed the crime and insists on going to trial, you can defend him, you just can't put forward a positive defence."

Length of the trial

Jury trials tend to be longer and more drawn out, because the jury must be absented from the courtroom whenever legal argument or prejudicial evidence is to be heard.

Juries can also take longer to deliberate on their verdict.

A judge only trial is shorter and more efficient.

Giving evidence

Should you take to the witness box if you are the accused?

According to the rules, every accused who decides to give evidence is cross examined by the prosecution, which can be difficult if you are not a good performer under pressure.

"It is always risky giving evidence," Ian Lloyd said.

"You may not be believed, even if you are telling the truth."

2.2 Common law

The term 'common law' has many different uses, as you would find if you were to put the term into a search engine on the internet. Common law in Australia today includes elements of the following:

- court-made law (as opposed to laws made by parliament)
- 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.

courts of equity
historically, courts whose decisions were more discretionary and based on moral principles, and which served as an antidote to the inflexibility of the common law

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Development of the 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 on the basis of local custom, and disputes were resolved by local courts. After the Normans invaded England in the 11th 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, but gradually Australia has 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 6th to the 11th 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, he or she 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'.

Figure 2.2 Australian common law is based on the English system. Shown here is the Royal Courts of Justice in London.

Before the ordeal, the defendant had to fast for three days and attend a special Mass. He was then given a painful task to complete or to bear such as carrying a red-hot iron bar a certain distance in his bare hands, retrieving a stone from a cauldron of boiling water, putting his 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, he or she was 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 the bishop's permission. It 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 11th century William the Conqueror sent judges (or justices) around the country with three main tasks to carry out:

1. Administer a common set of laws throughout the country.
2. Report on any threats to the throne.
3. Assess the wealth of the country so that taxes could be levied.

When a later ruler, 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 and apply punishments, and ensure that common rulings were made overall. 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.

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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, he could lose his case. Even later, the common law would hold that a person was bound by a contract, even if he had made a mistake or been tricked into signing it. By the 15th 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.

For many years, the Chancellor was a priest as well as a judge. Chancellors did not base their judgements 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**.

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

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 are still used today.

The systems of common law and equity co-existed, but not always peacefully. In the early 17th 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 he or she 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.

Figure 2.3 Contracts that are unfair can be cancelled by the court.

The doctrine of precedent

As stated above, the common law (or case law) is the law developed by judges when deciding cases. Not only are there rules about the presentation of evidence and the running of the case, but also judges must resolve disputes on the basis of decisions made in similar cases. A judgement that is followed is called a **precedent**, and it provides the authority for the legal principle contained in the decision. The doctrine of precedent is also known as ***stare decisis***.

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

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

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 allow 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.

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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. 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:

- The ***ratio decidendi*** – the essential legal reason why a judge came to a particular decision. A *decidendi* in a higher court will set a binding precedent on lower courts.
- ***Obiter dicta*** – other remarks made by the judge regarding the conduct of the trial; for example, about the credibility of a witness. These remarks do not form part of the decision and, thus, do not set a precedent.

Figure 2.4 The doctrine of precedent may set a standard for future cases.

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)

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 a decision of the higher court is correct. This is known as 'binding precedent'. For example, the New South Wales Local Courts and District Court must follow the decisions of the New South Wales Supreme Court. 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.

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.

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In Court

***Gutnick v Dow Jones & Co. Inc.* [2001] VSC 305**

In this case, the plaintiff argued that he had been defamed over the internet. The defendant, Dow Jones, publishes an online news magazine. An article in that magazine discussed the business dealings of the plaintiff, 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 report 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.

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.

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

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

jurisdiction
the powers of a court, depending on its geographic area, the type of matters that it can decide, and the type of remedy that it can award

Review 2.1

1. Describe how common law originated.
2. How were people tried for crimes in medieval England? What were the problems with this system?
3. Define equity law and explain how it differs from common law.
4. How is the principle of precedent used in court decisions?
5. Explain why Australian law is based on common law principles.
6. Evaluate the importance of the *Gutnick v Dow Jones & Co. Inc.* [2001] vsc 305 case.

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 2.5 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.

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

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.

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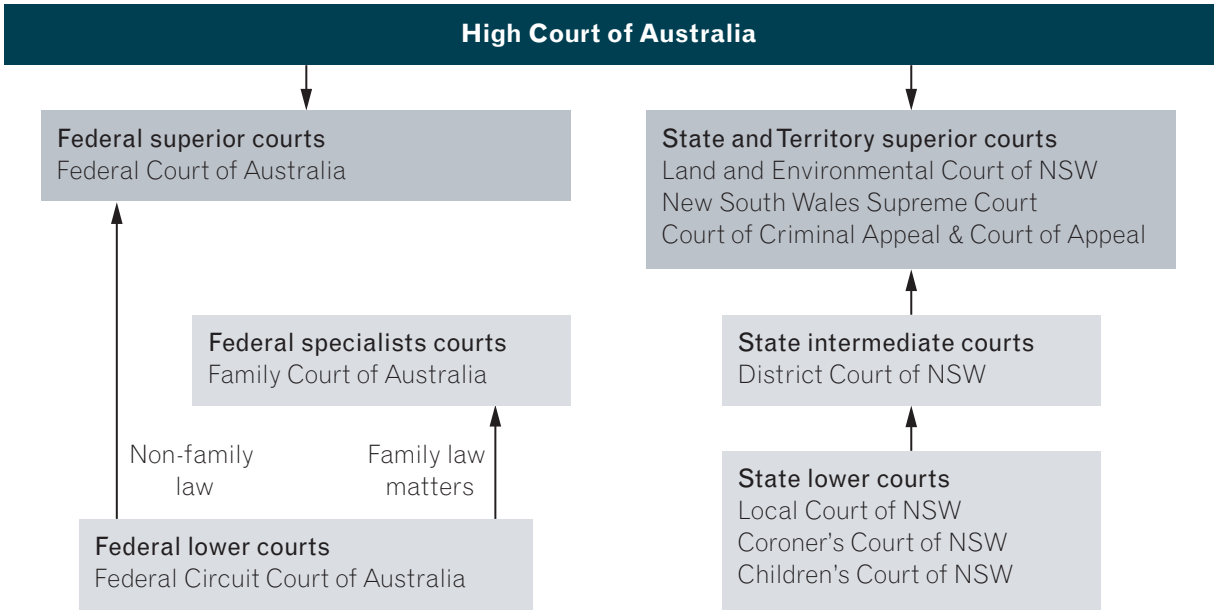

Figure 2.5 State/territory and federal court hierarchy

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.

Figure 2.6 The Temora Court House (NSW) was built in 1902.

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

indictable offence
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 a greater penalty

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. The Local Court is also known as the Magistrates' Court. In the Australian Capital Territory, the court that has this role is called the Magistrates' Court.

Most criminal matters are heard in the Local or Magistrates' Court, as only very 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**.

committal hearing
inquiry held in the Local 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)

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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 such as property settlements and residence orders for children. In this area, the Local Court has federal jurisdiction and in these matters 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.

Coroner's Court

In New South Wales and in the Australian Capital Territory, the role of the Coroner's Court is to ensure that unexplained or suspicious deaths (or suspected deaths), fires and explosions are properly investigated. If necessary, **coronial inquests** are carried out and cases are handed to a higher court for trial if the inquest finds evidence of criminal action/s. For example, in March 2015, a visiting Brazilian student Roberto Laudisio Curti died in Sydney after police fired tasers at him 14 times. The coronial inquest recommended that charges be laid against the police officers for using unnecessary and excessive force in the arrest. The matter proceeded to trial, and one of the four police officers involved was found guilty of assault.

coronial inquest
investigation into a death that has occurred in unusual circumstances, held in the Coroner's Court and overseen by a magistrate called the Coroner

Children's Court

In New South Wales and in the Australian Capital Territory, the Children's Court deals with civil matters concerning the protection and care of children and young people. It also deals 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.

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.

Intermediate courts

The 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 with which the District Court cannot deal are murder, treason and piracy: these need to be dealt with by the Supreme Court.

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

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 $750 000, or larger amounts if both parties agree. It also has **appellate jurisdiction**.

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

The 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 and civil cases involving large sums of money (there are no monetary limits on its civil jurisdiction) 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**. All cases are heard before a judge and jury.

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

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. Most civil matters are dealt with by a judge alone, 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, they may be heard by 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 in much the same way as the state court system does.

The Federal Circuit Court of Australia

The Federal Circuit Court of Australia was established as the Federal Magistrates Court by the Commonwealth Parliament towards the end of 1999 and conducted its first sittings in July 2000. In November 2012, the Federal Parliament passed legislation changing the name of the Federal Magistrates Court of Australia to the Federal Circuit Court of Australia. The title of Federal Magistrate was changed to Judge.

The Federal Circuit Court was established to relieve some of the case load of the Federal and Family Courts and reduce the cost and time required to deal with more minor federal matters. The Federal Circuit Court has 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 does not deal with criminal matters. It shares its original jurisdiction with the Family Court of Australia and the Federal Court of Australia; matters can be transferred between these courts, depending on the complexity of the legal issues.

The Federal Circuit Court plays a strong role in settling disputes in regard to trade practices, human rights, copyright, industrial law, privacy and migration. It currently deals with over 90 per cent of migration and bankruptcy applications.

The Federal Court of Australia

The Federal Court of Australia was established by an Act of Parliament in 1976. It assumed some of the jurisdiction previously managed by the High Court of Australia and all of the 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 equal to the Family Court of Australia, and above the Federal Circuit Court.

The Family Court of Australia

The Family Court of Australia is a superior federal court that deals with the most complex family

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Figure 2.7 The Family Court of Australia in Sydney

law matters. It was established by the Australian Parliament in 1975. Its main function is 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 can hear appeals from a decision of a federal magistrate or a single Family Court judge.

The 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 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.

Legal Links

The Legal Access Services website was set up to provide legal advice to ordinary Australians. It provides information on the Australian legal system.

The NSW Department of Justice has information about the courts of New South Wales and Australia; for the website refer to: http://cambridge.edu.au/redirect/?id=6488.

The ACT Law Courts and Tribunals website provides information on that territory's courts and tribunals.

The Australian Government Attorney-General's website has information about the federal legal system and courts; for the website refer to: http://cambridge.edu.au/redirect/?id=6489.

Review 2.2

1. Outline the need for courts in society.
2. Explain what is meant by 'court hierarchy'.
3. Identify the highest court in Australia.
4. What types of matters are heard in the local court? Who hears these matters?
5. Indicate the types of cases that are dealt with in the District Court of New South Wales. Who decides these cases?
6. Describe the role of the Supreme Court of New South Wales.
7. Explain the importance of the High Court of Australia.
8. In which court would the following matters most likely be heard?
   - **a** murder trial
   - **b** an appeal from the New South Wales Supreme Court
   - **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** the 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.

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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.

bicameral
containing two chambers or houses of parliament

In Federal Parliament, the upper house is the Senate and the lower house is the House of Representatives. The government is formed by the political party that wins the majority of seats in the lower house. 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, Minister for the Environment. Their positions (or portfolio) are offered to them by the prime minister 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.

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 Queen must assent to laws. At the federal level, she is represented by the Governor-General and at the state level by a governor in each state.

Figure 2.8 The House of Representatives in Parliament House, Canberra

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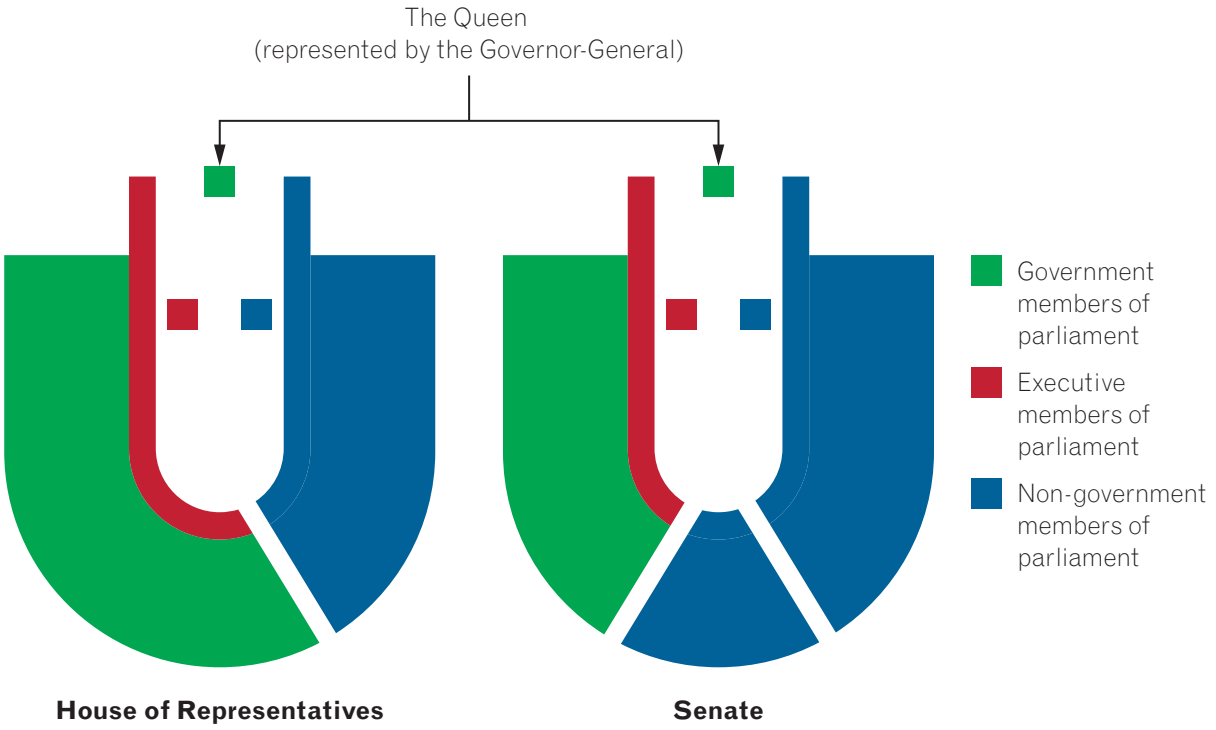

Figure 2.9 The Parliament of Australia

Legal Links

For information on the Commonwealth Parliament go to the Parliament of Australia website.

The legislative process

Passing legislation

One of the most important functions of parliament is the passing of laws. Most laws are introduced by the party that holds government. A proposed new law is known as a **bill**. Bills are usually introduced by ministers, who are responsible for their preparation. Any Member of Parliament can introduce a bill; however, if a bill is introduced by a member who is not a minister (called a backbencher), the bill is known as a private member's bill.

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

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.

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 other states with bicameral parliaments) is generally the same as passing laws through Federal Parliament. This process is outlined in Figure 2.10.

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.

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

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The process of passing a bill through parliament

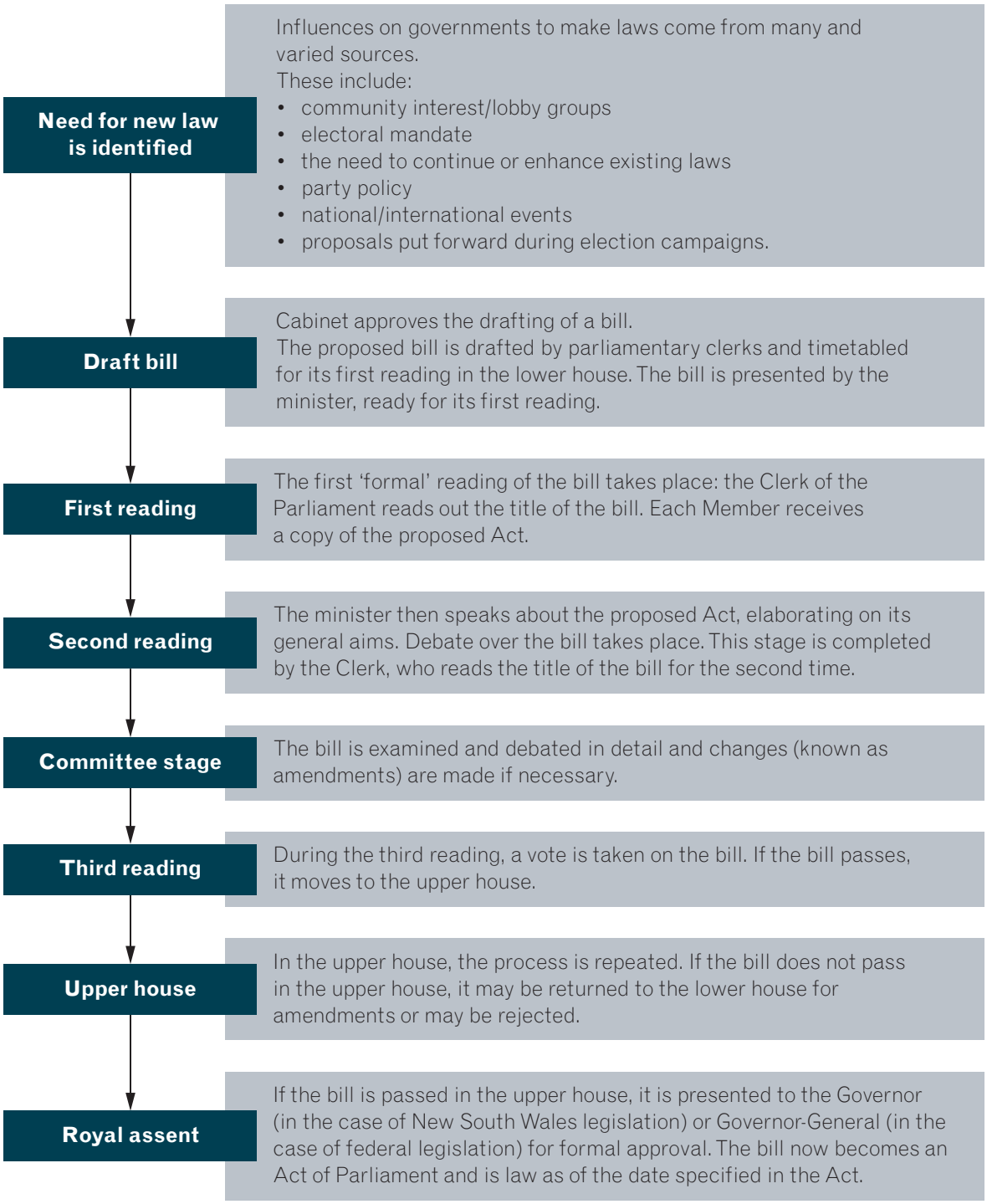

Figure 2.10 The passage of a bill through parliament

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

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Table 2.1 The advantages and disadvantages of delegated legislation

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

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.

Review 2.3

1 Outline the differences between court-made law and statute law.
2 Devise a way to explain to the public how an act of parliament is made. You may wish to use a flow diagram, a series of cartoons or a storyboard.
3 Write a meaning for delegated legislation. Demonstrate your knowledge with appropriate examples.

2.5 The Constitution

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, which outlines 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 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 a gradual shift in consciousness led many groups and individuals to promote the concept that Australia would be better off if the six colonies amalgamated 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.

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

The different viewpoints and the fears of the smaller colonies of being 'consumed' by New South Wales and Victoria played a substantial role in shaping the final constitution document. As with 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**.

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

After a series of referendums in 1898, 1899 and 1900, the colonies eventually found a compromise position on a proposed constitution, but, before it could take effect, approval from the British Parliament was required. The *Commonwealth of*

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

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

tariff
a tax that must be paid on imports or exports

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'.

Australia Constitution Act 1900 (UK) was passed and Australia came into existence as a nation on 1 January 1901. 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' judgements upon any appeals it hears (**s** 73 of the 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 of the Australian Constitution).

s
abbreviation for 'section' of any legislation; 'ss' is the abbreviation for 'sections' (plural)

It is interesting to note that there was considerable pressure for New Zealand to join Australia; in fact, the Canberra suburb of Manuka was named after a native New Zealand tea tree, by Walter Burley Griffin in 1912 when there was still hope that New Zealand may become part of Australia.

The Constitution itself is s 9 of the *Commonwealth of Australia Constitution Act*. 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.

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Figure 2.11 A flag used in Sydney as part of the 1901 celebration of Federation

Figure 2.12 Promotional material for 'White Australia'

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 s 51 ensures that the states have control over the 'residual powers'; that is, those not listed in s 51. This will be examined in detail later in this chapter.

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 ss 51 to 60. These sections provided the split (or division) of powers between the Commonwealth and the States.

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 s 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 s 51; namely, those areas over which the federal and state governments have **concurrent powers**. Section 52 outlines the **exclusive powers** of the federal government; that is, only the Commonwealth (federal) Parliament can legislate on:

(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.

legislative powers
the legal power or capacity to make laws

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

exclusive powers
powers that can be exercised only by the Federal Parliament

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Commonwealth government legislative powers

Section 51.

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
(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;
(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;

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 s 90, for example, states clearly that the federal government has exclusive power over customs, and s 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 s 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.

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In Court

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

If either the Commonwealth or a state government passes a law that contravenes the Australian Constitution, that law would be deemed unconstitutional and thus be declared invalid.

Technically the government would be said to be acting ***ultra vires***. But what happens if the state and Commonwealth laws were both valid, as can often be the case with a concurrent power? This situation arose in *Commonwealth v Tasmania* [1983] HCA 21, known more commonly as the Tasmanian Dam case.

Tasmania wanted to build a hydroelectric dam on the Franklin and Gordon river system. A group of environmentalists began a protest 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.

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 Tasmania'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.

Figure 2.13 Dianne Coon with an original 'No Dams' sign at People's Park Creek on the 25th anniversary of the Franklin River dam protest.

The federal government recognised the Wild Rivers area as a region of special significance, and it was listed under the World Heritage Convention. The federal government passed the *World Heritage (Property Conservation) Act 1983* (Cth), which specified that such areas of special significance should be protected. The Franklin was included as one such area. Now there was a state law allowing the construction of the dam and a federal law that demanded that 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 Tasmania had argued that the construction of the dam and the regulation of that area of the state 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 s 109, the federal law would override 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.

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

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

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Figure 2.14 The Australian defence forces are the responsibility of the Commonwealth Government as national defence is an exclusive power and s114 forbids the states from raising their own military forces.

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. 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', how the federal government has gained some power over this is explained in detail and is also referred to in the Tasmanian Dam case earlier in this chapter.

It should be noted that there is a provision in s 51(xxxvii) 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).)

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

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 Chapter VII, 'Alteration of the Constitution', s 128, and is known as a referendum.

Once again the fear of the smaller colonies of being made irrelevant by federation resulted in a process that makes constitutional change difficult. Of the 44 proposed amendments to the Constitution, only eight have been successful. In some published copies of the Australian Constitution, these successful amendments are often 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 s 128, are:

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

(ii) The proposed change must be put to the electors 'not less than two months nor more than six months' after going through both houses.

(iii) There must be an absolute majority of voters Australia-wide who approve the change; that is, 50 per cent of voters plus one.

(iv) There must be a majority of states that approve the change; that is, four of the six states must vote for the change.

(v) The alteration must go to the Governor-General for royal assent.

In 1967, the most successful referendum in Australian History (90.77% vote in favour) altered s 51(xxvi) and deleted s 127, which enabled the Commonwealth Government to pass laws in relation to Aboriginal and Torres Strait Islander peoples. This ensured consistency of laws, as some states had discriminatory laws and were reluctant to change them. Prior to this Indigenous people could only be counted as part of the 'flora and fauna'.

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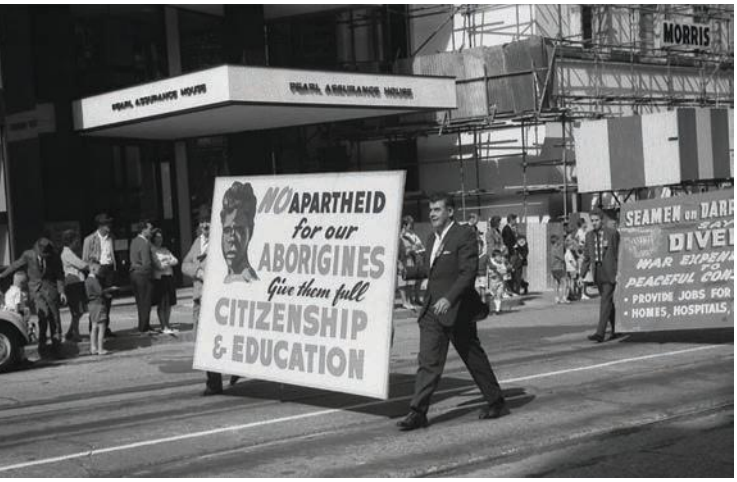

Figure 2.15 In 1967, Australia voted 'yes' to allow the federal government to make laws concerning Indigenous people after a nationwide concerted campaign to end this discrimination.

Other successful referendums included amending s 72 so that judges in the High Court and the other federal courts had to retire at age 70. This was the last successful referendum; the next nine proposals were all defeated. The last referendum was held on 11 November 1999 and involved changing 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, but the push to make Australia a fully independent nation remains.

bipartisan
having the support of the two major political parties

Review 2.4

1 With the use of examples, explain how the Australian Constitution reflected the concerns of the former colonies.
2 Australian has six states and two territories. Refer to s 121 of the Constitution and indicate if this is the maximum limit 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. What is the implication of this difference?
4 Define the term 'Division of Power'.
5 Read the article 'High Court strikes down ACT gay marriage law' that can be accessed by the following link: http://cambridge.edu.au/redirect/?id=6491. What role does s 109 have in deciding which level of government has 'power' over a certain area?
6 How did the decision in the Tasmanian Dam case give the federal government power to make a law over the 'environment' when this is considered a 'residual power'?
7 In 1999 a referendum for Australia to become a republic failed. See the Fast facts: The 1999 referendum via the following link: http://cambridge.edu.au/redirect/?id=6492. Class discussion – Should Australia become a republic?
8 Class activity – Conduct your own 'referendum' (use your class or year level to 'vote').
   a Decide on an issue (e.g. Is NRL better than AFL? Is a Kit Kat a better chocolate than a Crunchie?). Create ballot papers with your 'issue' that voters must answer Yes or No.
   b Divide the class (if enough students) or year up into the 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%

   c Give every student one ballot paper and tally their votes. Apply points 3 and 4 of the referendum rules outlined on page 38 (note that the territories are only counted as part of the Australia-wide vote) and determine whether the referendum would succeed.

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Research 2.1

1 What did s 127 of the Australian Constitution state?
2 When was it altered?

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 18th 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 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 he, she or it has unfettered power and the risk of dictatorship is very real. If the three arms are independent, each acts as a check on the others, ensuring that no branch abuses its power and that **civil liberties** are protected.

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

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 to 60)
- Chapter II – The Executive (ss 61 to 70)
- Chapter III – The Judicature (ss 71 to 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 regards 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.

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.

Research 2.2

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 Conduct an internet search to identify modern day 'dictatorships' and identify what aspects of their rule breaches the 'separation of powers'.

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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. The current composition of the High Court bench can be viewed via the following link: http://cambridge.edu.au/redirect/?id=6493.

Section 71 also allows the Commonwealth Parliament to create other courts. Over time, parliament has created the Federal Court, the Family Court and the Federal Circuit 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. Most High Court judges come from the bench of the state 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 ss 75 and 76.

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

Section 75

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;
(iv) between States, or between residents of different States, or between a State and a resident of another State;
(v) 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.

Section 76

The Parliament may make laws conferring original jurisdiction on the High Court in any matter –
(i) arising under this Constitution, or involving its interpretation;
(ii) arising under any laws made by the Parliament;
(iii) of Admiralty and maritime jurisdiction;
(iv) relating to the same subject matter claimed under the laws of different States.

Cases that come under original jurisdiction begin in the High Court itself. Matters relating to the interpretation of the Constitution fall under s 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.

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

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

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Figure 2.16 Justice Michelle Gordon was appointed to the High Court in June 2015.

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. The *Australia Act 1986* (Cth) severed the judicial link with England; appeals from the Australian judicial system no longer go to the Privy Council in England for final determination.

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. 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 cases on pages 43–45 are examples of the High Court exercising its original jurisdiction to interpret the Constitution.

Research 2.3

Divide the class into pairs and choose one month from the last 12 months. View the summary of High Court decisions for each year as outlined in the monthly 'bulletins' via the following link: http://cambridge.edu.au/redirect/?id=6494.

The group is to prepare a slide presentation that outlines:

- a case 'handed down'
- 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 judgements' from any cases emanating from:

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

Section 73 also states that 'the judgement 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.

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

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In Court

***South Australia v Commonwealth* ('First Uniform Tax case') [1942] HCA 14**

Section 51(ii) of the Constitution clearly gives the Commonwealth the legislative power to collect taxes. This was considered a concurrent power, so both the Commonwealth and the states were collecting income taxes until 1942. As a wartime emergency measure, federal laws were introduced which effectively made the Commonwealth the only level of government able to collect income taxes. In return, the Commonwealth agreed to return to the states a grant of money about equal to what they could no longer collect as income tax.

These grants are under s 96, which states that 'the Parliament may grant financial assistance to any state on such terms and conditions as the Parliament thinks fit'. The states believed the new law would not only deny them financial independence, but would also allow the Commonwealth to dictate how they spent these grants.

The states did not like this proposal, as it would make them reliant on the Commonwealth for the bulk of their revenue. The states went to the High Court, claiming the new law was aimed primarily at denying them the right to collect income tax and thus reducing their **fiscal** independence. The High Court ruled that this was irrelevant; the proposed law was constitutional and therefore valid.

fiscal
relating to government financial matters

In Court

***Murphyores v The Commonwealth* ('Fraser Island case') [1976] HCA 20**

Murphyores extracted certain minerals from sands on Fraser Island under a lease granted by the Queensland Government. Such a lease was certainly constitutionally valid, and the environmental consequences were also a state concern.

The Commonwealth Government disagreed with the project, partly on environmental grounds, but had no constitutional power to simply shut down the operations on Fraser Island. Instead it relied on one of its legislative powers – specifically s 51(i), over trade and commerce – to prohibit export of the minerals. Murphyores relied on those exports for its financial viability, but under s 112 of the *Customs Act 1901* (Cth), the Commonwealth could prohibit the export of any goods from Australia, either absolutely or unless certain conditions were complied with.

Murphyores went to the High Court, arguing that the Commonwealth had acted outside its constitutional power, but the High Court noted that, while the effect of the use of s 51 may well be to override a traditional state power, the Commonwealth was within its rights to prohibit the export of the minerals. The motivation for the Commonwealth's use of the power, such as concern about the environmental effects, was irrelevant.

Figure 2.17 Tourists sitting on some of the 'sands' that were to be mined on Fraser Island, situated off the south-east coast of Queensland. Fraser Island is now World Heritage listed.

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In Court

***R v Brislan; Ex parte Williams* [1935] HCA 78**

Dulcie Williams was convicted of receiving messages by 'wireless telegraphy' without proper authorisation. Dulcie was using a 'wireless broadcasting receiving set' (that is, a radio). In the appeal, it was claimed that the Commonwealth had acted *ultra vires* by charging her under the *Wireless Telegraphy Act 1905* (Cth), as the section under which she was charged does not extend to radio sets, and, if it did, it was invalid, because s 51(v) of the 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 in respect of any such broadcasting services. Consequently, it has been accepted that the Commonwealth has the constitutional power to make laws with respect to new developments in communications technology, such as television and the internet, and is thus responsible for the roll-out of the National Broadband Network.

R
'R' at the beginning of a case name refers to Regina (Latin for 'Queen'). Since Australia is a constitutional monarchy this refers to our head of state, on whose behalf the prosecution case is run. When the head of state is a male, as was the case in 1935, the 'R' stands for Rex, which is Latin for 'King'.

ex parte
(Latin) 'from one side'; in a case this means the other side is absent or unrepresented

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.

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

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.

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 leave.

merits review
analysis of the facts presented in a case, and often the policy choices that led to the decision

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. As it states 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

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In Court

***Google v ACCC* (2013) 294 ALR 404; [2013] HCA 1 (6 February 2013)**

This case involved a search engine company (Google) being held responsible for the misleading or deceptive comments that it communicated that were made by another person in the Federal Court being overturned on appeal by the High Court. It involved four businesses (STA Travel, Carsales, Ausdog and Trading Post) sponsoring links on Google that would appear when certain key words were entered (notably, if you typed in the name of a rival company links to the above companies would appear prominently). The aim was to divert web traffic away from rivals. Some people wrongly assumed that these 'results' were organic but in fact they were sponsored links.

The High Court decision means Google is no different from any other medium that hosts advertisements. It is the creator of the misleading or deceptive material that is responsible, not the business that hosts the advertisements. In *obiter dicta* the Court noted that if Google (or any publisher) is aware that the material is misleading or deceptive they can be held liable as per s 251 of *The Australian Consumer Law*.

government official or department has acted *ultra vires*, or whether he, she or it has followed the rules of **natural justice** (procedural fairness). These concepts are covered in the HSC course.

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 present your case, the right to freedom from bias by decision-makers, and the right to a decision based on relevant evidence

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 tens of thousands of years, the **First Australians** have occupied this continent as many different societies with diverse cultural relationships linking them to their own particular lands. More than 200 distinct languages, and countless dialects of them, were in use when European colonisation began. While people in some communities continue to speak their own languages, many others are seeking to record and revive threatened ones. Aboriginal and Torres Strait Islander peoples retain their connection to their traditional lands regardless of where they live.

First Australians
Aboriginal and Torres Strait Islander peoples; the original inhabitants of Australia

They traditionally lived a hunter-gatherer lifestyle, and one in which gender played a role: women collected berries, fruits and other plants, and also hunted smaller animals, while men hunted for large animals like kangaroos, emus and turtles. On the coast, people relied on catching fish and many types of shellfish. Not all Indigenous peoples were nomadic; in many cases, groups would stay in an area for a certain period of time depending on seasonal variations and the availability of food.

There is no single system of Aboriginal and Torres Strait Islander law. The separate Indigenous nations developed their own laws, but there were also common aspects among groups. All of these laws are spiritually based and closely linked to the land. Aboriginal and Torres Strait Islander law is based on tradition, ritual and socially acceptable conduct. For this reason it is known as '**customary law**'.

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

A main difference between Aboriginal and Torres Strait Islander 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 law; but, to many Aboriginal and Torres Strait Islander peoples, land is sacred and cannot be owned. Instead people are

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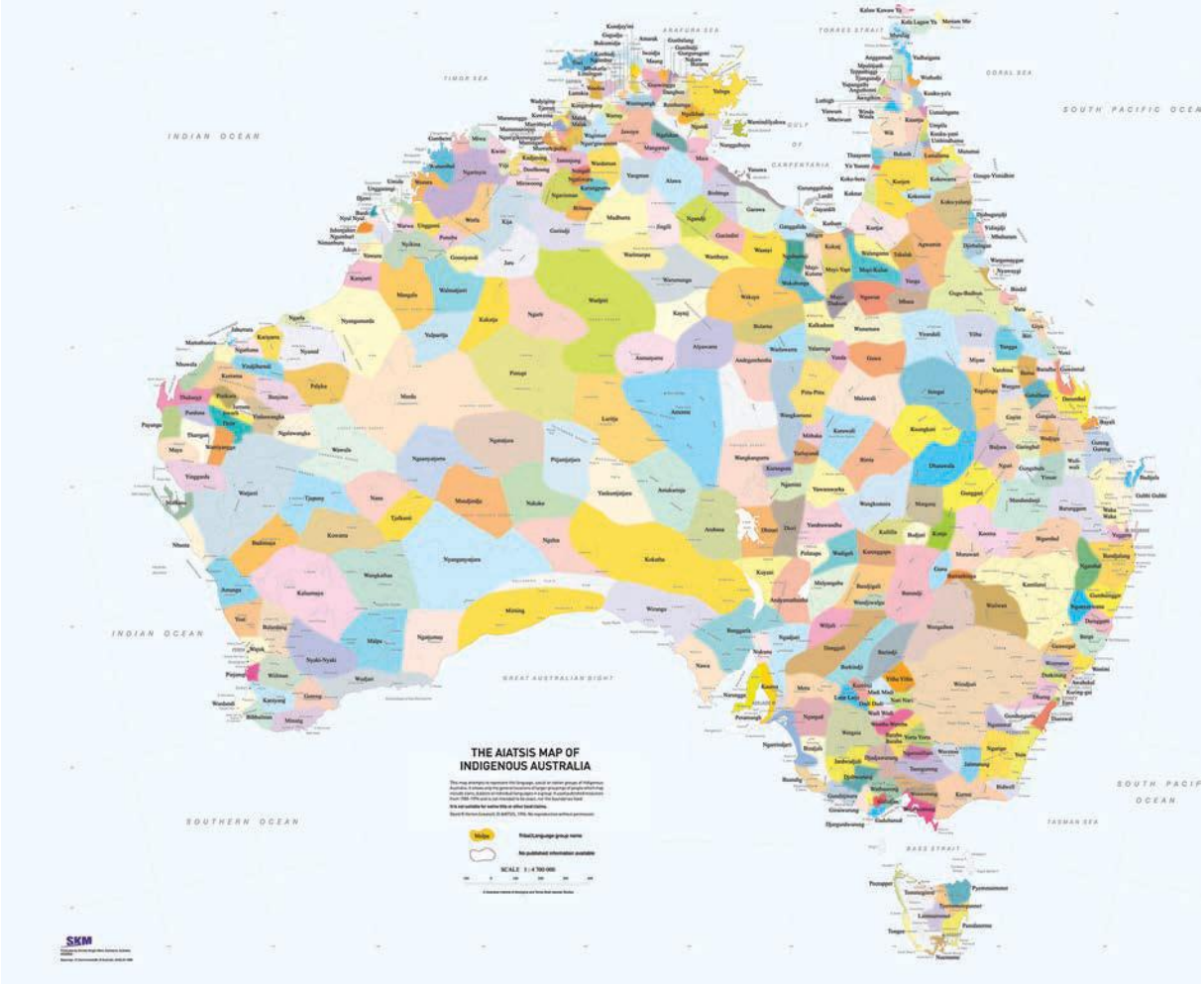

Figure 2.18 This map attempts to represent the language, social or nation groups of Aboriginal Australia. It shows only the general locations of larger groupings of people, which may include clans, dialects or individual languages in a group. It used published resources from 1988–1994 and is not intended to be exact, nor 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.

custodians of the land, looking after it for future generations. This collective guardianship is a key feature of customary law; however, the lack of tangible ownership is one reason why the British people felt that they could settle and impose British property law in Australia. The British considered Australia to be an unoccupied land, as they could not see any signs of ownership such as fences and signs. The term that is used for this is '***terra nullius***', a Latin expression meaning 'empty 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. It has been judged legally invalid.

Although today federal and state legislation and the common law govern Australia, many Indigenous people still follow their own customary law as well.

Diversity of Indigenous societies

Aboriginal and Torres Strait Islander law is tribal and different 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 traditional law, the majority of Indigenous communities will generally see that disputes are not restricted to individuals. The resolution of the dispute, involving negotiation,

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mediation and conciliation, will involve everyone in the community. There are also offences that are not recognised by non-customary law but are punishable under traditional law. Examples include insulting an **elder** and the singing of sacred songs in public. These are offences in most Indigenous societies, regardless of where they are located in Australia.

elders
older men and women of recognised wisdom and authority, who are the keepers of traditional knowledge within Indigenous communities; they are responsible for such things as initiations and the handing down of punishments when community laws are broken

The spiritual nature of Indigenous customary law

The Dreaming is the basis of much Aboriginal and Torres Strait Islander law. The Dreaming is the history of Aboriginal and Torres Strait Islander peoples: their creation and teaching stories. It explains how the land, animals, plants and sky were created and has a very strong religious element.

The Dreaming
the source of Indigenous Australian 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 religion 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 Indigenous people have lived under two legal systems: the common law system derived from Britain and Indigenous customary law. As more than two-thirds of Aboriginal and Torres Strait Islanders live in remote areas, they are more likely to use customary law to settle a dispute.

The significance of land and bodies of water to Indigenous societies

The idea of individual land ownership is alien to Aboriginal and Torres Strait Islander 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 loss of this land means losing the group's culture and history. In the same way, Aboriginal and Torres Strait Islander 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. These responsibilities are tied into their traditional laws and the stories and rituals that pass on these laws and responsibilities. Failure to

Figure 2.19 In Indigenous Australian societies, land belongs to a group, not to individuals.

Figure 2.20 Aboriginal and Torres Strait Islander peoples pass their laws and customs down through traditions such as dance and storytelling.

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follow the traditional laws can be seen as a failure to show respect for the land and traditional values.

Ritual and oral traditions within Indigenous societies

Aboriginal and Torres Strait Islander law is part of everyday life. The law is an integral part of the values, customs and ethics of Indigenous peoples and has developed over many thousands of years. Most laws relate to marriage, child-rearing, religion, 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.

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

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 and, 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 Indigenous societies

When customary laws are broken or disputes arise within traditional Indigenous groups, the family and the community are involved. Discussions or meetings, rather than formal judicial processes, would be 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 Aboriginal and Torres Strait Islander 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 Indigenous societies

It is expected that everyone in the community will follow and reinforce the 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**.

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.

Punishments range from ridicule and shaming to exile, spearing or death. Punishment by death is much less frequent today than in it was in the past, possibly because of conflict with Australian law. The justification for physical punishments such as spearing or beatings is sometimes expressed as to 'restore balance' for the parties and their families.

The relevance of customary law today

In the past 20 years, there has been greater legal recognition of Aboriginal and Torres Strait Islanders' rights as the traditional landholders of Australia. Many aspects of customary law can be seen embodied in Australian law today. The practice

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of sustainable development, for example, is the basis for current environmental laws. Conciliation and mediation are increasingly used to resolve disputes in criminal, consumer and employment law.

Customary laws are also sometimes taken into account when an Aboriginal or Torres Strait Islander is charged with a crime. For example, where an act has been done because Aboriginal 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.

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

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 2.6

1. Describe the importance of tradition in Aboriginal and Torres Strait Islander customary law.
2. Discuss the different relationships that Europeans and Aboriginal and Torres Strait Islanders have with the land.
3. Outline why it is not possible to refer to a uniform Aboriginal and Torres Strait Islander customary law.
4. What do the laws of Indigenous Australian peoples have in common?
5. Explain some ways in which customary law is relevant to the Australian contemporary legal system.

Research 2.4

View The Dreaming section of the Australian Government website and complete the following activities. See the section via the following link: http://cambridge.edu.au/redirect/?id=6495.

1. Explain the importance of The Dreaming to Aboriginal and Torres Strait Islander peoples.
2. Outline how stories of The Dreaming are passed on through generations.
3. Who has custody of these stories?
4. Discuss why many of these stories are called 'sacred' and 'secret'.
5. Look at the list of stories and their summaries and distinguish the common themes of many of these stories.
6. Choose a story and briefly recount its main ideas.

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 (meaning the authority to rule itself).

domestic law
the law of a state

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.

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Sovereignty means that 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 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 (continuing at the time of writing).

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.

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 do so.

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.

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

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 the First World War (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.

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Figure 2.21 The European Parliament Building in Brussels

Declarations

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

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

In 1948 the declaration was ratified by a proclamation by the United Nations General Assembly. Forty-eight countries voted in favour of it, with none voting against it and only eight abstaining. The declaration is the basis for two binding UN human rights covenants: the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR). 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

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* (ICCPR) says that 'sentence of death shall not be imposed for crimes committed by persons below eighteen years of age'.

Article 37 of the *Convention on the Rights of the Child* (CROC) provides that 'neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen 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 constitution to execute 16- and 17-year-old offenders, but it now found that standards of decency had evolved since that time. There was now a national consensus that death is disproportionate punishment for juveniles. In addition to state legislation and practice, the court had 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'.

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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* (the 'Lombok Treaty, 2006'), concerning their common security and respective national security; or
- multilateral – between many states; for example, the *Charter of the United Nations* (1945), which established the United Nations and its organs and agencies. Each country that is a signatory to this treaty has a seat in the General Assembly and participates in UN processes.

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 *Rome 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.

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

ratify
to formally confirm that the country intends to be bound 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.

Legal decisions

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.

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

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 judgements 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 ICJ 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.

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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 2.7

1 Explain two different ways that the term 'state' can be used.
2 Identify what is meant by the term 'international law'. Outline the different ways in which international law is made.

International organisations

The United Nations

The United Nations (UN) is the chief organisation involved in international law. It was established in 1945 by the *Charter of the United Nations*. At its first meetings, 51 countries were represented; by 2012, there were 193 members. The UN's 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 UN 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 many other humanitarian operations.

Figure 2.22 In 1973 the German Democratic Republic became a member of the United Nations.

The UN's 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 that the member states vote upon.

Critics of the UN believe that reform is necessary for its continued relevance. State sovereignty often poses a challenge to the authority of the UN, 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). As the UN has no powers to make states enact its resolutions into domestic law or to follow a particular course of action, its effectiveness is very much dependent on the political will of states.

The main organs of the UN are discussed here.

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 UN, 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.

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

The General Assembly meets every year and can meet more often if required.

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The Security Council

The **Security Council** is the most powerful part of the UN. It is the executive of the UN and has the final say 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 the Second World War). There are also 10 non-permanent members who serve for two years each. Australia has been a member of the Security Council five times since 1945.

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

Under the Charter of the UN, it is the Security Council that 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, disappointed many human rights groups due to the absence of stronger measures such as an immediate oil embargo and targeted sanctions against government officials. Currently, the civil war in Syria, with its loss of life and destruction, is causing much discussion and debate, with the UN declaring the situation 'unacceptable'. However, as yet no economic sanctions have been imposed, as general agreement has not been reached among members. This lack of power has meant that UN workers cannot access refugee camps in Syria to provide aid and is limited to making statements calling its member countries to carry out sanctions.

Figure 2.23 The UN Security Council controls the UN's peacekeeping corps.

A further criticism of the Security Council is that having been set up over 60 years ago it does not reflect a broad spectrum of 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 UN are the Economic and Social Council, the Trusteeship Council, the Secretariat and the International Court of Justice (discussed below).

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

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Figure 2.24 International flags near The Hague where the International Court of Justice is based.

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. Australia has 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 via the following link: http://cambridge.edu.au/redirect/?id=6496.

Legal Links

For more information on the United Nations bodies view the United Nations website via the following link: http://cambridge.edu.au/redirect/?id=6497.

Review 2.8

1 Why was the United Nations 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.

Research 2.5

View the United Nations website. Choose one of the issues that the United Nations covers (e.g. human rights).

Write a report about some of the recent initiatives taken by the United Nations in this area.

Outline any problems that you see the United Nations facing as it undertakes these initiatives.

Intergovernmental organisations (IGOs)

Intergovernmental organisations (IGOs) are organised groups of states, established to pursue mutual interests in a wide variety of areas. Many IGOs are subsidiary agencies of the UN; 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 aim is to ensure the safe and fair treatment of workers.

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.

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Figure 2.25 The symbol of the European Union

Legal Links

Refer to http://cambridge.edu.au/redirect/?id=6498 for a link to a list of intergovernmental organisations.

Non-government organisations (NGOs)

Non-government organisations (NGOs) are associations based on common interests and aims, and which have no connection with any government. They make contributions in 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 7 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 indigenous peoples, regulation of the global sale of weapons, and the abolition of torture and the death penalty.

Figure 2.26 Amnesty International is a part of many global campaigns.

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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, the terms of the convention are already being satisfied by domestic law).

To pass new legislation implementing a treaty, the federal government may rely on the external affairs power in s 51(xxix) of the Constitution. It may also rely on other powers such as the trade and commerce power in s 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 UN 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 (ICCPR) – see, for example, *Human Rights Act* 2004 (ACT); *Charter of Human Rights and Responsibilities Act* 2006 (Vic)
- *Convention on the Rights of the Child* (CROC) – see, for example, *Family Law Act 1975* (Cth), in particular s 67ZC
- *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) – *Sex Discrimination Act* 1984 (Cth)
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) – Division 274 of the *Commonwealth Criminal Code*.

Review 2.9

1 Discuss the limitations of international law.
2 Identify some organisations that influence international law.

Research 2.6

Investigate adversarial and inquisitorial legal systems. Write a report that looks at the origins and workings of adversarial and inquisitorial legal systems. Include a comparison of the systems, looking at the advantages and disadvantages of each system. You might like to look at Indonesia and recent trials that have taken place with respect to terrorist activity and drug smuggling. Come to a conclusion about which system you think would be better for Australia.

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Chapter summary

- The Australian Constitution took shape during the process of Federation.
- 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 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 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 Aboriginal and Torres Strait Islander traditions, rituals and acceptable conduct.
- Customary law still has relevance 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 states 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, which requires judges to follow rulings made in previous court cases, unless they are inconsistent with a higher court's decision or 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.

Chapter summary questions

Multiple-choice questions

1 What section of the Constitution outlines the referendum process for amending the Constitution?

A s 51
B s 73
C s 109
D s 128

2 When is a binding precedent set?

A when it is established by a higher court
B when a judge has determined that the facts of a case are similar to another case
C when a judge accepts the advice from a judge in a higher court
D when parliament passes a law about a case

3 A minister contacts a judge in the Federal Court and directs her to make a decision 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 s 128.

4 What is the main purpose of equity?

A to achieve justice
B to achieve fairness
C to achieve equality
D to achieve damages

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5 Which United Nations body is primarily responsible for codifying and developing international law?
   - **A** Security Council
   - **E** General Assembly's Legal Committee
   - **F** International Law Commission
   - **G** 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 Constitution.
3 Use examples to describe the various roles of the High Court.
4 Class debate: if the Constitution were to be rewritten today, what current state government powers should go directly to the federal government?
5 Explain the difference between common law and statute law. Analyse their relationship.
6 Describe the distinguishing features of Indigenous customary law.
7 Discuss the relationship between the government and the whole parliament when it comes to making new laws or amending current laws.
8 Evaluate the influence of international law on domestic law.
9 Explain the jurisdiction of each of the courts in New South Wales or the Australian Capital Territory.
10 Critically analyse the ways that Indigenous customary law has been, and can be, incorporated into the contemporary Australian legal system.

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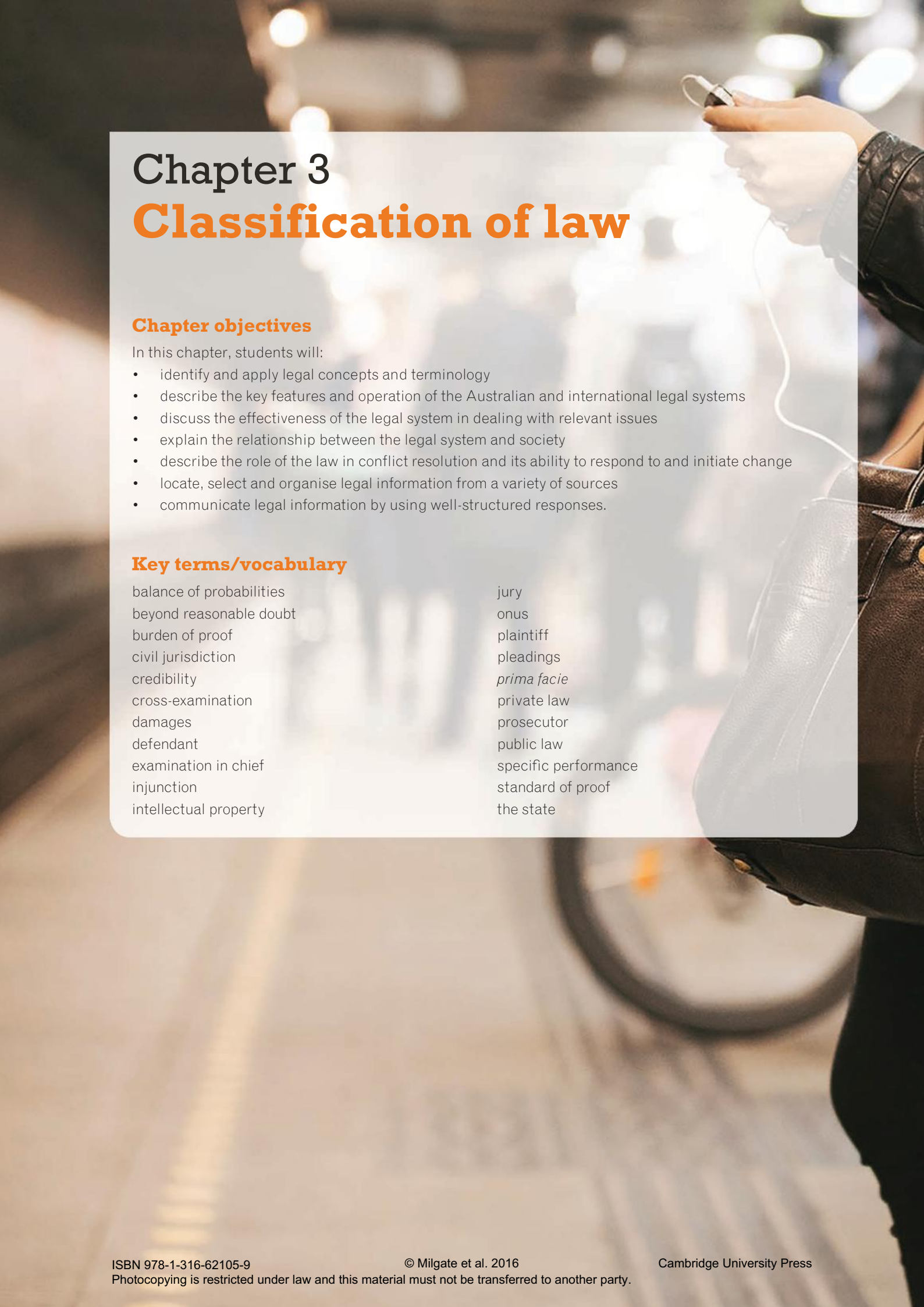

Chapter 3
Classification of law

Chapter objectives

In this chapter, students 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.

Key terms/vocabulary

balance of probabilities
beyond reasonable doubt
burden of proof
civil jurisdiction
credibility
cross-examination
damages
defendant
examination in chief
injunction
intellectual property
jury
onus
plaintiff
pleadings
prima facie
private law
prosecutor
public law
specific performance
standard of proof
the state

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Relevant law

IMPORTANT LEGISLATION

Australian Constitution
Crimes Act 1900 (NSW)/*Crimes Act 1900* (ACT)
Judiciary Act 1903 (Cth)
Criminal Code 2002 (ACT)

SIGNIFICANT CASES

Donoghue v Stevenson (1932) AC 562
Roach v Electoral Commissioner [2007] HCA 43

Legal oddity

The *Crimes Act 1900* (NSW) makes it a specific offence to steal a fence:

> s 515: Whosoever steals, or cuts, breaks, or throws down with intent to steal, any part of any live or dead fence, or any material set up, or used, as a fence, or any stile, or gate, or any part thereof, respectively, shall, on conviction by the Local Court, be liable to pay the value of the property stolen, or the amount of injury done, in addition to a fine of 1 penalty unit.

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3.1 Public law

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

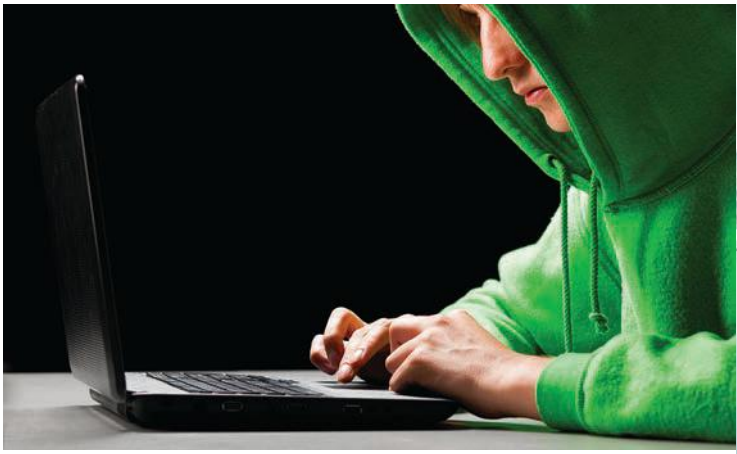

Figure 3.1 The Crimes Acts have been amended to cover computer crimes.

Public law deals with the powers and obligations of government and citizens, and the relationships between persons and the state. 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. Its function is to maintain public safety and order for the whole of society. The state has this responsibility because an offence is seen as being against the whole community even if only one individual is affected. This is because the offence is seen to damage the moral order of society; that is, the safety of persons and property.

In Australia, criminal law is the responsibility of each state. The common law plays a significant role in Australian jurisdictions, including New South Wales and the Australian Capital Territory, but each state and territory also has its own legislation to cover criminal behaviour. The actions and punishments covered by these laws are the same, or similar, in all 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 criminal justice systems of the states and territories are also similar.

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

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.

Legal Links

View the following acts in full via the following links:

- *Crimes Act 1900* (NSW) – http://cambridge.edu.au/redirect/?id=6499
- *Crimes Act 1900* (ACT) – http://cambridge.edu.au/redirect/?id=6500
- *Criminal Code 2002* (ACT) – http://cambridge.edu.au/redirect/?id= 6501

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.

Administrative law cannot be used to challenge all government dealings; for example, policy

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Figure 3.2 Administrative law can only be challenged through a review.

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 departments that are set up to administer these policy decisions can be challenged under administrative law. In this way, a taxpayer could challenge his or her 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 he or she can challenge it.

There are three ways in which a person can seek a review of a decision made by a government agency. The avenue taken depends upon the nature of the complaint and whether the complaint is made against a federal or state decision. These ways are:

- 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, but if this is not the case then a person can simply request that the decision be reconsidered.
- External review – This is a more formal system, where the merits of a decision made by an agency are reviewed by a person or body outside the agency.
- Judicial review – Only courts can provide judiciary review of administrative decisions, and the only areas they can consider is whether or not the 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 the same kind of jurisdiction to the Federal Court.

Government departments have information about appealing against decisions on their websites. In New South Wales and in 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.

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 topics. It also specifies that when there are inconsistencies between state and Commonwealth legislation, the Commonwealth law will prevail.

If a law violates the rules contained 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 this court are similar to those of other courts in the sense that they are very formal and the two sides argue their cases, usually represented by highly respected barristers. However, they differ in the following ways:

- Cases are heard by one or more judges (called Justices). Cases involving interpretation of the 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 will prevail.
- High Court decisions are binding on all courts in Australia.

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In Court

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

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

Vickie Lee Roach, a serving prisoner, took the case to the High Court on the ground 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.

Review 3.1

1. Explain the role of administrative law and how an administrative decision of a government body can be challenged.
2. Identify the courts that can decide questions of constitutional law. What types of questions are included in this category?

3.2 Private law

Private law regulates 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** and the action is known as a civil proceeding. Three major areas of civil law are contract law, tort law and property law.

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

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, he or she 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 he or she agreed to do by signing the contract. Thus, they are designed to put the **plaintiff** in the position he or she would have been in if the contract had been performed properly; that is, to compensate him or her. The amount of compensatory damages is intended simply to provide the plaintiff with the benefits that he or she would have had if the defendant had kept the agreement, not to punish the defendant.

damages
monetary compensation for harm or loss suffered

plaintiff
the person who initiates a civil action

Figure 3.3 A contract reflects an agreement between two parties.

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The plaintiff may also seek one of the following remedies:

- An **injunction** – this is an order usually directing a party not to do something; for example, ordering the defendant to cease the conduct breaching the contract. In some cases, an injunction may require the party to do something; for example, requiring a telephone customer to remove wiring that he or she 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. It will only be ordered if the amount of damages provides insufficient compensation.

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 him or her to perform

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

Tort law

Torts are 'civil wrongs'. The word 'tort' comes from the French word meaning 'wrong'. Tort cases deal with situations in which someone 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 he or she owes to someone.

Breach of contract is also a civil wrong, but the difference between tort and agreements is that with agreements 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 he or she was in before the wrong was committed. For example, someone slipping 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, in terms of both time and money, so it is important that plaintiffs take this into account when deciding whether the wrongdoing is worth bringing a case. This issue can be seen in the newspaper article where a woman won and then lost damages after a fall in a supermarket see the article on page 66.

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

- negligence
- nuisance – public and private
- trespass to 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 (see In Court on page 67).

Figure 3.4 Trespass to land is an example of a tort.

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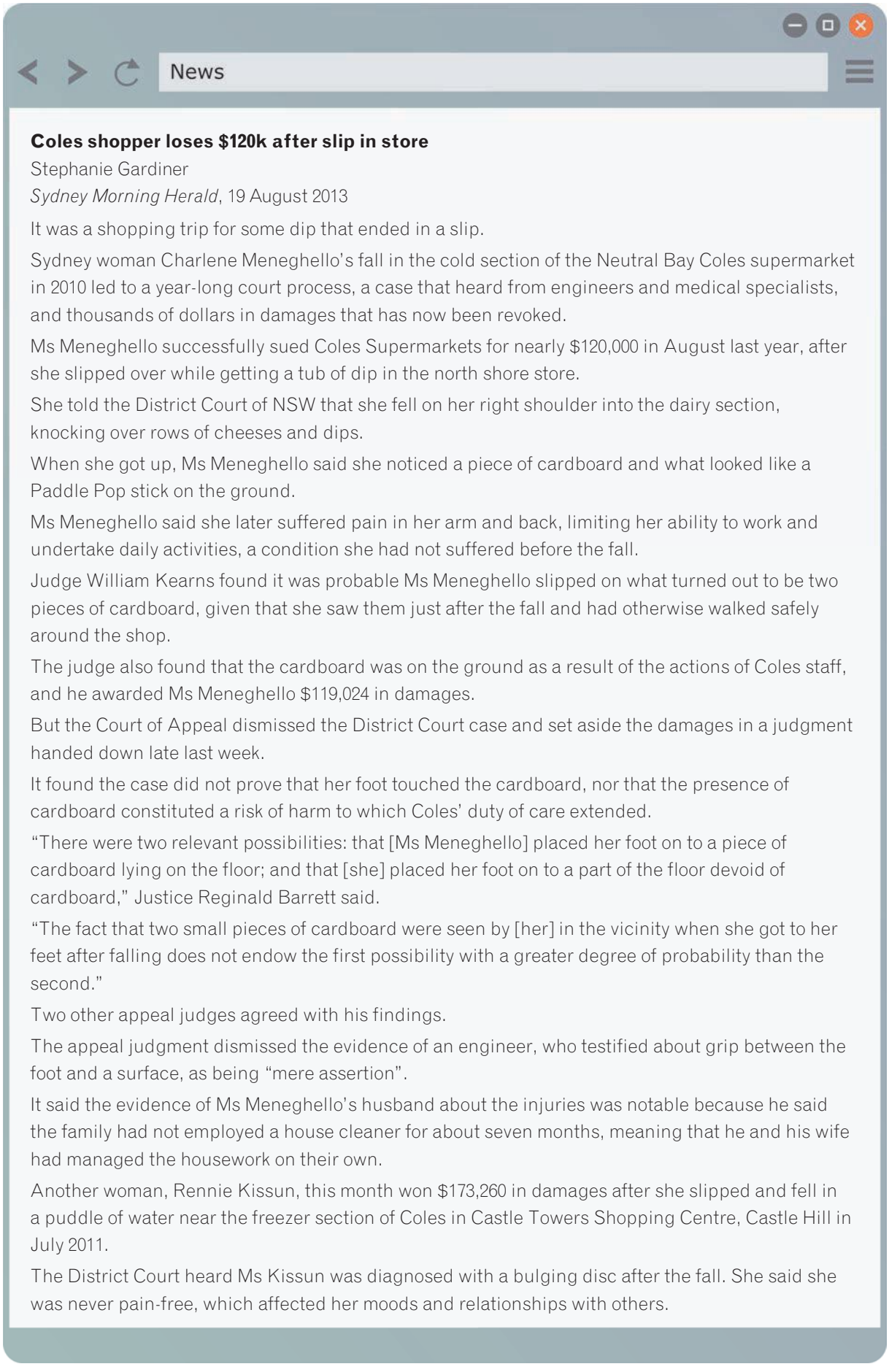

Coles shopper loses $120k after slip in store

Stephanie Gardiner

Sydney Morning Herald, 19 August 2013

It was a shopping trip for some dip that ended in a slip.

Sydney woman Charlene Meneghello's fall in the cold section of the Neutral Bay Coles supermarket in 2010 led to a year-long court process, a case that heard from engineers and medical specialists, and thousands of dollars in damages that has now been revoked.

Ms Meneghello successfully sued Coles Supermarkets for nearly $120,000 in August last year, after she slipped over while getting a tub of dip in the north shore store.

She told the District Court of NSW that she fell on her right shoulder into the dairy section, knocking over rows of cheeses and dips.

When she got up, Ms Meneghello said she noticed a piece of cardboard and what looked like a Paddle Pop stick on the ground.

Ms Meneghello said she later suffered pain in her arm and back, limiting her ability to work and undertake daily activities, a condition she had not suffered before the fall.

Judge William Kearns found it was probable Ms Meneghello slipped on what turned out to be two pieces of cardboard, given that she saw them just after the fall and had otherwise walked safely around the shop.

The judge also found that the cardboard was on the ground as a result of the actions of Coles staff, and he awarded Ms Meneghello $119,024 in damages.

But the Court of Appeal dismissed the District Court case and set aside the damages in a judgment handed down late last week.

It found the case did not prove that her foot touched the cardboard, nor that the presence of cardboard constituted a risk of harm to which Coles' duty of care extended.

"There were two relevant possibilities: that [Ms Meneghello] placed her foot on to a piece of cardboard lying on the floor; and that [she] placed her foot on to a part of the floor devoid of cardboard," Justice Reginald Barrett said.

"The fact that two small pieces of cardboard were seen by [her] in the vicinity when she got to her feet after falling does not endow the first possibility with a greater degree of probability than the second."

Two other appeal judges agreed with his findings.

The appeal judgment dismissed the evidence of an engineer, who testified about grip between the foot and a surface, as being "mere assertion".

It said the evidence of Ms Meneghello's husband about the injuries was notable because he said the family had not employed a house cleaner for about seven months, meaning that he and his wife had managed the housework on their own.

Another woman, Rennie Kissun, this month won $173,260 in damages after she slipped and fell in a puddle of water near the freezer section of Coles in Castle Towers Shopping Centre, Castle Hill in July 2011.

The District Court heard Ms Kissun was diagnosed with a bulging disc after the fall. She said she was never pain-free, which affected her moods and relationships with others.

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In Court

***Donoghue v Stevenson* (1932) AC 562**

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

A friend bought Mrs Donoghue some ginger beer in a dark glass bottle, which prevented Mrs Donoghue from seeing the contents. Some ginger beer was poured into a glass for her, which she drank. When the rest of the ginger beer was poured into the glass, a decomposing snail came out of the bottle. This made Mrs Donoghue feel quite ill, and later she also suffered from severe gastroenteritis. She sued David Stevenson (the respondent), who was the manufacturer of the ginger beer.

Figure 3.5 A decomposing snail found in ginger ale formed the basis of litigation.

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

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

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'. He went further than the narrow decision in *Heaven*, however, citing *obiter dicta* 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 didn't have a contract. As May 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, not only because of the judgement 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.

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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, but also 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 something. 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. Distinguish between public and private law.
2. Outline the types of remedies that can be sought by the plaintiff if a contract is breached.
3. Describe tort law.
4. Outline the different types of property that are protected by property law.

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 these key differences and relevant terminology.

Figure 3.6 If you are found responsible for a car accident with another person due to reckless driving, you could face both criminal and civil proceedings.

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 the case to civil court as well. In both cases, however, 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, and sometimes a **jury**. The judge will consider the evidence and make a decision in favour of one of the parties.

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

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, 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 upon the seriousness of the offence that the accused is alleged to have committed; that is, whether it is a summary or indictable offence.

Summary offences are relatively minor and include certain traffic offences and offensive

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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.)

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

standard of proof
the degree or level of proof required in order 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 in order for the prosecution (the state) to obtain a conviction against 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 the case to the court

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

behaviour. They are heard and decided by a magistrate or judge without a jury.

An indictable offence is a serious criminal offence 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).

For summary matters in New South Wales, the police themselves may prosecute the case in the Local Court. Not only do the police investigate crimes and arrest suspects, but they also have a specially trained police officer, called the police prosecutor, who represents the state in court. Serious crimes are prosecuted by the Office of the Director of Public Prosecutions (DPP). In the Australian Capital Territory, the DPP is responsible for prosecuting all criminal matters in both the Magistrates' Court and Supreme Court.

The accused, known as 'the defendant', will usually employ a lawyer to represent him or her. 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 a sufficiently strong case that the accused has committed an indictable offence.

Trials of indictable matters take place in the District or Supreme Court in NSW, depending on the seriousness of the offence, and in the Supreme Court in the ACT. Criminal trials are heard before a jury of 12 people, unless the accused elects to have his or her case heard before a judge alone. The jury's job is to consider whether there is enough evidence to convict the accused. The judge advises the jury and deals with questions of law. The jury will consider the evidence provided in court and decide 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 unanimous verdict; that is, they must all agree. However, in New South Wales in 2006, new legislation allowed for the following: if

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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 of the jurors; or if there are 11 jurors and, after at least eight hours they cannot all agree, the verdict can be agreed by 10 jurors.

Criminal trial process

At the start of the 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 will be presented to prove the defendant's guilt.

Each side then calls witnesses and 'examines' them by asking them questions. This is called **examination in chief**. Its purpose, for the prosecution, is to establish facts to prove the case. For the defence, its purpose is to disprove the prosecution's case.

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

Cross-examination allows each side to examine the witnesses of its opponent, in order to call into question the opponent's version of the facts, or a witness's **credibility**.

Figure 3.7 At the start of the trial, the indictment is read to the accused.

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

After all of the evidence has been given, each side gives a closing address to the jury. This final speech draws together the evidence and provides an argument for that side's position. It may also answer arguments that could be made by the other side. The judge will then 'sum up' the case and instruct the jury 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** (the onus) rests on the prosecution, which must prove beyond reasonable doubt that the accused has committed the offence with which he or she is charged. The prosecution needs to convince the jury that the crime was committed by the defendant for the defendant to be found guilty. It is the job of the defence to disprove the prosecution's case and provide evidence to show the innocence of their client.

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

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

Hearings in the different courts

Local and Magistrates' Courts

Most criminal cases are dealt with by the Local or Magistrates' Court. These courts do not make use of juries and judges. Rather, a magistrate makes the decision. Matters are generally handled quickly, efficiently and cost-effectively.

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Figure 3.8 Quirindi Local Court, in the Hunter Valley

In the Local and Magistrates' Courts, the lawyers and magistrates do not wear traditional robes and solicitors carry out most legal work. The proceedings are less formal than the higher courts. Many defendants choose to represent themselves and so argue their case without the help of a lawyer.

Coronial inquests

A coronial inquest will occur when there is an unnatural death or an unexplained fire or explosion. The proceedings are more inquisitorial than normal court proceedings, as the coroner's office will gather 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

Children charged with a crime are treated differently by the court system, as immature persons are regarded as having a different degree of responsibility from adults. Conviction by a Children's Court, even for a serious crime, has less severe consequences than conviction in an ordinary criminal court. Most charges against people under 18 years of age are heard in a special Children's Court hearing. They are usually heard before a magistrate who specialises in children's cases and takes reasonable measures to ensure that the child understands the proceedings.

The case is heard in a closed court and the public is 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.

Review 3.3

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

Research 3.1

1. View the NSW Department of Justice website.
2. Who hosts this site? Why was it set up?
3. View 'Courts and tribunals'. Imagine that you are doing work experience at the local primary school and have to teach a Year 6 class about the local court. Develop an internet activity based on the information on the website.

Civil procedure

Civil proceedings are court actions that are due to disputes between individuals. They are initiated by individuals or organisations, rather than the state. Civil proceedings manage matters such as breach

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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', an individual who or organisation which has committed the breach or the wrong.

The process in a civil claim

The statement of claim outlines the facts of the dispute and the parties involved in the dispute. There are rules for the way in which it must be 'served' on the defendant, which must be followed strictly. As discussed in Chapter 2, the court that has jurisdiction to decide a civil matter will depend on the type of claim and the monetary amount involved.

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

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

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 them. A defendant may also file a counterclaim against the plaintiff.

At this stage, the parties are able to obtain more information about each other's arguments through a process called 'discovery'. This process allows each party to obtain information to assist them in responding 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 upon. 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 the dispute cannot be settled, the matter will be referred to trial. During the trial, each side has the right to produce evidence, call witnesses and carry out cross-examinations. When both sides have presented all evidence, the judge will make a ruling. If the plaintiff is successful, the judge will make a decision about 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 will be required under the judgement such as the completion of an action (e.g. the transfer of the property in dispute).

Burden and standard of proof in civil cases

The burden of proof in a civil case is on the injured party (the plaintiff) to prove his or her allegations. The rules of civil procedure give the defendant the chance to provide evidence that rebuts the case made by the plaintiff. 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 he or she suffered injury or loss as a result of the actions of the defendant or that 'his or her claim is correct in law'.

Figure 3.9 The plaintiff must have proof to support their allegations.

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Review 3.4

1 Construct a flow diagram showing the steps taken in civil legal action.
2 How would you decide whether to make a personal injury claim for negligence that resulted in medical bills of $100 000? In which court would this case be heard?
3 What sorts of facts might be sought in discovery in a case involving a debt that was not paid?
4 Is it more difficult to prove a case in criminal law or civil law? Explain your answer.
5 With a classmate, make a poster (either by drawing or cutting out pictures) showing as many civil wrongs and criminal acts as you can. Draw up a table to list these and the court in which cases about these wrongdoings will be heard.

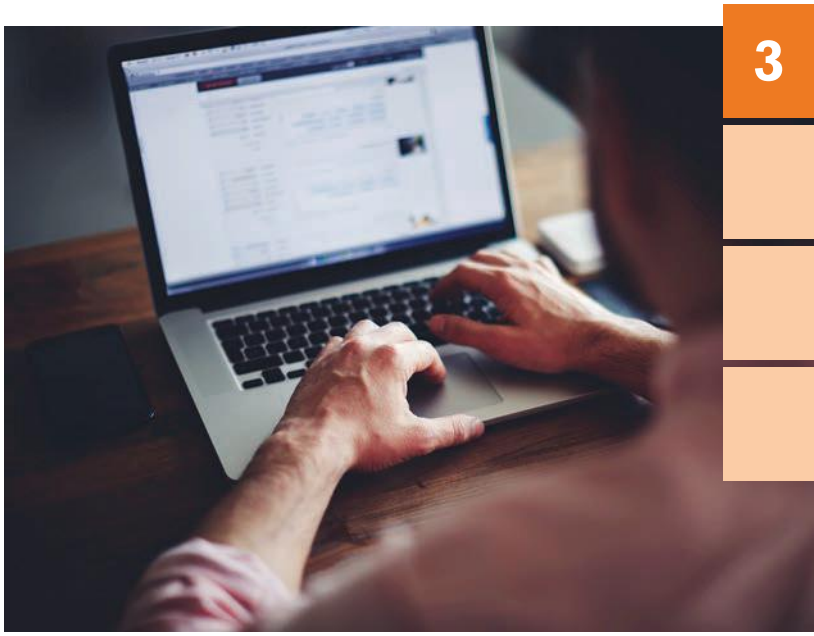

Figure 3.10 You can look up many cases online.

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:

1 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. In order to help you record and summarise your findings, a Media File pro forma is provided on the Cambridge GO website. It is recommended that you print a number of copies of this pro forma, make notes specific to each case and attach them to each article you collect.
2 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 Australasian Legal Information Institute. These sites have information about rulings on a wide variety of court cases.
3 Observation – Observing a court case in action is an important way of reinforcing and extending your knowledge of criminal and civil law. The NSW Department of Justice website lists all courts in New South Wales, and information about Australian Capital Territory courts can be found at the ACT Courts & Tribunals site. Students are able to visit most courts that are open to the general public. However, if a school group is thinking about attending a court, it is important to contact the court to ensure that correct protocols and etiquette can be 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 below.

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 in cases. The judge makes decisions about points of law and gives instructions to the jury to make sure

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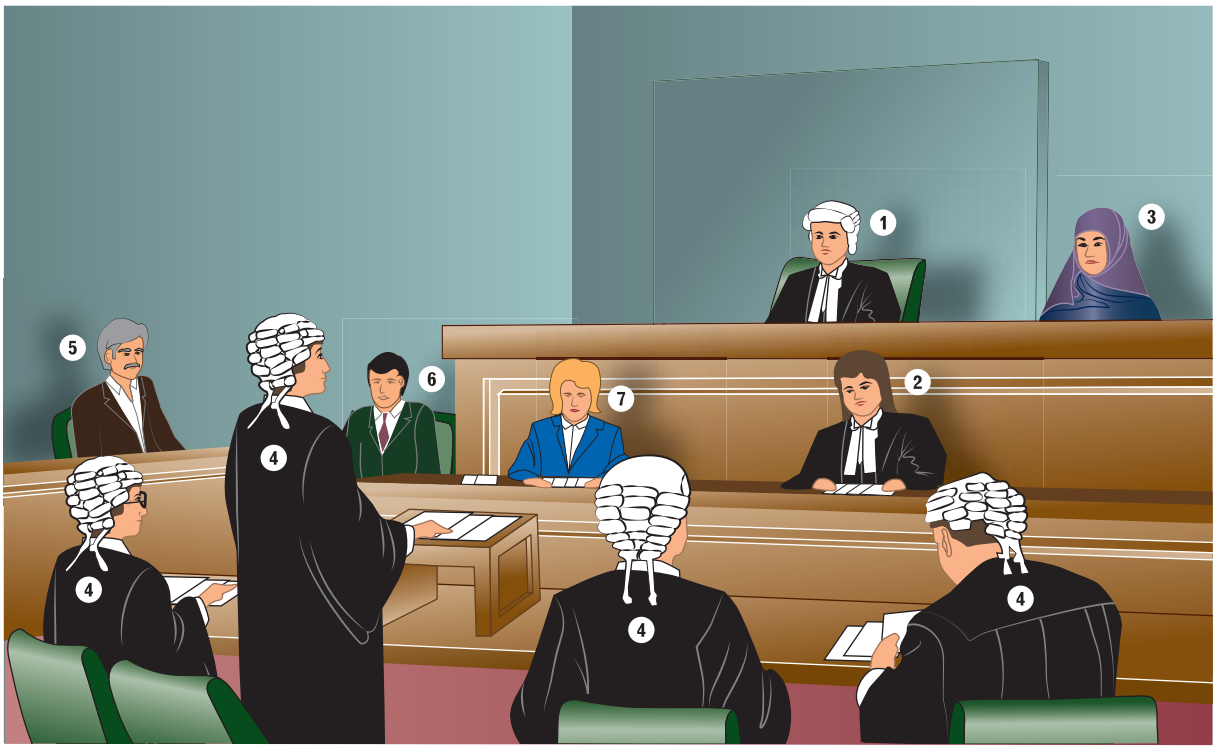

Figure 3.11 Court cases involve a number of participants, including **1** judge or magistrate, **2** judge's associate, **3** tipstaff, **4** barristers and solicitors, **5** witnesses, **6** court officers and **7** court reporter.

that they understand the proceedings and evidence presented. The judge is required to hand down sentences and rulings. In civil cases, the judge will sit 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, the magistrate will decide whether a person is guilty or innocent. The magistrate will decide on the punishment in criminal cases, and the amount of money awarded in civil cases.

Magistrates will refer very serious criminal offences to the District Court (in NSW) or to the Supreme Court (in the ACT). The magistrate will 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, it will be referred to a higher court.

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

Judge's associate

The judge's associate is a confidential secretary to the judge and performs clerical duties for the court in which the judge is presiding. He or she generally has 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, the tipstaff may provide research and administrative support.

Barristers and solicitors

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

Solicitors may work in any of a number of practice areas. Some of the major areas of employment are family law, conveyancing for real estate transactions, and the preparation of wills and contracts. Traditionally, only barristers can represent parties in court. Solicitors will most often prepare a brief for a barrister when a case must go before a court, as

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well as doing research and providing legal advice. In the Local or Magistrates' Court, however, 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, barristers and solicitors 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.

Solicitors 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. 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 his or her name is called. Once called, the witness must take the stand and either swear an oath or make an affirmation to tell the truth.

Court officer

The court officer is responsible for the court lists and calls witnesses into the courtroom. He or she administers the oath or affirmation, ensures that the public are seated in the right areas, and announces the arrival and departure of the judge or judges. The court officer communicates questions from jurors to the judge and passes documents from the bar table to the associate: the associate then gives them to the judge, jury or witnesses. The 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 and answers questions from jurors, and manages the jury room and the comfort of the jurors.

Court reporter

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

Corrective services officer

In a criminal case, the accused is guarded by a corrective services officer, who also escorts the accused to and from the courtroom.

Jury

A jury is a panel of citizens who consider the evidence and decide on questions raised in the case. Their job can be described as 'fact-finding', and their decision is called a verdict.

The members of a jury are ordinary people, randomly selected to the jury list, which has been 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 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, while the person who must defend his or her actions is called the defendant. In a criminal trial, the defendant is the person accused of the crime, and there is no plaintiff.

Media

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

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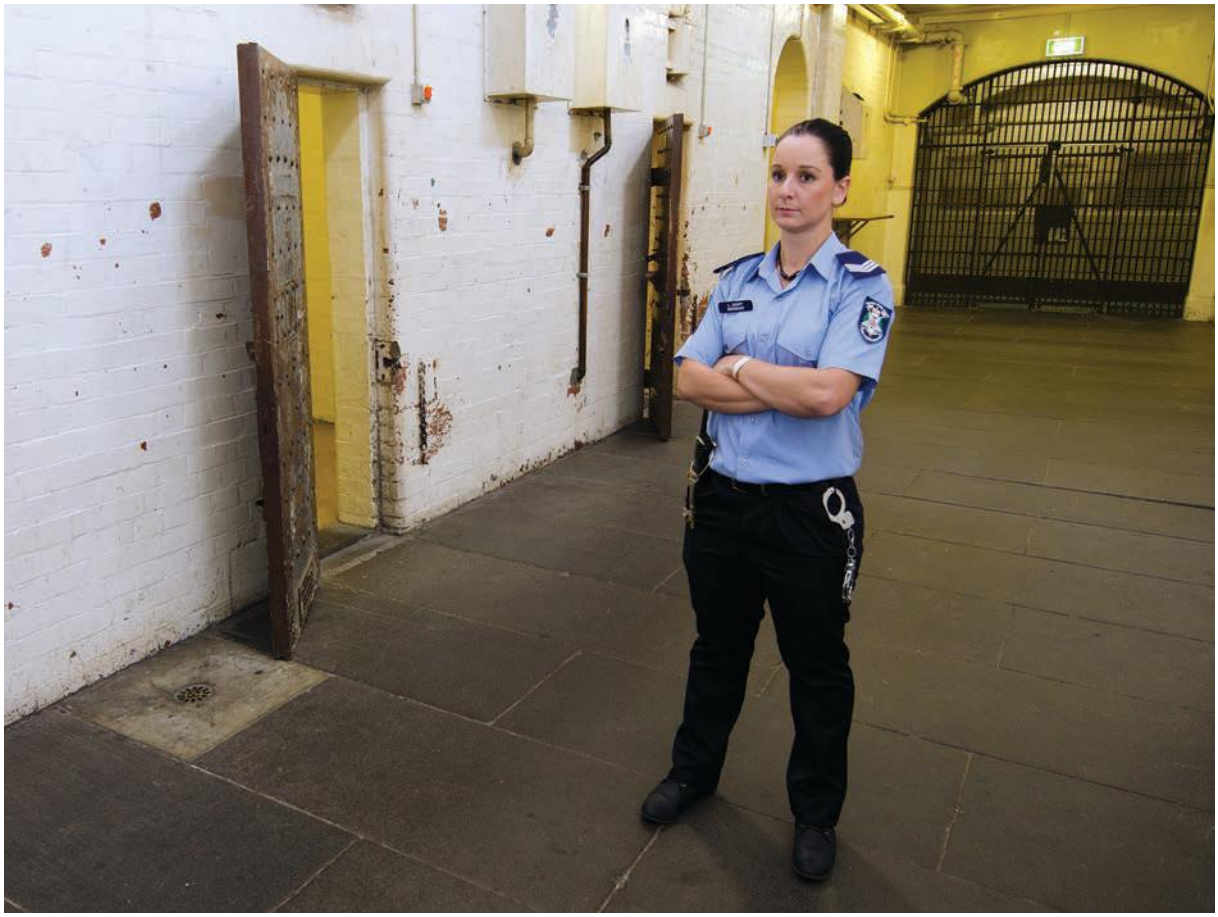

Figure 3.12 A corrections officer guards the accused.

Review 3.5

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

3.4 Common and civil law systems

Many countries throughout the world have a system of law 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 of the world.

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 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 governing relationships between private individuals, in contrast to the criminal law.

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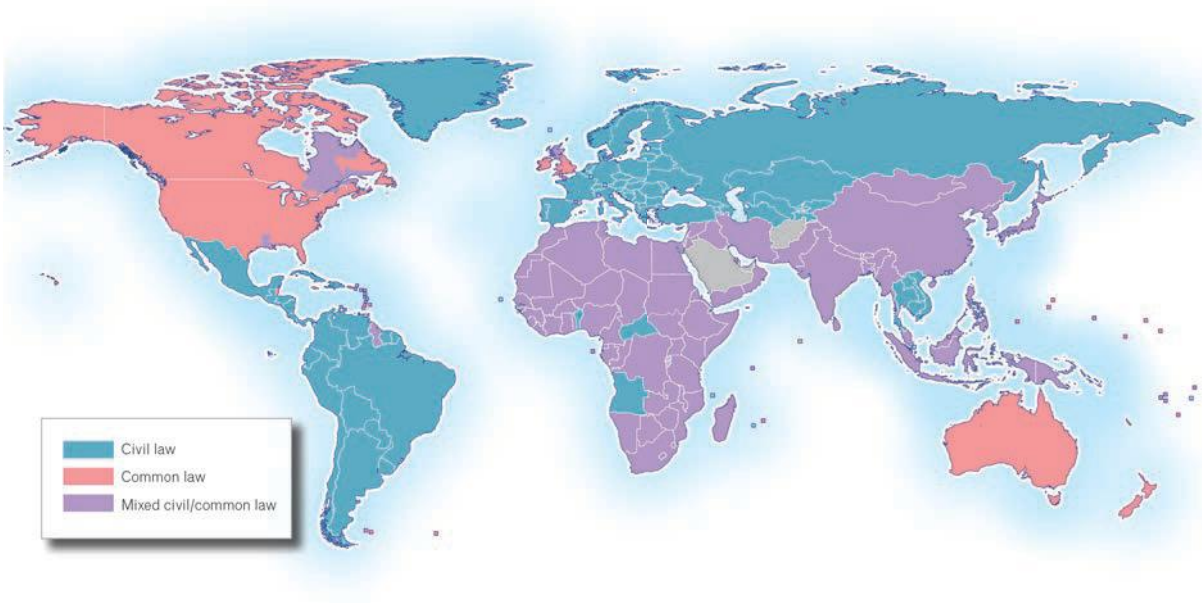

Figure 3.13 Some countries use the civil law system, while others use the common law system. Sometimes other customary legal systems are combined with the civil or common systems.

Civil law systems in other countries

The term 'civil law' can be confusing. Within the legal system of Australia it means private law; that is, disputes between individuals. But the term is also used to describe the legal systems of countries that have developed from the Roman law system instead of the English common law system; for example, France, Germany and Italy.

Whereas common law countries like Australia have an adversarial system of trial, 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 3.14 Civil law has its origins in Roman law.

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Chapter summary

- The law is divided into public 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 interactions between people and the state. It includes criminal, administrative and constitutional law.
- The Australian Constitution sets out the foundational rules of Australian Government. Constitutional law governs any changes made to these laws.
- Private law governs relationships between individuals or between them and organisations or companies. It includes contract, tort and property law.
- The court where the case is heard will depend on such things as the severity of the crime in criminal cases and the amount of damages sought in civil cases. Cases involving issues of equity will mainly be considered by the Supreme Court.
- Criminal and civil court procedures are different in a number of ways. In a criminal trial, the prosecution has the burden of proof. In a civil matter, the plaintiff has the burden of proof.
- The standard of proof in a criminal trial is beyond reasonable doubt. In a civil hearing, it 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 precedent.

Chapter summary questions

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 to achieve justice in civil cases
B to ensure fairness in government decisions
C to allow people to bring criminal charges against government departments
D 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 to decide whether they are consistent with the Australian Constitution
B to exercise veto power, if necessary, when a bill comes before parliament
C to ensure that they are consistent with international treaties that Australia has signed
D to advise the minor parties on how they can get laws passed

4 What can a plaintiff expect from a successful tort claim?

A compensation from the defendant in the form of damages
B compensation from the state
C an injunction to prevent the defendant from approaching the plaintiff's solicitor
D 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 his or her 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. Do you think many people seek justice in this way? Justify your answer.

2 Describe the remedies available when you have a contract for services and the other party fails to do what they agreed to do.

3 What is tort law? Discuss the idea that tort law has turned us into a society that sues each other when things go wrong.

4 Explain the roles of prosecution and defence in a criminal case.

5 Compare and contrast the features of criminal and civil law.

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Chapter 4
Law reform

Chapter objectives

In this chapter, students 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.

Key terms/vocabulary

Apprehended Domestic Violence Order (ADVO)
balance of power
capital punishment
de facto relationship
estate
forensic
fraud
Hansard
harmonisation
hung jury
identity theft
precedent
public morality
sedition
social values
table
terms of reference
Youth Justice Conferences

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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)
Crimes (Domestic and Personal Violence) Act 2007 (NSW)

Legal oddity

In February 2016, a Sydney taxi driver was fined for wearing brown shoes!

Under the *Passenger Transport Act 1990* (NSW), the driver of a taxi must wear an approved network uniform at all times, although shoe colour is not specified. Because the driver was waiting at a taxi rank, he was given a choice between a fine for being in a no-stopping zone, or a lesser fine for being out of uniform.

The fine was ultimately annulled, when it turned out that this section of the Act had been amended two months earlier.

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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 similarly dynamic in order 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.
>
> M.D. Kirby, *Reform the Law: Essays on the renewal of the Australian legal system* (Oxford University Press, Melbourne, 1983), p. 7

Changes to laws should not only recognise the changes taking place in society, but should also reflect those changes which 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.

Figure 4.1 Historically, social values in Australia have been heavily influenced by the Christian faith.

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 that 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 and ethics are shaped by various cultural factors, often including religion.

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

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

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 have 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.

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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 the traditional belief has been the understanding that a family must have a mother and a father in a heterosexual relationship recognised formally by 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 where 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 New South Wales 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 the NSW Parliament, the De Facto Relationships Act 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.

Figure 4.2 Over the past 40 years, the idea of what constitutes a family has evolved to the point where the definition in the *Marriage Act 1961* (Cth) no longer reflects the social values of a significant number of Australians.

de facto relationship
(from Latin meaning 'existing in fact'): a relationship between two adults who are not married but are living together as a couple

Under this Act, 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 *Wills, 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 Act 1989* (NSW) has been repealed.

estate
all of the property that a person leaves upon death

The Rudd government in 2008 acted on the Australian Human Rights Commission's report, *Same-Sex: Same Entitlements*, and an audit of Commonwealth legislation to remove discrimination and enable same-sex couples and their children to be recognised by Commonwealth law. These changes were legislated to ensure that Australia remained a fair and just community by allowing same-sex couples and their families to enjoy identical entitlements that opposite-sex de facto couples enjoy.

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Case Study

Whose social values should prevail?

In California, same-sex marriages were recognised when the Supreme Court of that state ruled in May 2008 that legislation banning these marriages was discriminatory and violated the state constitution. Since then there have been many couples who have legitimised their relationships in the eyes of the law through marriage.

In November 2008, voters overturned the court ruling by agreeing through 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: '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 those marriages conducted after the court ruling will remain valid.

More recently the Supreme Court of the United States legalised same-sex marriage in a decision that applies nationwide in *Obergefell v. Hodges* on 26 June 2015. The court held that the Fourteenth Amendment requires states to offer same-sex marriage and 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 seems to be supportive of marriage equality. There are certain sections of the American public that are opposed to any such changes.

It passed the Acts that came into effect in 2009. These were:

- *Same-Sex Relationships (Equal Treatment in Commonwealth Laws Superannuation) Act 2008*
- *Same-Sex Relationships (Equal Treatment in Commonwealth Laws General Law Reform) Act 2008.*

This legislation removed discrimination from 85 pieces of federal legislation in areas such as taxation, superannuation, social security, the Pharmaceutical Benefits Scheme (PBS) and Medicare safety nets, in addition to aged care. It also amended legislation that did not recognise same-sex couples for the purposes of child support, immigration, veterans affairs and citizenship.

Over the past few years there has been increased debate concerning the amendment of the Marriage Act to allow same-sex couples to marry. The Turnbull government has pledged to hold a plebiscite, which will be a direct vote of the Australian people on whether or not to recognise same sex marriage in 2016. The Labor party advocates that parliament act now to amend the Marriage Act given, they argue, that the majority of Australians support the change. Some states have mooted proposed 'civil union' legislation, which would to all intents and purposes recognise same-sex relationships as a legally recognised form of partnership similar to marriage.

Review 4.1

1. Outline the sequence of events that led to the *Property (Relationships) Legislation Amendment Act 1999* (NSW). What did that Act accomplish?
2. What are some other types of social changes that might lead to law reform? How might the reform 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 the criminal law is failing victims, the community and/or the accused, new concepts of justice may need to be formulated.

In the past, **capital punishment** for particular murder offences was seen as the most effective way of dealing with the most heinous crimes. It was a case of society delivering pure retribution for a crime: 'a life for a life'. It was also suggested that

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it provided a strong deterrent to those disposed to commit murder. In fact, in a significant number of homicides the offender and the victim knew each other, and many involved extreme breakdown 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 that as a form of punishment it had little deterrent value.

capital punishment
the practice of sentencing a person to death by judicial process; also referred to as the 'death penalty'

It was also recognised that, whatever the chances of a criminal's rehabilitation, executing him or her extinguishes the possibility completely. There are very strong arguments that capital punishment violates prohibitions of cruel, inhuman and degrading punishments in international human rights treaties, and that where it exists, it is imposed more often on poor, uneducated and otherwise vulnerable persons. In addition, there is the risk of killing an innocent person who has been wrongly convicted.

As a result of these moral arguments and practical considerations, social attitudes with respect to capital punishment shifted and no Australian jurisdiction now permits it. Because the concept of what justice requires shifted from pure retribution to a greater emphasis on rehabilitation, and because deterrence clearly was not being achieved, capital punishment no longer served the community's purposes.

Another notable example of changes in the way the law punishes offenders can be seen in **Youth Justice Conferences** established under the *Young Offenders Act 1997* (NSW). This is discussed in more detail in Chapter 9. Youth Justice Conferences are an attempt to divert young first-time offenders away from the court system and hence a criminal record. Their aim is to act as a 'circuit breaker' in a young person's behaviour trajectory. A conference may involve members of the community, the offender's family, the victim and his or her family, and professionals such as a social worker. Youth Justice Conferencing has enjoyed support from the community, as it has achieved positive results for young first-time offenders. Some have argued that it should be used for a wider range of offences, including serious offences, because it obliges the young person to consider the consequences of his or her actions, in particular the harm caused to the victim.

Youth Justice Conferences
meetings of all the people who may be affected by a crime committed by a young offender; used to help them to accept responsibility for their actions while avoiding the court system

Other law reform initiatives to address new concepts of justice include circle sentencing for Indigenous offenders, the NSW Drug Court and the enforcement of parenting orders in the Family Court, to name a few. All of these reforms are attempts to deal with issues that the current laws were clearly failing to address.

There has also been some speculation about the introduction of a specialist court to deal with sexual assault matters. This has been put forward because of a range of issues, including the sensitivity with which victims are treated during the legal process and an understanding of the context of sexual assault and what that means with respect to the physical collection of evidence from victims, in addition to proving that consent was not given. Our legal system is based on an adversarial system in which the accused can put the witnesses for the prosecution to robust questioning. This has been viewed as an important part of ensuring people are not wrongly convicted. It is a challenge to find the balance between ensuring the accused is able to pursue a defence fairly, while avoiding re-victimising a victim. A specialist court may be better placed to achieve this.

Figure 4.3 Youth Justice Conferencing has shown positive results within supportive communities.

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Research 4.1

Use the links below to research law reform. Identify how the initiatives work and assess whether they are an improvement on the previous ways in which the law dealt with these issues.

Circle sentencing
http://cambridge.edu.au/redirect/?id=6502
http://cambridge.edu.au/redirect/?id=6503
NSW Drug Court
http://cambridge.edu.au/redirect/?id=6504
http://cambridge.edu.au/redirect/?id=6505
Enforcement of parenting orders
http://cambridge.edu.au/redirect/?id=6506
http://cambridge.edu.au/redirect/?id=6507

Example: combatting domestic violence

Domestic violence is different from violence perpetrated on the street, in schools or in the workplace. The Women's Action Alliance defines domestic violence as 'violence occurring within a household or between family members. Its most common form is violence by a husband against a wife (legal or de facto) but it can also include violence by wife against a husband or child against parent. Violence by parent against child is more commonly referred to as child abuse'.

Domestic violence can be manifested sexually, physically or verbally and in most cases causes psychological harm to the victim. Victims of domestic violence are usually isolated socially and they often stay in these relationships for many reasons, including fear of reprisal.

In the past, victims of domestic violence had to report an incident to the local police. In many cases the victim was told that this 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 will determine 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 incidents had inadequate protection under the law and it was clear that the legislation was not sufficient.

Figure 4.4 Domestic violence is undergoing reforms in order to make reporting and protection easier for the victim.

Legislation

In New South Wales, the *Crimes (Domestic Violence) Amendment Act 1982* (NSW) inserted new provisions into the *Crimes Act 1900* (NSW), introducing the concept of an **Apprehended Domestic Violence Order (ADVO)**. ADVOs could be obtained by victims 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.

Apprehended Domestic Violence Order (ADVO)
a court order used for the protection of a person involved in an intimate, spousal or de facto relationship

As more became understood about the perpetrators and circumstances of domestic violence, significant law reform continued to unfold.

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Some of these developments have included:

- The *Crimes (Domestic Violence) Amendment Act 1993* (NSW) allowed police to apply for interim ADVOs after hours by telephone, as well as making it an offence to 'stalk' or 'intimidate' a person.
- The *Crimes Amendment (Apprehended Violence) Act 1999* (NSW) distinguished between orders taken out for domestic violence and those relating to 'personal violence' in other situations such as disputes between neighbours. In addition, the police must record in writing why they did not proceed with criminal charges for a breach of an ADVO.
- Amendments to the *Bail Act 1978* (NSW) removed the presumption that bail will be granted in relation to domestic violence offences or breaching an ADVO, where the defendant has a history of violence.
- Amendments to the *Firearms Act 1989* (NSW) allowed police to seize any firearms present when called to the scene of a domestic violence incident.

After 30 years of amendments to various legislation, especially the Crimes Act, it was felt that the crime of domestic violence deserved a stand-alone Act of Parliament. Hence the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) was passed and took effect in 2008.

This Act repealed Part 15A of the Crimes Act, 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. 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 s 38, an ADVO made to protect an adult must automatically include any children living with that adult, unless sufficient reasons are given as to why they should be left off.

Additional domestic violence initiatives

Governments around Australia have recognised that there is still room for improvement as on average one women is killed each week in Australia as a result of domestic violence. A number of new initiatives have been announced in 2015 to further combat what appears to be deeply entrenched social factors in the causes of domestic violence. New approaches to justice continue to be required to complement the legislative provisions in place to protect victims. Some of these are included in the following:

- Women and children in domestic violence cases across New South Wales will be able to give evidence via audio or video link.
- Police will have the power to collect video and photographic evidence at the time of responding to domestic violence situations.

The federal government has also announced an additional $100 million to be allocated to improving measures to prevent and respond to domestic violence. Some of this funding will be allocated to fund trials of GPS trackers for perpetrators and special safe phones for victims, as well as proposed CCTV cameras to enhance security and safety of women at home. Additional specialist training for general practitioners is also included. It has also been argued that while the funding is a needed boost to combat domestic violence, further funds are still required for crisis accommodation and community legal centres, which are equally important avenues to assist women in escaping violence.

Legal Links

Read the downloadable document 'Domestic Violence is a Crime' via the link http://cambridge.edu.au/redirect/?id=6508 for more information about the law relating to domestic violence.

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 20th century, and required the introduction of new laws for safety, ownership and licensing, and (eventually) environmental protection.

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Figure 4.5 Advancements in technology and social media resulted in enormous social change, including changes to legal systems around the world.

The development of life-support devices and treatments since the 1960s has meant that the legal definition of death had to be changed. Rather than referring to the cessation of respiration and heartbeat, most jurisdictions now require the irreversible cessation of all functions of the entire brain, as it is now possible to keep a person's heart and lungs operating for a significant period of time, but with no brain function.

More recently the progress made in 'birth technologies' has also seen changes to laws at both state and federal level 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.

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 previous 'cold cases'. In New South Wales, there are more than 400 unsolved homicides, dating back as far as 1975. Because DNA is very stable over a significant period of time, biological material collected can still be used, decades later, to create DNA profiles for analysis. Many 'cold' cases are being reopened for police

Figure 4.6 Advances in forensic technology create new challenges for the law.

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 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 the Act took place. Among other changes, s 11 was revised to allow DNA samples to be collected from suspects in an increased range of offences, which include some indictable offences as well as a number of summary offences.

Another major change concerned the period of time that a suspect's DNA material could be kept for **forensic** use. Under the Act 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 s 88(2)(c), where DNA has been collected from a suspect who ends up being convicted of a different

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crime as a result of an investigation of the same acts, the DNA material does not have to be destroyed.

forensic
relating to the detection and investigation of crime

Such provisions are intended to increase conviction rates. Some have argued, however, that without sufficient legislative protections relating to the use of this technology, there can 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 case is dependent on that evidence, especially if the accused has been refused bail.

In order to speed up the process, the New South Wales Government decided in 2008 to outsource some of its testing to private laboratories. Such delegation of responsibility will generally require further safeguards to ensure the privacy, confidentiality and integrity of the testing procedures. However, in 2010 delays had not improved despite the state government saying that resources had been boosted in this area. In 2011, 67 innocent people spent an average of 239 days in custody before being exonerated by the District Court.

The Law Society's criminal law committee believes delays in DNA analysis are still common, and predicts that the adverse impact on the criminal justice system caused by backlogs at the laboratory will worsen.

Review 4.2

1 What are the factors that have to be balanced when introducing new legislation or amendments that use scientific advances to increase police investigative powers?
2 What are some scientific advances other than DNA testing that have led or may lead to legislative changes? List some of the factors that need to be considered or balanced when making changes.

Example: identity theft

Over the past 10 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. Those 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 his or her personal information, was not itself a criminal offence in most Australian

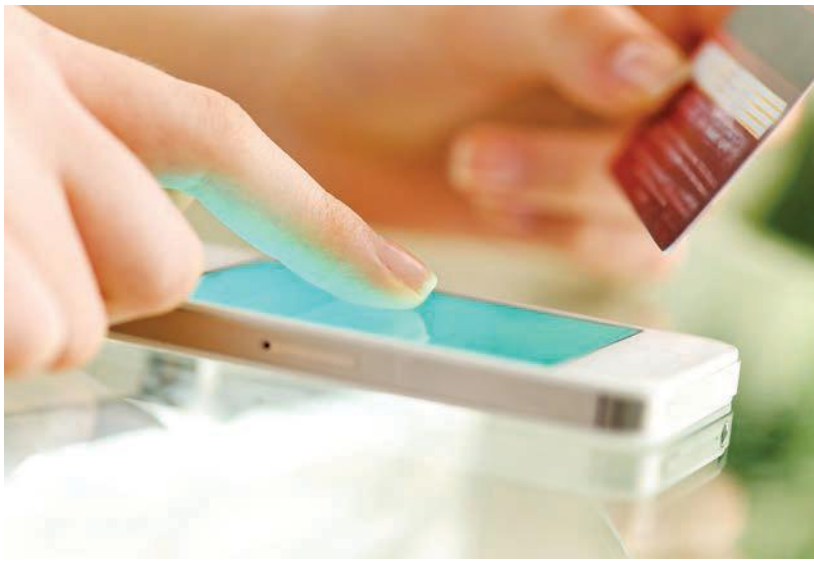

Figure 4.7 The advent of digital technology has made identity theft easier to commit and more difficult to prosecute because offences are committed across jurisdictional borders.

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jurisdictions until recently. (The first states to enact legislation specifically criminalising identity theft were South Australia and Queensland in 2003 and 2007, respectively.) Rather, it was what was done with the stolen identity. Because assuming another person's identity was a preparatory step in the commission of offences such as fraud or theft, such offences could 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. Much existing legislation, including the provisions in the Model Criminal Code referred to in Chapter 3, requires at least proof that the accused had the intent to use the information in his or her possession to obtain a financial benefit. However, identities can be assumed for other reasons; for example, to cross national borders for the purposes of organised crime or terrorism.

Law reform in this area could include the enacting of state and federal legislation creating 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 would include making, supplying or using information about a person that is capable of being used to identify him or her; 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 NSW

Section 192E of the *Crimes Act 1900* (NSW) is the provision most directly relevant to identity theft.

> Subsection (1) states:
> 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 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).

Unauthorised access to and modification of computer data are covered in Part 6 of the Act, and these also might be used to prosecute identity crime.

Research 4.2

Using the internet, research the types of criminal activities that can be carried out under the following activities:

- terrorism
- unlawful immigration
- fraud involving email and the internet
- dissemination of obscene materials electronically
- funds transfer fraud
- health benefits fraud
- social security fraud.

4.3 Agencies of reform

As discussed above, 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 upon 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

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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

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.

The 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 (set up by a statute).

The main role of the Commission 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. It also works to bring about **harmonisation** of Commonwealth, state and territory laws where possible. It 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.

harmonisation
agreement among the laws of different jurisdictions

An inquiry involves a process of research and consultation. Once the ALRC has completed an inquiry and report, it will make recommendations to the federal government through the Attorney-General. 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 Commission'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 ALRC's recommendations have been either substantially or partially implemented by the government. Some of the more recent areas of law reform examined by the ALRC are the federal **sedition** laws, privacy laws and freedom of information legislation.

sedition
words or acts said or done with the intention of urging others to use force against the government

The NSW Law Reform Commission

This 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. Its role also includes consolidating overlapping legislation, hence simplifying the law. The New South Wales Government will refer issues to the Commission for investigation as to what, if any, law reform is necessary. In its research it will generally consult with the public.

For example, in 2005 the Commission investigated changing from unanimous verdicts to majority verdicts of 11 or 10 jurors.

Prior to this inquiry, research by the NSW Bureau of Crime Statistics and Research in 2002 showed that 8 per cent of trials in the District Court between 1998 and 2001 resulted in a **hung jury**. It 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 weren't many cases in which a jury was unable to return a verdict because of one juror. Other arguments for majority verdicts were that it would make verdicts quicker and easier, would create less pressure on jurors, and would be consistent with most other Australian jurisdictions.

hung jury
a jury that is unable to reach agreement

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Arguments for retaining unanimity included the following:

- It 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.
- It allows for greater deliberation of the issues.
- Juries may disagree for good reasons.
- It promotes community confidence in the justice system.
- It is consistent with the requirement of unanimity in trials for Commonwealth offences.
- The number of hung juries is relatively small.

In its conclusions the Commission stated:

> We believe that until a comprehensive study is conducted in NSW to determine the existing practices in NSW 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 New South Wales Government passed the *Jury Amendment (Verdicts) Act 2006*. 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.

It appears 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 NSW. 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.

Research 4.3

View the Australasian Legal Information Institute website via the link http://cambridge.edu.au/redirect/?id=6509 and select from one of the NSW Law Reform Commission's completed reports dating from 2005. 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' will have both Members and Senators.

Figure 4.8 Standing committees inquire into and report on matters referred to them by the Senate or House of Representatives.

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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.

Once a committee has been asked to undertake an inquiry, the terms of reference are drawn up. Members of the public as well as experts in a field may be asked to give submissions. The committee will hear witnesses, examine evidence and formulate conclusions. The media usually attend and report on committee proceedings.

As the hearings are conducted in public, every submission is recorded in **Hansard** and available on the internet. At the end of the inquiry the committee will write and **table** a report in parliament.

Hansard
a full account of what is said in parliament or in parliamentary inquiries; named for English printer T. C. Hansard (1776–1833), who first printed a parliamentary transcript

table
to place on the table for discussion

The media

One of the hallmarks of a sound working democracy is a 'free' and 'fair' press. This means that the government is not 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 who 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 them to apply public 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' which cannot be treated as all other crimes and requires additional legal responses. This will be examined in greater detail in Chapter 5.

Figure 4.9 *The Sydney Morning Herald* is an active news organisation in the field of investigative journalism.

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Non-government organisations (NGOs)

Non-government organisations (NGOs) are organisations that 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 common characteristics of NGOs have been identified as follows:

- They are formed voluntarily by individuals.
- They are independent of government.
- They 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 for expenses such as utilities, publications and paid employees.
- Their aim is to improve people's circumstances and prospects, within the scope of their mission.

C. Ball and L. Dunn, *Non-Governmental Organisations in the Commonwealth: Guidelines for Good Policy and Practice* (The Commonwealth Foundation, London, 1994)

Figure 4.10 The RSPCA is an NGO which campaigns for the rights and protection of animals. It opposes the live export of Australian cattle overseas.

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, discussed in Chapter 2, and Greenpeace have developed a formidable reputation in their pursuit of goals such as human rights and combatting environmental threats. Consequently, they now have the resources and the tactics, developed over many years, to put pressure on nations.

Due to NGOs' independent status, however, governments and other institutions can ignore them and continue to carry out practices that are contrary to the NGOs' goals. The Royal Society for the Prevention of Cruelty to Animals (RSPCA) 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 law that already exists, or to introduce new laws.

Lobby groups target Members of Parliament, parliamentary committees, the media and the public as well as governmental inquiries. 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.

The Lone Fathers Association of Australia has been a strong advocate for 'shared equal parenting'. Amendments 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 Refuge Resource Centre, the Family Law Director of NSW Legal Aid and Women's Legal Services 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

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parents, but also offered reduced protections for victims of family violence. A former Chief Justice of the Family Court, Alistair 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 fall-out 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.

Review 4.3

1 Compare and contrast the aims and methods of the following agencies of law reform.
   - **a** law reform commissions and lobby groups
   - **b** parliamentary committees and Law Reform Commissions
   - **c** lobby groups and the media
   - **d** lobby groups and NGOs

2 What are some of the 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, as well as 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.

precedent
a judgement that is authority for a legal principle, and that provides guidance for deciding cases that have similar facts

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 deal with the matter before them, and as such law reform in the courts comes about in an ad hoc or piecemeal way. Although changes to the law do occur as a result of judicial decisions, they do so over an extended time frame.

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

Figure 4.11 The Supreme Court in Melbourne

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legal landscape in Australia. An obvious example is the 1992 Mabo decision declaring 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.

The impetus for this type of change, however, 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.

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 NSW, the Legislative Council.

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

Political parties present their policies to the voters prior to 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 in order to pass legislation through the parliament. In contrast, the Baird Liberal government in NSW (2016) has a commanding majority that can make 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 will be 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 NSW, because it has been repealed. Indeed, s 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* states that 'the repeal 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 'History' or 'Acts (Point-in-Time)' in an online legislation database.

'Consolidated Acts' and 'In Force Legislation' will contain acts that are currently in force; that is, that have not been repealed.

The United Nations

The United Nations is the chief organisation involved in international law. The role of the United Nations in the development and implementation of international treaties was outlined in Chapter 2. As such, it is the primary mechanism in the evolution and reform of the law governing states.

The effectiveness of the United Nations in promoting peace and security around the world via international law is discussed in more detail in Chapter 2. Law reform may take place when Australia implements a treaty by passing domestic legislation that takes account of the international obligations.

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Figure 4.12 Australian politician Craig Laundy presenting at an Australian Human Rights Commission function

Intergovernmental organisations

As mentioned in Chapter 2, many intergovernmental organisations (IGOs) are subsidiaries of the United Nations. These bodies are established to meet and decide upon certain international issues such as refugees, tariffs and wealth. To this extent they contribute to international law reform on a global as well as a regional scale through the promotion and development of multilateral and bilateral treaties.

Other agencies

Other agencies of law reform also exist and are listed below. Find their websites and research the role they perform in contributing to law reform in Australia.

- Royal Commissions
- The NSW Coroner
- The Office of the NSW Ombudsman
- The Australian Human Rights Commission

Review 4.4

1 Explain the purpose of precedents.
2 What factors can contribute to whether a bill is passed or rejected?
3 Define 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, correct defects, simplify it and 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 ensure a high rate of compliance.
- When the law fails to deliver just outcomes to individuals or groups within the community, it 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. They are independent of 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 or simplifying 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.

Chapter summary questions

Multiple-choice questions

1 Which of the following statements is the most correct way to describe public morality?
- **A** a shared set of religious beliefs
- **B** crimes committed against the community
- **C** similar values and beliefs held by the majority of the community at a particular point in time
- **D** the shared set of beliefs held by the Australian Parliament

2 Law reform is necessary at times because technology advances at a rate faster than the law. 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** IVF procedures
- **D** collection of DNA evidence

3 Law reform commissions have been set up by parliaments to investigate areas of potential law reform. Which of the following determines the scope of their investigation?
- **A** ministers' directions to the 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
- **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 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 what is meant by law reform.
2 Explain why changing social conditions contribute to the need for law reform.
3 Explain, using examples, how the law has lagged behind technology.
4 Discuss the reasons why Australia no longer imposes capital punishment for murder.
5 Describe the extent to which the law has improved its response to domestic violence.
6 Outline some of the problems that have arisen with the advent of DNA evidence.
7 Explain why identity crime can be difficult to prosecute.
8 Explain the extent to which law reform commissions are effective instruments for changing the law.
9 Explain how the United Nations can be a vehicle for law reform in Australia.
10 Outline the strengths and weaknesses of the courts and parliament as vehicles for law reform.

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Chapter 5
Law reform in action

Chapter objectives

In this chapter, students 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.

Legal oddity

In NSW, you are not allowed to leave your car unlocked, or with the windows open, if you are more than three metres away, and there is nobody else in it. This doesn't apply if the windows can't be secured, or the doors can't be locked – for example, if you have an open sports car.

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Topic 1:
Law reform and native title

Key terms/vocabulary

dispossession
martial law
native title
nomadic
pastoralists
terra nullius

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

SIGNIFICANT CASES

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141
Mabo v Queensland [1988] HCA 69
Mabo v State of Queensland (No. 2) ('Mabo case') [1992] HCA 23
Wik Peoples v Queensland ('Pastoral Leases case') [1996] HCA 40
Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58

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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 settlement and who can prove that they have had a continuous association with that land. It is a contentious topic in Australian law as, traditionally, Indigenous Australian people did not believe in individual ownership of land but that the land was owned by everyone.

native title
the right of Indigenous people to their traditional lands

In fact, the term 'native title' has such significance that the High Court used it when they recognised Australian peoples Indigenous property rights in *Mabo v Queensland (No. 2)* ('Mabo case') [1992] HCA 23. The Mabo decision was the first legal recognition that the Indigenous peoples of Australia had a system of law and ownership of their lands that existed long before European occupation and settlement. This recognition overthrew the idea of ***terra nullius***, and subsequent cases have led to efforts to enshrine native title in legislation.

terra nullius
(Latin) 'land belonging to no one'; the idea and legal concept that the land in Australia was not owned by anyone, and was therefore open to European settlement. It has been judged legally invalid.

Figure 5.1 Native title is the recognition of Indigenous Australian peoples land rights. Uluru is one example.

History of government policy

'Aboriginals', as they were called by past generations, are more appropriately referred to as 'Indigenous Australians', as this term encompasses both Aboriginal and Torres Strait Islander peoples. Torres Strait Islanders are of Melanesian origin. One of the most famous Torres Strait Islanders is the late Eddie Mabo, who was born on Murray Island (Mer) and belongs to the Meriam people. We will refer to Eddie Mabo and his legal battles later in this chapter.

Indigenous people have inhabited the Australian continent for the past 50 000 years, living a sometimes **nomadic** lifestyle. Although they did not use legal documents or written laws, it is undisputed that Aboriginal and Torres Strait Islander peoples used oral law, customs and traditions to maintain order and control behaviour. Tribal elders employed negotiation, discussion, rulings and sanctions when it came to unacceptable behaviour. Traditional Indigenous societies were, and still are, rule-governed.

nomadic
a term used to describe people who tend to travel and change settlements frequently

It is clear from the map in Chapter 2 (page 46) that Indigenous Australian people lived in distinct cultural and language groups; it is not accurate to categorise Indigenous people as belonging to a single cultural group. In 1788, when the First Fleet arrived, the belief at the time was that Aboriginal

Figure 5.2 Indigenous Australian people were forced to adapt to European culture and expectations.

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and Torres Strait Islander people were 'savages', with no concept of land ownership. There were no fences, landlords, tenants or farms to speak of, and no signs to indicate ownership; therefore, the British Government declared the land *terra nullius*.

The colonial laws and policies relating to Indigenous people did not serve their interests, but were suited to the white colonists' interests. Some examples of these laws and policies can be seen in Table 5.1 on page 105.

Review 5.1

1. Write a meaning for 'native title'.
2. Identify the Latin term meaning 'land belonging to no one'. Why did the British Government operate as though the land had no ownership?
3. Describe the legal systems of Indigenous Australians prior to 1788.
4. Describe the three main policies of Australian governments in relation to Indigenous people from 1788 to 1967. List one effect of each policy.

5.2 Operation of the legal system relating to native title

Part of the rich and diverse cultural heritage of Aboriginal and Torres Strait Islander peoples was a well-developed structure of laws that governed their relationships with one another, and with the land. All of this changed with European settlement. It would take 200 years for this system to be formally recognised.

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 apparent, then English law would dominate.

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 the Indigenous people, 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 clearly evident by 1835 when businessman and explorer John Batman attempted to lease land from the Indigenous people in the area around 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 Wilson's Promontory in the south and nearly as far west as the current border of Western Australia – belonged to the Crown, not to the Indigenous people.

The concept of *terra nullius* has had a vast impact on the Indigenous Australian population. Their treatment by the colonists, which involved loss of land, loss of culture and forced dispersal, has led to considerable social problems. This will be discussed in more detail later in the course. By the 1840s, for example, most Aboriginal people in Tasmania had

Figure 5.3 Indigenous Australians have a strong bond with the land.

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Table 5.1 Government policies and their effects on Indigenous Australians

Policy/law	Effect
Dispossession/dispersal (1788–1800s)	
Since Indigenous people were not recognised as citizens, it was not a criminal offence to hunt, shoot and kill them. The general belief was that Indigenous people would eventually 'die out'. **Martial law** in New South Wales (1816) Martial law in Tasmania (1824)	Massive reduction in Indigenous population. Traditional Indigenous areas were converted to farming lands. Aboriginal 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 Aboriginal 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 Aboriginal people could live and work, what jobs they could do, and whom they could marry and associate with. The powers of the Board under the NSW 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, Indigenous populations were a long way from 'dying out', and the policy was to 'Europeanise' them so that they would leave behind their language, culture, artefacts and traditions, and become 'similar' to Europeans.	The European majority attempted to teach the Indigenous population to be 'white'. This was met with both submission and resistance.
Nationality and Citizenship Act 1948 (Cth)	Aboriginal people became Australian citizens (as distinct from British), along with everyone else, but not all states gave them full rights such as the right to vote in Commonwealth elections.
1940s: 'Exemption certificates' or 'Citizenship certificates' were given to some Aboriginal people by some states.	Effectively, these certificates meant the holders were 'not Aboriginal'. The certificates had strict conditions, such as requiring a 'European lifestyle', and could be revoked without warning.
1962 amendments to the *Commonwealth Electoral Act 1918* (Cth)	The amendments gave the right to vote in Commonwealth elections to all Indigenous people in states that had not already provided for this right.
Reconciliation (1967–)	
1967 referendum amending the Constitution	The phrase 'other than the Aboriginal race in any State' was removed from s 51(xxvi), giving the Commonwealth the power to make laws specifically for the benefit of Aboriginal people. Section 127, which provided that Aboriginal people were not counted as part of the population for census purposes, was deleted.
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 Constitution be amended so as to show recognition of Aboriginal and Torres Strait Islander peoples.

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been killed, died from introduced diseases, or been forcibly relocated.

dispossession
the removal or expulsion of people from their traditional lands

martial law
law enforced by the military over civilian affairs; overrides civilian law

The concept of *terra nullius* has also had an enormous impact on native title claims. Any Aboriginal or Torres Strait Islander 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 considered empty prior to British settlement, it also meant that the settlers could possess most of the arable land with government approval – which entailed driving off anyone else who might be living on this land at the time. 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 Aboriginal law and custom?

The legal status of Indigenous Australians up to 1967

The doctrine of *terra nullius* meant that in the eyes of the law Indigenous Australians did not exist as citizens. The criminal laws did not protect Indigenous people and, throughout the first half of the 19th century, government policies 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 June 1838, a group of Indigenous 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 Indigenous men, women and children were slaughtered.

Figure 5.4 Early Australian laws resulted in the mistreatment of many Indigenous people.

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 Indigenous peoples. 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 Aboriginal people went unreported.

Until the 1967 referendum, there were two references to Aboriginal peoples in the Constitution: s 51(xxvi) and s 127. Section 127 excluded Aboriginal 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 for Aboriginal affairs to state governments. Since there were no federal laws governing the welfare of Indigenous Australians, different states interpreted their rights and legal status in various ways, resulting in inconsistencies and inhumanity.

Many people incorrectly believe that the 1967 referendum gave Indigenous Australians the right to vote; however, the right to vote in Commonwealth elections had been extended to all Indigenous Australians who did not already have this right under the laws of their state – namely, those in Western Australia and Queensland – by amendments in 1962 to the *Commonwealth Electoral Act 1918* (Cth). 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 Aboriginal and Torres Strait Islander people: most of the federal and state laws discriminating against them had been repealed by 1967. However, the referendum became a symbol of the public

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recognition of the rights of Indigenous Australians, and its success reflects the change in attitudes and beliefs that was taking place in the 1960s. 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 Indigenous Australians and to override any discriminatory state laws. Section 127 was deleted. From this point on, Aboriginal affairs became a federal issue, and Aboriginal and Torres Strait Islander people 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. 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**.

pastoralists
farmers raising sheep or cattle, usually on large areas of land

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.

In response to the Gurindji land claim, the government negotiated with the owners of the stations to return part of the land to the traditional owners.

The Mabo cases

Between 1985 and 1992, Eddie Mabo and four other men from the Murray Islands 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

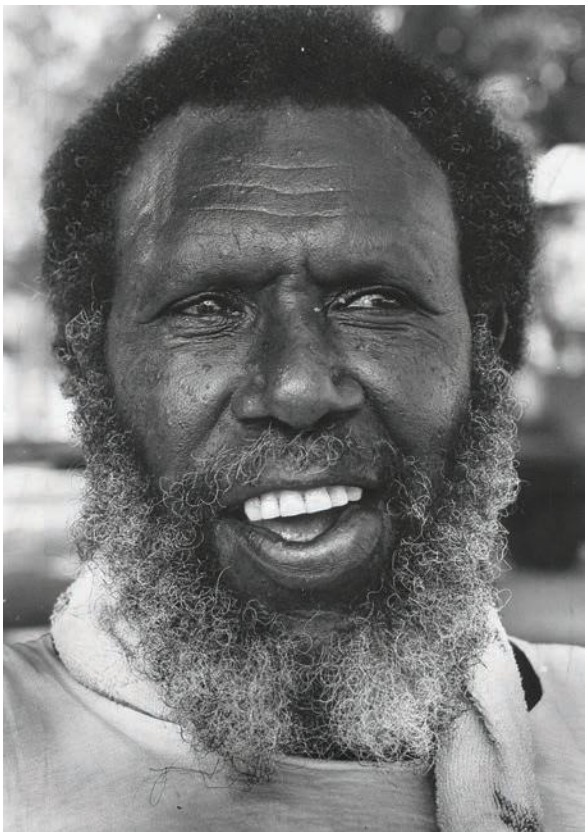

Figure 5.5 Eddie Mabo took his challenge to the High Court and won.

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be limited to a greater extent than that of other members of the community. Under the Constitution where federal and state laws conflict federal law prevails.

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 this time, 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 Indigenous people 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).

The Mabo case and the ensuing legislation significantly changed the legal status of Indigenous Australian 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 Indigenous people 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.

Review 5.2

1. What was the legal status of Aboriginal and Torres Strait Islander people prior to 1967?
2. Outline the changes between 1967 and 1993. Why do you think these changes occurred?
3. Describe how the Yolngu people's native title claim was resolved in court. What was the newly elected Whitlam government's response to this decision?
4. Explain the importance of the 1992 Mabo decision for the legal status of Indigenous Australian peoples.
5. Evaluate the statement made by Prime Minister Paul Keating in 1993 on the passing of the Native Title Act.

Growing recognition of native title in some countries

Native title means the right of indigenous people to live on their land and use it for traditional purposes. Throughout the world there has been growing recognition of the rights of indigenous peoples to their own lands. Hunting and fishing rights and land ownership rights have been returned to many indigenous groups in different countries.

There has also been a move to give greater self-determination to indigenous groups. Self-

Figure 5.6 New Zealand is a good example of the integration of indigenous culture.

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determination means the right of indigenous 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 indigenous 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 provides independent research on native title. Information relating to native title can be found at the website via the following link: http://cambridge.edu.au/redirect/?id=6510.

5.3 Agencies of law reform relating to native title

When claiming traditional ownership of land, Aboriginal and Torres Strait Islander 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 National Native Title Tribunal, 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 in claiming native title. Refer to the following link: http://cambridge.edu.au/redirect/?id=6511.

The High Court

With respect 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 Aboriginal and Torres Strait Islander peoples are brought before the National Native Title Tribunal, which investigates and mediates them. 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.

Native title was not recognised in Australia until 1992, when the High Court, in the Mabo decision, overturned the doctrine of *terra nullius*.

The 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 Indigenous inhabitants of Australia.

In this case, the High Court recognised the existence of native title for a group of Murray Islanders in the Torres Strait. Eddie 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 islanders 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 native title rights were taken back by the federal government.

As a result 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

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- 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.

The Wik case

The Mabo decision and the Native Title Act resulted in other Indigenous groups attempting to reclaim land. The Wik and the Thayorre people launched a case against the Queensland Government in 1996 (*Wik Peoples v Queensland* [1996] HCA 40), 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 Thayorre 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.

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 Indigenous 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.

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 people 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.

The Yorta Yorta case

The Yorta Yorta people are Aboriginal people whose traditional lands are located in north-east Victoria. They applied to the Native Title Tribunal for determination of native title in respect of public land and water in February 1994. 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. The Native Title Registrar, who assesses claimants' applications to the Tribunal, accepted their application in May 1994. The application was under mediation from September 1994 until May 1995, and then referred to the Federal Court.

The claim was dismissed by the Federal Court. Justice Olney found that the claim was not supported by the evidence, as the Yorta Yorta people had stopped occupying their traditional lands in the 19th century. 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 then appealed to the High Court (*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58). They claimed that the previous judgements had been wrong in requiring them to prove continuous observance of traditional laws and customs in relation to land. The High Court handed down its decision in December 2002 and upheld 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

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Figure 5.7 Perth was the only capital city to be recognised as part of a native land title.

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.

Recent cases

There have been other significant cases and amendments that have strengthened Indigenous rights in the area of native title in Australia. In 2001, the case of *Yarmirr v Northern Territory* [2001] HCA 56 determined that native title rights of the Croker Island community included free access of the sea and sea bed, 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 judgement.

Review 5.3

1 Define 'native title' and 'self-determination'. Which Indigenous Australian groups have gained greater recognition in these areas?
2 Assess the significance of the Mabo decision.
3 What was the impact of the Wik case?
4 Explain how a government might respond to the following. Give examples.
   a a court decision whose outcomes or likely consequences the government supports
   b a court decision whose consequences are as yet unclear
   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 their claim to native title.
7 Explain the reasons their claim was denied.
8 How does this decision affect other native title claims?

Research 5.1

Read the article 'Native title rights, regulations and licences: the Torres Strait Sea Claim' via the following link: http://cambridge.edu.au/redirect/?id=6512.

1 Compare the Torres Strait Sea Claim to the original Mabo case. What similarities are there?
2 Summarise the three important preliminary points discussed in the article.
3 Describe how previous cases have paved the way for the Torres Strait Sea Claim case.

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The National Native Title Tribunal

The National Native Title Tribunal (NTT) 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 NTT 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 agreement about proposed developments. It also helps in the negotiation of other sorts of agreements such as those for Indigenous 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 or not native title exists.

The process of proving native title can be slow and expensive. In the period between the establishment of the NTT and 31 December 2011, 200 applications were submitted and 175 determinations were made. Of the 175 determinations:

- 134 were that native title exists over all or part of the area
- 41 were that native title does not exist.

Figure 5.8 Rudd's apology to the Stolen Generations was streamed across Australia on 13 February 2008

Legal Links

More details can be found at the National Native Title Tribunal website.

The parliament

Parliament's role in recognising native title is to enact legislation to protect the property rights of Aboriginal and Torres Strait Islander peoples.

Public pressure and lobbying by interested parties have seen new laws regarding native title introduced in Australia. As mentioned above, the *Native Title Act 1993* (Cth) was enacted in response to lobbying by Indigenous 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 Indigenous Australians for past injustices inflicted on them. Speaking in the House of Representatives in Canberra on 13 February 2008, Mr Rudd said the parliament apologised for laws and policies which 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.

State legislation

As discussed, the Mabo and Wik decisions led to Commonwealth legislation in the area of native title and self-determination for Aboriginal and Torres Strait Islander peoples. State legislation has also been enacted to give rights to and protect the interests of Indigenous Australians.

The *National Parks and Wildlife Act 1974* (NSW) provides for the protection of places and relics which are of significance to Aboriginal culture. Under this Act, it is an offence to knowingly destroy, disturb or remove these objects or to destroy, deface or damage these places.

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The *Aboriginal Land Rights Act 1983* (NSW) recognises that:

- land was traditionally owned and occupied by Aboriginal people
- land has spiritual, social, cultural and economic significance to Aboriginal people
- it is appropriate to acknowledge the importance of land to Aboriginal people
- government decisions made in the past have had a negative effect on Aboriginal 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 Aboriginal land, conciliate disputes, and advise the state government on land rights. The Act provided for the ownership of reserve land to be transferred to the Aboriginal people, through a local council or the state Land Council, but in fact only a small percentage of land has 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 s 28 was repealed in 2001.

The Act also permits local Land Councils to negotiate agreements with the owners of land to give Indigenous Australians access for the purpose of hunting, fishing or gathering.

Federal legislation

Federal Parliament has enacted legislation to protect all parties involved in, and affected by, native title claims. As discussed above, 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 and 99 years. The leases and processes are overseen by the Office of Town Leases. More information about these leases can be found at the following link: http://cambridge.edu.au/redirect/?id=6513.

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 Indigenous 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 Indigenous people.

More recent changes

The *Native Title Amendment Act 2007* and the *Native Title Amendment (Technical Amendments) Act 2007* 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* was further amended by the Rudd government with the *Native Title Amendment Act 2009*, 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*. It sets up a process for dealing with the construction of public housing and some other public facilities.

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 he or she represents will share the rights gained.

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5.4 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 very 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 stumbling block 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 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 because, when the British took over this land, they excluded the Yorta Yorta community. This is a problem faced by other Aboriginal and Torres Strait Islander 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 whose interests are at odds with native title claims. In addition, legal progress is very slow; for example, in 1996 the Yaegl people lodged a claim over land around the mouth of the Clarence River. Further claims were lodged in 1998 and 2011 over adjoining lands. When native title was finally awarded in 2015 many of the original claimants had died.

Figure 5.9 Sky writing over Sydney

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.

Review 5.4

1. Draw a timeline showing the recognition of native title rights and self-determination for Aboriginal and Torres Strait Islanders in Australia and in New South Wales.
2. Outline the major legislation governing native title at the federal and state levels.
3. Describe the major federal and state legislation protecting places and objects of cultural significance for Indigenous Australians.
4. In what way is native title a collective right?

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Topic 2:
Law reform and sport

Key terms/vocabulary

civil litigation
conciliation
contempt of court
express consent
indictable offence
sponsorship
tort law
trespass to the person

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
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)
Crimes Amendment (Cheating at Gambling) Act 2012 (NSW)

SIGNIFICANT CASES

Gardner v AANA Ltd [2003] FMCA 81
Taylor v Moorabbin Saints Junior Football League and FootballVictoria Ltd [2004] VCAT 158
McCracken v Melbourne Storm Rugby League Football Club Limited [2007] NSWCA 353
Director of Public Prosecutions (NSW) v Elias [2013] NSWSC 28 (1 February 2013)
R v Packer (2014) NSWLC

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5.5 Conditions that led to law reform relating to sport

Significant changes have occurred within the Australian sporting landscape over the past few decades. 'Australia' and 'sport' are terms that have almost become synonymous. Sport has become an integral part of Australian culture and Australians have performed incredibly well on the world stage post WWII, winning many world championships in a range of sports. Domestically, intense competition and high stakes surround sports such as rugby league and union, Australian rules football, association football (soccer) and basketball. Unsurprisingly, Australian sport has become 'big business' and significant prize-money and prestige are associated with winning national competitions. Large corporations are increasingly associating themselves with a team or competition through **sponsorship** deals that provide significant financial incentives for athletes and teams in exchange for advertising and media exposure. Consequently, the names and logos of national and multinational companies can be seen on players' jumpers and prominently displayed around the venues; a major sponsor of Cricket Australia has been a fried chicken chain. A major sponsor of the National Rugby League (NRL) competition is a telecommunications company. These sponsorships involve 'naming rights' such that the name of the competition or team is interwoven with the sponsor's name, and supposedly the reputation of a company as a supporter of a particular team or sport. By winning competitions or being associated with highly successful teams, 'sponsors' hope to increase profits and market share.

In addition, the rise of professional sport means that athletes such as Greg Inglis (NRL), Lauren Jackson (basketball) and Steve Smith (cricket) are 'at work' when we watch them play. These athletes are considered employees and their teams or organisations become their employers.

The pressure on teams to perform and an apparent 'win at any cost' attitude has led to an increasing range of legal issues in recent times. 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 as it relates to long term injuries. These issues are governed by many areas of law whereas, traditionally, the laws and rules of sporting competitions have been strongly influenced by the expression 'what goes 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.

sponsorship
the support of an individual, event or organisation financially or through the provision of products or services

Criminal law: off-field behaviour

Criminal law is not excluded from behaviour on a sporting field. An illegal act, such as a punch thrown during a match, is usually reprimanded by the referee and a judiciary who may impose a penalty of suspension from future matches. However, in 1985, during a professional Australian Rules

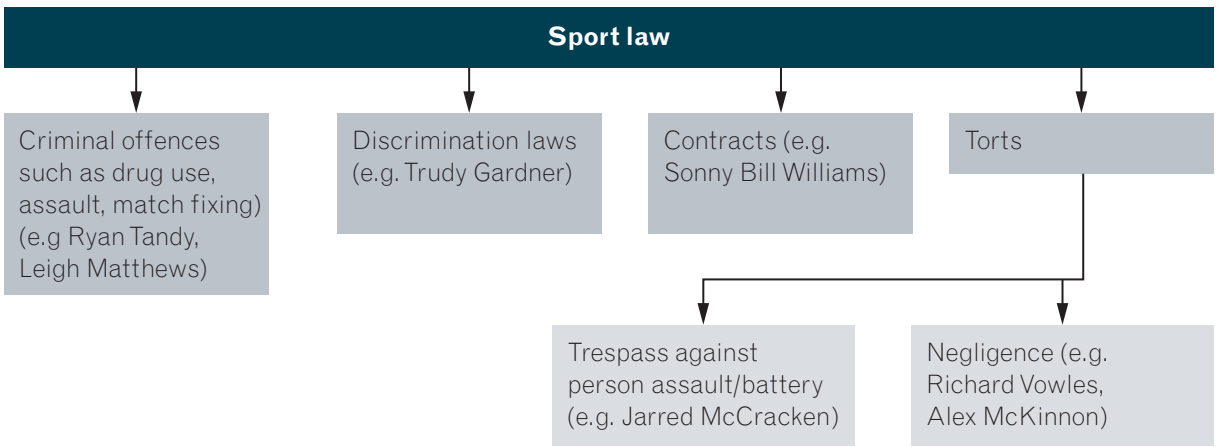

Figure 5.10 Sport law spans a number of different areas of law.

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match, Hawthorn captain Leigh Matthews struck an opponent in the face, causing the breaking of his opponent's jaw. Days later, Matthews was arrested, charged and convicted of assault and ordered to a 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 risen to prominence in recent years. As technology has allowed online betting to flourish, a number of athletes have attempted to influence the outcome of a game in which they are involved. In 2010, Ryan Tandy, an NRL player, bet several thousand dollars on a game through his manager and friends, on an aspect of a 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 payout. Tandy was found guilty of match fixing and sentenced to community service.

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 or legislation.

Figure 5.11 Technology has allowed online betting to flourish.

Civil law: breach of contract

Professional athletes are required to sign contracts that legally bind their playing services to a club and a competition. Sonny Bill Williams was paid $450 000 per year by the Canterbury Bulldogs in the NRL. Although contracts are broken from time to time in many areas of business, often leading to **civil litigation**, it came to most fans as a huge surprise when Williams broke his contract in 2008 by leaving Australia to play rugby union in France, without even telling the club or his teammates of his decision.

civil litigation
court action brought to remedy a wrong or breach of contract law

Many sporting contracts contain 'get-out' clauses for both parties so that if players are injured or playing poorly, clubs may release them from their playing lists. However, in this case, there was no 'get-out' clause; Williams sought a release from his contract to play for another team for a far greater salary.

The chief executive officer of the NRL called on the International Rugby Board, the governing and law-making body for rugby union, to stop Williams from switching codes. The board said it had no jurisdiction over individual clubs' contracts.

The Bulldogs and the NRL obtained a temporary injunction preventing Williams from playing for the French club, Toulon, and initiated proceedings in the NSW Supreme Court. The consequences of breaching the injunction could have been **contempt of court** proceedings against Williams, or the Bulldogs may have been able to seize his assets. As Williams is an outstanding player who draws many fans, and the Bulldogs had invested much time and money in his training and development, his breach of contract could have entitled them to damages.

contempt of court
words or actions that show a disregard for the authority of the court or interfere with its powers

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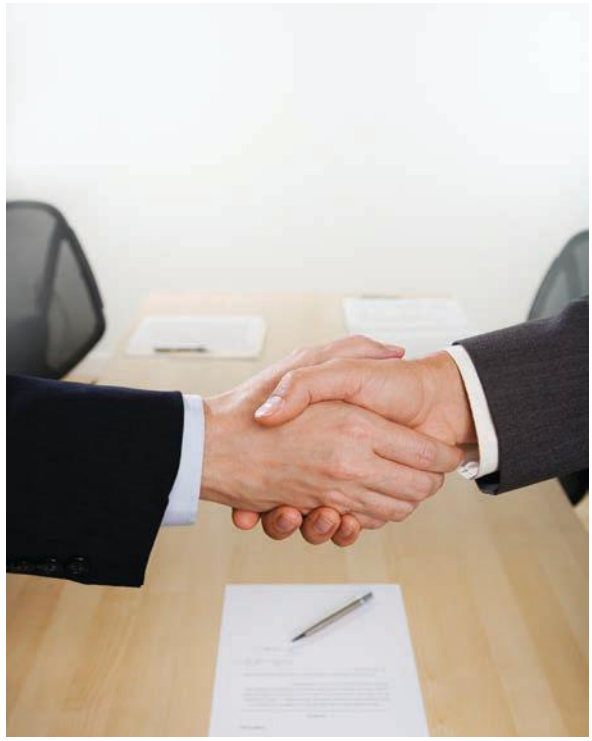

Figure 5.12 Professional athletes are required to sign contracts that legally bind their playing services to a club and a competition.

A settlement was eventually reached between the parties, with Williams being ordered to pay $750 000 to the Bulldogs, and agreeing not to play in the NRL before 2013. His contract with the Bulldogs expired in 2012. Williams did return to the NRL in 2013 and 2014 for another club; however, since this case, there have been no similar breaches of contract in which a player simply walked away from a club.

Review 5.5

1. Define the term 'sport law'. List some of the factors that have created the need for law reform.
2. What are some of the consequences of sport being 'big business'? List and rank in order three issues that arise out of the intense desire to win competitions.
3. What mechanisms for resolving a contract dispute were attempted in the Sonny Bill Williams case? What was the final outcome?

Civil law: harm suffered in sport

Rules of games or sports are different from laws, and when made by sporting bodies, they are often referred to as 'codes of conduct' that all players are required to follow. Such rules may also include specific rules in contact sports that concern the safety of players. In rugby matches of both codes, players pushing against each other to form a 'scrum' may create a potentially dangerous situation, and referees must follow certain procedures before they allow a scrum. Clubs, leagues or other agencies involved have a duty of care to the participants. In 1998, a rugby union player, Richard Vowles, successfully sued the Welsh Rugby Union for damages after he became a quadriplegic in a scrum that collapsed, breaking his neck. According to the rules, the referee should not have allowed a scrum if it was considered that it would be dangerous. In this instance Vowles successfully argued the referee had not followed 'duty of care'.

Despite this, amateur and professional players give **express consent** to acts that would constitute the basis for the criminal offence of assault – an **indictable offence** – when done in a non-sporting context. When players participate in various sports, they accept the risk of harms that can occur within the course of the game, when played in accordance with 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. In 2014, Alex McKinnon, an NRL player, was severely injured in a tackle. He was lifted by a number of defenders and landed on his neck causing him to be wheelchair bound. Grabbing a person and slamming him to the ground would be the basis of an assault charge if inflicted without consent. However, players give express consent to tackles in rugby. However, they do not give express consent to behaviour that is prohibited by the rules and McKinnon may seek compensation through legal channels by suing the opposition club and the sports governing body.

express consent
consent given directly, either orally or in writing

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

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Figure 5.13 In rugby matches of both codes, players pushing against each other to form a 'scrum' may create a potentially dangerous situation.

While there are criminal compensation schemes for victims, maintained and administered by the state, and an example of police taking action against Leigh Matthews in 1985, the compensation sums involved are generally much lower than the amount of financial compensation that a successful plaintiff could receive in damages. The maximum compensation available in New South Wales for a victim of a violent crime is $50 000. 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**.

trespass to the person
a tort involving direct contact with a person's body without that person's consent

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'. This just means that it is more probable than not that the defendant is responsible for the wrong suffered – an easier requirement to satisfy.

In Court

***McCracken v Melbourne Storm Rugby League Football Club Limited* [2007] NSWCA 353**

In this high-profile New South Wales case, Jarred McCracken successfully sued two players from the Melbourne Storm after an 'illegal' tackle by two opponents was deemed 'a gross infringement of the laws of the game'. McCracken injured his neck, which ultimately ended his career. McCracken received compensatory damages of $97 000; however, his claims for loss of future earnings were rejected.

Other professional athletes have sought damages for loss of wages, in addition to medical expenses, pain and suffering.

Even in the 'non-professionalised' world of amateur sport, material loss may be considered in the decision as to the quantum of damages awarded. In 1997, Darren Kennedy's jaw was broken by a high tackle by Gary Pender 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 bills. The club's lawyers argued that because the players were volunteers, the club could not be responsible for their conduct.

The NSW 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, and Pender was doing what the club expected him to do. Both cases set a strong precedent for a significant legal battle between lawyers for Alex McKinnon and National Rugby League.

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Review 5.6

1 Consider the idea that 'what happens on the field, stays on the field'. Is it ever an appropriate approach to behaviour in sport? Discuss, with illustrations.
2 Explain why athletes would rather pursue action in civil law courts rather than through the criminal justice system.

Research 5.2

Review the details and comments on the Richard Vowles case via the following link: http://cambridge.edu.au/redirect/?id=6514.

1 Explain why the referee was held liable for Vowles' injury.
2 What is 'contributory negligence', and why was it relevant in this case?

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 and 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 on the basis of 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, though not the exclusion of the other two girls. The judge added that it would be preferable if Football Victoria would, instead of excluding girls, give them the choice of whether to participate.

Figure 5.14 Many sports become 'boys only' after a certain age.

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 in other sports in order to justify an exception to the relevant legislation.

There are also differences in the legislation of the various states and territories. 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:

> 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.

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Research 5.3

Answer the following questions after referring to the *Anti-Discrimination Act 1977* (NSW) via the following link: http://cambridge.edu.au/redirect/?id=6515.

1. Discrimination on the basis of sex is explicitly prohibited by this Act. What other characteristics of persons besides their sex do not justify discrimination, according to the Act?
2. Are any of these characteristics relevant to discrimination within sport? Can you imagine situations in which they might be relevant? Discuss.
3. Is a person's sex different in any way from these other characteristics? Why or why not?

5.6 Agencies of law reform relating to sport

The Australian Human Rights Commission

The Australian Human Rights Commission is an independent statutory organisation, established in 1986. It was called the Human Rights and Equal Opportunity Commission (HREOC) prior to 2008. It 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 Human Rights Commission 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.

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 them.

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 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 granted the interim injunction. As a result of missing those three games, Gardner lost match payments and sponsorship.

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 money. The Federal Magistrates Court found that the prohibition had breached ss 7 and 22 of the Sex Discrimination Act.

The NSW Law Reform Commission

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

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Figure 5.15 Match fixing is often tied to gambling.

behaviour as a result 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, 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 this notion that he had not placed a bet on this particular match.

Under existing laws, Tandy may not have had charges laid against him. By 2012, the Crimes Amendment (Cheating At Gambling) Bill 2012 was being read in the New South Wales Parliament. The proposed legislation aimed to outlaw behaviour inadequately covered by existing legislation. Sadly, Tandy took his own life in 2014.

The 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 (AIS) is one of its divisions.

As a result of the netball ban, 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. The 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 to play 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.

Research 5.4

View the Australian Human Rights Commission website and research other areas dealt with by the Commission in relation to sport. You might first try searching the site using the word 'sport'.

5.7 Mechanisms of law reform relating to sport

The courts

As discussed in Chapter 4, the courts' role in interpreting legislation as applied to a particular case is to clarify the law's meaning. Where a higher court sets a precedent, it is making a statement about the application of the legislation or common law rule in relation to a set of facts and the way the law should be applied in the future. A court's consideration of a situation and the arguments for and against a claim can reveal unfairness or injustice in the legislation itself.

The Federal Sex Discrimination Commissioner in 2003, Pru Goward, commented on Gardner's case, saying that it was good to see the courts developing case law around the Sex Discrimination Act. The circumstances of pregnant women continuing to pursue sport at high levels constituted a new application of the antidiscrimination legislation.

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The 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. It is based in Lausanne, Switzerland, and 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.

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.

Many of the disputes brought before the CAS are quite serious. In 2013, 34 current and past players from AFL club Essendon were accused of taking performance-enhancing drugs during an alleged systematic program to boost strength and endurance and presumably to increase success at the club. Essendon was investigated by ASADA (Australian Sports Anti-Doping Authority), which claimed the club must stand down its players for a period of time between six months and two years. The AFL rejected ASADA's evidence and ran its own investigation into the matter and concluded that the players were not guilty of taking drugs and no bans were put in place. Significant controversy took place over the matter during 2014. However, in 2015, the World Anti-Doping Authority (WADA) appealed to the CAS and asked for new standards of evidence to be introduced and for Essendon players to be re-investigated for drug taking. WADA rejected players' excuses that they were unaware they were being given illegal substances by their coaches and managers, stating violation #1 as the basis for their guilt.

Figure 5.16 Many Essendon players were alleged to have taken illegal supplements as part of their training.

Legal Links

You can view the 10-point violations code published by ASADA via the following link: http://cambridge.edu.au/redirect/?id=6516.

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 sport law – the Australian Sports Commission.

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Review 5.7

1. How could it be argued that the law as it relates to pregnant athletes should be different from ordinary laws protecting equal opportunity for women athletes?
2. What types of matters are heard by the Court of Arbitration for Sport? Review the Essendon 34 case. Should clubs be able to enforce their own codes of conduct? Explain.
3. Is a fight on a football field in a close match different from a fight on a street corner and, if so, should penalties for fights on the sporting ground be less than for assaults committed on the street?

5.8 Effectiveness of law reform relating to sport

Contract

Breaches of contract in the sporting world may have different particulars from breaches of contract in other areas of business, but the mechanisms and remedies are not markedly different. The Sonny Bill Williams case, illustrates the increasingly global nature of commercial sport, and may be interesting because it crossed jurisdictional boundaries: two countries and two different rugby codes. However, it is not clear that there is a significant need for law reform in this area.

Harm suffered in sport

A greater readiness to sue and the professionalisation of sport are two social factors contributing to players' preference for civil remedies rather than the criminal law. 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 as a result of wrongs done to them. As mentioned, Alex McKinnon may seek 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. In response, the NRL may need to show that the type of tackle that caused his injuries must be heavily sanctioned or eradicated completely from the game.

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 to their needs

tort law
the body of law that deals with civil wrongs including negligence, defamation, trespass and nuisance

Indeed, in 2013 the National Football League (NFL) of the United States settled on a $765 million package to support the 4500 players who were suing the league for damages. The players claimed the NFL knew of the long-term dangers of head collisions and that they had concealed such information from the players and failed to notify them of such dangers during their careers. By 2015, the NRL had introduced new rules in to matches whereby players that 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.

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 UN *Convention on the Elimination of All Forms of Discrimination Against Women*, and domestic legislation implementing this treaty makes discrimination on the basis of sex 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

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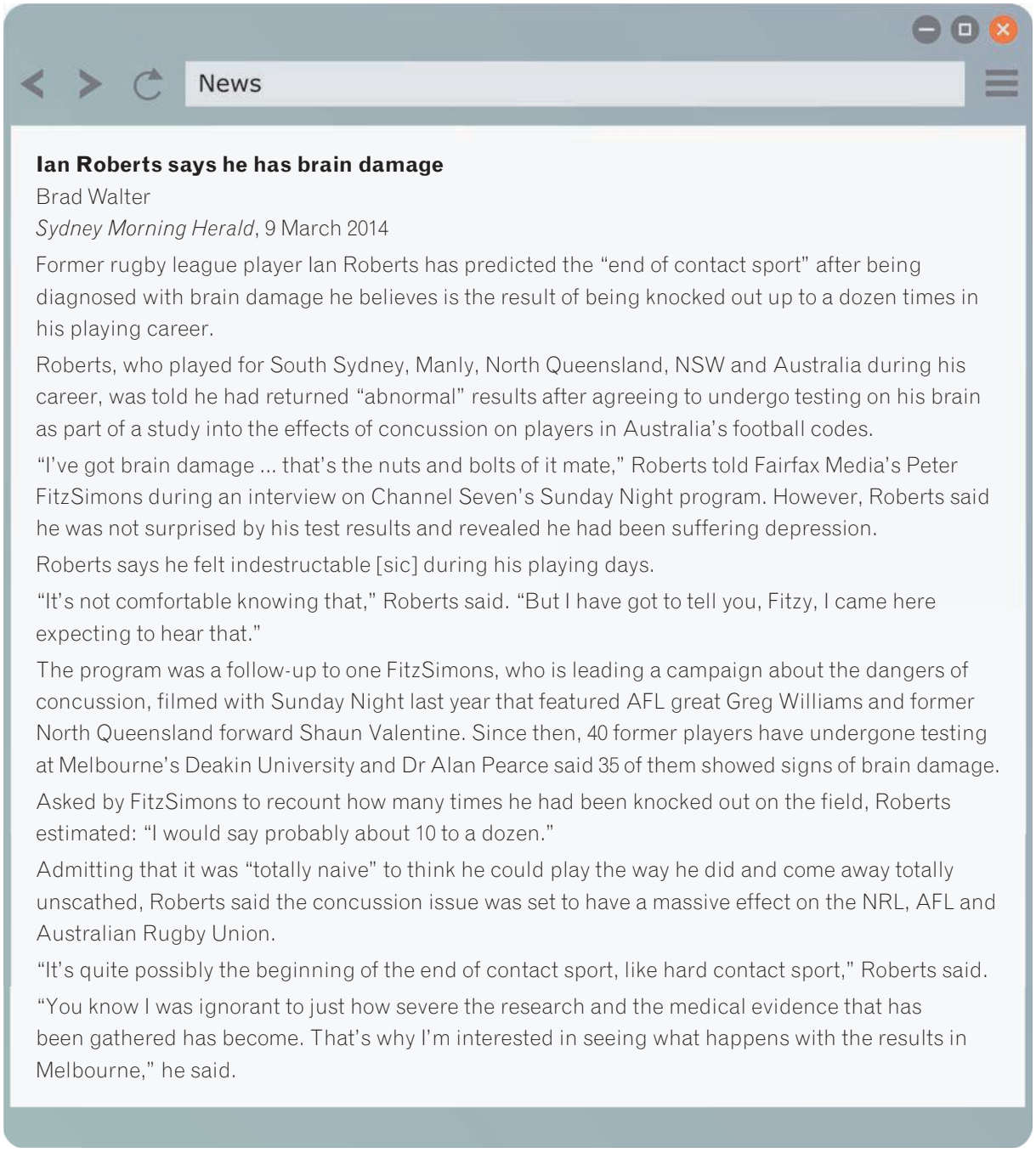
parliaments to think about when drafting legislation. In the course of law reform, parliaments must balance concerns about negligence claims against the need for fairness.



Ian Roberts says he has brain damage

Brad Walter

Sydney Morning Herald, 9 March 2014

Former rugby league player Ian Roberts has predicted the "end of contact sport" after being diagnosed with brain damage he believes is the result of being knocked out up to a dozen times in his playing career.

Roberts, who played for South Sydney, Manly, North Queensland, NSW and Australia during his career, was told he had returned "abnormal" results after agreeing to undergo testing on his brain as part of a study into the effects of concussion on players in Australia's football codes.

"I've got brain damage ... that's the nuts and bolts of it mate," Roberts told Fairfax Media's Peter FitzSimons during an interview on Channel Seven's Sunday Night program. However, Roberts said he was not surprised by his test results and revealed he had been suffering depression.

Roberts says he felt indestructable [sic] during his playing days.

"It's not comfortable knowing that," Roberts said. "But I have got to tell you, Fitzy, I came here expecting to hear that."

The program was a follow-up to one FitzSimons, who is leading a campaign about the dangers of concussion, filmed with Sunday Night last year that featured AFL great Greg Williams and former North Queensland forward Shaun Valentine. Since then, 40 former players have undergone testing at Melbourne's Deakin University and Dr Alan Pearce said 35 of them showed signs of brain damage.

Asked by FitzSimons to recount how many times he had been knocked out on the field, Roberts estimated: "I would say probably about 10 to a dozen."

Admitting that it was "totally naive" to think he could play the way he did and come away totally unscathed, Roberts said the concussion issue was set to have a massive effect on the NRL, AFL and Australian Rugby Union.

"It's quite possibly the beginning of the end of contact sport, like hard contact sport," Roberts said.

"You know I was ignorant to just how severe the research and the medical evidence that has been gathered has become. That's why I'm interested in seeing what happens with the results in Melbourne," he said.

Research 5.5

1 Read the article 'Ian Roberts says he has brain damage' and answer the following.
   a On what basis does Roberts claim he has brain damage?
   b Should Roberts have the right to compensation given he was involved in a sport that allows strong physical contact?

2 Evaluate 'sport law' in dealing with the rights of players' rights to safety and/or compensation.

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Topic 3:
Law reform and sexual assault

Key terms/vocabulary

complainant
consent
in camera
sexual assault

Relevant law

IMPORTANT LEGISLATION

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)

SIGNIFICANT CASES

R v Anon (Gang-rape case)
R v MM [2002] NSWCCA 58
R v Mc
R v Mak and others
R v BS and MS (Gang-rape trial)

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5.9 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 this process there is a tension between the rights of the accused and the interests of individuals and the community, and 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 just outcomes for victims and the community.

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 offences are the least reported crimes in NSW and have the lowest conviction rates. This is compounded by delays in cases, contributing to a low rate of satisfaction on the part of victims.

In 2014 the Australian Bureau of Statistics (ABS) stated that:

- The sexual assault victimisation rate increased to a five year high of 88 victims per 100,000 persons
- The majority of sexual assault victims (83% or 17,072 victims) were female
- Persons aged 19 years and under accounted for 60% (12,446 victims) of all victims of sexual assault.

According to the Australian Law Reform Commission, under-reporting of sexual assault makes it difficult for the legal system to respond to this type of crime. In its report, *Family Violence – A National Legal Response*, the Commission stated:

> 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.

Under-reporting is hard to gauge so only estimates can be used in approximating the incidents of sexual assault in homes and the broader community. Organisations such as the Rape and Domestic Services Australia and the Australian National Research Organisation for Women's Safety provide one such source of information on domestic and sexual violence against women (see Figure 5.17).

Under-reporting can be attributed to the following factors. Many victims 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 offender is known to the victim, making proof more difficult.

In addition to this, traditionally there was no established system for addressing the 'multiple needs' of some victims, including translation, mental health support, accommodation and counselling.

Figure 5.17 Research from the 2012 ABS Personal Safety Survey and Australian Institute of Criminology shows that both men and women in Australia experience substantial levels of violence. Domestic and sexual violence is overwhelmingly committed by men against women.

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The Director of Public Prosecutions will generally prosecute if there are prospects of a conviction and it is in the public interest. Where the victim knows the attacker – the vast majority of reported cases – much of the case will rely on one person's word against that of another unless there is convincing physical evidence. Advocates for victims argue that cases that involve a stranger are more likely to proceed, because it is easier to establish that the sex was not consensual, the assaults are often of a more severe nature, and there is more likely to be strong physical evidence.

Physical evidence often poses another major obstacle. Victims of sexual assault will generally need to be physically examined and questioned in detail in order to obtain evidence that can be used in court.

In addition, there has been a real lack of state resources provided to doctors who work in sexual assault services. Training for 'Sexual Assault Nurse Examiners' of sexual assault victims, instead of doctors, was one area of need identified and the NSW Department of Health commenced this training in 2004. Although the nurse examiners have training in clinical practice and forensic assessments and routinely give evidence in court, this initiative was seen by some as a 'resource efficiency' measure.

As a result 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 won't result in a trial. The 2012 national Personal Safety Survey reported that approximately 20 per cent of women who had experienced sexual violence by a male offender had reported this to the police. This was an improvement of only 1 per cent on the 2005 survey.

> In NSW the number of sexual offences reported to police exceeded the number of proven charges by about ten to one … Approximately 8% of sexual offences committed against children and 10% of recorded sexual offences against adults reported to police are ultimately proven at court.
>
> Jacqueline Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System', *92 Contemporary Issues in Crime and Justice* (January 2006), NSW Bureau of Crime Statistics and Research.

Figure 5.18 The lack of support services specialising in sexual assault has the potential to reduce the likelihood of just outcomes for victims of sexual assault.

Given the estimates of the number of unreported incidents, this conviction rate represents a small proportion of the incidents that are occurring. It is worth asking why this is the case, especially when compared to all other categories of crime.

Review 5.8

1. Give some reasons for the low percentage of sexual crimes that are actually reported to police.
2. What are some of the difficulties in proving a sexual assault case when the victim knows the attacker?
3. Why is specific training important for doctors and nurses dealing with sexual assault victims?

5.10 Agencies of law reform relating to sexual assault

The Criminal Justice Sexual Offences Taskforce

The Criminal Justice Sexual Offences Taskforce was established in 2004 by the NSW Attorney-General to investigate issues relating to sexual assault and the prosecution of these crimes. Its task was to advise

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the Attorney-General on how the criminal justice system could become more responsive to victims 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 for implementation. As a result of its report, new legislation was passed from 2005, some of which is discussed below. In conjunction with the Taskforce investigation, the New South Wales Government also asked the Australian Institute of Criminology (AIC) to investigate the question of whether giving evidence via closed-circuit television 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. These findings went some way to convincing the government that this could be a reliable mode of delivering evidence for traumatised victims who did not want to be in the same room as the accused.

As a result in 2015, victims of sexual assault may give evidence via closed-circuit television, with the victim speaking to a camera, which is shown on a television screen in the court. This means that the victim 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, saving the victim from giving 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 in these trials.

Rape and Domestic Violence Services Australia

Rape and Domestic Violence Services Australia has been at the forefront of reforms to the way sexual assault matters are dealt within the criminal justice system. The organisation provides support services such as where to get help, undertakes an educative function through research and links to other bodies in Australia. It provides support and counselling for anyone who has experienced sexual violence.

Figure 5.19 Rape and Domestic Violence Services Australia is a support and referral service for victims of sexual violence, available 24-hours via telephone or online.

Legal Links

For more information view the Rape and Domestic Violence Services Australia website.

The 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 victims of sexual assault matters. Questions that belittle, confuse or mislead victims are to be banned. Attacks on the victim, 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 victims of serious sexual assault crimes in court. Victims being forced to recount their experience over and over, and defence counsel badgering victims 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 fairly low importance, and a readiness to exploit the prejudices of some segments of the public.

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Research 5.6

1 Read the news article 'Australian government approaches to addressing sexual violence against women'.
2 Obtain some or all of the following additional articles using a search engine.
   - Adele Horin, 'One in four women suffer sexual violence: Study', *Sydney Morning Herald*, 3 August 2011
   - Adele Horin, 'Slut Walk turns apathy into action on sex attacks', *Sydney Morning Herald*, 13 June 2011
   - Stephanie Anderson, 'Sexual assault: How common is it in Australia?', *SBS*, 17 July 2015 (updated 23 August 2015)
3 Outline the criticisms made of the criminal justice system in these articles. What are some suggested reforms that could improve the effectiveness of sexual assault laws? Discuss.

5.11 Mechanisms of law reform relating to sexual assault

Parliament

There have been many Acts passed by the New South Wales Parliament over the past few years to usher in reform in sexual assault matters. Some of the key legislation has been:

- *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 have to prepare themselves to give evidence every time a trial is 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, then the complainant cannot be forced to give further evidence unless she or he decides to do so.
- *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 giving evidence. The Act also introduced a new section into the *Criminal Procedure Act 1986* 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 the person is not consenting are elements of sexual assault offences such as rape. If someone is under the influence of alcohol or drugs, there may be no capacity to give consent. In court, an accused will be examined by the prosecution on what steps he or she 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.

complainant
a person alleging that a sexual assault has been committed against him or her

in camera
(Latin) privately; only specified persons such as the 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 he or she agrees

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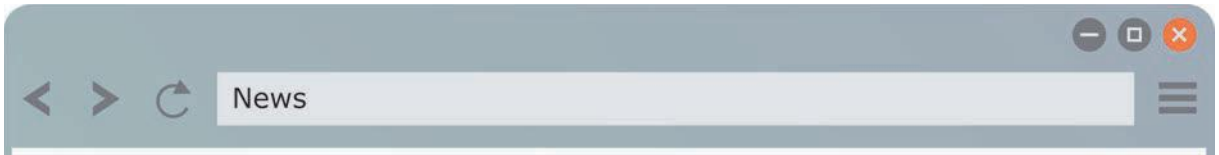

Australian government approaches to addressing sexual violence against women

August, 2015

A great deal of government funding is being directed towards dealing with sexual violence against women, using a range of different approaches.

In April 2015 the NSW government appointed Pru Goward to the new role of Minister for the Prevention of Domestic Violence and Sexual Assault. It was the first Australian state to introduce such a portfolio, but only two months later Yvette Berry became the ACT Government's inaugural Coordinator-General for Domestic and Family Violence.

The processes for prosecuting sexual violence offenders are particularly important, due to the need for protecting the wellbeing of the victims. A possible approach to this is having separate court systems for sexual violence. On 1 September 2015, Queensland began trialling a specialist court for domestic and family violence, set up within the Southport Magistrates Court. The hope is that having a magistrate familiar with the issues, and more focused support services, it will be easier for victims to deal with the legal system. The ACT government is also considering this approach.

The NSW Attorney-General, Gabrielle Upton, has said that rather than setting up a specialist court, the State Government prefers to apply consistent best practices across all courts when dealing with sexual assault. This means that no matter where the victim is, they will receive the support they need. For example, the *Criminal Procedure Amendment (Domestic Violence Complaints) Bill* 2014 allowed domestic violence victims to pre-record their evidence in a video, rather than being present in the courtroom.

Because different state governments take different approaches, there is a risk that different standards may be applied to sexual offenders. However, next year a national outcomes standard for perpetrator interventions is being implemented. The Council of Australian Governments is also aiming to agree to a national domestic violence order scheme, which means that orders issued in one state will be recognised and enforced across the country.

At a Federal Government level, funding of nearly $400 million has been allocated to federal and other joint projects, as part of the *National Plan to Reduce Violence against Women and their Children 2010–2022*.

A key area is supporting Indigenous and migrant women, and women with limited English skills. These groups have increased difficulty in navigating the legal system, and achieving justice. The intention is that by mid-2016 a national framework, including a training package, will be available for judicial officers and court personnel, to increase understanding and management of the issues faced by these women.

In addition, $4 million extra funding has been allocated to 1800RESPECT, the 24-hours, 7-days professional online and telephone sexual assault counselling service. The increase in funding was in response to increasiong demand for the service.

More challenging, but vitally important, is the need for an attitudinal shift. Over the past decades, Autralian attidudes towards victims have improved significantly, but there is still room for behavioural change in the level of reporting of sexual assault.

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Figure 5.20 A person must be capable of giving consent before engaging in a sexual act. Someone who is drunk or on drugs may not be able to give consent.

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.

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 (reduced on appeal).

It has been suggested that specialist courts for sexual offences would lessen the trauma suffered by victims when giving evidence, and would improve conviction rates. Some of the features of such courts would include appropriate technology, such as closed-circuit television, and facilities such as separate entrances for defendants and victims. Suggestions have also been raised for a specialised case management process using specially trained judges and prosecutors, screening processes, technology and other features of such a court.

Research 5.7

Use a search engine to find and read one of the following articles:

- Richard Ackland, 'New rape trial is on a slim premise', *Sydney Morning Herald*, 5 March 2004.
- Jocelynne Scutt, 'The rights and wrongs of the courtroom', *Sydney Morning Herald*, 23 May 2005.
- Clare Buttner, 'Justice failing rape victims', *Lawyers Weekly*, 29 May 2007.

1 What is the author arguing?
2 What support does he or she offer for his or her ideas?
3 Discuss if the issues raised historically in these articles still exist today.

5.12 Effectiveness of law reform relating to sexual assault

As discussed, the low reporting rates for sexual crimes, and consequently the low number of offenders successfully prosecuted, were a serious concern to the New South Wales Government and to the community at large. The legislation passed from 2005 on has been an attempt to address this problem. The chief task is to ensure that victims are not further traumatised by the court process, while protecting the right of an accused to a fair trial.

Changes to the law of consent in late 2007 may prove to deliver a significant shift in outcomes for the complainant. In the vast majority of matters, where the accused is known to the complainant, a reversal of the onus of proof regarding consent may make it more difficult for the accused to deny criminal responsibility. It may in turn encourage more victims to report offences.

As the new laws are applied in the courts, there will be more information for assessing whether the requirement of 'reasonable grounds' for believing that there was consent will unfairly prejudice juries against a defendant.

Issues raised in this chapter suggest that these reforms are having little practical impact.

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Figure 5.21 The government has begun to take steps to address issues of violence and how such matters are handled.

The changes to the NSW Barristers' Rules with respect to the questioning of sexual assault victims 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 a rethink of the way defence lawyers will conduct their cases in the future.

State governments have implemented at least two-thirds of the 70 recommendations of the Criminal Justice Sexual Offences Taskforce. Some of the following have also been introduced:

- Continuing efforts to address delays in sexual assault matters. The District Court had introduced mandatory timetables.
- Closing court when victims are giving evidence.
- Complainants can use remote witness facilities in 78 locations across the state.
- Judges are required to disallow improper cross-examination questions.

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. A NSW Bureau of Crime Statistics and Research report stated that:

> In nine out of 10 cases of sexual assault reported to NSW Police, however, the victim and offender already know each other. In many cases they are partners or former partners. … [T]he capacity of the police to lay charges and clear the offence in these circumstances depends greatly on whether the victim is willing to give evidence and whether there is any corroborating evidence, such as injury to the victim.

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 against those of the victim and the community.

Review 5.9

1. How has the New South Wales Parliament addressed the need for reform in the area of sexual assault crimes? Give examples.
2. What other agencies have had a role in bringing about changes to the way 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 that have taken place.
4. How could success in this area be measured? Give examples.

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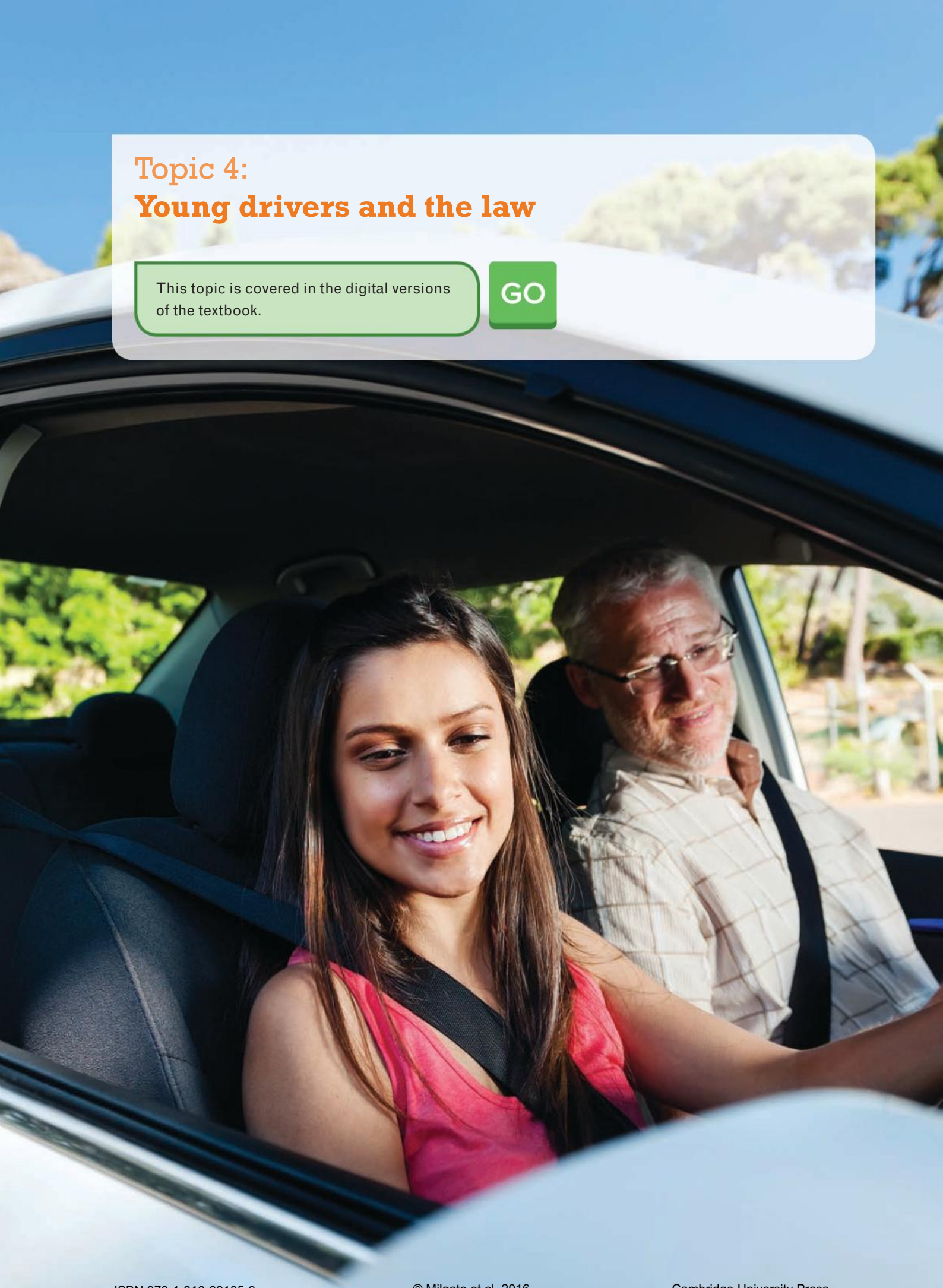

Topic 4:
Young drivers and the law

This topic is covered in the digital versions of the textbook.

GO

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Topic 1: Law reform and native title

Topic summary

- 'Native title' refers to Aboriginal and Torres Strait Islander peoples' right to an area of land with which they have had an ongoing association.
- The concept of *terra nullius* was used to justify the implementation of British law and the dispossession of Indigenous peoples.
- The 1967 referendum amended the Constitution to allow the Commonwealth to legislate for Indigenous Australians, and to allow them to be counted in the Census.
- The Mabo case was a significant High Court decision that abolished *terra nullius* and led the federal government to pass 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 summary questions

Multiple-choice questions

1 British policies towards Indigenous Australians 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 Constitution

2 What was the effect of the 1967 amendments to the Australian Constitution?
- **A** They gave Indigenous people the right to vote.
- **B** They allowed the Commonwealth to make laws for Indigenous Australians, and allowed them to be counted in the Census.
- **C** They gave them native title.
- **D** They gave Australian citizenship to all Aboriginal people in New South Wales and Victoria.

3 Which of the following statements is true of the Wik decision?
- **A** It gave Indigenous Australian peoples native title over all pastoral land.
- **B** The High Court held that pastoral leases could co-exist with native title, but where there was a conflict, the pastoral lease took priority.
- **C** It overturned Mabo.
- **D** The High Court found that the *Native Title Act 1993* (Cth) was unconstitutional.

4 The aim of the National Native Title Tribunal is:
- **A** to assist with native title negotiations
- **B** to determine whether a particular place is *terra nullius*
- **C** to advise the Federal Court of Australia on native title
- **D** to hear criminal cases involving Indigenous Australians

5 Which of the following statements is true of native title?
- **A** It can be claimed by an individual.
- **B** It is a collective right shared by a group.
- **C** It is the modern term for *terra nullius*.
- **D** It is contained in s 128 of the Constitution.

Short-answer questions

1 In your own words, describe the Myall Creek Massacre. Why do you think this massacre occurred?
2 Create a timeline outlining the key stages of Indigenous Australian people's right to vote in federal elections.
3 Describe the role of the National Native Title Tribunal.
4 Who was Eddie Mabo? How did he change Indigenous Australian's rights?
5 Discuss the relationship between court decisions and subsequent legislation. Explain how law reform relating to native title has taken place so far.

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6 Reforms continue to take place in regards to native title. Carry out some research and write a brief summary of more recent changes to the law and community opinion.

Topic 2: Law reform and sport

Topic summary

- Sport law is a complex combination of tort, criminal and contract law, and is based on 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 to sponsor 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 through the court system, 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 a duty of care.
- Agencies of law reform in sport include the Australian Sports Commission and the Australian Human Rights Commission.

Topic summary questions

Multiple-choice questions

1 Sport 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 judgements and tort law
- **D** none of the above

2 Express consent is a term that 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 the 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.
- **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

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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

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. What can happen if a contract is breached?
4 Why do you think victims of violence on the sporting field do not report an offence to police?
5 Discuss two ways in which women's participation in sport has led to law reform.

Topic 3: Law reform and sexual assault

Topic 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 just outcomes for victims.
- 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 victims.
- Agencies of law reform relating to sexual assault include parliamentary inquiries such as the Criminal Justice Sexual Offences Taskforce, non-government organisations such as the Rape and Domestic Services Australia, and professional organisations.
- The media have been influential in putting pressure on governments to reform the laws relating to sexual assault.
- Since 2005, various laws have been passed in New South Wales to improve criminal procedure in relation to sexual assault cases.

Topic summary questions

Multiple-choice questions

1 Which of the following was not a reason to reform the law in the area of sexual assault?
- **A** low rate of reported sexual offences
- **B** low rate of convictions
- **C** poor level of service to victims in terms of information and resources
- **D** the media were insufficiently interested in sexual assault cases

2 The Criminal Justice Sexual Offences Taskforce set up in 2004 has brought about which of the following changes?
- **A** legislation to improve procedures regarding the giving of evidence
- **B** legislation requiring judgements to reflect public opinion about sexual offenders
- **C** a greater number of sexual offences reported
- **D** a statutory requirement that the media report cases with greater understanding of the law

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3 The New South Wales Government asked the Australian Institute of Criminology to investigate whether giving evidence via closed-circuit television altered the way in which the evidence was received; that is, whether it affected juries' empathy for the victim or the accused. Which of the following best reflects those findings?
   - **A** Juries were more likely to favour the accused.
   - **B** Juries were more likely to favour the victim.
   - **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 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 prove that the complainant consented to sexual intercourse.
   - **B** It prohibited the cross-examination of victims by an accused person representing himself.
   - **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.

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 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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Part II
The individual and the law

30% of course time

Principal focus

Through examining the roles of legal and non-legal institutions, laws and media reports, students will gain an understanding of how the law impacts on individuals.

Themes and challenges

- How justice, laws and society are connected
- Balancing the rights and responsibilities of individuals
- The relationship between the rights of individuals and the needs of the state
- How the law is used to regulate technology
- The role of legal mechanisms in effectively bringing about justice for society and individuals

Chapters in this part

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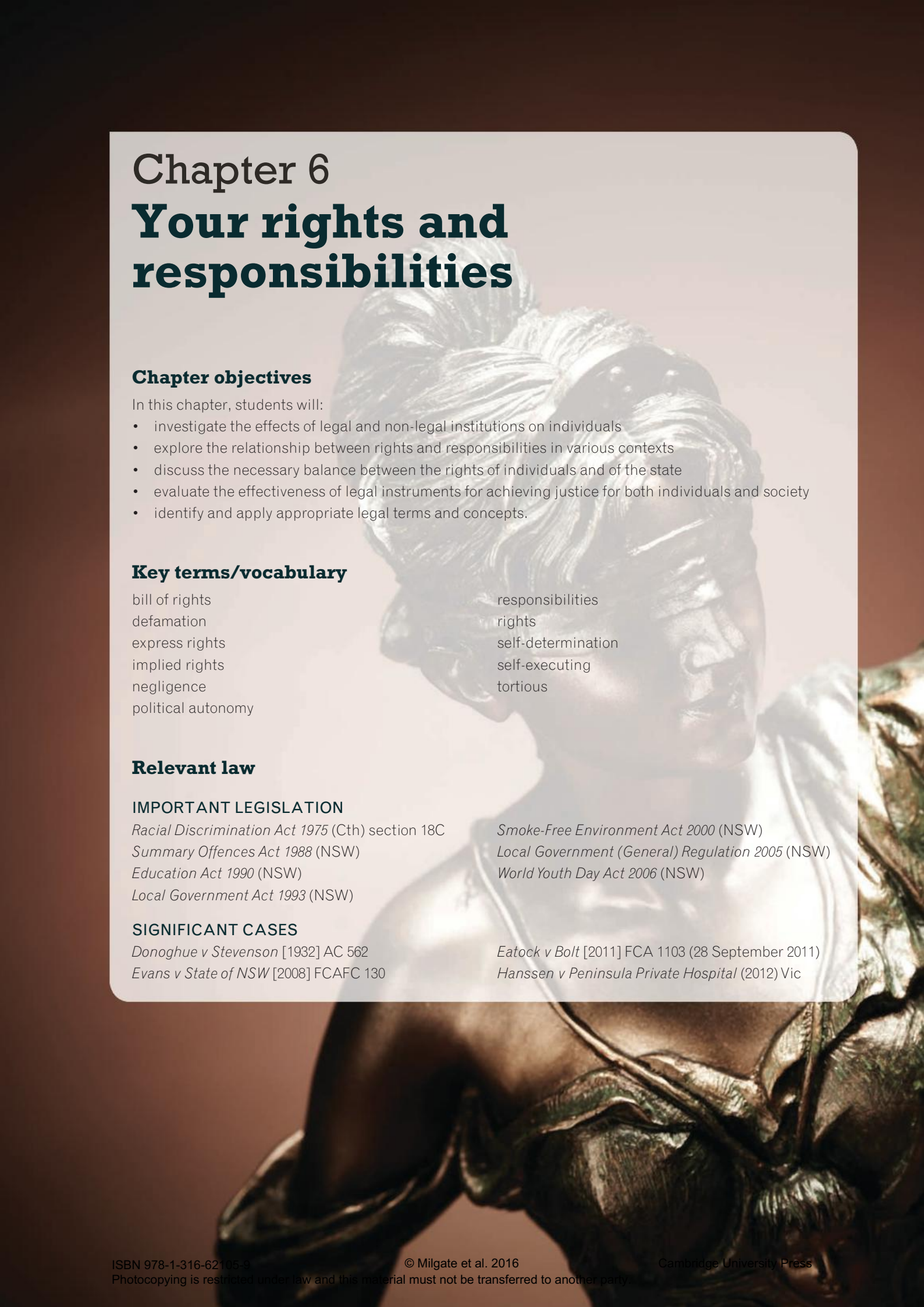
Chapter 6
Your rights and responsibilities



Chapter objectives

In this chapter, students 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.

Key terms/vocabulary

bill of rights
defamation
express rights
implied rights
negligence
political autonomy
responsibilities
rights
self-determination
self-executing
tortious

Relevant law

IMPORTANT LEGISLATION

Racial Discrimination Act 1975 (Cth) section 18C
Summary Offences Act 1988 (NSW)
Education Act 1990 (NSW)
Local Government Act 1993 (NSW)
Smoke-Free Environment Act 2000 (NSW)
Local Government (General) Regulation 2005 (NSW)
World Youth Day Act 2006 (NSW)

SIGNIFICANT CASES

Donoghue v Stevenson [1932] AC 562
Evans v State of NSW [2008] FCAFC 130
Eatock v Bolt [2011] FCA 1103 (28 September 2011)
Hanssen v Peninsula Private Hospital (2012) Vic

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Legal oddity

Since the year 2000, the fashion of wearing 'baggy' pants was prohibited by many North American schools, local governments, airlines and transit agencies. Shortly before the 2008 US Presidential Election, Barack Obama appeared on MTV saying:

> [B]rothers should pull up their pants. You are walking by your mother, your grandmother, your underwear is showing. What's wrong with that? … Some people might not want to see your underwear. I'm one of them!

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6.1 What are rights and responsibilities?

Rights are entitlements that people have by legal 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 an area in which they live. The 'local' high school (under the *Disability Discrimination Act 1992*) must treat students with disabilities in the same way as all other students.

rights
legal or moral entitlements or permissions

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, a parent has both legal and moral responsibility to take care of his or her 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.

responsibilities
legal or moral obligations to others

tortious
wrongful; constituting a tort or breach of duty to others

Rights and responsibilities are related in some ways. Where citizens have particular rights, the state has a responsibility to protect those rights and ensure that they are not violated by individuals, groups or the state itself. 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 the local school by making arrangements such as wheelchair access, teacher support and training.

Figure 6.1 Students with disabilities have the right to attend a public school and participate in an equal range of academic and sporting activities.

Legal basis of rights

For a right to have a legal basis, it must be protected by law and thus be enforceable. In Australia, legal rights are derived through our Constitution, statute and common law.

Constitution

Our Constitution sets out two types of rights: express and implied. **Express rights** such as s 116 give us the right to freedom of religion. Such rights stop future governments from banning a religion or forcing citizens to follow any one religion. **Implied rights** such as the right to freedom of speech need to be 'read between the lines' and are not expressly written in to the Constitution.

express rights
civil and political rights that are clearly and absolutely outlined in the Constitution

implied rights
civil and political rights that can be inferred from the Constitution, rather than being expressly stated

Statute

Examples of rights protected by statute are the rights not to be excluded or restricted on the basis of race or ethnic origin and physical or mental disability. These rights are contained in the *Racial Discrimination Act*

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1975 (Cth) and the *Disability Discrimination Act 1992* (Cth). For example, an employer would not be able to dismiss an employee because he or she was from a certain racial group. Nor would a political party be able to refuse to allow someone to join because of his or her 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; (1992) 177 CLR 292, the High Court ruled that individuals have the right to a fair trial, which includes legal representation paid by the state in serious criminal trials.

Legal basis of responsibilities

As stated above, where someone has a right, someone else 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 Acts such as the *Education Act 1990* (NSW), and are based on the principle, stated in s 4 of the Act, that every child has the right to an education.

Figure 6.2 All children have the right to access 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, 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 their consumers.

In another context, there is a duty of care from doctors to their patients. Breach of the duty of care, resulting in harm that could be foreseen, entitles the person harmed to bring an action for **negligence**. In *Hanssen v Peninsula Private Hospital 2012 Vic*, the parents of a boy severely handicapped during childbirth sued a hospital for negligence. The case was settled and the family received millions of dollars in damages.

negligence
carelessness; a tort that involves breach of a duty of care resulting in harm that could be foreseen

Review 6.1

1 Explain the difference between rights and responsibilities and describe how they are related.
2 How does a right gain legal basis?
3 What other terms can be used to describe legal responsibilities?

6.2 The nature of individual rights

The distinction between moral and legal rights

Legal rights outlined above fall under categories based on our Constitution, statutes and common laws. By contrast, moral rights can be argued from different viewpoints, and may or may not be upheld by those that have responsibility in respect of the right. For example, most of us would expect the right to fidelity when in a relationship but it is not a breach of statutory, common or constitutional law for people to engage in extra-marital affairs. Therefore,

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Figure 6.3 A controversial moral right is the right for same-sex couples to marry.

while an act of infidelity may be immoral, it is not illegal.

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 so. In other words, moral rights and responsibilities are not enforceable. While many laws have been passed because they agree with the moral views of most people in a community, and are complied with for similar reasons, the law is sometimes slow to change to reflect changes in social attitudes and public morality. Same-sex marriage provides a good example. Polling by Galaxy Research (2009–2012) found that 64 per cent of survey respondents agreed with changing the *Marriage Act 1961* (Cth) and allowing same sex couples the right to matrimony. Same-sex couples therefore do not share the same rights as heterosexuals.

A bill of rights?

Protections provided by bills of rights

Countries including the United States, the United Kingdom and New Zealand have a document known as a **bill of rights**. Such a document sets out specifically what individuals are entitled to expect of their government. Australia is the only Western democracy that does not have one.

bill of rights
a statement of basic human rights and privileges

Although the United Kingdom has no single constitutional document, the English *Bill of Rights of 1689* sets out a few fundamental rights and is still in force today. However, it is limited in its scope and deals mainly with succession to the throne and the way in which English law was to be adopted in its colonies (see page 153 on the 'doctrine of reception'). As one of the 47 member countries of the Council of Europe, the United Kingdom is a party to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1953) and is bound by it. The United Kingdom introduced the *Human Rights Act 1998* to give further effect in United Kingdom law to the rights contained in this convention.

In the United States, the *Bill of Rights*, ratified in 1791, consists of the first 10 amendments to the Constitution and contains fundamental rights of individuals in private life, in the criminal justice process and with respect to the government generally.

New Zealand's *Bill of Rights Act 1990* contains civil, democratic and human rights, including freedom from discrimination and freedoms from government intrusions into individuals' lives.

Table 6.1 shows some examples of rights contained in bills of rights.

Research 6.1

View the US *Bill of Rights* (the first 10 amendments to the US Constitution) via the following link: http://cambridge.edu.au/redirect/?id=6517.

1. Choose three rights that are contained in the US *Bill of Rights*. Summarise these rights in your own words.
2. For each of these rights, explain why it was considered important enough to be included in the US *Bill of Rights*.
3. Are these considerations still relevant today? Why or why not? To help you with further research view other links via http://cambridge.edu.au/redirect/?id=6518.

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Table 6.1 Examples of rights enshrined in a bill of rights

New Zealand: *Bill of Rights Act 1990*	United States of America: *Bill of Rights*	European Union: *European Convention for the Protection of Human Rights and Fundamental Freedoms*
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)

Arguments for and against an Australian bill of rights

In Australia, a bill of rights has never existed, as the authors of our Constitution believed that citizens' rights would be protected by decisions of the courts 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 bill of rights are summarised in Table 6.2.

Figure 6.4 Australia has freedom of religion, which allows all faiths to be practised in Australia.

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Table 6.2 Arguments for and against a bill of rights in Australia

For	Against
Australian law gives insufficient protection to fundamental freedoms, and a bill of rights would enshrine those rights.	Rights are already protected by statutes and the common law.
A bill of rights would make our current laws more cohesive and accessible, rather than being 'locked up' in past judgements and statutes.	A bill 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 bill of rights would bring Australia in line with other countries.	Enabling judges to strike down laws made by parliament that are inconsistent with a bill of rights would be undemocratic.
A bill of rights would allow Australia to meet its international obligations more effectively.	Rights written in a bill of rights can become outdated very quickly in a rapidly changing world.
A bill of rights would protect the rights of minorities.	A bill of rights would actually restrict rights, because once defined, a right is limited by the words in which it is expressed.
The High Court's interpretation of 'implied rights' in the Constitution is too limited: we need a document explicitly setting out our rights.	The judiciary would become too political if there were a bill of rights.

Review 6.2

1. Make a list of five rights and corresponding responsibilities.
2. Describe the difference between legal and moral rights, using examples.
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. What are some further arguments for and against an Australian bill of rights? Do we need a bill of rights? Justify your answer.

6.3 Individuals' rights and responsibilities in relation to the state

Conflicts between rights and responsibilities

Australian citizens have certain expectations of their local, state and federal government, and they understand that while citizens enjoy the rights granted by the Constitution, other statutes and the common law, they also have responsibilities. At times the rights of individuals and their responsibilities to the local, state or national community come into conflict.

Over the past few years in New South Wales, smoking cigarettes has been outlawed in more places. Manly Council, which governs Manly Beach through delegated authority, introduced a no-cigarette policy for its beach in 2004. Council rangers were able to fine people smoking on the beach up to $50. Individuals' desire to smoke on the beach clearly conflicts with the desires of non-smokers to have a smoke-free environment. Also, there is conflict between smokers and the council's responsibility in keeping the beach free of cigarette butts and creating a healthier environment for marine life. By 2012, Manly Council had imposed smoking bans on all ocean and harbour beaches, within 10 metres of child playground areas, sporting fields and all events run by the council. On 6 July 2015, smoking became banned under the *Smoke-free Environment Act 2000* (NSW) in all outdoor seated dining areas, in

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Figure 6.5 A no-smoking sign on Manly Beach, Sydney.

areas four metres from an indoor dining area and in areas within 10 metres of a food fair stall.

Other conflicts between the rights of individuals and the state are seen as more serious. At times, governments have asked citizens to be willing to die in wars that the citizens oppose. Throughout the 1960s and 1970s, the Australian Government felt obliged to assist in the United States' effort to defeat communism. Approximately 47 000 young men were conscripted to fight in the Vietnam War between 1966 and 1972, through the enactment of a law that permitted them to select young men randomly from birth records. If an individual refused to respond to a letter from the government, he was pursued and often jailed. Those who believed that violence or war was morally wrong, or that the Vietnam War was not a just war, were known as 'conscientious objectors'. Individuals' rights in relation to the state have taken a new turn since 11 September 2001, when not only the United States but also other countries, including Australia, began to enact legislation to protect its citizens from terrorism. We will look at some of the problems for individual rights in Chapter 19, which deals with the case of Mohamed Haneef. Haneef, an Indian-born Australian resident, was detained without charge for 12 days in connection with a bombing that he had nothing to do with.

State interference with personal liberties

In all Western democratic countries, individuals can govern themselves in terms of the food they eat, the clothes they wear, the jobs they do and how many children they have. Laws based on religious beliefs would violate constitutional prohibitions in Australia, the United States and many other countries, and moral justifications of laws dealing with such individual matters would not last long in a multicultural society with diverse beliefs. Nonetheless, there are examples where governments have tried to exert statutory authority within these areas.

As mentioned in the news article on the next page, some US state governments attempted to outlaw the wearing of trousers that reveal underpants – a fashion among teenagers at the time, inspired by hip hop artists who have displayed them at concerts and on album covers. The legislation was based on the view that such fashions were indecent and offensive to the rest of the community and constituted a criminal offence of indecent exposure.

More recently, authorities in the United States have been issuing fines of $85 to pedestrians who walk and send text messages at the same time. In Forth Worth, New Jersey, there have been 23 minor accidents between cars and pedestrians. More seriously, three people have been killed as a result of not paying attention to traffic because they were using their phones while walking.

Figure 6.6 Should governments have the right to control when we text?

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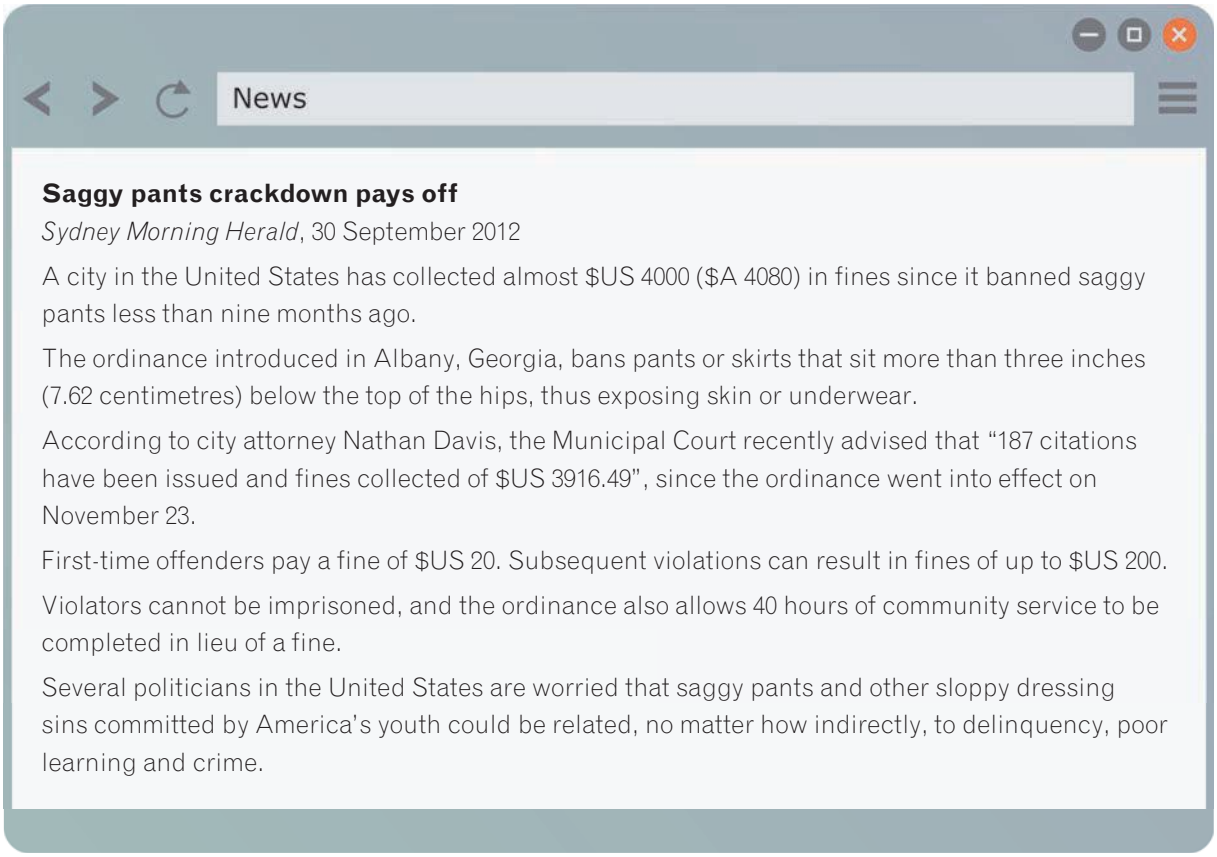

Saggy pants crackdown pays off

Sydney Morning Herald, 30 September 2012

A city in the United States has collected almost $US 4000 ($A 4080) in fines since it banned saggy pants less than nine months ago.

The ordinance introduced in Albany, Georgia, bans pants or skirts that sit more than three inches (7.62 centimetres) below the top of the hips, thus exposing skin or underwear.

According to city attorney Nathan Davis, the Municipal Court recently advised that "187 citations have been issued and fines collected of $US 3916.49", since the ordinance went into effect on November 23.

First-time offenders pay a fine of $US 20. Subsequent violations can result in fines of up to $US 200.

Violators cannot be imprisoned, and the ordinance also allows 40 hours of community service to be completed in lieu of a fine.

Several politicians in the United States are worried that saggy pants and other sloppy dressing sins committed by America's youth could be related, no matter how indirectly, to delinquency, poor learning and crime.

Review 6.3

1 Discuss the rights of a local council to ban:
   - smoking on a beach
   - the use of mobile phones while walking in public
   - topless sunbathing.
2 Read the news article 'Saggy pants crackdown pays off'. Outline the reasons why any government is likely to be unsuccessful in outlawing the display of underpants. Are there any countries that enforce the wearing of certain clothing? Do they have a right? You should try to write at least one point or argument for both sides of these scenarios.
3 Discuss whether a police officer in New South Wales could arrest you for indecency or offensive conduct under the *Summary Offences Act 1988* (NSW). (This Act outlaws offensive, indecent and anti-social behaviour.)

It's a free world?

As discussed, the Australian Constitution does not contain a bill of rights. It does expressly protect a few rights of individuals. These are:

- s 80: the right to a trial by jury
- s 116: freedom of religion
- s 117: the right not to be discriminated against on the basis of one's state of residence
- s 51(xxxi): the right to compensation if one's property is compulsorily acquired for any purpose in respect of which the Commonwealth government has the power to make laws.

Freedom of expression

The issue of freedom of expression arose in 2008 when the Catholic Church and the New South Wales Government hosted World Youth Day in Sydney. While celebrations and events ran for a week in July, special powers were granted to police through the *World Youth Day Act 2006* (NSW) and *World Youth*

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Day Regulation 2008 (NSW). The Act prohibited conduct that 'annoyed or inconvenienced' the participants, and police could issue fines of up to $5500 for the sale or distribution of a range of items, including stickers, T-shirts and condoms. A group called the NoToPope Coalition, protesting the pronouncements of Pope Benedict XVI on sex and condoms by handing out such items, challenged the regulation in the full Federal Court as an intrusion on their freedom of expression. The court struck down the part of one clause of the regulation relating to 'annoying conduct', but retained the prohibitions on 'inconveniencing', obstructing or putting people's safety at risk. They held that it was not parliament's intention that regulations would be made preventing the exercise of free speech.

Some critics of this decision (*Evans v State of NSW* [2008] FCAFC 130) have questioned the jurisdiction of the Federal Court, arguing that only the High Court has the power to interpret the Constitution. The judgement could also be questioned on the basis of its application of the implied right, given the very narrow scope that the right was found to have in the High Court cases of the 1990s.

In 2009, social commentator Andrew Bolt was brought to account over comments he made about 'light-skinned' Indigenous people of Australia. 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' Indigenous people led by Mr Pat Eatock successfully sued Andrew Bolt in the Federal Court. Bolt and his publishers were forced to publish 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. However, by 2015, the government of the day decided not to proceed with the alteration of section 18C of the *Racial Discrimination Act 1975* (Cth).

Figure 6.7 Andrew Bolt was sued for claiming that 'light-skinned' Indigenous people exploit welfare payments.

Review 6.4

1. Explain the difference between an 'express right' and an 'implied right'.
2. What rights are expressly guaranteed by the Constitution?
3. Do Australians have a right to freedom of expression? Justify your answer. Use the cases of World Youth Day.
4. Examine the case of *Eatock v Bolt*. Do Australians have the right to free speech?

Defamation

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 hurt his or her reputation? What legal rights and responsibilities do you have as the speaker or writer? And how well does the law work to protect reputations on the one hand and free speech on the other?

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

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
- 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.

Even if you were taken to court and successfully used one of the three defences listed above, it may cost you a significant sum in legal fees. Consider the case of Joe Hockey following.

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News

Joe Hockey tells defamation hearing Fairfax articles caused his father to 'break down in tears'

Nicole Chettle
ABC, 9 Mar 2015

The Treasurer, Joe Hockey, has told the Federal Court his father broke down in tears when he spoke to him after headlines emerged last year that read "Treasurer for sale".

Mr Hockey has been giving evidence during his defamation case against Fairfax Media over a series of articles published in newspapers and on the internet relating to his involvement with the Liberal Party fundraising group, the North Sydney Forum (NSF).

He is taking legal action against the Sydney Morning Herald, The Age, The Canberra Times and their online services.

Figure 6.8 Joe Hockey after giving evidence at the Federal Court in Sydney during his defamation case against Fairfax Media (AAP: Nikki Short)

Mr Hockey said he was "absolutely devastated" when he bought a newspaper in the Canberra suburb of Manuka last May.

"I saw the front pages. I was just stunned and the newsagent says 'What's all this about?' And I just shook my head."

The Treasurer said his father is frail and there was doubt in his voice when he spoke to him on the telephone.

"He broke down in tears when I rang him," he said.

Mr Hockey revealed his daughter later asked if someone was trying to "buy" him.

The Treasurer told the court "the only thing you walk out of politics with is your reputation ... my view is there must be integrity in the political system."

He said he did not rely on the NSF to influence his decisions.

Social media message viewed by over 250,000 people

The articles in the Sydney Morning Herald reported the NSF was not fully disclosing its activities to the electoral funding authorities.

A social media message on Twitter with the headline "Treasurer Hockey for sale" was viewed by 279,000 people.

The court heard a series of email messages was exchanged between the editor-in-chief of the Sydney Morning Herald Darren Goodsir, Fairfax chief executive officer Greg Hywood and the political reporter, Mark Kenny.

One email sent by Goodsir in May 2014 read: "I have long dreamed of a headline 'Sloppy Joe'".

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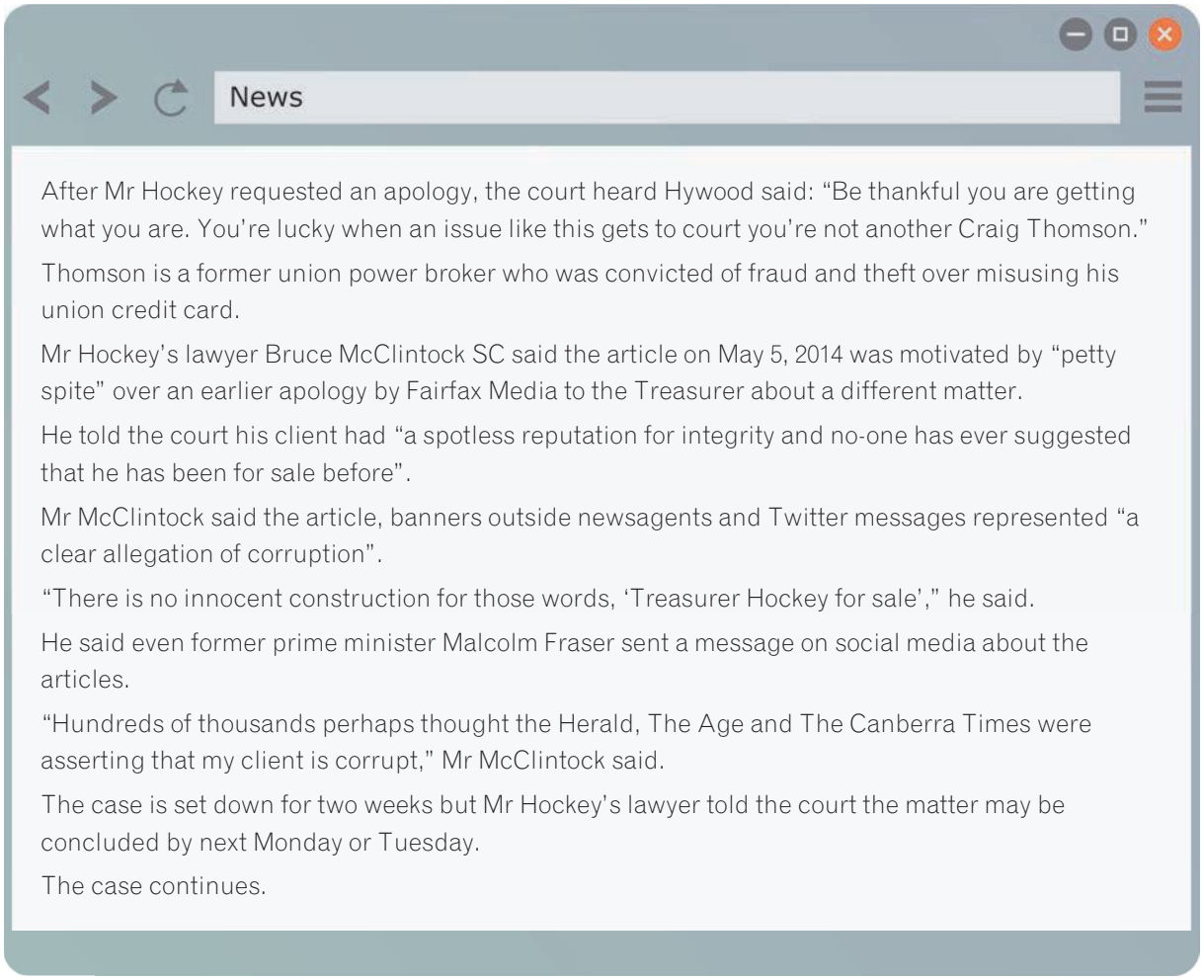

Review 6.5

Read the news article above and answer the following questions.

1 Outline the reason Mr Hockey was suing Fairfax media for defamation. How did Fairfax media argue it did not defame Mr Hockey?
2 Evaluate the current laws on defamation. What responsibilities do you have when you talk about someone else?

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.

self-executing
(of a treaty) automatically becoming binding on a state party to the treaty as soon as the treaty has been ratified

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 (UN) or other international organisations, such as subsidiary bodies of the UN 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* is an important declaration of the rights to which

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all humans are entitled. The following extract summarises what the UN is trying to achieve internationally.

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.

The full text of the Declaration can be viewed via the following link: http://cambridge.edu.au/redirect/?id=6519.

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.

Rights are something thought to be possessed not only by individuals but also by peoples or nations. **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 UN's Charter, as well as in the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*. Article 15 of the *Universal Declaration of Human Rights* (see left) expresses this right in terms of all individuals' right to a nationality.

self-determination
the right of people to determine their political status or how they will be governed based on territory or national grouping

The UN Charter, Chapter 1, Article 1, part 2 includes self-determination as one of the purposes or goals of the United Nations:

> 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, 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

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Figure 6.9 The UN became involved in the Syrian conflict as the violence escalated and forced people from their homes.

become involved in high-risk conflicts where their own interests are at stake, there has been no UN action.

One place where the UN has intervened, with limited success, has been in Syria, due to increasing conflict and violence against civilians. In 2012, the UN 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 increasing levels of violence and an inability to broker a ceasefire between the warring factions.

The rights of Indigenous 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 we saw in Chapters 2 and 5, Australian Indigenous people have faced serious challenges to their **political autonomy** since European settlement. Their laws were radically different from British laws and were not considered to constitute a system of law at all. 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.

political autonomy
self-determination, independence

One way in which self-determination is demonstrated in Australian Indigenous communities is through the use of customary law rather than the English common law. Circle sentencing is an example of tribal law in practice.

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 Canadian experience with indigenous communities and has the goal of preventing crime, supporting victims and giving indigenous people greater involvement in the criminal justice system. Sentences are more likely to be meaningful for the offender if imposed by authorities within his or her own culture.

Circle sentencing works in the following way. When an accused person in a criminal trial has pleaded guilty or been found guilty, and is a member of an indigenous 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 offender, the victim and their families form part of the group, as well as respected members of the local indigenous community.

Review 6.6

1 What are the purposes of the *Universal Declaration of Human Rights*?
2 How are those rights enforced? Suggest some possible ways they could be more effectively enforced.

Research 6.2

Read the article by Brendan Thomas, 'Circle sentencing: involving Aboriginal communities in the sentencing process' (2000), which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6520.

1 What are the aims of circle sentencing?
2 What are the benefits?
3 What are the drawbacks?

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Chapter summary

- Rights and responsibilities are contained in our Constitution, statute and common law.
- Moral rights are not actually 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 extend from government interest in personal dress and conscription in wartime to anti-terrorism measures that go much further in limiting people's rights.
- The Australian Constitution contains a few express protections for individual rights, and the High Court has recently defined an implied right to freedom of political communication.
- International efforts to articulate and protect rights are contained in numerous conventions, treaties and declarations. There are often difficulties in enforcement, as some states do not recognise these agreements or have not incorporated these rights into their domestic legislation.
- The right to self-determination is an internationally recognised right of peoples.

Chapter summary questions

Multiple-choice questions

1 How are legal rights protected?
- **A** by statute law alone
- **B** by common law alone
- **C** by both statute and common law
- **D** by ethics and religious customs

2 Which of these statements about moral rights is true?
- **A** They have no legal basis.
- **B** They can be enforced.
- **C** They are the same as legal rights.
- **D** None of the above.

3 Which of these statements is true?
- **A** Every state in the world has a bill of rights.
- **B** A bill of rights can only be drafted by the United Nations.
- **C** A bill of rights is a document setting out the rights of individual citizens.
- **D** A bill of rights is part of Australia's Constitution.

4 What sort of right is the right to euthanasia?
- **A** a common law right
- **B** a legal right
- **C** a moral right
- **D** none of the above

5 How is the right to freedom of speech protected?
- **A** by statute
- **B** by common law
- **C** by both common and statute law
- **D** it is not protected by either statute or common law

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Short-answer questions

1 Outline the arguments for and against a bill of rights in Australia.
2 List two examples of how rights are protected by statute and common law in Australia.
3 Describe the difference between moral and legal rights, using examples.
4 Give an example of a conflict between the rights of individuals and their responsibilities to the state. Discuss how it might best be resolved.
5 Discuss the right of Indigenous people in Australia to self-determination.
6 Explain the concept of circle sentencing. Why might it be effective?
7 Explain the reasons for constructing declarations of rights. List some examples of such declarations.
8 What other rights are not expressly contained in the Australian Constitution, but enjoyed by Australians as a result of statutory or common law? Discuss.
9 How does defamation pose a threat to individuals' free expression? What defences are available to someone who has critical things to say about a political figure?
10 How are internationally recognised rights protected in Australia? Discuss.

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Chapter 7
Resolving disputes

Chapter objectives

In this chapter, students 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.

Key terms/vocabulary

alternative dispute resolution (ADR)
apprehended violence order (AVO)
arbitration
Australian Federal Police (AFP)
conciliation
conveyancers
freedom of information (FOI)
law enforcement agencies
mediation
mule recruitment
negotiation
state police

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 Human Rights Commission Act 1986 (Cth)
Privacy Act 1988 (Cth)
Criminal Code, contained in the Criminal Code Act 1995 (Cth)
Trees (Disputes Between Neighbours) Act 2006 (NSW)
Government Information (Public Access) Act 2009 (NSW)
Coroners Act 2009 (NSW) section 23

SIGNIFICANT CASES

Toonen v Australia, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)
Croome v Tasmania [1997] HCA 5

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Legal oddity

The Hatfield–McCoy feud is the most famous family feud in American history. Between 1880 and 1891, eight Hatfields and seven McCoys were killed in matters relating partly to land disputes but mostly to revenge and family pride.

In 2002, Ron McCoy and his cousin Bo McCoy sued a man named John Vance, a descendent of the Hatfield family, over access to an old McCoy family cemetery that now stands on Vance's property. Located in rural Kentucky, USA, Vance had been letting McCoys and other visitors visit the cemetery for years but had recently put up a 'No trespassing' sign after members of the McCoy family started charging visitors an admission fee for visiting the cemetery on his land. The McCoys eventually won the dispute.

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7.1 Law enforcement agencies

There are a number of **law enforcement agencies** that have an important role in upholding statutes at state and federal levels, as well as some of the legal restrictions placed on these 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

The police

State and territory police

Under Australia's constitution, state governments hold responsibility to provide police services. Each state and territory police service has responsibilities involving 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 police have rules that they must obey when they perform these duties. To ensure that evidence is collected correctly and thus is able to be used by the prosecution in a court case, the police are covered by a code of practice. The Foreword to the code outlines what it covers:

- police powers to stop, search and detain people
- police powers to enter and search premises, and seize property
- police powers to arrest, detain and question suspects
- the way in which suspects and others are to be treated by police.

Each state and territory in Australia has its own police force. The New South Wales Police Force is primarily concerned with enforcing criminal law, particularly those offences contained in the *Crimes Act 1900* (NSW). Some of the most serious crimes are clearly those against the person such as homicide, manslaughter and sexual assault. More recently, new laws have been passed to combat organised 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 **apprehended violence orders (AVOs)** restricting the movements of some individuals in relation to others is another part of the job of the **state police**.

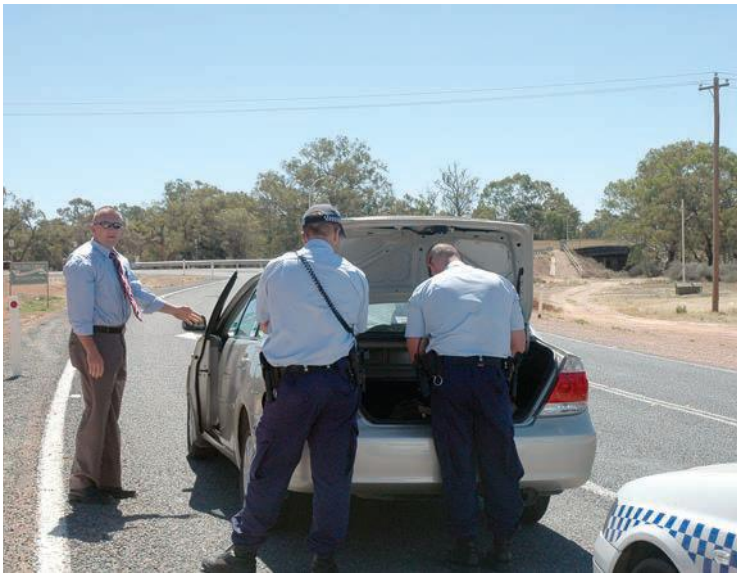

Figure 7.1 Police powers to stop, search and detain people are defined in the code of practice.

apprehended violence order (AVO)
court order to protect a person who fears violence or harassment from a particular person. In NSW, 'apprehended personal violence orders' prohibit violence between members of the public; 'apprehended domestic violence orders' prohibit violence in the context of a family

state police
law enforcement agencies with statewide jurisdiction

A current issue for state policing is the use of taser or stun guns, also called Controlled Electronic Devices (CEDs), to subdue, apprehend and disable suspects. These weapons deliver a strong shock that disrupts the central nervous system. In 1995, a mentally unstable man Roni Levi threatened a number of people on Bondi beach with a knife. Police shot him dead after he ignored repeated warnings to drop his weapon. Advocates of CEDs argue that Mr Levi might still be alive today if police carried CEDs rather than firearms.

There was a renewed call for CEDs to be carried by police in December 2008. This followed an incident in which Tyler Cassidy, a 15-year-old Victorian youth, was shot dead after brandishing a knife and making threats towards police. However, while healthy adults are unlikely to suffer lasting damage from a CED,

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abnormal heartbeat may be brought on in persons with existing heart disease or other risk factors such as mental illness, drug use, alcohol use or high stress. A 2008 Amnesty International report, 'Less than Lethal?', documented the deaths of 334 people in the United States after CEDs were used on them. In more than 40 of the cases, coroners found that the shocks had led to or contributed to the death.

Another problem with CEDs is that they are open to abuse by police officers and there appear to be few guidelines or restrictions on their use, leaving suspects at the mercy of some overzealous officers. Amnesty International's study found that 90 per cent of those who died after having a CED used on them were unarmed and did not pose a threat to the public.

In March 2012, a Brazilian student Roberto Laudisio Curti was tasered by police for allegedly stealing biscuits from a convenience store in Sydney. Mr Curti had taken the drug LSD at some stage during the night and was showing signs of extreme paranoid and agitated behaviour. After being asked by police to stop and talk to them on several occasions, Mr Curti was chased by six police officers, who used capsicum spray before using a CED to apprehend Mr Curti. He died as a result.

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 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).

Australian Federal Police (AFP)
the federal police agency of the Commonwealth of Australia, set up to enforce the federal laws and to protect the interests of Australia both domestically and internationally

Figure 7.2 Australian Federal Police Headquarters

Significantly, the nature of the AFP and what is required of it have changed since 11 September 2001. The AFP has reacted 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. The AFP may also be involved in the family law process if the Family Court makes specific orders requiring the involvement of the AFP; for example, if the Court believes that a child may be taken 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.

Chapter 19 details the AFP's investigations into Mohamed Haneef's alleged role in a terrorist attack in Glasgow, Scotland. It is not the most glowing of reports as the AFP spent $8 million investigating Dr Haneef, only for him to be found to have been wrongfully arrested. Similarly, Chapter 14 considers the controversy around their 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 in 2015 to the Australian Border Force (ABF). It was originally known as the Department of Trade and Customs and was the first government department established

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in 1901. Approximately 20 million passengers each year move through 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; and
- 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 surveillance of 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 analysis as well as the use of detector dogs and computer technology.

Figure 7.3 Family law prevents parents from illegally taking their children out of Australia.

In November 2014, Australia's Federal Police made one of the largest drug seizures in the country's history. Approximately 2.5 tonnes of illicit drugs were seized in Sydney with an estimated street value of $1.5 billion. Six men were charged with drug importation with the federal police commenting that many more were involved at the point of shipment, probably in Germany with links through Asia.

The drugs would have been distributed around the country if they had not been seized. Australian Crime Commission chief executive Chris Dawson said the recent ice epidemic was not limited to major cities, but had spread to rural areas as well.

Over the last few years in Australia, the drug commonly known as 'ice' has seemingly become the drug most widely used by people, with horrific consequences for users and their families.

A joint statement was made by the serving Prime Minister Tony Abbott, the serving Immigration and Border Protection Minister Scott Morrison and Justice Minister Michael Keenan in which they praised the teamwork provided by law enforcement agencies. They said that this was a 'landmark day' in the battle against organised crime and drugs.

Australian Crime Commission

The Australian Crime Commission (ACC) was established under the *Australian Crime Commission Act 2002* (Cth). 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 ACC in NSW. Similar legislation was passed in the other states and territories, effectively bringing the *Australian Crime Commission Act 2002* (Cth) into state or territory law. All arms of intelligence gathering and law enforcement were thereby brought together to unify the fight against serious, organised criminal activity.

The ACC has a number of important functions, involving both intelligence and investigative roles:

- collecting and analysing criminal intelligence data

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- giving advice about National Criminal Intelligence Priorities (NCIPs) to the ACC 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. The first category, detailed in Part 10.7 of the *Criminal Code* (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.

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

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', whereby email is used to lure unsuspecting computer users to a fake website where they 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 and thwart attacks on Australia. ASIO's role is expanding; it employs approximately 1500 people. ASIO's information is used by 75 government departments, police and senior decision-makers.

Chapter 19 outlines the role of ASIO in the arrest and detention of terror suspect Mohamed Haneef, in which ASIO correctly advised the AFP that Dr Haneef was not a suspect in the 2007 Glasgow Airport bombing and that there was virtually no evidence linking Dr Haneef to this terrorist attack.

Figure 7.4 ASIO headquarters in Canberra

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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 of tax or the underpayment of tax. During 2012, the ATO reported a range of prosecutions and subsequent custodial sentences for tax fraud and evasion. Robert Agius was sentenced to nine years' jail for tax evasion schemes through his company PTK Vanuatu. Mr Agius was found guilty of conspiring to defraud the Commonwealth and conspiracy to dishonestly cause a loss. These convictions demonstrate the serious nature of tax offences and the power of the ATO. Mr Agius was one of nine people given custodial sentences for tax fraud or tax evasion crimes.

Other laws administered by the ATO include those governing fringe benefits tax (FBT), the Goods and Services Tax (GST) and superannuation.

Review 7.1

1. What is a law enforcement agency? Give an example of a government body that has enforcement powers and briefly summarise its specific aims.
2. Explain the role of the police in the legal system. Comment on the importance of jurisdiction in law enforcement.

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.

Alternative dispute resolution

Going to court 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 $30 000–$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 (ADR) uses a variety of methods to resolve disputes between parties without involving court processes. ADR allows the participants not only to save time and money, but also to have more control over proceedings.

alternative dispute resolution (ADR)
dispute resolution processes, such as mediation, arbitration and conciliation, that do not involve courts

ADR 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 who attempts to help the parties come to an agreement. In arbitration, the neutral third party will make a decision that is binding on the parties involved in the dispute. These are discussed below.

Negotiation

Negotiation means 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 involved and therefore is usually low in cost.

negotiation
any dialogue intended to resolve disputes and/or produce an agreement on further courses of action

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 to come to a decision that they both find acceptable.

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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 them.

The mediator does not provide advice on the matters or impose a decision on the parties. The mediator may not have particular expertise in the subject area, but will be an expert in the process of mediation. Through his or her negotiation and listening skills, the mediator is able to assist the parties in examining the issues, and the parties will come up with their own solutions to settle the dispute.

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, although he or she does not make a decision for them. A conciliator may be a legal practitioner or professionally qualified in the subject matter of the dispute. He or she will be responsible for managing the process, explaining the rules and acting as an umpire. In conciliation, the parties may also have their own legal advisers.

Community Justice Centres and Conflict Resolution Service

Community Justice Centres (CJCs) aim to resolve disputes through mediation. In NSW, there are six centres, which offer informal and impartial dispute resolution services to government agencies and also to all sections of the community. CJCs are funded by the New South Wales Government and provide their services free of charge.

CJCs deal with disputes within families (including youth conflict), workplaces, neighbourhoods and communities.

Figure 7.5 A divorcing couple may seek mediation to settle any disputes.

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CJCs are designed to resolve disputes between members of the same community. As these people usually have an ongoing relationship, it is important that a dispute over something like a fence is resolved as quickly and economically as possible with no long-lasting acrimony. A dispute over an issue such as who is responsible for the repair of a fence can be resolved at a CJC by the parties talking through their dispute with a neutral mediator. It will be more satisfactorily resolved here than in a formal and confrontational courtroom.

In the ACT, the Conflict Resolution Service (CRS) has existed since 1988 as a non-profit organisation to help solve 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 brought in to determine how the dispute is to be resolved. It is useful when the subject matter of the dispute requires an expert and/or when a court-like procedure is desired, but with a greater degree of confidentiality. It is used when a contract specifies arbitration for resolution of any disputes arising, in industrial relations matters, and in tenant and landlord disputes. It has become the preferred procedure in Australia for disputes involving commercial contracts.

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

In 2015, Coles supermarkets were forced to pay $12 million in compensation to small bread suppliers as a result of arbitration. A dispute between Coles and 4000 small bread suppliers arose out of Coles' claim to bake fresh bread each day in its retail stores. In fact Coles only pre-baked bread and stored it on site. By claiming the bread was 'made' in its stores, Coles had made false and misleading claims to its consumers. Coles had fined and refused payments to many of its suppliers and former Victorian premier Jeff Kennett became the independent arbiter in the dispute.

Review 7.2

1 Distinguish between the processes of mediation, conciliation and arbitration. Where does negotiation fit in?
2 Why might someone prefer alternative dispute resolution to taking the other party to court? Give reasons.

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 (LEC).

The NSW Land and Environment Court

The NSW Land and Environment Court 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.

Figure 7.6 NSW Land and Environment Court deals with building and planning matters, as well as environmental and development disputes.

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The LEC's jurisdiction is granted by more than 60 New South Wales Acts. It does not have the power to hear matters outside that statutory jurisdiction. It deals with environmental, development, building and planning disputes, and certain types of native title claims. Alternative dispute resolution is integrated within its procedures.

Among the statutes granting the court jurisdiction is the *Trees (Disputes Between Neighbours) Act 2006* (NSW). This Act allows the court to make judgements on issues involving the removal or pruning of trees and who should pay.

Tribunals

Tribunals offer a less formal and expensive method of dispute resolution than the court system. 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

NSW Civil and Administrative Tribunal (NCAT) was established on 1 January 2014, combining the roles of 22 previously separate tribunals. It has four main divisions (Administrative and Equal Opportunity Division, Consumer and Commercial Division, Guardianship Division and Occupational Division) and deals with various types of disputes between individuals, as well as individuals against organisations.

Disputes between individuals will often come under the Consumer and Commercial Division; examples include disputes about repairing or replacing the fence between two residential properties, and excessive noise or pet ownership within a block of units or townhouses.

Review 7.3

1 Define alternative dispute resolution. Outline some of the forms it may take. Which one do you think would have the most desirable results? Justify your answer.
2 If you are having problems with your neighbours, why should going to court be the last step taken?
3 What options are there for settling a dispute with your neighbour? Discuss with reference to the types of disputes that might arise.

Research 7.1

1 View the NSW Caselaw website and search for the case *Bowan v Glanville* [2008] NSWLEC 10.
2 Summarise the dispute between neighbours in relation to trees. Evaluate the court's judgement. Why couldn't the neighbours negotiate a settlement without resorting to the Land and Environment Court?

7.3 Disputes with the state

There are a number of methods by which state power or government decisions and policies can be challenged. Some of these are informal or 'non-legal' methods, and others involve formal legal channels.

Non-legal methods of challenging state power

The media

By writing a letter, sending an email, calling television and radio stations or posting status updates on social media sites, citizens are able to inform the community of a decision they think is unfair, unjust or harsh. There have been many instances in which major networks have taken on a story and caused the government to overturn a decision.

For example, it could be argued that children were released from migrant detention centres

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in August 2005 as a result of media pressure. If individuals and pressure groups are frequently heard on radio and television, the government may decide to respond and reverse a policy decision. In this case, the Commonwealth Department of Immigration and Multicultural Affairs, as it was then called, explained that it had 'softened' its stance on the detention of immigrants.

The internet is a source of information and a means of communication. By means of common interest websites, people can get together physically, online or both to discuss situations where public officers have allegedly acted unjustly. One such site, entitled 'Whistleblowers Australia', states:

> The goal of Whistleblowers Australia (WBA) is to help promote a society in which it is possible to speak out without reprisal about corruption, dangers to the public and other vital social issues, and to help those who speak out in this way to help themselves.

WBA uses social media sites such as Facebook to share information and report corrupt, unfair or illegal behaviours by individuals, companies or government organisations.

Members of Parliament

Members of state and federal parliaments (MPs) are elected by voters to represent a particular area or electorate. For example, former Prime Minister John Howard held the federal seat of Bennelong, in Sydney, before being defeated by Maxine McKew in the 2007 federal election.

All citizens within an electorate are able to contact the office of their representative and speak to their MP about an issue that may trouble 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 voters would argue that Mr Howard lost his seat because he was not attending to the needs of his electorate. Ms McKew's campaign focused on issues within the electorate. Ms McKew lost this seat in 2010 to former tennis player John Alexander, who currently holds the seat as at 2015.

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 his or her 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 they have been wronged by a government department or agency in that jurisdiction. MPs and councillors can help in resolving the dispute so that it does not need to go to court or a tribunal. MPs and councillors rely on being re-elected to their position, so it is in their interest to help their constituents resolve disputes quickly.

Figure 7.7 The media can play a role in challenging or influencing political decisions.

Trade unions

Groups of people in various industries unite to form trade unions to protect their rights and conditions of employment. Unions can help to negotiate a workplace agreement containing important provisions about workplace safety, wages and conditions. They will also take action when an employer proposes to change the conditions of work in a way that is detrimental to employees. In Australia, the legislative approach to industrial relations was historically based on conciliation and arbitration. Going on strike is a last resort.

In the early 1970s, one union, the Builders Labourers Federation, banned workers from worksites so that various sites of heritage value in Sydney were not demolished for the purpose of

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Figure 7.8 People often protest in an attempt to communicate their message.

potential property development. These 'green bans' were highly successful: a small park in Hunters Hill and terrace houses in Victoria Street, Potts Point, still exist today. The historic area of Sydney known as The Rocks was also saved and protected by the actions of unions placing bans on work at proposed demolition sites.

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. How would you go about challenging the state if they refused to award you the Higher School Certificate (HSC)? What laws and means would you utilise to investigate why you did not receive your HSC?
2. Which of the informal methods of challenging state power would be the most effective and why?
3. Evaluate the effectiveness of informal methods of challenging state power.

Interest groups, including non-government organisations

People can also form groups where they share political values or aims, or have 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, Facebook and Twitter, and was actively involved in the fight against Woolworths and its 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.

Legal methods of challenging power

Challenges to decisions of government or government bodies can also be made on a formal or 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 can be ineffective in terms of practical outcomes if the people conducting the review have been involved with a decision that is not appropriate or incorrect.

A recent example is that of the Combined Pensioners and Superannuants Association of NSW (CPSA). The organisation 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. The Minister for Transport claimed that there had been extensive consultation and that it indicated 'overwhelming community

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Figure 7.9 The Combined Pensioners and Superannuants Association of NSW applied to see documents related to community consultation over the booking fee for country train fares.

support' for the booking fee. Previously, pensioners were entitled to four free rail trips per year.

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*. 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 (FOI)** legislation.

freedom of information (FOI)
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. FOI legislation governs the processes of obtaining this information, at state and federal level.

The application was denied, so the CPSA requested 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. These include 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, which deals with disputes between consumers and businesses, or tenants and landlords, as well as between individuals. Another is the NSW Administrative Decisions Tribunal, which hears cases involving allegations of discrimination and professional misconduct, and reviews administrative decisions of New South Wales Government bodies.

The Administrative Decisions Tribunal has six divisions and an appeal panel. The divisions will conduct reviews of decisions by government agencies in the following categories:

- the community services sector, including child care and disability services
- decisions of the Chief Commissioner of State Revenue, many having to do with state taxation
- professional conduct of legal practitioners and property **conveyancers**

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- equal opportunity claims referred to the Tribunal by the Anti-Discrimination Board
- retail tenancy and 'unconscionable conduct' claims against retail landlords
- decisions of government agencies under a wide variety of laws (the General Division).

conveyancers
people who deal professionally with the legal and practical matters involved in the transfer of titles to property when real estate is sold and purchased

The General Division of the Administrative Decisions Tribunal most often deals with applications regarding access to government information applications, privacy and licensing matters involving firearms, passenger transport and the security building industries.

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 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 a Commonwealth Government or private organisation has mishandled their personal information, including health information. There are legal responsibilities that government departments must carry out in the collection and storage of 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.

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 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 a process whereby a court with the relevant jurisdiction can review a decision made by a government department only on the basis of whether the decision 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 as a general rule, decisions are subject to the following requirements:

- Natural justice: You will study this concept in greater 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 of law.

A person desiring judicial review must have standing; that is, he or she must be directly affected by the issue. There would be huge costs associated with judicial reviews if they could be ordered by any interested persons, whether they were directly affected or not.

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

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- *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'. The Office of the Ombudsman was 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 can use the Ombudsman's office to deal with complaints against them or their officers; for example, RailCorp, Junee Correctional Centre, government and non-government schools, and agencies providing child care and residential care. The Ombudsman does not have the power to impose any punishment or fine on a government agency or department. He or she can, however, make recommendations to the department in question or to the New South Wales 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 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.

NSW 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

Figure 7.10 One of the main areas of complaint received by the Office of the Ombudsman involves community services.

Figure 7.11 People should be protected from discrimination on the basis of characteristics such as disability.

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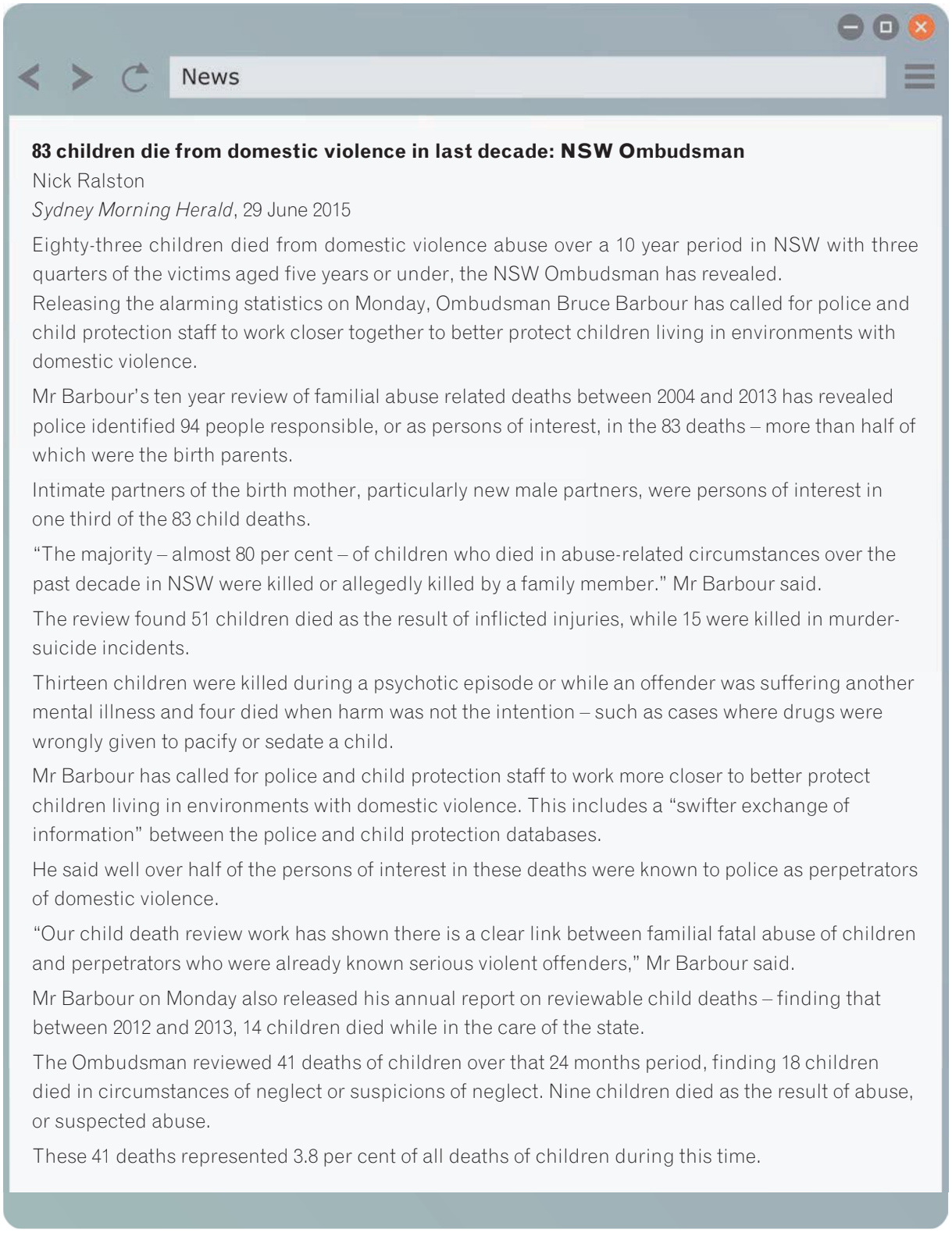

83 children die from domestic violence in last decade: NSW Ombudsman

Nick Ralston

Sydney Morning Herald, 29 June 2015

Eighty-three children died from domestic violence abuse over a 10 year period in NSW with three quarters of the victims aged five years or under, the NSW Ombudsman has revealed.

Releasing the alarming statistics on Monday, Ombudsman Bruce Barbour has called for police and child protection staff to work closer together to better protect children living in environments with domestic violence.

Mr Barbour's ten year review of familial abuse related deaths between 2004 and 2013 has revealed police identified 94 people responsible, or as persons of interest, in the 83 deaths – more than half of which were the birth parents.

Intimate partners of the birth mother, particularly new male partners, were persons of interest in one third of the 83 child deaths.

"The majority – almost 80 per cent – of children who died in abuse-related circumstances over the past decade in NSW were killed or allegedly killed by a family member." Mr Barbour said.

The review found 51 children died as the result of inflicted injuries, while 15 were killed in murder-suicide incidents.

Thirteen children were killed during a psychotic episode or while an offender was suffering another mental illness and four died when harm was not the intention – such as cases where drugs were wrongly given to pacify or sedate a child.

Mr Barbour has called for police and child protection staff to work more closer to better protect children living in environments with domestic violence. This includes a "swifter exchange of information" between the police and child protection databases.

He said well over half of the persons of interest in these deaths were known to police as perpetrators of domestic violence.

"Our child death review work has shown there is a clear link between familial fatal abuse of children and perpetrators who were already known serious violent offenders," Mr Barbour said.

Mr Barbour on Monday also released his annual report on reviewable child deaths – finding that between 2012 and 2013, 14 children died while in the care of the state.

The Ombudsman reviewed 41 deaths of children over that 24 months period, finding 18 children died in circumstances of neglect or suspicions of neglect. Nine children died as the result of abuse, or suspected abuse.

These 41 deaths represented 3.8 per cent of all deaths of children during this time.

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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 Service (NSW, 1995). More recent is the Royal Commission into Institutional Responses to Child Sexual Abuse (Commonwealth, 2015).

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: 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 the 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 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 citizen feels that he or she has been wrongfully accused of corruption, he or she may seek judicial review in the New South Wales Supreme Court.

During 2014, ICAC conducted a major investigation into NSW 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. Many other high-profile and former high-profile politicians, some of who were Ministers of the Crown, were investigated for corrupt conduct with much of the proceedings being covered by major media outlets and sources.

Review 7.5

1. Explain the process of internal review of a government agency's decision. What are the potential problems with internal review?
2. Explain the function of freedom of information legislation.
3. Describe the role administrative 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. What is judicial review? How does it differ from review of the merits of a decision?
6. Outline the role of an ombudsman. Using a recent example from the media, explain how the NSW Ombudsman is limited in solving issues such as domestic violence.
7. Explain the importance of natural justice as the state attempts to enforce laws.

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Research 7.2

1. View the website for the Anti-Discrimination Board of NSW (ADB).
2. Choose 'Publications' from the top menu. From the left-hand menu select 'Equal Time Newsletter' and then 'Legal Cases – Index'.
3. Discuss two cases and evaluate the effectiveness of the ADB in bringing about just outcomes. You should 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 under the responsibility of 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); it is now called the *Australian Human Rights Commission Act 1986* (Cth).

As detailed in Chapter 5, the Commission 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.

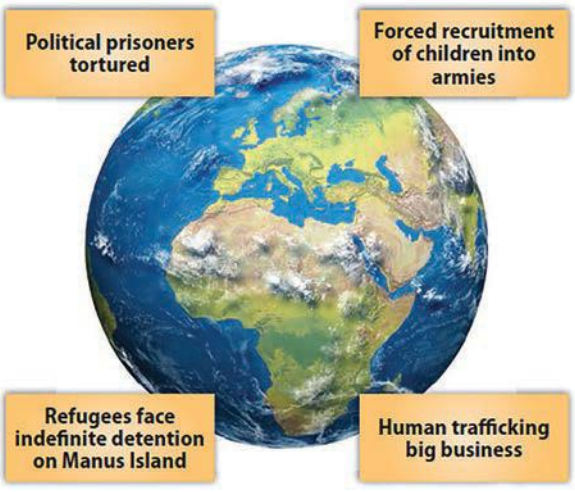

Figure 7.12 Headlines frequently refer to breaches of human rights.

The United Nations

International treaties and declarations containing key principles of human rights include:

- *International Covenant on Civil and Political Rights* (ICCPR)
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- *Convention on the Rights of the Child* (CROC)
- *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)
- *Convention on the Elimination of All Forms of Racial Discrimination* (CERD)
- *Universal Declaration of Human Rights* (UDHR).

The last declaration is the most widely known and longest standing (1948) and aims to address some of the issues raised in the headlines in Figure 7.12.

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 relating only to a single convention. The UN Human Rights Committee is one of these. It rules on individual complaints pertaining only to the *International Covenant on Civil and Political Rights* (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*

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Code 1924 Act (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, to force an amendment to the Criminal Code.

Research 7.3

1. Investigate the provisions of the human rights treaties listed on the previous page.
2. Briefly summarise the purpose of each of these treaties.
3. Compare and contrast the types of rights contained in the *International Covenant on Civil and Political Rights* and the types of rights contained in the *International Covenant on Economic, Social and Cultural Rights*.

Figure 7.13 In June 2016 Eddie Obeid's wife, Judith and two of the couple's five sons were called to give evidence in his criminal trial over alleged business dealings at Circular Quay.

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Chapter summary

- Law enforcement agencies at local, state and federal level have the task of enforcing laws and rights within their jurisdiction. These include state and federal police, ASIO, Australian Customs and Border Protection Service, the Australian Crime Commission and the Australian High Tech Crime Centre.
- The nature of policing has changed dramatically since 2001 in relation to terrorism, cybercrime and border protection.
- Disputes between individuals can be resolved using various legal (formal) and non-legal (informal) methods.
- Disputes between individuals and the state can also 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 these rights.
- Cases such as *Toonen v Australia* and issues such as the use of CEDs illustrate the ongoing need for law reform in relation to human rights and their enforcement.

Chapter summary questions

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** 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 ASIO

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 Informal methods of challenging state power include:
- **A** media, trade unions and external review
- **B** trade unions, internal review, courts
- **C** Members of Parliament, trade unions and media
- **D** internal and external review and media

5 Statutory bodies include:
- **A** the ADB, the AHRC and ICAC
- **B** Amnesty International, the ADB and the ABC
- **C** the ADB, the AFP and the media
- **D** the ABC, the ADB and the ATO

Short-answer questions

1 Outline the roles of the Australian Human Rights Commission and the Anti-Discrimination Board of NSW. Explain why individuals and the state require such bodies.
2 Describe the role of at least three law enforcement agencies in New South Wales or Australia.
3 Explain how the role of one law enforcement agency has changed since 2001.
4 Discuss the use of taser guns by police forces to subdue and detain criminal suspects. Find recent cases that support your views.
5 Identify and describe a recent dispute between individuals that has been solved through mediation, arbitration or negotiation.
6 What is your opinion of the Australian Human Rights Commission, the Anti-Discrimination Board of NSW or Independent Commission Against Corruption? Do you think we need such bodies?

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Chapter 8
Contemporary issue: The individual and technology

Chapter objectives

In this chapter, students will:

- investigate the way in which the law has an impact on the relationship between individuals and technology in cyberspace
- identify the key features of the relationship between the individual and technology in cyberspace
- describe how the individual relates in cyberspace to other individuals, institutions, organisations, corporations and governments
- investigate the nature of the relationship between the individual, the legal system and cyberspace
- discuss the effectiveness of the legal system in addressing issues that relate to the individual in cyberspace.

Key terms/vocabulary

copyright
cyberbullying
cyberspace
cyberstalking
digital dossier
disinhibition effect
extradition
internet
Internet Service Providers (ISPs)
laissez-faire
libertarian
metadata
online predator
patents
racial hatred
terrorism
trademarks
World Wide Web

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Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Crimes Act 1914 (Cth)
Copyright Act 1968 (Cth)
Racial Discrimination Act 1975 (Cth)
Privacy Act 1988 (Cth)
Criminal Code 1995 (Cth)
Racial Hatred Act 1995 (Cth)
Communications Decency Act of 1996, 47 USC § 230
Crimes Amendment (Computer Offences) Act 2001 (NSW)
Cybercrime Act 2001 (Cth)
Spam Act 2003 (Cth)
Competition and Consumer Act 2010 (Cth)
Copyright Amendment (Online Infringement) Act 2015 (Cth)
Telecommunications (Interception and Access) Amendment (Data Retention) 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
United States of America v Ivanov, 175 F Supp 2d 367 (D Conn 2001)
Department of Internal Affairs v Atkinson and Others (High Court of New Zealand, 19 December 2008)

Legal oddity

In 2011, a wildlife photographer travelling in Indonesia had his camera set up with a remote trigger, and a crested black macaque (monkey) used it to take a number of 'selfies'. The photographer believed he owned the copyright in the photographs, but others argued that they belonged in the public domain, as he had not taken the photos himself. People for the Ethical Treatment of Animals (PETA) took this one step further, applying for a court order to administer proceeds from the photo for the benefit of the macaque who had pressed the remote trigger. In January 2016, the US District Judge dismissed the case, on the grounds that copyright law does not extend to animals.

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8.1 The impacts of technology on the individual

Governments face many challenges in trying to make regulations and laws where technology is concerned. The main difficulty is that technology is often on the cutting edge of development and therefore often gives rise to issues that have rarely or never been raised in political, legal and community discussions.

As Australians, we are exposed to technology every day – from making EFTPOS transactions, shopping on the **internet** and emailing our friends, to being involved in discussions about the ethics of stem cell research, genetically modified foods and cloning of animals or humans.

internet
a global network of interconnected computer networks that allows users to obtain and share information in a number of ways

An important area of technology is information technology; that is, the storage, sending and retrieval of information through computer systems. 'Information' is a broad category encompassing data of all types. Information may be expressed in mathematical form, as computer code, verbally or in some other type of language.

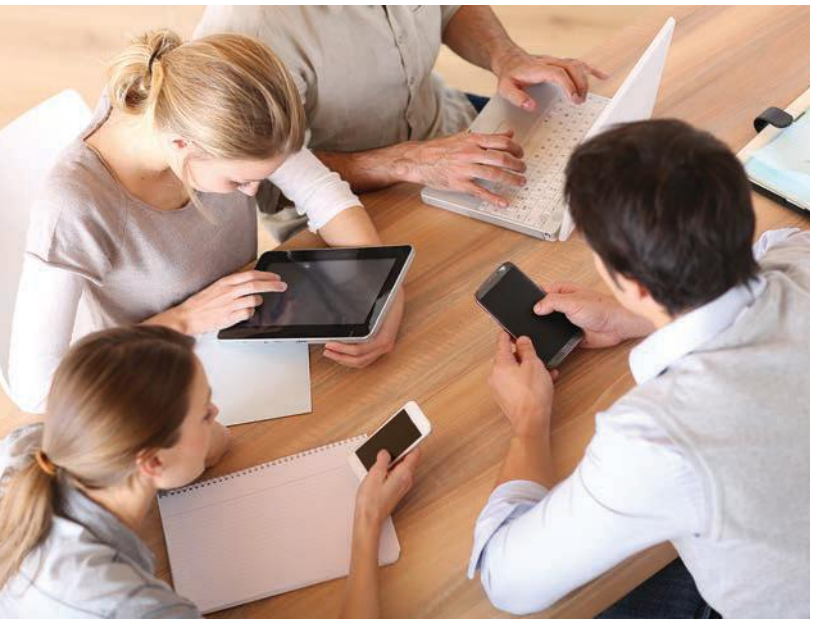

Figure 8.1 There are nearly four billion internet users in the world.

The internet

One of the most important and interesting technological developments, particularly in terms of the law, has been the creation of the internet. There are between three and four billion internet users in the world and this number is increasing every day. As a result, cybertechnology and cyberspace are major areas of interest for citizens and law-makers all over the world.

Legal Links

For an up-to-date estimate on statistics for the internet, see the website 'Internet Live Stats' via the following link: http://cambridge.edu.au/redirect/?id=6521.

The history of the internet

Information about the history of the internet is available in the digital versions of the book.

GO

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. Today, people are spending more and more of their time in cyberspace for entertainment, leisure, business, communication, education, research and even political activism. New developments in technology have long been the catalyst for great social, cultural and economic changes. However, the changes now being brought about by technological innovations relating to the internet are affecting our lives with unprecedented speed and in unpredictable ways.

cyberspace
the 'environment' in which electronic communication occurs; the culture of the internet

Cyberspace is the global online virtual world created by the interconnection of millions of computers on the internet. By the second decade

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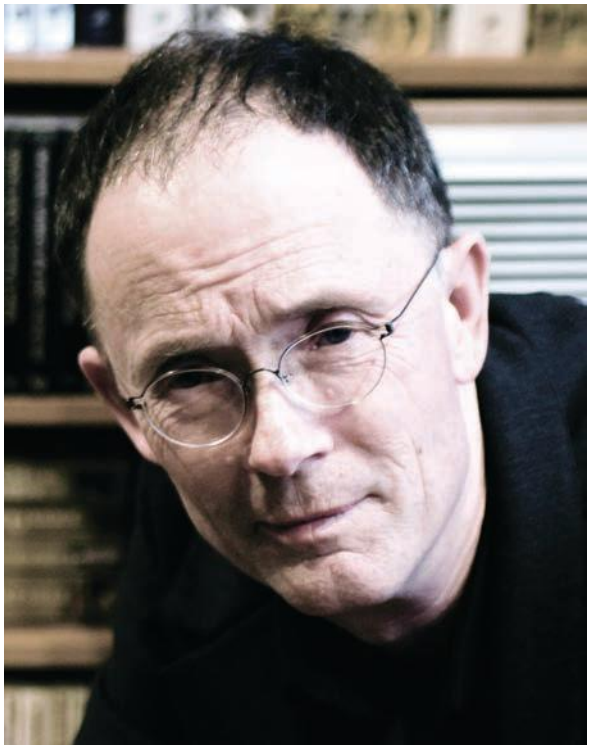

Figure 8.2 The term 'cyberspace' was coined by science fiction writer William Gibson in 1982, well before the internet as we know it today.

of the 21st century, cyberspace has emerged as a kind of parallel universe in which people live a part of their lives. We now speak of our online and our offline lives. 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. Its global nature poses particular challenges for the law.

In 1996, the US writer and political activist John Perry Barlow published 'A Declaration of the Independence of Cyberspace'. This short manifesto declared that government has no legitimacy in cyberspace, and those who 'gather' there have formed a democratic and egalitarian social contract that has no need of external controls.

Despite the optimism of anarchists and **libertarians**, it has become painfully apparent that cyberspace is no different from any other area of human activity. There is the potential for great good but also for great harm, and laws and regulations are needed.

libertarian
an advocate of minimal government control or interference in the lives of individuals

Research 8.1

View the Internet World Stats website. Look at two different regions. Compare the countries with the highest and lowest internet penetration in these regions.

The nature of cyberspace

There are at least three distinctive features of cyberspace that pose unique challenges for legal regulation.

- *It facilitates anonymity*. The internet has made it much easier for persons to distribute information and messages anonymously or using a pseudonym. Web-based email services and many online discussion forums allow you to create a user name and hide your identity if you wish. While domain names are actually identifiers for computers on the internet, and the IP number (physical address) of the computer being used can usually be determined, there is software that can be used to encrypt internet activity or to hide identifying information about where a website originated. This feature of cyberspace has certain advantages for individuals' privacy, but it also provides opportunities for cybercriminals.
- *It facilitates creativity*. The computers connected to the internet do not just retrieve information as a television receives programs from a network; they also permit information and services to be created and supplied through the internet. They can be used to create software programs that improve their performance or enhance or change their role. This feature makes the internet unlike any other electrical device or network that has ever been developed.
- *It 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. However, the negative side to the lack of national boundaries is that it is difficult for a nation-state to control what goes on within

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Cambridge University Press

Figure 8.3 The internet's global nature allows people to communicate at little or no cost to people with common interests all around the world.

Review 8.1

1 List some of the positive aspects of the global nature of cyberspace.
2 List some of the drawbacks, especially with respect to the enactment and enforcement of laws.

its territorial borders, if those activities are also taking place in cyberspace.

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 the 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, to alter data for some other reason or to maliciously spread a virus. Hacking also has the potential to be used in an act of terrorism.

The *Cybercrime Act 2001* (Cth) amended the *Criminal Code* (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* (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.

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. He was convicted on various charges stemming from his breach of s 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. He appealed to the Queensland Supreme Court, where convictions on two of the charges were set aside but the sentence of two years' imprisonment was not changed (*R v Boden* [2002] QCA 164).

Information about the case *United States v Ivanov*, 175 F Supp 2d 367 (D Conn 2001) is available in the digital versions of the book.

GO

Internet fraud

Fraud is intentionally misrepresenting or concealing information for the purposes of deceiving or misleading. 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 email, websites promoting pyramid selling (where people are offered the right to sell a product or service, as well as the right to sell

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Figure 8.4 Hackers are criminals.

the scheme itself in the same way), and unsolicited advertisements that come up when a search is performed.

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 Nigeria (or some other 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', in which the recipient of email that appears to be from a bank is asked to submit his or her account details. The information is then used to steal the person's money.

Fraud may also be perpetrated through the use of fake websites. In *Australian Competition and Consumer Commission v Chen* [2002] FCA 1248, the Australian Competition and Consumer sought declarations from the Federal Court of Australia that a foreigner Richard Chen had breached key provisions of the then *Trade Practices Act 1974* (Cth) prohibiting conduct likely to mislead or deceive consumers. Chen, an American, did not live in Australia and all of his activity was conducted from the United States. He operated three websites that appeared to be associated with the Sydney Opera House, and purported to sell tickets to performances there. The stated price for the tickets was twice the price of genuine ones, and consumers who provided their credit card details never received tickets. The Federal Court granted the declarations, as well as an injunction requiring Chen to remove the websites, take steps to prevent Australian residents from accessing them, and stop operating misleading and deceptive websites.

Legal Links

For further information on internet fraud, see the AFP website via the following link: http://cambridge.edu.au/redirect/?id=6522.

Research 8.2

1 Find the definitions for the scams listed below by accessing Scamwatch via http://cambridge.edu.au/redirect/?id=6523 and Internet Scams via http://cambridge.edu.au/redirect/?id=6524.
   - online auction and shopping scams
   - domain name renewal scams
   - spam (junk mail) offers
   - free offers on the internet
   - modem jacking
   - spyware and key-loggers
   - ringtone scams
   - up-front payment scams
2 Make a list of the 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. In other words, this is email that the recipient has not asked for or granted permission to have sent to him or her. It is bulk because it is sent to large numbers of people, often through the use of mailing lists. 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 service (MMS). It does not cover faxes, voice

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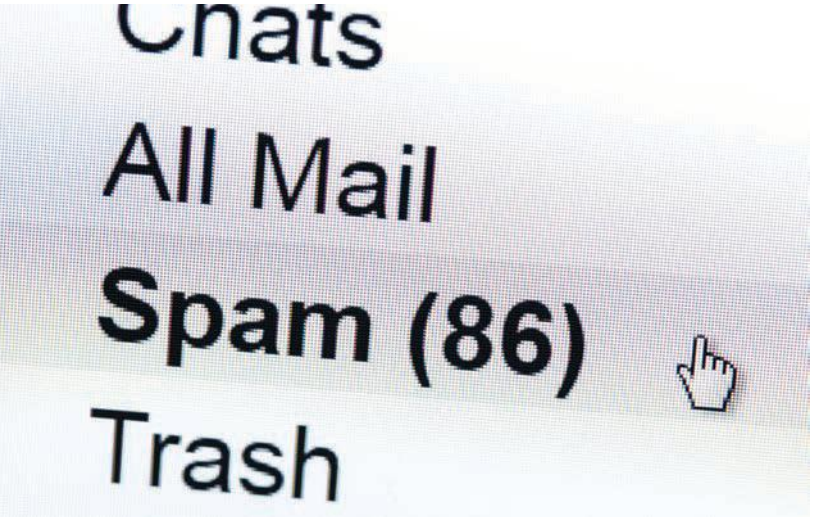

Figure 8.5 Spam is an annoyance to internet users.

telephone calls or messages, or unsolicited ads that pop up to be seen by an internet user.

The Act was passed as a result of public concerns about spam. As discussed above, 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 that people dislike contains advertisements for pornography and other products related to sex, illegal gambling schemes, pyramid selling, and misleading or deceptive advertisements. Its method of distribution means that inappropriate material can be sent to minors.

The *Spam (Consequential Amendments) Act 2003* (Cth) amended the *Telecommunications Act 1997* (Cth) and the *Australian Communications Authority Act 1997* (Cth) to enable effective enforcement. The Spam Act is enforced by the Australian Communications and Media Authority (ACMA), a Commonwealth statutory authority responsible for the regulation of radio and television broadcasting, telephone communications and the internet.

GO

Information about the case *Department of Internal Affairs v Atkinson and Others* (High Court of New Zealand, 19 December 2008) is available in the digital versions of the book.

Research 8.3

View the ACMA website and:

- find out how to make complaints about spam
- outline various ways in which spam is being fought in Australia.

Legal Links

For further discussion of spam and what is being done internationally to tackle it, view the following websites:

- Australian Competition and Consumer Commission 'The London Action Plan' via the following link: http://cambridge.edu.au/redirect/?id=6525.
- Spamhaus via the following link: http://cambridge.edu.au/redirect/?id=6526.

To see the current Australian spam legislation, view the Federal Register of Legislation website and enter 'Spam Act 2003' into the Quick Search field.

Cyberterrorism

Information about Cyberterrorism is available in the digital versions of the book.

GO

Cyberwarfare

One of the problems of a cyber attack is that it is hard to notice when it starts. It may take days before realising an attack is under way. We still have not had a Pearl Harbor on the internet. Part of the now discredited report *Rebuilding America's Defences*, written by a conservative think-tank called the Project for a New American Century, had US domination of cyberspace as one of the important ingredients in ensuring US global hegemony in the 21st century.

As stated in *Rebuilding America's Defences*:

> It is now commonly understood that information and other new technologies … are creating a dynamic that may threaten America's ability to

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> exercise its dominant military power … Control of space and cyberspace [will] be a key to world power in the future. An America incapable of protecting its interests or that of its allies in space or the 'infosphere' will find it difficult to exert global political leadership.

Regardless of the concerns about former President George W. Bush publicly endorsing the ideas of the Project for a New American Century, the report was probably right in identifying cyberspace as an area that the US defence force cannot ignore in the future.

Since 11 September 2001, concerns have arisen in US security circles about the US Defence Forces' ability to deal with cyber attacks. These security concerns have been heightened since then by a series of cyber attacks that some experts fear may be probing attacks from foreign adversaries who are trying to find weak spots in US security networks.

Types of attacks

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 (DoS) attacks – when a large number of computers in one country are used to launch a DoS 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.

Some known cyber attacks on the United States in the past show what is possible in cyberwarfare:

- Eligible Receiver – 1999
- Moonlight Maze – 1998
- Code Red – July 2001
- Mountain View – mid-2001
- Nimda virus – September 2001
- Slammer – January 2003
- Titan Rain – a series of coordinated attacks on the United States since 2003.

Research 8.4

Many of the attacks that the United States has experienced may be simply probes of US internet websites to find weaknesses. Research some of the cyber attacks mentioned above.

1. In what ways can cyberwar be fought?
2. Identify some recent cyber attacks.
3. What plans have been made to counter a cyber attack?
4. How would a significant cyber attack on the United States affect Australia?

Legal Links

View the PBS Frontline website and search for descriptions of some of the attacks mentioned above.

The Council of Foreign Relations website has an article called 'Confronting the Cyber Threat', which analyses the threats posed by cyberwarfare. Access the article via the following link: http://cambridge.edu.au/redirect/?id=6566.

It also links to the US Airforce's 2007 report by Shane P. Courville, titled 'Center for Strategy and Technology: Air Force and the Cyberspace Mission.' Access the article via the following link: http://cambridge.edu.au/redirect/?id=6567.

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 is the exception when it comes to international law and cyberspace. In many

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Review 8.2

1 Name three types of crime committed by means of the internet. Explain how each of these can cause harm to people.
2 What is fraud? How can it be committed by means of the internet? What are some other ways that fraud can be committed, besides on the internet?
3 What is spam? Is it merely an annoyance, or does it raise serious legal issues? Explain, using examples.
4 List legislation that has been passed specifically to deal with cybercrime. What other legislation has been used to prosecute crimes committed in cyberspace?

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.

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 these ideas. So the idea must have developed into something tangible – for example, a software program or an essay – to qualify for protection. Three types of intellectual property rights are **copyright**, **trademarks** and **patents**.

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 which is new, inventive or useful

Research 8.5

View the website of the World Intellectual Property Organization (WIPO) at http://cambridge.edu.au/redirect/?id=6527.

1 Locate WIPO's definition of intellectual property.
2 Make a list of the treaties regarding intellectual property.

Copyright

Copyright is the type of protection given to work intended to convey information or enjoyment of literary form such as books, software, broadcasts, films and music. Material that has been produced in Australia is protected by the *Copyright Act 1968* (Cth). This material is also protected by the laws of other countries that have signed the international treaties to which Australia is a signatory. 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* (TRIPS) (1994)

Figure 8.6 Controlling copyright can be an issue with digital content.

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- *WIPO Copyright Treaty* (1996)
- *WIPO Performances and Phonograms Treaty* (1996)
- Copyright Amendment (Online Infringement) Bill 2015.

New challenges for the law relating to copyright have arisen as a result of digital technology; that is, information represented by discrete signals. Computers are digital machines and cyberspace is therefore a 'digital environment'. Digital technology has made it very easy to copy and share music and film, and the legal issues relating to this are explored in Chapter 21.

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 agreements, 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 8.7 Trademarks of major companies make them readily identifiable.

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 to continue to research or develop new products or technology. A patent gives the owner the exclusive right to derive commercial benefit from the invention for the term of the patent, within Australia and its territories. International agreements regarding patents, such as the *Patent Cooperation Treaty* (1970), give our trading partners similar rights and ensure that the patent rights of Australian 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 reproduction of 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 factor in problems relating to intellectual property: 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 further information on trademarks and patents, view the IP Australia website via the following link: http://cambridge.edu.au/redirect/?id=6642.

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Review 8.3

1 What is a property right? (Refer to Chapter 3.) Explain the specific nature of intellectual property rights, in contrast to other kinds of property.
2 What can be protected by each of the following? Explain how each of these works.
   - copyright
   - trademark
   - patent
3 How are intellectual property rights affected by the increasing use of the internet? Discuss, with examples.
4 Outline some of the legal means of protecting intellectual property in Australia and internationally.

8.3 Difficulties with enforcing rights

There are a number of 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.

cyberbullying
harassment using digital media such as websites, email, chat rooms, social networking pages or instant messaging

cyberstalking
repeated harassment using email, text messaging or other digital media with the intention of causing fear or intimidation

In cyberspace, there are few barriers between individuals and 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**'.

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

Social networking sites such as Twitter and Facebook and online communication media such as chat rooms require varying degrees of public personal disclosure; that is, information of a personal nature is 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.

Privacy

The information that we present about ourselves online, including photographs, forms our '**digital dossier**'. This 'digital dossier' comprises all the information about a person, which is held in multiple locations.

digital dossier
all the types of information about a person that he or she has deliberately or unintentionally put onto the internet, 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.

There has been a trend towards the use of services and storage of files, documents, email and other personal information online, in '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. 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

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Figure 8.8 Cloud computing is revolutionising cyberspace while increasing security concerns.

Figure 8.9 The use of metadata by governments and corporations is a major privacy concern.

websites or web pages. So 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 social security, health insurance and taxation. Amendments to the Act in 2000 extended the privacy regime to parts of the private sector, relating to how businesses should collect, store, use and disclose personal information. Some states and territories, including New South Wales, have also enacted privacy legislation; others have privacy schemes for government agencies based on the privacy principles contained in the federal 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 2008, the Australian Law Reform Commission (ALRC) produced a report called *For Your Information: Australian Privacy Law and Practice*, in which it recommended extensive changes to privacy laws and practices to take account of new technology, as well as a way that individuals can bring a civil action for serious breach of privacy. The federal Privacy Act was introduced in 1988, predating super computers, the internet, mobile phones, digital cameras, ecommerce, sophisticated surveillance devices and social networking websites – all of which make it more challenging to keep personal information secure. The Privacy Act worked well for a long time, but without refinement it cannot keep up with developing technologies. Information privacy now connects with nearly every part of our day-to-day lives. This includes medical records and health status, finances and credit rating, and other personal details recorded on a vast array of company and public databases. Even our ability to display photos of ourselves online has privacy implications. In 2012, the federal government passed the *Cybercrime Legislation Amendment Act 2012* (Cth) to tighten up privacy rules by giving people more information about the use of their personal details in cyberspace. However, critics wonder whether this is enough and are concerned about government moves to store the browsing history of everyone in Australia.

Metadata

The real danger to privacy these days is **metadata**. Despite all these laws about privacy, the reality today is that metadata is being used by governments and corporations alike to discover more about people's tastes, interests and relationships. In the recent book

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Data and Goliath by Bruce Schneier, the author claims that we are living in the 'golden ages of surveillance' and that we are all 'open books to both government and corporations'. Schneier says 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'. For example, the following claims are made about how corporations and governments are using metadata:

- There is a whole industry devoted to tracking people in real time and that location data is sold to data brokers who resell it to anyone who is willing to pay for it.
- The US National Security Agency keeps comprehensive location information about mobile phones everywhere the world and that this information is used to target drone strikes.

metadata
the data about data; it is information that identifies individuals through phone and internet activity giving a detailed picture of their lives and relationships

Figure 8.10 Edward Snowden used to work in the United States as a contractor to the CIA. In May 2014, he fled the United States after leaking information about mass global spying carried out by the American National Security Agency. He was given temporary asylum in Russia.

Review 8.4

1. How might someone's 'digital tattoo' pose problems for him or her in the future? List some hypothetical scenarios. Outline ways that you can prevent this from happening with respect to your online activities.
2. What is metadata and why is it an increasing threat to everyone's privacy today?

Safety

Another potential danger of revealing too much about oneself is that false identities are easily created, and the person with whom you are communicating may not be genuine. Parents may be justifiably concerned about **online predators**, who assume an identity in order to entice young people into harmful encounters online or in the physical world.

online predator
person with malicious intent, such as sex offender or paedophile, who gives false and misleading identities with the aim of enticing their victims into harmful encounters online or in real life

For others, the disinhibition effect may contribute to behaviour such as rude language, harsh personal criticism or violent online games. At the extreme end of the continuum, the disinhibited behaviour may include threats, cyberbullying or cyberstalking.

Expression of **racial hatred** is illegal in Australia under the *Racial Discrimination Act 1975* (Cth). The *Racial Hatred Act 1995* (Cth) amended this Act to extend its coverage, giving people a mechanism to complain about racial hatred. In the offline world racial hatred may occur through speech, gestures, images or written publications. This law applies equally to cyberspace, at least for people under the jurisdiction of Australian law. As with other types of expression, it is relatively easy for anyone to encourage racial hatred in cyberspace.

racial hatred
abuse or denigration of a person because of his or her race, or verbal abuse or denigration of a race generally

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Figure 8.11 Facebook is an online social networking site that requires personal information.

In late 2008, there were calls in Australia to toughen laws on cyber-racism after a spate of occurrences on social networking sites. See *Criminal Code Act 1995* (Cth) Part 10.6 – Telecommunications Services 474.17 using a carriage service to menace, harass or cause offence.

> A person is guilty of an offence if:
> a the person uses a carriage service; and
> b the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Research 8.6

Research the laws involving cyber-racism in Australia and evaluate their effectiveness. Start with the Cyber-Racism section on the Australian Human Rights Commission website, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6528.

Legal Links

For further information on digital safety issues, see the Australian Government's Children's eSafety website via the following link: http://cambridge.edu.au/redirect/?id=6529.

Review 8.5

1 How are cyberbullying, cyberstalking and cyber-racism different from their counterparts in the physical world?
2 Should laws against these acts be drafted to relate specifically to cyberspace, or are existing laws adequate?
3 List some non-legal ways that could be used to protect against cyberbullying, cyber-racism and online predators. Consider the following agents in your answer: parents, teachers and schools, older teenagers (e.g. siblings, friends or mentors of younger children), software companies and internet service providers.

Protecting children

One of the most significant concerns about cyberspace is the need to protect children, not only from inappropriate content and online predators, but also from serious criminal offenders who victimise children. Child pornography is a legal and moral problem that goes beyond the legality of images or text on the internet or other media.

In the United States, laws to protect children from inappropriate material must be drafted in such a way as not to violate the right to freedom of expression contained in the First Amendment. Another difficulty is that if a law is too broad in the scope of what should be prohibited, it can prohibit too much – including content that is unlikely to be accessed by children or to have anything to do with the victimisation of children. This and other issues will be further examined later in the discussion of the proposed 'clean feed' legislation in Australia.

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In Court

***Reno v American Civil Liberties Union*, 521 US 844 (1997)**

In 1996, due to public pressure, the US Congress passed a law known as the *Communications Decency Act of 1996* (CDA). Two provisions of the CDA prohibited the 'knowing' transmission on the internet of obscene or indecent sexual communications or images to people under 18 years of age.

This was seen by many as a violation of the principle of freedom of expression. One of the groups that held this view was an advocacy organisation called the Electronic Frontier Foundation (EFF), an international non-profit group based in the United States and particularly concerned with preserving freedom of speech in the context of the internet. John Perry Barlow, mentioned previously, was a founding member of the EFF, and the CDA was the stimulus for his 'Declaration of the Independence of Cyberspace'.

Following a federal court's ruling that the CDA violated the First Amendment, the US Government appealed to the Supreme Court. A broad coalition of individuals and groups had joined the American Civil Liberties Union (ACLU) as plaintiffs in the original case, including not only the EFF but also organisations and trade unions of editors and publishers, high school journalism teachers and Human Rights Watch. The 'Reno' in the title of the case was Janet Reno, US Attorney General from 1993 to 2001.

The Supreme Court, affirming the lower court's decision, held that the indecency provisions of the CDA were an unconstitutional restriction of free speech. The court found that the terms 'offensive' and 'indecent' were vague, and the provisions of the CDA overly broad. It concluded that the CDA did not have enough of a focus on protecting minors from potentially harmful material. Moreover, there is no effective method of finding out the age of an internet user.

The court's view was that online communication differs significantly from broadcast media, in that a user will seldom encounter content 'by accident'. The internet should therefore be subject to less regulation.

Legal Links

For full text of the decision in *Reno v American Civil Liberties Union*, 521 US 844 (1997) refer to the following link: http://cambridge.edu.au/redirect/?id=6530.

Internet filtering

Similar concerns about offensive and obscene content were raised in Australia during the period of the Rudd–Gillard governments. The idea of 'clean feed' legislation originated during the Howard federal government and involved the establishment of a filtering scheme that would be imposed on all **Internet Service Providers (ISPs)**.

Internet Service Providers (ISPs)
companies that offer customers access to the internet

The Rudd Labor government that was elected in 2007 continued to consider the 'clean feed' proposal. The $70 million plan would block web pages listed in a 'blacklist' maintained by ACMA. It was argued that this would not only prevent internet users from seeing unwanted and inappropriate material, but would also combat child pornography itself. Two potential types of filter were canvassed. Either all pornographic material would be blocked, or an 'opt-in' scheme would allow users to continue receiving 'adult material'.

The mandatory proposal was much more restrictive than the voluntary ISP filter schemes operating in some European countries, which block only child pornography. One version of the scheme in Australia would include a wider range of material, some inappropriate for children but not necessarily involving pornographic or violent content. 'Social themes' upsetting to children could include divorce and euthanasia.

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It has been pointed out that criminals distributing child pornography seldom use sites that are accessible on the **World Wide Web**. Increasingly, they are using less public methods such as peer-to-peer networks, which allow single computers to communicate with each other; encrypted networks, or smaller networks using codes that only the members know; or other systems that prevent public access. Consequently, blocking websites is not an effective means of stopping the spread of child pornography.

World Wide Web
a system of documents that are accessible on the internet and that are connected to each other through hyperlinks the user can click on to be taken to another location; the World Wide Web is not the same thing as the internet

Some ISPs dislike the proposal because it is too easily bypassed by users, and because enforcement would be too onerous. Another objection was the risk that the filter would block material that has nothing to do with the type of content that the law aims to fight. Due to significant grassroots opposition to the 'clean feed' as well as the Labor Government's political problems, these proposals to filter the internet in Australia stalled and no action was taken on the 'clean feed.'

Figure 8.12 Since the Arab Spring of 2011, the Supreme Council of Armed Forces, which is the governing group in Egypt, has enforced strict controls over the internet and especially social media in a bid to prevent further dissent.

Approaches to rights

Laissez-faire approach to rights

Some internet commentators advocate a ***laissez-faire*** approach to information, which means they do not think it should be regulated in any way. They argue 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 taking this line is the Electronic Frontier Foundation, which was founded in 1990 with the primary goals of defending free speech, privacy and consumer rights.

laissez-faire
a French word literally translated as 'allow to do', used to describe economic philosophies that government should not intervene in business; may also be used in a broader sense of minimal government intervention in most aspects of society

Research 8.7

Follow the link to Barlow's 'A Declaration of the Independence of Cyberspace', of 8 February 1996, via the following link: http://cambridge.edu.au/redirect/?id=6531.

1 What are the key points of the speech?
2 Discuss Barlow's assertion that governments should keep out of cyberspace.

Interventionist approach to rights

Other commentators argue that an appropriate role for governments is to ensure that the law deals with online phenomena such as race hatred and pornography, and to ensure reasonable quality overall. These advocates do not trust the marketplace of ideas. They advocate a more active role for governments in regulating quality on the internet. This approach would involve:

- enacting legislation and/or international treaties
- imposing obligations on ISPs to block certain content
- strengthening enforcement agencies.

Other means of dealing with questionable material in cyberspace have been suggested. Many of these methods of improving the quality of information rely on the active involvement of online

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communities and of key actors and stakeholders, both private and public. These include not only governments, law-makers and law enforcement agencies, but also parents, teachers, software companies and other businesses. Governments would need to take a leadership role, but would also need to give the 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 skill classes in schools; search engine filtering; and 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, as there is a dearth of international agreements. Most of the laws regarding cyberspace are national laws that are tied to local values. Limits on national law enforcement remain despite the global nature of the internet.

Review 8.6

1. How is the debate about government regulation of internet content in the United States different from the form that it takes in Australia? How is it similar?
2. Do you think *Reno v American Civil Liberties Union* would be decided in the same way today? Give reasons for your answer. How likely is it that an internet user might encounter content 'by accident'? Give examples.
3. What were the positions of the two sides in the 'clean feed' debate?
4. Outline at least one argument for each side in the philosophical debate about how governments should approach individual rights regarding internet content. Be sure to provide reasons (evidence) for the claims that each side might make.
5. Think of at least one objection to the argument for each side's view. Which view is the more plausible? Justify your answer.

8.4 Future directions

Why laws are needed

In order to combat cybercrime of all sorts, there must be enforceable laws. Cyberspace is a new and exciting development in society, but arguably there is no reason to think people are any better able to regulate social behaviour there than in any other place, in the absence of external authority.

In 1995, when eBay was founded, the company's owners did not believe that they needed to rely on government or laws to make their online business work. They had an online 'feedback forum' where buyers and sellers could post praise and complaints about one another and their transactions, and one 'customer support person' who was paid $100 a month to resolve disputes. However, with the growth of the company, scams began to proliferate. Goods were offered but not delivered, hundreds of would-be buyers were affected, and it was only a matter of time before eBay faced a lawsuit by alleged victims of fraud. Without the threat of prosecutions to limit the relatively small number of dishonest users, cybercrime could ruin an online business. Governments are needed to create an environment where the rule of law prevails and where law enforcement mechanisms will deter those who break the law.

Governments provide public goods that enable individuals and businesses to use the internet effectively. These public goods are:

- the cable network and communication laws
- criminal law
- laws governing property rights
- enforcement agencies.

Essentially, the smooth functioning of the internet depends on governments preventing harm and protecting rights. Countries whose governments do a poor job of this are finding that big companies are refusing to do business there.

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Current status and sources of law in cyberspace

National

Statutes

States have produced numerous laws to govern use of the internet within their borders. Many laws relating to cyberspace are contained within more general statutes. For example, the *Crimes Act 1900* (NSW) contains ss 308 to 308I, which set out computer offences, including hacking. These provisions were added in 2001 by means of the *Crimes Amendment (Computer Offences) Act 2001* (NSW).

There are also Acts at federal and state level that specifically pertain to cyberspace activity such as the *Spam Act 2003* (Cth).

Court decisions

Superior courts can create precedents in relation to the legalities of activities in cyberspace. As we saw, the US Supreme Court's decision in *Reno v American Civil Liberties Union* that the indecency provisions in the *Communications Decency Act of 1996* were unconstitutional restrictions on free speech resulted in those statutory provisions being struck down. Although courts in one country are not bound by decisions in another country (that is, foreign decisions cannot serve as precedent), judges sometimes refer to cases from other countries in their decisions.

International

Unlike other areas of law where issues cross national boundaries, there are few specific 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 common issues faced by all states. This is yet to occur, however.

Some international organisations and their current roles with respect to governance in cyberspace are listed below.

- *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 UN-sponsored treaties or conventions that are specifically designed to govern cyberspace. Intellectual property aspects of internet use are looked after by WIPO.

Figure 8.13 International law has been slow to keep up with the internet.

- *World Intellectual Property Organization (WIPO)*: WIPO is a specialised agency of the United Nations concerned with intellectual property.
- *European Union (EU)*: The EU is an economic and political partnership of European nations that has regulatory powers in various areas of social and economic life. In 2003, the EU reformulated its regulatory framework covering communications to cover 'all electronic communication networks and services', and began to review that framework in 2008 to ensure that it stays current. The EU has made a number of treaties relating to cyberspace. Parties to the *Council of Europe Convention on Cybercrime* (2001), for example, include 38 European countries, Canada, Japan, Montenegro, South Africa and the United States.
- *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

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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. In 1973, the addressing system known as the Internet Protocol, or IP, became the accepted way of connecting all networked computers. In 1984, a simpler way of naming internet addresses was worked out with the establishment of the name server. Up to this point every internet address was known by a long number such as 121.255.098.4. Now, simpler names could be assigned to these numbers to produce easy-to-remember addresses. So, an IP address like 121.255.098.4 could become an easy-to-remember name like 'business.com'. In 1985, this was formalised as 'Domain Name System', or DNS, and the top-level domain names such as .com, .net and .org were introduced. In 1998, IANA became part of ICANN. 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.

Strategies for governments

In their efforts to exert control in cyberspace, governments do not have to be completely effective to be adequately effective. Achieving perfect legal control is quite often just too expensive.

Intermediaries

One way in which governments can exert control over content is by enlisting local intermediaries such as ISPs and the companies that control the physical internet connections. They can also influence the policy of what goes on the local portals for search engines. By utilising financial intermediaries, such as PayPal, banks or credit card companies, a government can wield huge influence over an industry – indeed, it can cripple it without going to court.

Needless to say, some countries that have utilised these methods are not known for having a high regard for freedom of expression or for corporate independence from government.

Prosecution of individual criminals

Quite often the simplest way a government can assert control over cyberspace is by physically arresting an individual suspected of cybercrime. The difficulty is that the person must be within the territorial borders of the government that is seeking him or her. Otherwise, **extradition** treaties can be used to remove the person from the country where he or she has taken refuge.

extradition
the handing over of a person accused of a crime by the authorities of the country where he or she has taken refuge to the authorities of the country where the crime was committed

Research 8.8

1. View the OpenNet Initiative website and look at the information relating to global internet filtering.
2. Using the 'view country profiles' drop-down menu, find some countries that have implemented ISP filtering schemes. Research the different schemes in use.
3. How do these schemes attempt to protect innocent content providers and internet users while filtering out objectionable material?
4. What are the types of objectionable material that they target?

Challenges to government control of cyberspace

One of the greatest challenges for governments is that each new technological innovation tends to make it easier for the law to be violated in some way. Often there will be a race between people using new technology to avoid the law, and authorities using new technology against the law-breakers. It can be quite costly for governments to chase and shut

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down illegal operations in cyberspace. Also, only developed (first world) countries have the financial and other resources to do this.

Another major difficulty for governments seeking to control content is the risk of censorship. As we have seen, this is of particular concern to countries with explicit protection for freedom of expression. On the other hand, countries that have no qualms about limiting free speech, such as China and Saudi Arabia, have achieved unprecedented control over internet content within their jurisdictions.

As there are many different legislative regimes in the world, what is illegal in one country may be permitted in another. In the absence of effective international conventions to deal with content that has human rights implications, such as child pornography, some nations have implemented measures such as ISP filtering.

Review 8.7

1 Why are strategies involving the use of intermediaries (such as ISPs, companies that provide physical infrastructure, and banks) problematic? List some of the objections that could be made to these strategies.
2 Name three problems for governments seeking to make certain types of web content illegal.

Global laws

The challenge of transnational cybercrime

Cybercrime is big business and it poses a challenge for law enforcement agencies. Crimes such as data theft, data tampering, and the creation of viruses and worms are enormously damaging. Companies also tend to under-report the effects of cybercrime on their business because they do not want the adverse publicity.

ISPs are not capable of blocking criminal activity unless they have the specific details of which user is involved. In combating cybercrime the enforcement agencies have to work quickly to deal with criminal acts because it is easy for criminals to slip back into anonymity once they know they have been detected.

One major reason for the Australian Government introducing the Metadata Laws in 2015 was to combat **terrorism**. This legislation requires ISPs to store information about their customers' phone and online usage for two years. However, civil liberties groups are concerned that too much power has been given to government in this legislation.

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

The only binding international treaty on cybercrime to have been formed to date is the *Council of Europe's Convention on Cybercrime* (2001), which entered into force in July 2004. However, it has been difficult getting countries to agree to sign the convention due to sensitivity about sovereignty and authorising third parties to do cross-border searches. Also, there are civil liberty concerns that the treaty jeopardises free speech and privacy rights. Forty-seven nations had signed and ratified the convention as of 2015, leaving seven signatories who have not yet ratified it. Though the aims of the treaty are noble, it has not yet made a significant contribution to fighting cybercrime. Nations are still relying on unilateral action and ad hoc cooperation

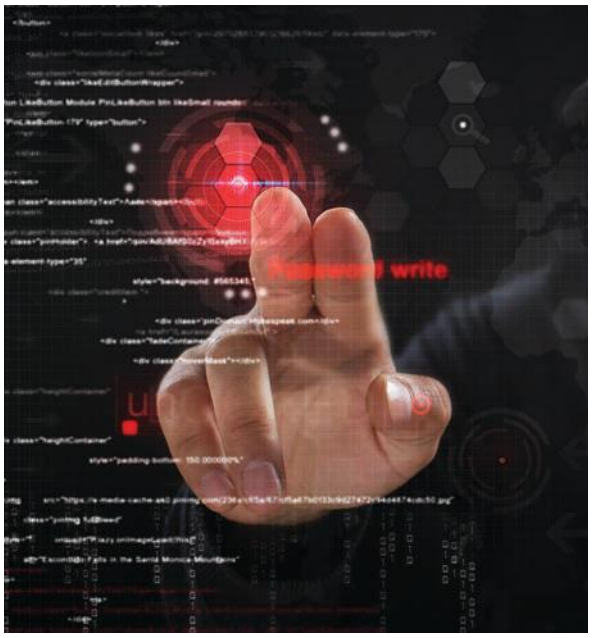

Figure 8.14 Concern over terrorist activity being organised over the internet led to the Australian government introducing Metadata Laws.

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with a few other like-minded nations to fight cybercrime.

However, the Convention on Cybercrime (Draft 25), along with recommendations made by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, influenced the development of *Australia's Cybercrime Act 2001* (Cth), discussed earlier in the chapter.

Legal Links

For further information about the Convention on Cybercrime, view the link via http://cambridge.edu.au/redirect/?id=6532.

ICANN's potential

One organisation that has enormous potential to be the ultimate global authority on the internet is ICANN. This non-profit organisation is responsible for the domain name system (DNS). The founders of ICANN intended it to be the ultimate authority for the internet. However, the US Government had responsibility for its oversight, under a memorandum of understanding between ICANN and the US Department of Commerce, from 1998 to 2009. Representatives of other countries and other observers have questioned why the United States should have primary authority, and argued that it should be more independent and therefore more international. In 2009 the United States gave up its control of ICAAN.

Some of ICANN's achievements have included:

- decentralisation of the sale and distribution of domain names, which led to a significant drop in the price of registering a domain name
- establishment of an effective method of resolving trademark disputes
- reduction in the incidence of cybersquatting; that is, making a profit from the use of someone else's domain name.

Most of all, ICANN has ensured the stability of the internet so that individuals, businesses and governments rarely worry about the internet collapsing.

Conclusion

Law's effectiveness in cyberspace has been limited because the internet is a global medium and laws are limited by national boundaries. The tension between global and local interests, as well as the cost of enforcing law with respect to the internet, has been a hindrance. In addition, law enforcement is tied to its area of jurisdiction, and the anonymity possible on the internet has made it difficult to trace offenders. Often, law must use a case-by-case approach, and prioritise cases according to those that have the most reasonable prospect of enforcement.

When drafting legislation and agreements, both national governments and international organisations must ensure that the new law or reform can accommodate the rapid pace of technological change, so that it is not made redundant or irrelevant in a short time. They must also avoid the unintended consequences of well-intentioned laws, balancing the protection of people directly or indirectly affected by activities in cyberspace with individual rights and community good.

Given the international nature of cyberspace, its effective regulation will require, at the very least, cooperation among states. A binding and enforceable international regime will require considerable effort, and quite possibly a voluntary relinquishment of some national authority.

Figure 8.15 Law's effectiveness in cyberspace has been limited because the internet is a global medium and laws are limited by national boundaries.

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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.
- Crimes specific to cyberspace include hacking and spam.
- Fraud and violations of intellectual property rights are not specific to cyberspace, but they take on a distinctive character in that context.
- Privacy and safety issues are of concern to many internet users, and particularly to parents of young users.
- The Australian Law Reform Commission has recommended the development of a statutory tort of breach of privacy, and other reforms to take account of new technology.
- Efforts to protect children from indecent or inappropriate material on the internet can conflict with the protection of individual rights to free expression. Combating serious criminal activity that makes use of the internet faces similar challenges, as well as the difficulty of enforcement.
- Philosophical approaches to rights in cyberspace fall into two general camps: *laissez-faire* and interventionist.
- While greater government control of cyberspace has clear benefits with respect to fighting crime, democratic governments must ensure that individuals' civil rights are not violated.
- International regulation of cyberspace is in its infancy.

Chapter summary questions

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 communitarianism

2 It can be concluded from the US Supreme Court decision in *Reno v American Civil Liberties Union* that:
- **A** cyberspace requires some degree of government control
- **B** laws that attempt to regulate internet content may restrict free speech
- **C** online communication is more like a conference call than a private conversation
- **D** all of the above

3 The international organisation concerned with copyright law is:
- **A** ICANN
- **B** IANA
- **C** the UN
- **D** WIPO

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

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

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Short-answer questions

1 Identify the various sources of law in cyberspace. Give examples.
2 Describe the various types of criminal offences that occur in cyberspace.
3 List the various types of intellectual property and explain how cyberspace may pose unique problems for the law in relation to them.
4 Describe the various ways in which privacy can be violated in cyberspace.
5 Explain how privacy is protected in Australia.
6 List some of the problems arising from the free and unrestricted transmission of information in cyberspace.
7 List some of the problems arising from government efforts to prevent the transmission of some types of information in cyberspace.
8 Explain why government control of cyberspace is constantly challenged.
9 List the international organisations that have some authority for the regulation of cyberspace. Describe the function and jurisdiction of each.
10 Outline the reasons why law is not always effective in cyberspace.

Extended-response questions

1 Evaluate the role of case law in shaping the regulation of the internet. Refer to two prominent cases in your answer.
2 Describe the features of the internet and explain the implications of these features on law-making in cyberspace.
3 'In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost.' Assess the implications of this aspect of John Perry Barlow's 1992 vision of cyberspace.
4 Evaluate the usefulness of international treaties in governing cyberspace.
5 Assess the effectiveness of government efforts to fight crime in cyberspace.

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

GO

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Part III
Law in practice

30% of course time

Principal focus

Through examining current issues and examples, students will gain an understanding of the practical operation of the law.

Themes and challenges

- How justice, laws and society are connected
- How law reform and development reflect changes in society
- Our reliance on the rule of law and its importance
- The effectiveness of the legal system in responding to and dealing with issues
- The role of legal mechanisms in effectively achieving justice for individuals and society

Chapters in this part

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Issue 1:

Groups or individuals suffering disadvantage

Chapter 9
Children and young people

Chapter objectives

In this chapter, students 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.

Key terms/vocabulary

adoption order
caution
children
corporal punishment
doli incapax
foundling
guarantor
indictable offence
juvenile
prohibited person
public space
sanction
summary offence
tort
warning
working with children check
young people
Youth Justice Conference

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Relevant law

IMPORTANT LEGISLATION

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)
Young Offenders Act 1997 (NSW)
Children (Protection and Parental Responsibility) Act 1997 (NSW)
Commission for Children and Young People Act 1998 (NSW)
Children and Young Persons (Care and Protection) Act 1998 (NSW)
Adoption Act 2000 (NSW)
Australian Citizenship Act 2007 (Cth)

SIGNIFICANT CASES

Gillick v West Norfolk and Wisbech Health Authority [1985] 3 All ER 402
Department of Health and Community Services (NT) v JWB & SMB ('Marion's case') [1992] HCA 15
Re W (A Minor) [1993] Fam 64

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9.1 Children, young people and the law

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.

children
generally persons aged 15 years and younger, depending on the legal context

young people
in NSW, persons aged between 16 and 18 years

How the law defines 'children' and 'young people'

Traditionally, the legal age of adulthood was 21 years. In the past 20 to 30 years, most jurisdictions have lowered this age to 18 years.

Article 1 of the *Convention on the Rights of the Child* (CROC) 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.

Figure 9.1 Under the law, a person aged 15 or younger is generally regarded as a 'child'. In New South Wales, a person between the ages of 16 and 18 is considered a 'young person'.

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 19th 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 19th 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, 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.

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

Children were 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.

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Figure 9.2 Children have a right to protection.

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, 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 wasn't until the introduction of a minimum working age that children began to attend school regularly.

By the end of the 19th 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* (CROC), and the *Gillick* case in England.

Convention on the Rights of the Child

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

CROC 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

Gillick v West Norfolk and Wisbech Health Authority [1985] 3 All ER 402 was a House of Lords decision. The Department of Health and Social Security 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 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 he or she had 'sufficient understanding and intelligence to enable him or her to understand fully what is

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proposed'. In other words, children have the right and the ability to make decisions to affect their lives, and they can do so competently as long as they understand the implications of their decisions.

Review 9.1

1. What challenges did children and young people experience in the 19th century in England? Give examples.
2. What is meant by *doli incapax*?
3. Outline how the law defines children and young people. Use examples.
4. Read about the facts of the Gillick case via the following link: http://cambridge.edu.au/redirect/?id=6533. Comment on the implication of the decision by the House of Lords.

Research 9.1

View the website of the Office of the High Commissioner for Human Rights.

1. Write a one-page summary of *UN Convention on the Rights of the Child* (1989) (CROC).
2. What is the significance of CROC? Does it bear any relation to the Gillick case? Give reasons for your answers.

9.2 Legal responses

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** made under the *Adoption Act 2000* (NSW) must also be registered (*Births, Deaths and Marriages Act 1995* (NSW) s 23). A child's name may be changed, and generally the child must consent to this change (*Adoption Act 2000* (NSW) s 101; *Births, Deaths and Marriages Act 1995* (NSW) ss 28, 29).

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. It also severs the legal relationship that existed between the adoptive child and his or her natural or legally recognised parents or guardians prior to the adoption process.

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.

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Figure 9.3 Children have the right to education.

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 s 22 of this Act, parents must send their children to a government school or a non-government school registered with the NSW Board of Studies Teaching and Educational Standards, 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 Office of Industrial Relations in NSW, 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 and Training 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. The report gave an interesting profile of young workers throughout the state and the commission reaffirmed its findings in 2008. 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.
- High levels of harassment and injury were reported by the children surveyed.

Research 9.2

View the websites for Young People at Work and Lawstuff to research other aspects of work for children and young people. Summarise your findings in a few paragraphs.

Medical treatment

In *Department of Health and Community Services (NT) v JWB & SMB* ('Marion's case') [1992] HCA 15, 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, she or he is capable of consenting to medical treatment.

This common law test is subject to s 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. The *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 174 authorises a medical or dental practitioner to carry out emergency treatment on a child or young person without parental consent.

As legislation does not deal with a young person's right to refuse medical treatment, this

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Figure 9.4 Parents have an obligation to seek medical treatment for their children.

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 his or her 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 of 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 s 19 of the Act, is a situation where a young person enters an agreement that is for his or her own benefit and is a necessity such as 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.

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

The Supreme Court of NSW 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 his or her own wrongful acts. The general rule is that parents are not liable for **torts** committed by their children.

tort
civil wrong involving breach of a duty; torts include negligence, defamation, nuisance, and trespass to the person, goods or land

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.

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Figure 9.5 Young people are expected to live at home until they are 18.

Inheritance and parentage
Care and control

GO

Information on inheritance and parentage, and care and control, including the *Children and Young Persons (Care and Protection) Act 1998* (NSW) is available in the digital versions of the book.

For the purposes of this unit of work, not all legislation associated with family matters, such as the *Family Law Act 1975* (Cth) and *the Family Law Reform Act 1995* (Cth), have been referred to, as these are covered in detail in the HSC course.

Review 9.2

1 How does a child become an Australian citizen?
2 List 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.

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.

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

The *Young Offenders Act 1997* (NSW)

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 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.

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

indictable offence
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 a greater penalty

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Under the Act, children and young offenders who have committed an offence covered in the Act may proceed through a three-tiered system of diversionary processes, comprising **warnings**, **cautions** and **Youth Justice Conferences**.

warning
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 measure to divert young offenders from the court system through a conference that addresses the offender's behaviour in a more holistic manner

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 is appropriately dealt with by caution by considering the seriousness of the offence, the degree of violence involved and 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.

A youth justice conference may be used for offences of the same gravity as those for which a caution is imposed or one that is more serious such as those involving harm to a victim. Conferences are designed to encourage the offender to take responsibility for his or her own actions, to provide support services, to promote the rights of victims, and to involve families and others in the justice process.

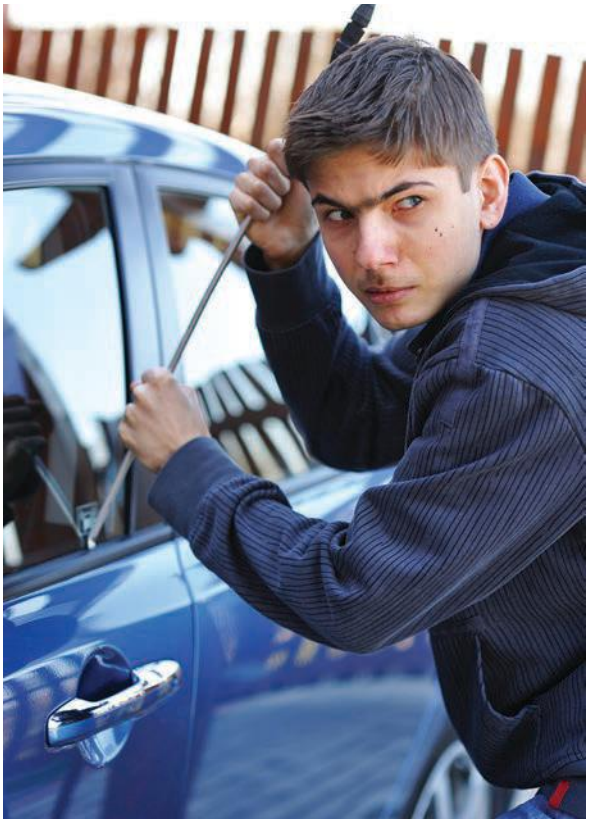

Figure 9.6 The Young Offenders Act aims to divert young offenders from the court system.

Crimes Legislation Amendment (Police and Public Safety) Act 1998 (NSW)
Children (Protection and Parental Responsibility) Act 1997 (NSW)

Information on *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) and *Children (Protection and Parental Responsibility) Act 1997* (NSW) is available in the digital versions of the book.

GO

Legal Links

The NSW Police Force website has information on warnings, cautions and youth justice conferences, which can be accessed via the following link http://cambridge.edu.au/redirect/?id=6534.

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Review 9.3

1 How are children and young people protected from discrimination?
2 Explain the purpose of *doli incapax*. What age group does it apply to?
3 What kind of offences does the *Young Offenders Act 1997* (NSW) apply to?

The role of the United Nations

The *Convention on the Rights of the Child* (CROC) 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 above, 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.

Figure 9.7 Child slavery and the use of children and young people as soldiers are continuing human rights challenges, despite international instruments such as CROC.

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 are as follows.

The 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.

A key role is making recommendations to government and non-government organisations 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* and the *Children (Criminal Proceedings) Act 1987* 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.

The 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.

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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 on employers reduce the likelihood of prohibited persons having contact with children in the course of their work.

working with children check
a check by the NSW Office of the Children's Guardian on the appropriateness of a person in NSW 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

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.

Review 9.4

1 Outline the main role of the NSW Advocate for Children and Young People.
2 Describe what is meant by the 'working with children check'.

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 Department of Family and Community Services (Community Services NSW).

Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 71 and 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'.

Community Services NSW

Community Services NSW 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 child care through licensing, and the funding and regulation of adoption services.

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 Family Court. Its legal representatives will also appear for children and young people facing criminal charges in the Children's Court.

The 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.

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 Department of Community Services (DOCS) for any matter. With the objective

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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. From 2012 to 2013, 1067 children died in New South Wales. The ombudsman's office report released in 2015 stated that 41 (3.8 per cent) of these deaths as reviewable: Of these:

- nine children died as a result of abuse (five), or in circumstances suspicious of abuse (four)
- eighteen children died in circumstances of neglect (15) or suspicious of neglect (three)
- fourteen children died while in care; all of whom were in statutory out-of-home care.

NSW Civil and Administrative Tribunal

As discussed in Chapter 7, the NSW Civil and Administrative Tribunal reviews 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 People Act 1998* (NSW).

COAG National Framework

In 2009, the Council of Australian Governments, an intergovernmental forum made up of the federal and all state and territory governments, published its *National Framework for Protecting Australia's Children 2009–2020*. 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.

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 Administrative Decisions Tribunal can play in protecting the rights of children.
3. What are the strengths and weaknesses of non-legal mechanisms with respect to the rights of children?

9.3 Non-legal responses

As children and young people cannot vote, it is difficult at times for their voices to be heard.

There are some very effective non-legal mechanisms that keep the issues of children and young people on the political agenda. They may be the first point of call, and 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 negotiating employment contracts for young people entering the workforce for the first time.

Kids Helpline

The 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 about issues, including family relationships, child abuse, mental health, bullying, drugs and alcohol, and eating and weight issues, as well as specific issues faced by people from Indigenous, non-English-speaking or rural backgrounds. View the Kids Helpline website for more information.

Figure 9.8 The Kids Helpline is a free service that gives advice and counselling to young people.

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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 provides fact sheets, case studies, job profiles and other information about work, specifically directed to young people.

Research 9.3

Search the internet for the websites of these institutions and organisations involved in protecting the interests of children and young people. Prepare a fact sheet on two of your choosing.

- Committee on the Rights of the Child
- The NSW Advocate for Children and Young People
- The NSW Office of the Children's Guardian
- The NSW Children's Court
- Community Services (formerly Department of Community Services)
- Legal Aid NSW
- The NSW Ombudsman
- The Australian Council of Trade Unions

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 come into contact with 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.

Seen and Heard: Priority for children in the legal process, a joint inquiry of the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission conducted in 1997, examined the relationship of children and young people and the legal process. Seventy-eight per cent of the 843 children and young people surveyed said that the police rarely treated young people with sufficient respect.

> 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.
>
> Source: 'Young People and Public Space' conference workshop presented by the Youth Justice Coalition and Youth Action and Policy Association, 2002

The *Seen and Heard* inquiry also examined how policing could become more consistent with CROC provisions and recommended that national standards should be implemented via legislation or policy in certain areas of concern. Some of the main areas are outlined below.

Young people and public spaces

Information relating to young people and public spaces is available in the digital versions of the book.

GO

Arrest and police interview

In some jurisdictions it is alleged that police rely heavily on arrest 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 Indigenous youth.

Article 37(b) of CROC states that arrest should be a 'last resort', not a routine practice, as it can be a very

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negative experience for children and young people. The *Seen and Heard* report also recommended that for children at risk, welfare and health services may be the more appropriate agencies to deal with the situation. This is not to deny that arrest is appropriate when it is necessary for a police officer to protect the community.

All suspects have the right to contact a lawyer and to have him or her 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, a situation sometimes exacerbated by language difficulties, 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 at the time of the *Seen and Heard* report was 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 the age of the offender and the circumstances under which the offence was committed. The report noted that research has indicated that detention and other harsh sentencing options are generally ineffective as deterrents to reoffending.

Most jurisdictions do this. In New South Wales, the courts follow guidelines under the *Children (Criminal Proceedings) Act 1987* (NSW), which gives special consideration to juvenile offenders. However, the report suggested that there was room for improvement in this 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' and recommending 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 that some young offenders are missing out on the benefits that conferencing offers. 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.

A further criticism of the application of the provisions of the Young Offenders Act from recent findings 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 NSW

Figure 9.9 Detention and other harsh sentencing options are reported as being ineffective deterrents to reoffending.

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Young Offenders Act (1997) is currently no more effective than the NSW Children's Court in reducing juvenile re-offending among persons eligible for a conference'.

Conferencing in Victoria produced lower reoffending figures but it is also suggested that this may be influenced by the fact that Youth Justice Conferencing in that state considers more serious matters and conferencing is not as easy to dismiss as a soft option.

Dr Weatherburn went on to say that, 'One 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* and the *Children (Criminal Proceedings) Act 1987* 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.
- The report also goes on to say, '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.'
- Lastly, it argues that 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.

Care and protection of children and young people
Children and young people in the workplace

Information on care and protection of children and young people and children and young people in the workplace is available in the digital versions of the book.

GO

International issues

Children around the world are exploited and abused where the laws of their countries fail to offer protection to them. There are approximately 250 million child labourers worldwide. In 2012, it was estimated there were as many as 250 000 to 300 000 children and young people involved in armed conflict, with up to 100 000 of these believed to be in Africa.

In countries ravaged by war and famine, where family structures have been destroyed, children lack the protection normally afforded to them within the family. Very 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.

Figure 9.10 Many products sold throughout the world are still made using forced child labour.

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Australia's obligations under the *Convention on the Rights of the Child*

As discussed earlier in this chapter, the Committee on the Rights of the Child examines the reports of parties to CROC and their compliance with their obligations under it. 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.

Australia has been a strong supporter of CROC from the very outset, 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.

The Joint Standing Committee on Treaties was set up to investigate and report on:

- issues arising from treaties
- proposed treaty actions
- questions relating to a treaty which one of the houses of parliament or a minister has referred to it
- other matters which the Minister for Foreign Affairs has referred to it.

For example, in 1998 its Report 17 looked at domestic ramifications of ratification; federal, state and territory progress in complying with CROC; the adequacy of programs and services for children's health, education and welfare; the adequacy of legislation in addressing the needs of children; and further action required. Nonetheless, some have argued that the development of a process for scrutiny of draft legislation for compliance with treaty principles should be a high priority.

Other deficiencies in Australian law regarding CROC 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, except in NSW, where 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 on junior rates of pay.
- It is argued that the criminal age of responsibility of 10 years is too low.

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

Child executions

Information on child executions is available in the digital versions of the book.

GO

Research 9.4

Research an international human rights issue regarding children and young people. Prepare a fact sheet outlining the issue. Issues could include child slavery, the use of children as soldiers in conflict or forced child labour. Use the Amnesty International website's search function to get started.

Conclusion

The rights of children have come a long way. Australian legislation has established processes and institutions to recognise and protect the important role that children and young people play in our society. It is accepted that these individuals have special needs because of their age, and that their physical, intellectual, emotional and social development depends on legal and social mechanisms to allow them to flourish.

There is still cause for great concern about the exploitation and abuse of children internationally. The force of international law relies on the domestic measures taken to implement the rights contained in treaties such as CROC, and the pressure brought to bear by the parties, not only by the treaty-based human rights committees.

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Chapter summary

- Historically, children had no legal rights. This began to change gradually in the 19th century, with the introduction of free compulsory education and laws limiting children's labour.
- The *Convention on the Rights of the Child* was an important development in promoting the rights of children and young people. It is the most signed of all international treaties.
- The law generally defines a child as a person under the age of 16, and a young person as one aged 16 to 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 *Convention on the Rights of the Child*.
- 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 NSW and non-government adoption service providers. It also conducts 'working with children' checks.
- The Children's Court has a dual role with respect to children and young people. It hears criminal matters relating to young offenders as well as care applications for children and young people considered to be at risk of harm.
- The Department of Community Services (DOCS) investigates reports of children considered at risk of harm.
- Non-legal mechanisms for protecting the rights of children and young people include counselling services and other community organisations.

Chapter summary questions

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 and young people under the age of 10 are not responsible for their crimes.
D People with mental disabilities are not responsible for their crimes.

2 Which of the following is the best definition for 'young person'?

A a person under the age of 16
B a person between the ages of 12 and 16
C a person aged between 16 and 18
D a person aged between 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 *Convention on the Rights of the Child* (CROC)?
   - **A** Laws must be passed within Australia to implement all of the provisions of CROC.
   - **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 CROC.
   - **D** Australia will pass laws recommended by the United Nations General Assembly.

5 Which of the following bodies monitors the mandatory screening of applicants for jobs in child care?
   - **A** Australian Council of Trade Unions
   - **B** NSW Department of Family and Community Services
   - **C** NSW Commission for Children and Young People
   - **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 19th century. Explain why this occurred.
2 In three paragraphs, define child abuse and explain some of the issues in relation to it.
3 Provide examples of contexts where the criminal justice system treats children and young people differently from adults.
4 Explain how the *Young Offenders Act 1997* (NSW) is unique and outline some of the recent criticisms made of the Act.
5 Comment on the extent to which the United Nations can regulate the implementation of the *Convention on the Rights of the Child* throughout Australia and the rest of the world.
6 Outline the roles of the NSW Commission for Children and Young People.
7 What challenges might confront Community Services NSW in performing its role effectively?
8 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.

GO

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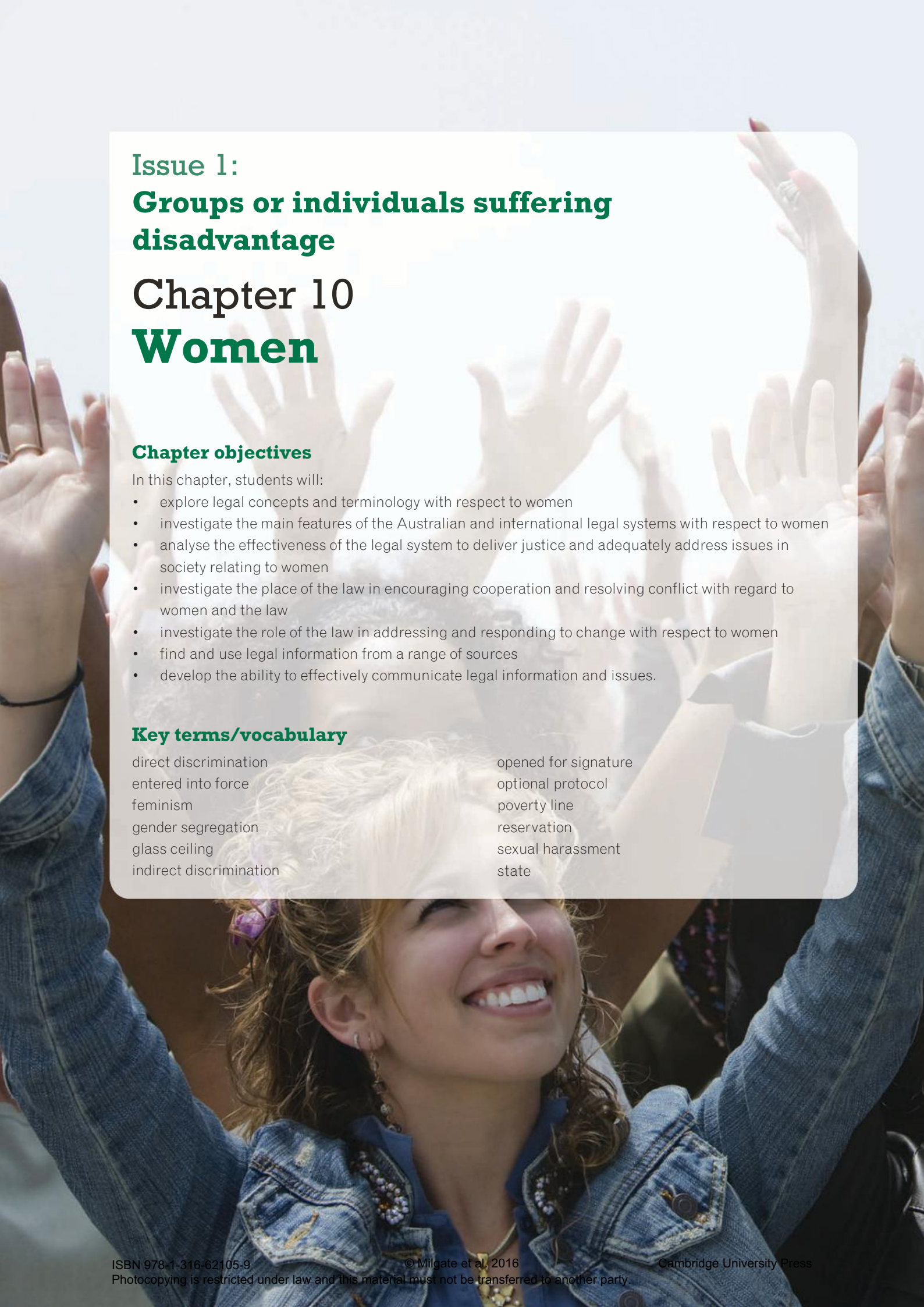

Issue 1:

Groups or individuals suffering disadvantage

Chapter 10
Women

Chapter objectives

In this chapter, students will:

- explore legal concepts and terminology with respect to women
- investigate the main features of the Australian and international legal systems with respect to women
- analyse the effectiveness of the legal system to deliver justice and 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.

Key terms/vocabulary

direct discrimination
entered into force
feminism
gender segregation
glass ceiling
indirect discrimination
opened for signature
optional protocol
poverty line
reservation
sexual harassment
state

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Relevant law

IMPORTANT LEGISLATION

Women's Legal Status Act 1918 (NSW)
Family Law Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth), formerly the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)
Workplace Gender Equality Act 2012 (Cth)

SIGNIFICANT CASES

O'Callaghan v Loder [1984] EOC 92–023

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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 men have held most of the political power and held most of the wealth in most societies. Intended or not, policies and laws have favoured men in all facets of society. 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, especially in the workplace.

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 many years, the attitude that women are different from men and inferior in significant ways has been reflected in the laws and policies of many countries, including Western societies. These attitudes meant that women had only a short period of paid employment – if any – until they married and took up the role they were destined to fulfil: homemaker. Men 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.

Figure 10.1 Historically, women's role was that of homemaker. As a result, many women are still expected to fulfil that role.

This position was strongly influenced by biology. As most women were always bearing children (no reliable and safe contraception was available), they were left 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. Much was written and said by men about women, especially in Victorian England, from reasons as to why they belong in the home bearing children to analysis of their sexual desires.

There have been signature times throughout the last 120 years where women's restricted roles were more prominently challenged. The two World Wars saw women, through necessity, take on non-traditional roles due to the shortage of men on the home front.

This was especially so during the Second World War. 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. They came to see that they had potential beyond their traditional roles in society, and began to ask why many areas of employment were denied to them and, more 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 such as the establishment of a national network of childcare centres and equal pay. It is considered a 'landmark manifesto' of Australian **feminism**.

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

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Figure 10.2 During the Second World War, women took on roles in factories and on farms to help with the war effort.

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.

The 1960s and 1970s was the next important period when women challenged their 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 couldn't be served in the 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, as women still lack pay equity, may suffer violence in the home and are underrepresented in senior management roles in the workplace.

Review 10.1

1 Describe the social attitudes about women prior to the 20th century and give some reasons why these attitudes permeated society.
2 Prepare 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 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 19th century, there seemed no pressing reason for young women to complete their secondary education, let alone go to university. 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. This did not deter some women, whose thirst for knowledge 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 some were elected to parliament in the 1920s.

The participation rate of young women in education has continued to increase significantly over the past 30 years, and in the years 2001–12 has increased marginally (see Tables 10.1 and 10.2).

Women enrolled in higher education comprised 53 per cent of enrolments in 2012. However, women have been underrepresented in trade apprenticeships in Australia and are substantially

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Table 10.1 Education participation rate[a][b], 15–24 years

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2012
Males %	56.1	56.1	55.9	55.9	56.2	56.1	56.5	59.7	57.8	58.4	59.7
Females %	56.0	57.9	58.5	57.8	58.1	57.5	57.9	58.1	58.3	59.8	61.9

(a) Includes persons enrolled in formal or non-formal learning.
(b) Males and females participating in education as proportion of persons aged 15–24 years for each sex.

Table 10.2 Apparent retention rate for full-time school students, year 7/8 to year 12

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2012
Males %	68.1	69.8	70.3	70.4	69.9	69.0	68.8	68.9	70.8	73.2	74.6
Females %	79.1	80.7	80.7	81.4	81.0	80.7	80.1	80.5	81.4	83.0	84.3

Table 10.3 Workforce participation by gender, full-time/part-time status and occupation

	Female			Male		
Occupation	Full-time (%)	Part-time (%)	Total (%)	Full-time (%)	Part-time (%)	Total (%)
Clerical and administrative workers	42.6	31.8	74.4	21.5	4.1	25.6
Community and personal service workers	26.1	42.0	68.1	20.1	11.8	31.9
Sales workers	20.1	40.3	60.4	24.0	15.6	39.6
Professionals	34.3	19.0	53.3	40.5	6.2	46.7
Managers	28.2	7.8	36.0	59.7	4.3	64.0
Labourers	11.0	23.2	34.2	42.3	23.5	65.8
Technicians and trades workers	8.2	6.1	14.3	78.4	7.3	85.7
Machinery operators and drivers	6.6	3.2	9.8	79.0	11.2	90.2
Total employees	**24.7**	**21.1**	**45.8**	**45.0**	**9.2**	**54.2**

Source: ABS (2015) *Labour Force, Australia, Detailed, Quarterly, Feb 2015*, cat. no. 6291.0.55.003, viewed 8 April 2015, http://www.abs.gov.au/ausstats/abs@.nsf/mf/6291.0.55.003 Note: Occupations are ranked from largest proportion of female employees to smallest.

underrepresented in the manual trades in Australia, with the number of women in manual trades being less than 2 per cent in 2015. This seems consistent with the level of occupational segregation seen in NSW and throughout Australia today, especially in the trades. With respect to labour force participation, women have made significant gains over the past 30 years to 2012, with participation rising from 43.5 per cent to 65.2 per cent. Across Australia, women still constitute the majority of part-time and casual workers. Workers in these categories often lack job security and other benefits available to those

Review 10.2

1 Examine Table 10.3 and outline the occupation groups in which women were well represented and under-represented in 2015.
2 Give some possible reasons for women's under-representation in some areas of apprenticeships and trainee commencements.

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Figure 10.3 Women make up over 50 per cent of higher education enrolments.

in full-time employment such as parental leave and holiday pay.

Social security

In the early 20th 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.

Figure 10.4 Women often fill carer's roles. People who provide care for a family member with a disability may be eligible for Carer Payment benefits.

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 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 he or she has primary responsibility for one or more young children and meets certain income tests. Separated parents can receive financial assistance with the cost of caring for their children, through the Child Support Agency.

Studies have shown that, over the long term, women fare far worse financially than men after a divorce. In addition, approximately 90 per cent of lone-parent families are headed by women. The responsibilities of child care 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 and below which a household is defined as poor; the poverty line is different in different countries

Marriage
The right to own property
The ability to sue and enter contracts
The right to vote
Jury service

Information on marriage, the right to own property, the ability to sue and enter contracts, the right to vote and jury service is available in the digital versions of the book.

GO

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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. 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.

Migrant women have been employed in factories in substandard conditions throughout Australia. Because these women have little English, they have not always been aware of their rights. 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 child care, evidence suggests that many women work long hours in poor conditions and are paid a pittance on a piecework basis. In 1992, the federal government Inquiry into Equal Opportunity and Equal Status for Women in Australia reported on this situation in its publication *Half Way to Equal*. As documented in the submission of the Asian Women at Work Action Group to the 2007 National Industrial Relations Inquiry, and a July 2008 report by the Australian Human Rights Commission, the problems are still very much in evidence.

It has also been noted that migrant women have an unemployment rate higher than Australian-born people, and for those from non-English-speaking backgrounds it is even higher than for migrants fluent in English.

Even those migrant women with a high level of educational qualifications usually cannot work in Australia without undertaking expensive bridging courses, sometimes on top of a recognised language course. As a result, many of these women must take jobs that pay far less than the jobs they would have had in their original countries, because their qualifications are not recognised.

Review 10.3

1. Explain some of the main issues in the workplace facing women from non-English-speaking backgrounds.
2. Outline why women from non-English-speaking backgrounds are more likely to be exploited in the workplace.

Research 10.1

Asian Women at Work has a membership of over 1300 migrant women workers. The group works to educate and empower Asian women workers in Australia. View the Asian Women at Work website for more information.

1. Use a search engine to find websites that discuss the activities of Asian Women at Work.
2. List the specific difficulties that migrant women face at work.
3. What recommendations does the group make for tackling these difficulties?
4. What agents would be involved in these efforts and what are their roles?

Aboriginal and Torres Strait Islander women

The impact of colonisation on Aboriginal and Torres Strait Islander women was 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 consequences of the practice of taking children from their parents were great spiritual, physical and emotional suffering. Today, compared to non-Indigenous women, Indigenous women fall behind on most indicators of health and wellbeing. The life expectancy of Indigenous women is 72.9 years compared to 82.6 years for non-Indigenous women.

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Figure 10.5 Today, compared to non-Indigenous women, Indigenous Australian women fall behind on most indicators of health and wellbeing.

Indigenous women are twice as likely to suffer from cervical cancer and eight times more likely to die from it than non-Indigenous women. Diabetes resulting from dietary and lifestyle issues is a major problem. Indigenous 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 Indigenous women is significantly worse than non-Indigenous women, (see Figure 10.6). With respect to educational indicators, Indigenous women fare significantly worse than non-Indigenous women and the general non-Indigenous population on retention rates to Years 11 and 12, post-school and tertiary qualifications. There has been a slight improvement in some of these areas, but thus far, many government attempts to overcome these entrenched disadvantages have failed.

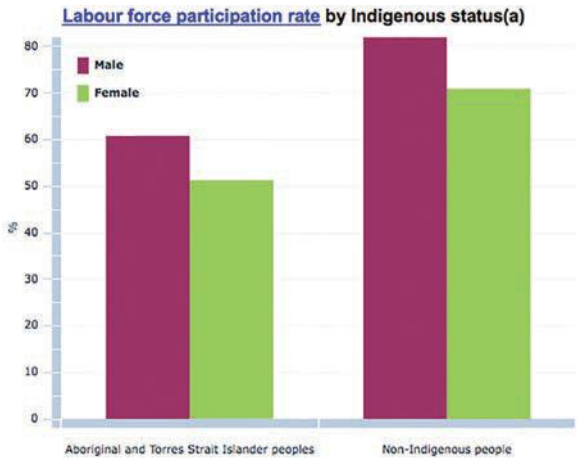

Figure 10.6 Comparison of estimated Indigenous and non-Indigenous labour force participation rates (15–64 years of age) as at 2016
Source: Australian Bureau of Statistics

Review 10.4

1 Outline some of the health and wellbeing issues facing Indigenous women today.
2 Assess why some of the attempts to resolve these issues have failed. Suggest possible reasons for this.

10.2 Legal responses

International law

The main treaty that addresses discrimination against women around the world is the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). It was **opened for signature** in 1979 and **entered into force** in 1981.

The preamble of CEDAW acknowledges that the Charter of the United Nations and the *Universal Declaration of Human Rights* 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'.

opened for signature
(of a treaty) having negotiations concluded and ready for parties' signatures. Many treaties, especially those convened by the UN, 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 upon those states which have consented to be bound by it

state
a politically independent country

It affirms that, in spite of this, there is still discrimination against women around the world.

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The treaty states that this discrimination:

> … 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.

The Convention 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

GO

Information relating to the role of the United Nations in protecting the rights of women is available in the digital versions of the book.

Domestic law

Legislation protecting women from discrimination exists at both state and federal levels 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 she is 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, where male employees are offered first choice for extra overtime ahead of female employees.

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
practices or policies that appear to treat everyone in the same manner, but which adversely affect a higher proportion of people from one particular group

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.

Figure 10.7 More women than men interrupt their working lives for a period of time when they have children.

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Sex Discrimination Act 1984 (Cth)

Some but not all provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women* 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.

sexual harassment
any unwelcome sexual behaviour, such as sexual advances, suggestive comments, unwanted touching, written communication 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 her or his job on the basis of the person's family responsibilities
- sexually harass someone.

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 woman (or a man) is subject to unwelcome behaviour from others because of their gender. It can include behaviour such as unwanted sexual advances, touching without consent, or making jokes or suggestive comments that are gender-oriented.

Often there is a power imbalance between the harasser and the harassed; usually the harasser occupies a higher position at the workplace. The person being harassed may think that her (or his) advancement, or indeed continued employment, depends on accepting such sexual overtures. This can make it difficult to establish a case for the harassment, even 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 his or her 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.

A person who has a complaint under the Sex Discrimination Act can take action through the Australian Human Rights Commission. This body, which was set up under the *Australian Human Rights Commission Act 1986* (Cth), was formerly called the Human Rights and Equal Opportunity Commission (HREOC). The Commission will investigate the complaint and organise a conciliation conference to try to resolve the complaint with the other party. If conciliation fails, the complainant may make an application to the Federal Magistrates Court or Federal Court to have the complaint heard.

The Australian Human Rights Commission

Information about the Australian Human Rights Commission, including a range of sex discrimination cases from 2006 to 2015 is available in the digital versions of the book.

GO

Anti-Discrimination Act 1977 (NSW)

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 establishes 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.

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

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Table 10.4 *Sex Discrimination Act 1984* (Cth) – complaints received by ground, 2013–14

Sex Discrimination Act – grounds	Number	Percentage
Sex discrimination	572	46.47
Marital or relationship status	32	2.60
Pregnancy	159	12.92
Sexual harassment	222	18.03
Family responsibilities	77	6.26
Breastfeeding	13	1.06
Gender identity	36	2.92
Intersex	3	0.24
Sexual orientation	35	2.84
Victimisation	58	4.71
Causes, instructs, induces, aids or permits an unlawful act	23	1.87
Advertisements	1	0.08
Total	**1231**	**100**

Source: Australian Human Rights Commission, Annual Report 2013–2014

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 10.5

1. Describe the difference between direct and indirect discrimination.
2. Explain why indirect discrimination is difficult to establish and then prove.
3. Outline the objectives of the *Sex Discrimination Act 1984* (Cth).
4. Define what is meant by 'sexual harassment'. What needs to occur before a complaint of sexual harassment can be initiated?

Workplace Gender Equality Act 2012 (Cth)

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 certain organisations to establish workplace programs to remove the barriers to women in the workplace, both when they enter and as they advance. Under the Act, any organisation that has 100 or more employees and that is a higher education institution, a private sector company, a non-profit or community organisation, a private school or a union must develop and implement such a workplace program.

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Cambridge University Press

Figure 10.8 Companies are expected to hire and promote women based on merit. Unfortunately, this does not always happen.

The Act's objectives 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. It is also hoped that equal opportunity will provide much-needed role models in managerial positions so that younger women will aspire to these positions. As well, no woman can be considered for a particular job for which she is not suitably qualified. The Act is not about putting women in jobs ahead of men: s 2A(a) clearly states that one of its objects is 'to promote the principle that employment for women should be dealt with on the basis of merit'. This means that matters such as selection and promotion of employees should be based solely on their qualifications, experience and ability to do the job.

The Act also establishes the Workplace Gender Equality Agency to oversee the implementation of the Act.

Government agencies

There are agencies at both federal and state levels that provide policy advice on women's issues.

Office for Women

The federal Office for Women (OfW) is part of the Department of 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. OfW 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.

Women NSW

At 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. The Office also has responsibility for Domestic Violence Prevention: to lead and manage government policy relating to the prevention of domestic and family violence.

Workplace Gender Equality Agency

Information relating to the Workplace Gender Equality Agency is available in the digital versions of the book.

GO

Research 10.2

1 View the NSW Department of Justice website and research some decisions made by the Administrative Law and Equal Opportunity Division of the Civil and Administrative Tribunal in 2015.
2 View the Anti-Discrimination Board NSW website. Click on 'Publications' and then 'Factsheets'. Select a fact sheet that is relevant to women and summarise women's rights in this area.

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Review 10.6

1 Explain the role of the Office for Women and Women NSW.
2 List and discuss some issues that might be raised by these offices in the development of law and policy relating to:
   - requirements for businesses regarding conditions of employment
   - budget provisions regarding the funding of health care
   - programs in which business leaders provide mentoring for high-achieving university graduates.

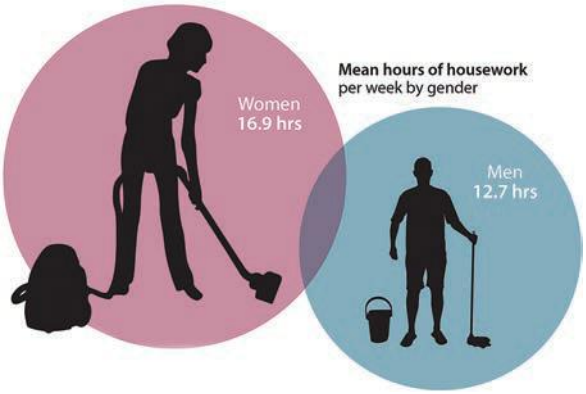

Figure 10.9 Statistics show that women continue to do more housework than men. (Source: Men Engaged in Shared Care Survey 2010, The Social Research Centre and the Institute for Social Science Research, The University of Queensland)

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.

Trade unions

In the early part of the 20th 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 child care
- 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 choose to become 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 bearing a child. Paid maternity leave gives mothers time to bond with and breastfeed their babies without financial considerations necessitating an early return to work.

In 2011, the federal government introduced 18 weeks' paid parental for working women. The scheme extends paid leave to either parent of a newborn child if he or she is 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 and commentators who have argued that law and policies making it easier for fathers to take a greater role in child care are necessary in order for women to have true choices. In 2016, the scheme is still in operation and over time it 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

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Electoral Lobby (WEL), founded in 1972. WEL 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'. WEL is a self-funded, non-profit organisation, not affiliated with any political party, that 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 10.3

1. View the Office for Women website via the following link: http://cambridge.edu.au/redirect/?id=6535. Research two current issues on the site under the headings, Economic Empowerment and Opportunity, Safety for Women and Leadership.
2. View the WEL website and research two policy positions of WEL. 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 child care.

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 UN *Convention on the Elimination of All Forms of Discrimination Against Women* (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 treaty where it has entered certain reservations. The committee can only continue to encourage states to review their current reservations.

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

Upon ratification, the Australian Government entered a reservation with respect to paid maternity leave, which it has now complied with. It also entered a reservation stating that it 'does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat duties'. Women in the Australian Defence Force now serve in combat areas, but structural and cultural discrimination is still very much evident in the defence forces. The *Treatment of Women in the Australian Defence Force* review, released in August 2012, revealed that one in four women in the defence forces had experienced some form of sexual harassment and this continues to be an ongoing cultural challenge today. It may be some time before such entrenched cultural attitudes towards women are overcome. Due in large part to states' reservations, there are still many areas where women experience discrimination and violations

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of their human rights. It is believed that there are at least four million women and girls sold into sex slavery each year and that approximately a quarter of all women experience domestic violence. It is estimated that up to 130 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 poor education opportunities for girls compared to boys, especially in developing countries. Women are also four times more likely to be infected with HIV/AIDS than men, and up to 130 million women die from this disease each year. Education about the spread of AIDS and programs that address specific health issues relating to women are not adequate in many poorer countries.

At the same time, 179 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 listed above 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.

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

The Australian Government signed the optional protocol in 2008, thus sending a message to the international community about its commitment to the treaty. 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 such mechanism.

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 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).

Figure 10.10 Pregnant women are often still able to participate in the workplace.

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.

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Review 10.7

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* (CEDAW).
2. What are reservations and how do 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 such as 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 disadvantage women, it is not illegal if the court believes it to be 'reasonable' (s 7B of the Act). This may go part of the way towards explaining the '**glass ceiling**' that women have described as an impediment to their career progress.

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

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 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 fell below $7000. These amounts are significantly lower than what might be achieved through the judicial system. Redress through the courts, however, is out of reach for most women due to time and cost.

Figure 10.11 Fighting discrimination can be costly and time consuming.

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The provisions of the Sex Discrimination Act regarding 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 Australian Human Rights Commission estimates that one in five women and one in 20 men experience sexual harassment in the workplace. 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, 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 unmeasured, the economic cost to employers and the community as a result of this staff turnover is 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.

In spite of some of the criticisms outlined above, the Sex Discrimination Act 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

Figure 10.12 Statistics from the Australian Human Rights Commission illustrate the degree of gender inequality that still exists today.

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definition of 'sexual harassment' has also been strengthened, with the complainant only having to show that she or he '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.

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 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.

Pay equity
Gender segregation of the workforce
Patterns of employment
Equal opportunity in the workforce

GO

Information about pay equity, gender segregation of the workforce, patterns of employment and equal opportunity in the workplace is available in the digital versions of the book

Review 10.8

Draw up a table with two columns headed 'strengths' and 'weaknesses', then list the strengths and weaknesses of the *Sex Discrimination Act 1984* (Cth).

Figure 10.13 Gender-based inequality is an ongoing issue. According to the 2010 Gender Equality Blueprint, published by the Australian Human Rights Commission, women chair only 2 per cent of ASX200 companies, hold only 8.3 per cent of Board Directorships, hold only four CEO positions and make up only 10.7 per cent of executive management positions in Australia.

Conclusion

Women have made substantial progress historically on many indicators. The law, however, is only a part of the solution. It is not possible to legislate attitudes, and firmly held beliefs can be difficult to change. Hence, improvement of women's rights and status in society will be generational, and the importance of educative programs cannot be overstated.

Beth Gaze, in a 2005 *Alternative Law Journal* article called 'Twenty Years of the Sex Discrimination Act: Assessing its achievements', argues that both legal and social change are essential.

If we are to prosper as a nation, we cannot continue to disenfranchise 50 per cent of the population. It is in everyone's interest to make our society more just and fairer.

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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 Indigenous Australian women face additional barriers to equality of opportunity.
- The UN *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) is the international treaty specifically addressing the many areas in which women experience discrimination.
- In Australia, anti-discrimination and equal opportunity legislation has been passed at federal and state level. 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 (formerly HREOC) 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 (WGEA) is a statutory body, one of whose main functions is to oversee the development of equality of opportunity programs within organisations 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 ACTU and the Women's Electoral Lobby are non-government groups that campaign on issues concerning women, especially in the workplace.
- The effectiveness of CEDAW is limited by the many reservations by states. CEDAW's strength 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 them 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'.

Chapter summary questions

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 the traditional social roles.

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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 to 'outworkers'.
- **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 making time to learn English.
- **D** Indigenous 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 UN *Convention on the Elimination of All Forms of Discrimination Against Women* 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 it
- **C** provisions that can be enforced by the UN Security Council or the 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 UN *Convention on the Elimination of All Forms of Discrimination against Women* will allow which of the following to happen?
- **A** The federal government will be able to pass legislation prohibiting discrimination.
- **B** The Committee on the Elimination of Discrimination Against Women will advise states on how best to implement the treaty.
- **C** The Committee on the Elimination of Discrimination Against Women will recommend trade sanctions against states in breach of the treaty.
- **D** Individual Australians will be able to complain directly to the Committee on the Elimination of Discrimination Against Women.

Short-answer questions

1 Explain why women were treated as inferior to men in early Australian society.
2 Explain the particular barriers experienced by Indigenous Australian women and migrant women.
3 Describe the different types of discrimination that women experience in Australian society.
4 Define the term 'equal opportunity'. Outline how it is provided for in Australian law.
5 Outline the role of the main international mechanism that promotes the rights of women around the world.
6 How is the NSW Office for Women's Policy different from its Commonwealth counterpart?
7 Assess the effectiveness of non-legal mechanisms in improving the rights of women in the workplace.
8 Explain the limitations that exist for a more effective implementation of the UN *Convention on the Elimination of All Forms of Discrimination Against Women*.
9 Discuss the strengths and weaknesses of the *Sex Discrimination Act 1984* (Cth). What reforms have taken place through amendments?
10 Discuss the effectiveness of the *Workplace Gender Equality Act 2012* (Cth) in removing barriers to equal opportunity in the workplace.

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Extended-response questions

Evaluate the effectiveness of the legal system in dealing with discrimination against women. Read the following quote to answer the questions below:

> [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, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press, New York, 1999), 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. Discuss.

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

GO

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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.

GO

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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.

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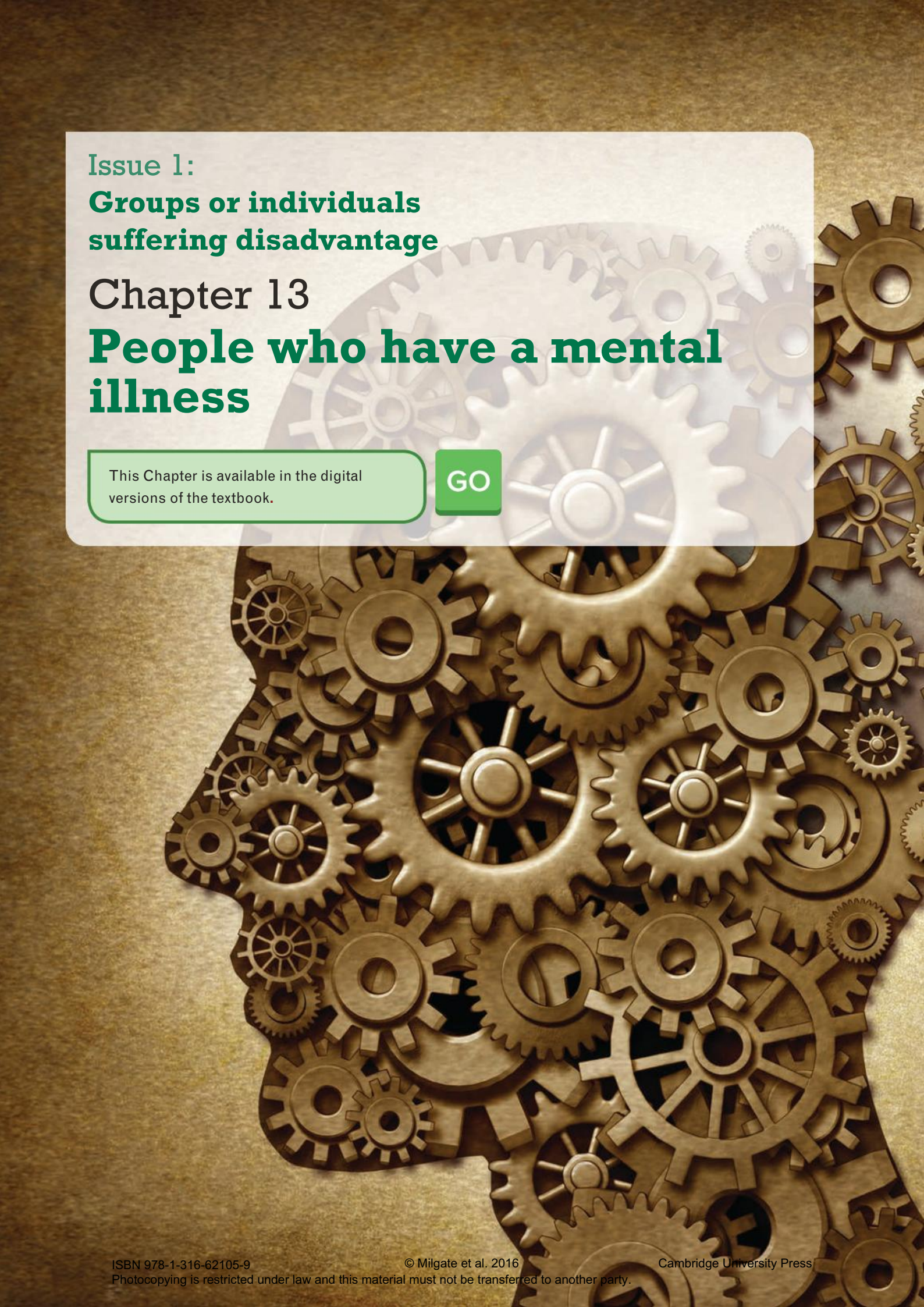

Issue 1:

Groups or individuals suffering disadvantage

Chapter 13

People who have a mental illness

This Chapter is available in the digital versions of the textbook.

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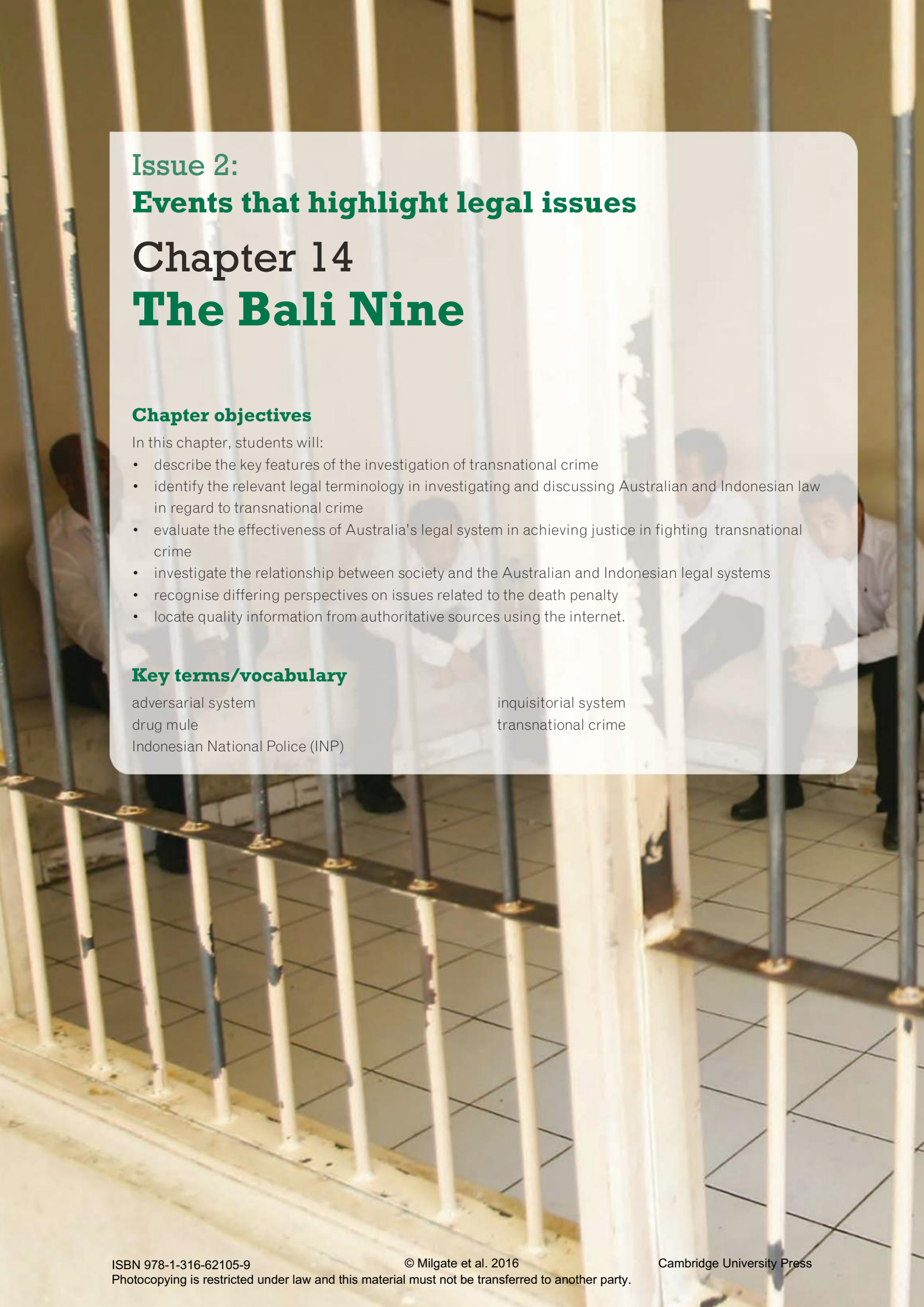

Issue 2:

Events that highlight legal issues

Chapter 14
The Bali Nine

Chapter objectives

In this chapter, students 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.

Key terms/vocabulary

adversarial system
drug mule
Indonesian National Police (INP)
inquisitorial system
transnational crime

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Relevant law

IMPORTANT LEGISLATION

International Covenant on Civil and Political Rights (ICCPR), 1966

Death Penalty Abolition Act 1973 (Cth)

Second Optional Protocol to the ICCPR, 1989

Indonesia Law on Psychotropic Substances, Law No. 5 of 1997, art. 59, Mar. 11, 1997

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) ('Law and Justice Amendment Act')

Agreement with the Republic of Indonesia on the Framework for Security Cooperation, 2006

Extradition Treaty between Australia and the Republic of Indonesia, 2007

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14.1 A brief history of the Bali Nine

On 17 April 2005, the Indonesia National Police (INP) arrested four Australians at Bali's Ngurah Rai Airport: Martin Stephens, Renae Lawrence, Scott Rush and Michael Czugaj. The Indonesian police found heroin strapped to the bodies of these four people. Soon after, Andrew Chan was arrested by INP officers at Denpasar Airport: his suitcase had 0.01 grams of heroin in it. Also, on the night of 17 April, 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 motel. In total, this group of nine Australians was planning to smuggle 8 kilograms of high-grade heroin into Australia. From this time on, they were known as the 'Bali Nine'. All were charged with trafficking heroin and faced the possibility of receiving the maximum penalty of death by firing squad, or lesser penalties of a life sentence or 20 years in jail.

In 2015, Andrew Chan and Myuran Sukumaran were executed by firing squad. This was an event that came to the attention of all Australians and involved statements in Parliament and pleas by Prime Minister Tony Abbott and Foreign Minister Julie Bishop to spare the lives of these two men. Despite being characterised as the 'king-pins' 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 and sometimes there is a clash between cooperation in transnational 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.

Figure 14.1 Myuran Sukumaran at the Denpasar District Court in 2006.

transnational crime
crime that occurs across international borders, either in origin or effect

Planning

The young Australians had been recruited by contacts they had made in nightclubs in Australia. The heroin was sourced from Thailand and the

Table 14.1 The Bali Nine

Name	Age in 2005	From	Role	Sentence (after appeals)
Andrew Chan	21	Sydney	Ringleader	Execution
Myuran Sukumaran	24	Sydney	Ringleader	Execution
Matthew Norman	18	Sydney	Drug mule	Life imprisonment
Scott Rush	19	Brisbane	Drug mule	Life imprisonment
Tan Duc Thanh Nguyen	21	Brisbane	Financier	Life imprisonment
Si Yen Chen	20	Sydney	Drug mule	Life imprisonment
Martin Stephens	29	Wollongong	Drug mule	Life imprisonment
Michael Czugaj	19	Brisbane	Drug mule	Life imprisonment
Renae Lawrence	27	Newcastle	Drug mule	20 years' imprisonment

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group was to pick it up and smuggle it back into Australia.

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 back 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, a very popular destination for Australian tourists.

drug mule
a person who transports drugs in their luggage, by ingesting them in pouches, or having them strapped to their body or concealed in some other way

Before leaving for Bali, Andrew Chan met Martin Stephens and Renae Lawrence who were staying in Room 126 at the Formule One Motel in the Sydney suburb of Enfield. Also in the same motel were Matthew Norman and Si Yen Chen, staying 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 then flew to Bali on 3 April. The others stayed at this motel for a few days, and then on 6 April they took the flight to Bali.

Figure 14.2 Signs warning of the death penalty to drug smugglers greet all who enter Indonesia through any of their airports.

Meanwhile, Scott Rush and Michael Czugaj had flown down 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. They took a flight to Bali on 8 April 2005. Sukumaran and Nguyen were on the same plane to Bali.

However, the activities of these young Australians had been followed with great interest by the Australian Federal Police (AFP).

Cooperation between law enforcement agencies

Australian Federal Police

In 2005, the AFP viewed Indonesia as one of the main places from which the drug lords would smuggle their drugs into Australia.

They had been watching the group of young Australians for six months since they received a tip-off from an informant in Brisbane. The AFP was not sure that this was a drug smuggling operation. It took the next few months to undertake surveillance, build profiles and put together information about friendship and travel plans. By April 2005, the AFP officers involved on the case had a big wall chart connecting each of the individuals under surveillance. There had been a recent crackdown on drug importations and the AFP knew that drug lords were trying every trick in the book to keep up the supply of drugs into Australia. The drug lords were aware of how lucrative the Australian market was. The use of drug mules was one of the many means that the drug lords used to smuggle drugs into Australia.

By 8 April, when all the Australians were in Bali, the AFP had a large amount of intelligence. All their intelligence pointed to Andrew Chan being the organiser. They decided to contact their counterparts in Indonesia.

Legal Links

See the Australian Federal Police website for further information.

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Indonesia National Police

AFP 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 gave 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. AFP officers in Operation Alliance gave close support over the next few years in response to the Marriott Hotel bombing in 2003, the bombing of the Australian Embassy in 2004 and the Bali Bombings of 2005.

Indonesia National Police (INP)
In Indonesia they are called the Kepolisian Negara Republik Indonesia, which is abbreviated to POLRI

On 8 April, the AFP's senior liaison in Bali, Paul Hunniford, sent a letter to INP in Bali 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, he again wrote to the INP listing the passport numbers, birth dates and likely return dates of eight young Australians. The AFP had no knowledge of Myuran Sukumaran. The INP would soon transmit information about the ninth Australian back to the AFP. Sukumaran was then added to the now substantial AFP wall chart.

Figure 14.3 Emblem of the Indonesia National Police

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 two previous times in the last six months, one of them with Renae Lawrence. Chan and Lawrence had managed to smuggle a shipment of heroin back to Australia without a hitch in October 2004.

Legal Links

Further information about the relationship between the AFP and INP can be found in the article: 'Partners against crime: A short history of the AFP–POLR relationship', *ASPRI*, March 2014, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6536.

The crime

On 8 April, Andrew Chan picked up 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, INP officers were stationed in the hotels that the groups of young Australians were staying at and 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 some more heroin. This gave the INP officers more time to continue surveillance and compile more evidence.

At 9 p.m. on 16 April, Chan met again with Bannakorn at Seaview Cottage to collect the rest of the heroin. This time INP officers were filming Chan though they did not know what he was doing in the building for 10 minutes.

As well as visual surveillance, which included numerous photos and some videos, the INP was

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also monitoring the phone conversations of the nine Australians. Even though the group spoke in code with each other on the phone, the metadata alone connected all of the Bali Nine together making it difficult for some of them to claim, as they later did, that they didn't know the other members of the group.

On 17 April, Andrew Chan checked out of his hotel and went to another hotel where he and 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, unaware of each other's existence, left in separate taxis to Ngurah Rai Airport in Denpasar.

Nguyen and Sukumaran headed to the Melasti Bungalows where they met up with Si Yen Chen and Matthew Norman. Meanwhile, Chan got a taxi to Ngurah Rai Airport. During all of this time every move had been under surveillance of the INP.

Arrest

At 8 p.m. on 17 April, Martin Stephens and Renae Lawrence arrived at Ngurah Airport. From the moment they got out of the taxi, every move they made was being watched. However, they were unaware of this as they passed through security without a hitch, 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.

Meanwhile, at 8:30 p.m, Scott Rush and Michael Czugaj left the hotel for Ngurah Airport. At the immigration counter at the airport the two men were detained by customs officials and escorted into an office where they found Martin Stephens and Renae Lawrence. Rush and Czugaj were searched. Between them, the four drug mules were found to be carrying 8.2 kilograms of heroin worth up to $4 million on the streets of Sydney.

Unaware that his four drug mules had been detained by customs, Andrew Chan then arrived at the airport and checked into the same flight as Stephens and Lawrence. Soon after, customs officials and police arrived and asked Chan to come with them.

Figure 14.4 Scott Rush was caught with heroin strapped to his body at Denpasar Airport.

Police then went to the Melasti Bungalows where Sukumaran, Matthew Norman, Si Yen Chen and Tan Duc Thanh Nguyen were celebrating Sukumaran's 24th birthday. Again, the three men did not know that every move that they had made that day had been under surveillance. The police searched the hotel room, and in a rucksack they found 334.26 grams of heroin. The four men were handcuffed and taken to Polda police station.

Review 14.1

1. What made the Bali Nine's crime a transnational rather than a domestic crime?
2. Describe the content of the letters that the AFP sent to the INP on 8 and 12 April.
3. Explain what methods the AFP and INP used to gather intelligence on the Bali Nine before their arrest.
4. How were each of the Bali Nine arrested?

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14.2 Legal responses

Trials

The Indonesian justice system is based on Dutch law inherited from the days when they had been part of the Dutch empire in Asia. As a result, Indonesian law follows the European system, which is **inquisitorial**, rather than the **adversarial system** 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.

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 which have civil legal systems rather than common law systems

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

In court, the Indonesian prosecutors had decided to bring the same charge against all Bali Nine defendants, regardless of their role – 'exporting narcotics as part of an organisation'. This charge carried the death penalty. Once the trials were under way in Denpasar District Court, the prosecutors followed the same strategy in each case of trying to get the co-accused to give evidence 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 that they had no idea of the true reason of why 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 story. 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 denial of any involvement or any knowledge about the drugs. When these five were

Figure 14.5 Tan Duc Thanh Nguyen, Si Yi Chen and Matthew Norman wait for the beginning of their trials on 12 October 2005.

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, had portrayed his client as 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 and was indeed guilty and not a shred of leniency should be given. They demanded the death penalty. Similarly, Chan was described as being the 'driving force' of the Bali Nine operation and that he had failed to cooperate and had given confusing and convoluted evidence. Therefore, the prosecutor demanded the death sentence for Chan in his trial. 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. These were to be the first Australians in history sentenced to death in

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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. What was the outcome of the trials for each member of the Bali Nine?

Imprisonment and rehabilitation

After their arrest, the nine young Australians were held at the cells in Polda Jail, though soon 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

GO

Information about Kerobokan Prison is available in the digital versions of the book.

The eight male members of the Bali Nine were lodged in the maximum-security block or 'tower block' as it was called in the prison. 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 has largely been due to Ilham Djaya who was head of the prison until April 2008. Djaya's number one priority was to clean up corruption in the prison. Gangs and drug dealers no longer run the jails, the drab grounds of the prison have been revamped and there are now gardens and lawn, worked on by 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 tower, 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 had a screen-printing machine. They were allowed out of the tower into the rest of the prison during the day.

Despite the fact that the four of them who were 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.

Ilham Djaya was replaced in 2008 by Mr Siswanto, who was the governor of the prison for the next 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.

Figure 14.6 Myuran Sukumaran with some of his artworks painted while in prison

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Legal Links

The SBS documentary, 'The Condemned' can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6537. It originally aired in November 2010 just days before a final hearing on whether Chan and Sukumaran's death sentences for drug trafficking would be carried out. The documentary gives an insight into their living conditions in Kerobokan Prison and their rehabilitation, as well as a lawyer's perspective.

Research 14.1

Read Jewel Topsfield's article, 'Bali nine executions: How Chan and Sukumaran's road to redemption changed Kerobokan jail', *SMH*, 22 February 2015, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6538.

1. How has Kerobokan Prison changed since 2005?
2. What was Chan and Sukumaran's reaction on arrival in the prison in 2005?
3. Outline the initiatives taken by Chan and Sukumaran to improve life in the prison for the inmates.
4. How does the author describe Sukumaran?
5. Why did the other inmates and the prison guards fear life in Kerobokan prison once Chan and Sukumaran had gone?

Appeals

The appeals process available to the Bali Nine commenced with an appeal to their sentences given in the Denpasar District Court to the Bali High Court. Appeals from 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.

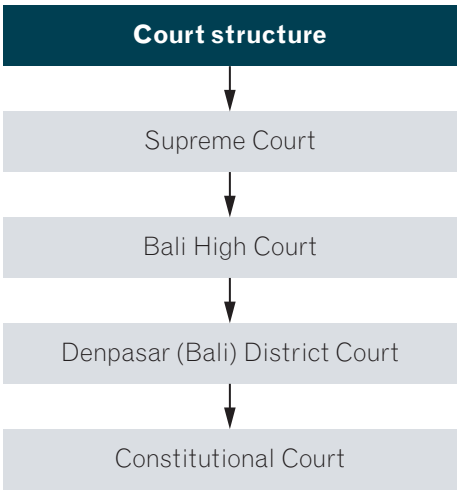

Figure 14.7 The court hierarchy in Bali

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 soon found out.

- 26 April 2006 – Bali High Court
  Chan and Sukumaran's death sentences confirmed.
- 27 April 2006 – Bali High Court
  Life sentences of Chen, Czugaj, Lawrence, Nguyen and Norman reduced to 20 years' imprisonment.
  Life sentences on Rush and Stephens upheld.
- 6 September 2006 – Supreme Court
  Convictions of the 'Melasti Three' and Rush upheld, and death penalty imposed, rather than lighter sentences granted by Bali High Court. This was in response to prosecution appeals about the sentence reductions given by the Bali High Court. Chan and Sukumaran's death sentences upheld.
  Stephens's life sentence upheld.
  Czugaj's life sentence reinstated.
- 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.

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- 6 March 2008 – Supreme Court
  Final appeal to the court – a *Peninjauan Kembali* or 'PK'.
  'Melasti Three's' PKs upheld, and death sentences reduced to life imprisonment.
- 10 May 2011 – Supreme Court
  Rush death sentence reduced to life imprisonment.
- 10 May and 6 July 2011 – Supreme Court
  Appeals by Chan and Sukumaran against death penalty dismissed.
- 13 May and 9 July 2012 – Indonesian President Susilo Bambang Yudhoyono
  Appeals by Chan and Sukumaran for pardon rejected.
- 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 Indonesian president's refusal to grant clemency rejected.

At the end of the appeals process, six of the Bali Nine are serving sentences of life imprisonment and one is serving a sentence of 20 years' imprisonment. The remaining two, Andrew Chan and Myuran Sukumaran, were executed by firing squad on 29 April 2015.

Execution of Andrew Chan and Myuran Sukumaran

GO

Information about the execution of Andrew Chan and Myuran Sukumaran is available in the digital versions of the book.

Review 14.3

1 Why did Kerobokan Prison have a bad reputation by the time that the Bali Nine arrived there?
2 List the different avenues of appeal taken by the lawyers for Chan and Sukumaran.
3 What were the outcomes of appeals by other members of the Bali Nine?
4 How would the execution have been carried out?

Research 14.2

Read 'Death for Bali ringleaders' which appeared in *The Age* after Chan and Sukumaran were given death sentences in February 2015. The article can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6539.

1 Where was this case heard?
2 What reasons did the judge Arief Supratman give for giving the two men the death penalty? (Give four reasons found throughout the article.)
3 What was the reaction of prominent Australians?
4 What comment did AFP chief Mick Keelty make?
5 According to their lawyers, what was the next legal move for Chan and Sukumaran?
6 If all else failed, what was the chance of a presidential pardon?

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14.3 Non-legal responses

Public campaign

Although their July 2012 appeal had failed, there did not seem to be a rush to have Andrew Chan and Myuran Sukumaran executed. This changed in October 2014, with the election of President Joko Widodo, who had run on a campaign of being tough to 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. One of these was the Mercy Campaign, which attracted over 200 000 signatures to a petition asking for clemency that was directed to President Joko Widodo. Newspapers, such as the *Sydney Morning Herald*, added their pleas to the cause, with an editorial on 23 February stating that the 'two men who have apologised and atoned from their crimes, pioneers of rehabilitation in Indonesia's prison system, will be killed senselessly'. The 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 around Australian and in Bali in all-night vigils until the time of execution.

Figure 14.8 Indonesian President Joko Widodo had run on a campaign of being tough to drug smugglers.

Figure 14.9 The Mercy Campaign attracted over 200 000 signatures to a petition asking for clemency.

Legal Links

View the Mercy Campaign website for more information.

Figure 14.10 Foreign Affairs Minister Julie Bishop and Deputy Opposition Leader Tanya Plibersek during a candlelight vigil for Andrew Chan and Myuran Sukumaran

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International diplomacy

There were various diplomatic attempts to prevent the executions.

- In January 2015, Prime Minister Tony Abbott made a direct appeal to Indonesian President Widodo to show mercy.
- On 5 March, Foreign Minister Julie Bishop again made an attempt to stop the executions by offering to repatriate to their homeland three Indonesian drug criminals in return for sparing the lives of Chan and Sukumaran.
- United Nations Secretary General Ban Ki-Moon also directly appealed to the Indonesian President.

There was also diplomatic fall-out after the executions. Prime Minister Tony Abbott announced that Australia would withdraw its ambassador from Indonesia and relations between the two countries soured.

Research 14.3

Read the article 'Bali Nine: Julie Bishop, Tanya Plibersek plead for clemency for Andrew Chan and Myuran Sukumaran,' *Nine News*, 12 February 2015, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6540.

1. What occurred in Parliament on this day and why was this unusual?
2. Identify the arguments deputy Labor leader Tanya Plibersek used in her address to Parliament.
3. Identify the arguments Foreign Minister Julie Bishop used in her address to Parliament.
4. Describe the reaction of the Indonesian Foreign Minister.

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 a period of up to four years at any of the ACU's campuses. The scholarship would be awarded on the basis of an essay on the sanctity of human life. Professor Gregory Craven, the Vice-Chancellor of the Australian Catholic University, had been one of the founders and co-spokesmen of the Mercy Campaign. Professor Craven 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.'

Legal Links

Further information about the Australian Catholic University scholarships can be found via the following link: http://cambridge.edu.au/redirect/?id=6541.

Review 14.4

1. Identify all of the public figures who came out in support of Andrew Chan and Myuran Sukumaran.
2. Describe the Mercy Campaign.
3. Outline the offer Foreign Minister Julie Bishop made to the Indonesian Government.
4. What initiative did Professor Craven announce in honour of Chan and Sukumaran?

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14.4 Effectiveness of responses

The Bali Nine is a significant example of the 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. Both the 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 on this, 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, a situation that a growing number of Australians who live or work overseas now face. Therefore it is important that Australia remains on good relations with as many countries as it can, and has in place understandings 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.

This 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 Australia 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 actions followed by the AFP that gave preference to cooperation over human rights obligations has been controversial.

From the early days of the case, the AFP was under fire for its role in facilitating the arrest of the Bali Nine by INP in Bali. The two letters sent by Paul Hunniford of the AFP, the senior liaison officer in Bali, 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 arrest on arrival in Australia. The AFP claimed that the nature of international cooperation over transnational crime fighting 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 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, when the INP had arrested the Bali Nine and then asked the AFP to send on the evidence that they had compiled in Australia, the AFP sent the information without requesting that the young Australians be exempted from the death penalty.

Most commentators agree that the actions of the AFP in this matter were lawful, and that there are benefits to having a good relationship with Indonesia: there are cases where terrorist plots have been foiled, and where 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 acted lawfully but they did not act morally. It is arguable that this does not fit in with Australia's obligations under international law.

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Arguments for and against sharing information without conditions

GO

More information about arguments for and against sharing information without conditions is available in the digital versions of the book.

The death penalty

Cindy Wockner, one of the authors of the comprehensive book on the nine Australians, *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 April 17, 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.

Figure 14.11 After 10 years in Kerobokan Prison, both Andrew Chan and Myuran Sukumaran were considered to be rehabilitated.

Australian law

Australia's position on the death penalty in domestic law has been crystal clear for many years. In 1967, Ronald Ryan became the last person in Australia to be executed. 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* (ICCPR) does allow for it, but only under limitations listed in Article 6.2:

International Covenant on Civil and Political Rights (ICCPR), 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 judgement rendered by a competent court.

However, the *Second Optional Protocol of the ICCPR* leaves no doubt as to the United Nations' position of the death penalty. In Article 1 the Protocol states:

Second Optional Protocol of the ICCPR, Article 1

1 No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2 Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

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There are numerous other treaties and covenants that also enshrine opposition to the death penalty. It is also to be noted the Rome Statute of 1998, which led to the creation of the international Criminal Court, excludes the use of the death penalty. So it is clear that we are seeing a movement towards global abolition of the death penalty. Since 1990, it has been abolished in over 40 countries, and has generally not been reintroduced. However, 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.

Legal Links

View the following via the given links:

- *International Covenant on Civil and Political Rights* (ICCPR), Article 6.2: http://cambridge.edu.au/redirect/?id=6542.
- Second Optional Protocol of the ICCPR, Article 1: http://cambridge.edu.au/redirect/?id=6543.
- Death Penalty Database – Indonesia: http://cambridge.edu.au/redirect/?id=6544.

Australia's policy on global abolition of the death penalty

If Australia does want to work towards the abolition of the death penalty in countries in which large numbers of Australians go for work or tourism, 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 be effective with Indonesia in promoting death penalty abolition there needs to be a principled and consistent policy by the Australian Government.

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. Indonesia is in fact moderate in its use of the death penalty in the region compared with countries like Malaysia and Singapore. There are strong lobby groups within Indonesia both for and against the death penalty, and the momentum for it could progress to see either its abolition or its increased use. However, the one factor that could tip Indonesia in the direction of abolition is the fact 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 its nationals. 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 argues that the abolition of the death penalty in Indonesia would contribute to the protection of Australians in Indonesia and minimise the threat to relations between the two countries. Also, it would build momentum towards death penalty abolition in the South-East Asian region. But for this to be achieved:

> The Australian government must avoid further equivocation on capital punishment. No advocacy will be effective if Australia is not a principled and consistent opponent of the death penalty.

Legal Links

The article, 'A Key Domino? Indonesia's Death Penalty Politics,' *Lowy Institute*, March 2012, by Dr Dave McRae can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6545.

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Figure 14.12 Justice Michael Kirby

In 2003, former High Court judge Justice Michael Kirby said the following in regard to 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 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.

Review 14.5

1. Why are the executions of Andrew Chan and Myuran Sukumaran significant for Australia?
2. What has been the criticism of the role of the AFP in the Bali Nine case?
3. Were the actions of the AFP in regard to the Bali Nine 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. How is the death penalty viewed in:
   - **a** the ICCPR?
   - **b** the Second Optional Protocol of the ICCPR?
7. Discuss the current situation with the abolition of the death penalty globally.
8. Outline Australia's policy on the death penalty.
9. What does Dr McRae recommend Australia's policy and actions in regard to the death penalty need to be?
10. Reflect on Justice Michael Kirby's view of the death penalty.

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Chapter summary

- The Bali Nine case is a classic example of a transnational crime involving police agencies from a number of national police forces.
- The Australian Federal Police (AFP) and the Indonesian National Police have been cooperating since the late 1990s.
- Information from the AFP to the Indonesian police made it possible for the Bali Nine to be arrested in Bali.
- 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.

Chapter summary questions

Multiple-choice questions

1 The AFP was established after:
- **A** the bombing of the Hilton Hotel in 1979
- **B** the Second World War
- **C** the 11 September 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 AFP's role in the Bali Nine cases has been criticised for:
- **A** prioritising cooperation with Indonesia above human rights concerns
- **B** failing to work effectively with the Indonesian 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

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Short-answer questions

1 Outline the role and work of the Australian Federal Police.
2 What was the Bali Nine's plan to smuggle heroin into Australia?
3 What surveillance methods did the Indonesian National Police use to gather evidence on the Bali Nine before arrest?
4 How were the Bali Nine arrested?
5 Describe the conditions in Kerobokan Prison.
6 Outline the structure and processes of the judicial system in Indonesia.
7 What role did Australian politicians play in the attempt to save Andrew Chan and Myuran Sukumaran?
8 How are executions carried out in Indonesia?
9 How does the existence of the death penalty in Indonesia pose an increased threat to Australians?
10 What do the international covenants say about the death penalty?

Extended-response questions

1 Describe the relationship between Australia and Indonesia between 2002 and 2015.
2 Evaluate the strategies used by each member of the Bali Nine in their trials.
3 Compare and contrast the Indonesian and the Australian judicial systems.
4 Discuss how Australia could work towards the abolition of the death penalty in the South-East Asian region.
5 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.

GO

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Issue 2:

Events that highlight legal issues

Chapter 15

Alcohol and violence

Chapter objectives

In this chapter, students will:

- outline the key features of Australia's law enforcement and courts
- identify the legal terminology relevant to investigating and discussing case and statute law
- evaluate the effectiveness of Australia's legal system in reducing the incidence of alcohol-related violence
- discuss the effectiveness of non-legal methods for changing public perceptions of alcohol-related violence
- locate quality and valid information from authoritative sources using the internet.

Key terms/vocabulary

BAC
lockout laws
one hit punch
one punch laws
whole of government response

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Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Liquor Act 2007 (NSW)
Passenger Transport Regulation 2007 (NSW)
Liquor Regulation 2008 (NSW)
Law Enforcement (Powers and Responsibilities) Amendment (Kings Cross and Railway Drug Detection) Act 2012 (NSW)
Pre-Paid Taxi Legislation: Passenger Transport Amendment (Kings Cross Taxi Fare Prepayment) Regulation 2012 (NSW)
Liquor Amendment (Kings Cross Plan of Management) Acts 2012 and 2013 (NSW)
Liquor Amendment (Small Bars) Act 2013 (NSW)
Intoxicated Persons (Sobering Up Centres Trial) Act 2013 (NSW)
Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW)
Liquor Amendment Act 2014 (NSW)

SIGNIFICANT CASES

R v Loveridge [2013] NSWSC 1638, 8 November 2013, Campbell J
R v Loveridge [2014] NSWCCA 120, 4 July 2014
Director of Public Prosecutions (NSW) v Lyttle [2015] NSWLC 4, 15 April 2015
R v McNeil [2015] NSWSC 357, 3 June 2015, Hulme J

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15.1 Violence in the Kings Cross area

In 2013, on New Year's Eve, a young man was punched in the head by a stranger. He fell to the ground heavily and fractured his skull. His injuries were so severe that he died 11 days later. This crime was a mirror image of a similar fatal attack in July 2012. The outrage felt by the public about these deaths reflected a growing concern about alcohol consumption and violence in NSW. These '**one hit punches**', 'king hits', 'coward punches' were to be the catalyst of legislative changes in NSW.

one hit punch
(also known as king hit or coward punch) a blow made with a closed fist, usually made without warning so that the recipient has no time to prepare or defend him or herself

Thomas Kelly

Eighteen-year-old Thomas Kelly was on a night out with his girlfriend. They were walking in Victoria Street, Kings Cross at around 10 p.m. on 7 July 2012 and, as Thomas talked on his mobile phone, a man who had been standing by the Mercure Hotel suddenly walked two to three steps towards them and punched Thomas in the head. The punch knocked Thomas to the ground and he hit his head on the pavement causing him to sustain a severe skull fracture and brain injuries. Thomas was taken to hospital and placed on life support but he died two days later.

The man responsible for this crime, 19-year-old Kieran Loveridge, was severely affected by alcohol and had already carried out an earlier random attack on another man. After he had assaulted Thomas Kelly, Loveridge ran off and carried out another three violent attacks on strangers.

Daniel Christie

Eighteen months later, 18-year-old Daniel Christie was out with his brother and friends in Kings Cross on New Year's Eve 2013 when he was suddenly struck in the face by the closed fist of Shaun McNeil. Twenty-six-year-old McNeil, a mixed martial arts enthusiast, was affected by alcohol and had just had a run in with three teenagers over a drugs transaction. Shortly after this he had an altercation with Daniel's group. Peter Christie was injured trying to defend his brother but Daniel took the full force of a 'king hit'. He fell to the ground, fracturing his skull. Daniel died 11 January 2014 in hospital when his family made the decision to turn off his life support.

Public reaction

The deaths of Thomas Kelly and Daniel Christie, so close to each other, caused public outrage and pressure was placed on the New South Wales Government to have tougher penalties regarding alcohol-fuelled violence. The main focus for this

Figure 15.1 Daniel Christie's brother, Peter and father, Michael with a portrait of Daniel.

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outcry was Kings Cross, a place seen by the public as a hive of criminal activity.

The violent acts on Thomas Kelly and Daniel Christie were not isolated events; Kings Cross had long been a destination for people looking for a big night out. Its international reputation meant that many tourists and visiting sailors headed to the 'Cross' for a good time. For many, this involves excessive drinking and, for some, drinking and drug taking leading to irrational behaviour. For these reasons, the government and police had long been concerned about the Kings Cross area.

Review 15.1

1. What is a 'one hit punch'?
2. Outline the events that lead to public outrage.
3. Kings Cross has always had a reputation. What do you know about Kings Cross? Identify the reasons why people may want to head to Kings Cross for a night out.

15.2 Legal responses

Whole of government response

The government responded to the death of Thomas Kelly with a four-phase **whole of government response**.

whole of government response
actions that go beyond just changing laws and include all areas of government such as transport and policing

The four phases

The first phase was for the NSW Office of Liquor, Gaming and Racing to conduct an audit. This audit began on 18 July 2012 and started with the scrutiny of the Responsible Service of Alcohol Registers of all 58 late-night trading venues in Kings Cross. These registers were compared with the crime registers of the Kings Cross police and the Bureau of Crime Statistics and Research data to ensure that licensed venues were fully reporting crimes. This was all carried out with wide media coverage, ensuring that Kings Cross remained under the spotlight.

Figure 15.2 King's Cross in Sydney

In the second phase, the government introduced new liquor restrictions to parliament. On 15 August 2012, the premier led a formal tribute to Thomas Kelly in parliament and then announced a raft of restrictions that would be placed on licensed venues in the Kings Cross Precinct. These limited the amount and type of alcohol to be sold after midnight on Friday and Saturday nights, as well as introducing new CCTV conditions that covered entries and exits for venues operating after midnight. Three alcohol education campaigns were also announced.

In the third phase of the New South Wales Government's response, on 18 September 2012, the premier, Barry O'Farrell, announced a campaign aimed at 'Cleaning up the Cross', which would see better transport links, greater policing on Friday and Saturday nights, and liquor licensing reforms.

This fed into the fourth phase, covering the period September 2012 to October 2013, when several key pieces of legislation were passed. These are outlined below.

Compliance and enforcement

The measures included expanding the boundary of the Kings Cross Precinct (and thus the liquor restrictions) and freezing new liquor licences for three years, up to 24 December 2015. In November 2012, the *Liquor Amendment (Kings Cross Plan of Management) Act 2012* (NSW) enacted these plans, amending the *Liquor Act 2007* (NSW) and also the *Liquor Regulation 2008* (NSW).

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Figure 15.3 New measures were put in place following violence in King's Cross.

The restrictive liquor licence conditions were also included in the *Liquor Amendment (Kings Cross Plan of Management) Act 2012* (NSW) and expanded to take in all licensed venues in the expanded Kings Cross Precinct.

Linked ID scanners were introduced to confirm and record identities of persons banned from entering premises in the precinct. This measure was incorporated into *Liquor Amendment (Kings Cross Plan of Management) Act 2013* (NSW) and included two new types of banning orders – a 48-hour ban and a 12-month ban.

A move to change the culture of the area saw the creation of a small bar licence that allowed businesses to cater for 60 or fewer patrons. This initiative was covered by the *Liquor Amendment (Small Bars) Act 2013* (NSW).

Another measure saw the introduction of sobering-up centres as a trial in the Kings Cross area. Under the *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW), three centres were set up for a 12-month trial period. In addition, at peak times there would be an increase in policing, the costs to be partly covered by licensed premises in Kings Cross.

Employees of licensed premises were expected to gain a Responsible Service of Alcohol Card under the *Liquor Amendment (Kings Cross Plan of Management) Act 2012* (NSW) and employees who committed a serious breach of liquor laws would have their card revoked.

Research 15.1

In New South Wales the issuing of liquor licences is covered by Liquor and Gaming NSW (previously called the Office of Liquor, Gaming and Racing). Find its website and look at its liquor licence requirements. Outline two requirements and comment on them as: (i) the owner of a licensed venue; and (ii) a member of the public.

Operation Rushmore

The NSW police led a campaign called 'Operation Rushmore', targeting alcohol-related crime and anti-social behaviour in the Kings Cross area in the lead up to the summer social period of 2012. The first 'blitz' occurred at the end of September 2012. This blitz involved police using drug detection dogs (without requiring a warrant) in the Kings Cross area and on train lines in the city. This measure was enacted into law with the *Law Enforcement (Powers and Responsibilities) Amendment (Kings Cross and Railway Drug Detection) Act 2012* (NSW).

Transport

In addition to Operation Rushmore, the government made changes to public transport in the Kings Cross area. Titled 'Transport', these changes involved improving the Kings Cross taxi rank to provide better safety for drivers and passengers. As well, a pre-paid taxi service was trialled and late-night bus services were extended. These changes were covered by the Pre-Paid Taxi Legislation: *Passenger Transport Amendment (Kings Cross Taxi Fare Prepayment) Regulation 2012 (NSW)* amending the *Passenger Transport Regulation 2007* (NSW).

The federal government provided $200 000 to the City of Sydney (the council area that covered Kings Cross) to make the main Bayswater Road taxi rank safer by installing CCTV cameras and improving the lighting.

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People and Places

The final part of the state government's response was titled 'People and Places'. Every Friday and Saturday night, a police officer was stationed in the CCTV control room. A coordinated education and public information campaign about risky drinking was carried out and, at the same time, Kings Cross was promoted through such events as the Kings Cross Festival to encourage a greater variety of people to visit.

Lockout laws

By October 2013, the final piece of legislation in response to the death of Thomas Kelly had been passed. But less than three months later, on New Year's Eve, would come the frighteningly similar killing of Daniel Christie.

On 21 January 2014, NSW Premier Barry O'Farrell announced a new package of reforms, covering both sentencing (discussed below) and prevention. It included community awareness campaigns and further transport options (free buses in Kings Cross), and also introduced the controversial '**lockout laws**'. Reforms to the NSW Liquor Act were presented to Parliament on 31 January, and the *Liquor Amendment Act 2014* (NSW) was passed later that year. Changes included a 1:30 a.m. lockout at hotels, registered clubs, night clubs and karaoke bars in the area of the Sydney CBD Precinct and the Kings Cross Precinct. This meant that if you were not on these premises at this time, you would not be allowed to enter; in addition, there would be no alcohol served after 3 a.m. in these precincts. These laws were seen as controversial by business owners as it limited their ability to run their businesses at a profit. Patrons were unhappy about not being allowed to be responsible for their own actions.

lockout laws
a general term used to describe the liquor licensing reforms that were brought in to deal with the issue of alcohol and violence in the Kings Cross area

Review 15.2

1. Describe the measures that went into the 'whole of government' response.
2. Construct a timeline that outlines the 'whole of government' response to solving the issues centred on alcohol and violence in the Kings Cross area.
3. What are lockout laws? There was criticism about these laws as they: (i) limited the abilities of licenced premises to conduct business; and (ii) limited the rights of individuals. Do you agree or disagree with these criticisms? Justify your answer.

Sentencing of offenders

Initial sentencing of Kieran Loveridge

Kieran Loveridge was charged with the murder of Thomas Kelly. In June 2013, the charge was downgraded to manslaughter by prosecutors. Loveridge pleaded guilty to this charge and was sentenced to six years' jail in November 2013, with a non-parole period of four years. He was also sentenced to one year and two months for the other assaults on the night, leading to a total of seven years and two months, with an effective non-parole period of five years and two months.

This caused immediate outrage as the prosecution, family of the victim and the public felt that this was not adequate punishment for the taking of a life. The NSW Director of Public Prosecutions immediately appealed against the sentence on the grounds that it was 'manifestly inadequate'.

New legislation

As part of the reform package announced on 21 January 2014, Premier Barry O'Farrell said that the government would consider new laws to deal with violent and fatal assaults. He told the media that replicating Western Australia's **one punch laws** was under consideration.

one punch laws
general term used to refer to changes to mandatory sentencing in response to alcohol-related violence

Along with the Liquor Act reforms, amendments to the *Crimes Act 1900* (NSW) were presented to parliament at the end of the month, and new legislation was passed later that year. The *Crimes*

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and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW) included the following areas:

- Mandatory sentencing for 'one punch' assaults. If someone unlawfully assaults a person, and the victim dies as a direct or indirect result of this, a 20-year maximum sentence is to be applied. If the offender is affected by alcohol or drugs, the sentence is a minimum of eight years and a maximum of 25 years.
- Increase of two years on maximum sentences for serious assaults where the offender is affected by alcohol or drugs, with a mandatory minimum of at least four years. The prescribed amount of alcohol is a **BAC** of 0.15 and higher under the new definition.

BAC
blood alcohol concentration measured in grams of alcohol per 100 millilitres of blood

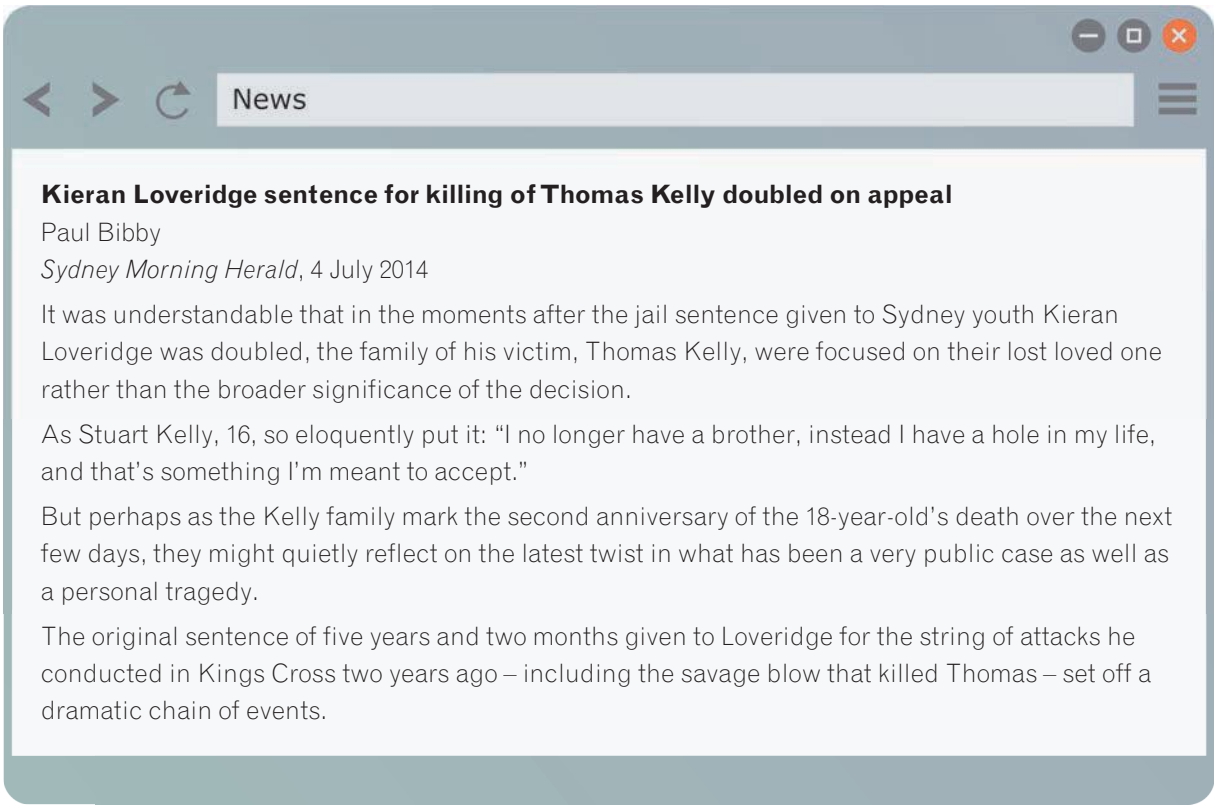
- When determining sentences, courts will no longer consider drugs or alcohol as a mitigating factor.
- Police will be able to carry out alcohol and drug testing on an offender if they suspect an assault was fuelled by alcohol or drugs.

Much media coverage has occurred as well as commentary among the legal community about these new laws, especially in regard to mandatory sentencing. There is concern among lawyers and charity groups that alcoholism and alcohol-related problems have become a criminal issue rather than one for which society should try to find solutions. As a person who is under the influence of alcohol will carry out actions that are not rational, the argument is that surely the community as a whole should undertake better education to reduce the incidences of excessive drinking.

Kieran Loveridge appeal and sentencing of Shaun McNeil

In July 2014, the NSW Court of Criminal Appeal increased Kieran Loveridge's jail sentence for manslaughter to a minimum of 10 years and six months, with a non-parole period of seven years. Sentences for the other assaults were also increased, leading to a total non-parole period of 10 years and two months – nearly twice the original non-parole period.

Shaun McNeil, who had delivered the fatal punch to Daniel Christie, was found guilty of manslaughter in the NSW Supreme Court in June 2015. He was sentenced to 10 years imprisonment.



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News

Within three months the then O'Farrell government bowed to public pressure and implemented strict mandatory sentencing laws for violent offences fuelled by alcohol.

On Friday, the NSW Court of Criminal Appeal resentenced Loveridge to a minimum of 10 years, two months' jail for the night of violence. This included increasing the minimum sentence for the manslaughter offence from four to seven years.

Would the mandatory sentencing laws have been imposed if Loveridge had been sentenced to a decade in jail by Justice Stephen Campbell in the first place?

The Director of Public Prosecutions and the Attorney-General had originally sought a guideline judgment rather than mandatory sentencing laws, and the latter was understood to have opposed them strongly.

A guideline judgment would have offered courts across the state a clearer path when sentencing offenders in "one punch" manslaughter cases and, if Friday's judgment is anything to go by, it may well have indicated that tougher penalties were appropriate.

Figure 15.4 Kelly family speaks out: Thomas Kelly's mother, Kathy, outside court after his killer's sentence was doubled. Photo: Brendan Esposito

The three-judge appeal panel led by Chief Justice Tom Bathurst found that the previous sentence had been "manifestly inadequate".

It upheld all seven of the appeal grounds put forward by the Crown, most crucially that sentencing judge Stephen Campbell failed to properly consider the need for general deterrence.

"The use of lethal force against a vulnerable, unsuspecting and innocent victim on a public street in the course of alcohol-fuelled aggression … called for express and demonstrable application of the element of general deterrence as a powerful factor on sentence in this case," their honours said in their reasons for judgment.

Some have read the judgment as an attempt by the court to send as clear a message as possible about the issue of alcohol-fuelled violence within the confines of the new laws.

Given the limitations of the new mandatory sentencing laws – such as the need to prove intoxication through a breath or urine test – it may in fact have a greater practical impact.

But such considerations were far from the Kellys' minds on Friday.

"I miss all the things that brothers do together – throwing a ball, laughing, joking, playing," Stuart Kelly said.

"I can tell you firsthand that to experience this kind of pain at such a young age is just … it's just too hard."

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Review 15.3

1 Outline the events leading up to the 'one punch' mandatory sentencing. There have been criticisms of this law for treating alcohol abuse as a legal issue and not a social issue. Do you agree or disagree with these criticisms? Justify your answer.
2 Shaun McNeil petitioned the court for a judge-only trial. He failed in this bid. For what reasons would he have not wanted a jury hearing his case (remembering that the media had highly publicised the issue of 'coward punches')?
3 Read the article on the previous page and answer the following questions.
   a In what ways has this been a public case?
   b What is a 'guideline judgement'? Did this occur in the original court case?
   c Who changed the sentence? For what reasons was the sentence changed?

Research 15.2

The case notes for the trials of both McNeil and Loveridge can be found on the CaseLaw NSW website by doing a search using the defendant's names. Choose one of the cases and write a summary about the judge's reason for imposing the sentence.

The Barry Lyttle case

The new legislation that covers knock-out punches in the Kings Cross Precinct underwent a severe test in January 2015. It also caused the public to question their perception of who delivers a 'coward punch'.

Irish tourists, Barry Lyttle and his younger brother Patrick Lyttle, were on a night out in Kings Cross. In the early hours of 3 January 2015 they got into an argument with each other. Patrick shoved Barry who retaliated by punching his brother in the face. Patrick fell to the ground, knocking his head and sustained severe injuries. Patrick was taken to hospital and Barry was arrested.

The case received media coverage but, unlike previous cases, did not invoke public outrage but public sympathy. This was because it had not been a random attack and not alcohol fuelled; Barry had only a low range alcohol reading. Barry's low alcohol reading meant that he was not charged under the new legislation but with recklessly causing grievous bodily harm.

As the media continued to report on the case, it showcased the closeness of the brothers whose mother had died of cancer in 2008. The media reported that Barry Lyttle had travelled to Australia with their father to reunite with Patrick who had been travelling around Australia. Patrick lay unconscious in hospital, Barry, under his bail conditions, was not allowed to visit his brother. Thankfully Patrick recovered and Barry was allowed to visit him as he recuperated.

Barry Lyttle was sentenced to a 13-month suspended sentence in the Downing Centre Local Court on 24 April 2015. Barry's remorse and CCTV evidence showing that Patrick had incited his brother assisted the magistrate in the sentencing decision. The brothers and their father returned to Northern Ireland.

Review 15.4

1 In what ways did the Barry Lyttle case: (i) test the new legislation; and (ii) test the public's perception of perpetrators of 'coward punches'?
2 Why was Barry Lyttle not charged under the new legislation? Do you think that this is fair?
3 What penalty did Barry Lyttle incur?

15.3 Non-legal responses

Government initiatives

One of the biggest non-legal ways to deal with alcohol-based crimes is to change the attitude to alcohol, especially as it has been a continuing culture in Australia to associate having a good time with drinking alcohol. As part of the 'Cleaning up the Cross' campaign, the government did target attitudes to drinking, especially excessive drinking.

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Figure 15.5 A responsible drinking campaign was run in response to problems caused by binge drinking.

Targeting a drinking culture has been an ongoing state government initiative: the 'Know when to say when' advertising campaign ran in 2011 and the current campaign 'Stop before it gets ugly' was introduced in 2013. 'What are you doing to yourself?' aired over the 2012–13 summer and specifically aimed at binge drinking in the Kings Cross area.

The alcohol industry

The alcohol industry has taken some steps towards curbing the issue of binge drinking. Although licensed premises and retailers of liquor benefit financially from the sales of alcohol, their reputations also suffer when the spotlight falls upon them in a negative way and this also affects their profits. Thus, it is to their advantage to monitor and discourage excessive drinking. In fact, under liquor licensing laws, if the responsible service of alcohol does not occur, penalties will be imposed.

DrinkWise Australia was established in 2005 by the alcohol industry as an independent, not-for-profit organisation. It has the primary focus of bringing about a healthier and safer drinking attitude in Australia. Its website lists the aims as to:

- Promote a generational change in the way Australians consume alcohol.
- Increase the age that young Australians are introduced to alcohol, as evidence has shown that alcohol can impact the development of the adolescent brain.

Community organisations

There are different community organisations that aim at educating people about the dangers of drug and alcohol abuse and at helping those affected by it. In NSW these organisations include:

- The Ted Noffs Foundation
- The Salvation Army
- Alcoholics Anonymous
- Lifeline
- Reachout Australia
- The Thomas Kelly Youth Foundation.

The Thomas Kelly Youth Foundation was set up in 2012 by the parents of Thomas Kelly. Its aim is to curb alcohol-fuelled violence so that families don't have to suffer the same loss as the Kelly family. The foundation has provided StaySafe areas that act as time-out places for vulnerable people with an aim at getting them safely home. The foundation's website also promotes safe drinking and highlights both responsible and irresponsible acts by the alcohol industry.

Figure 15.6 The Salvation Army is one of the community organisations that aims to educate people about the dangers of drugs and alcohol.

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The changing terminology of violence

The terminology of violence has changed as the media has focused on the deaths of Daniel Christie and Thomas Kelly. What was widely known as 'king hit' is now being called a 'coward's punch'. Daniel Christie's parents assisted in the use of the new term by saying that they found the expression 'coward's punch' a more appropriate term to describe what was done to their son.

The O'Farrell government changed the terminology further by talking about 'one punch laws' – an expression first coined in Western Australia. No matter what expression is used to describe the random and forceful blow, it has managed to keep the focus of the media and the public on the problem of alcohol and drug-fuelled violence and in doing so raised awareness of this issue.

Figure 15.7 Renaming 'king hit' to 'coward punch' is intended to shame offenders.

News

Push to refer to king hit attacks as 'coward punches' after teen left in coma

ABC online, 3 January 2014

The New South Wales government has backed calls for king hit attacks to instead be referred to as "coward punches".

It comes after the family of Daniel Christie released a statement expressing gratitude for the support of doctors, police and the general public. …

"We don't agree with the popular term king hit," the family statement reads.

"We have heard it referred to as a 'coward punch', which seems to be more appropriate.

"We have all been affected so much by this tragedy and our clear focus remains with our son and brother through this difficult time."

State Police Minister Mike Gallacher says he agrees about the use of the term "coward punch".

"The only people that wouldn't embrace this would be cowards that would punch people indiscriminately in such a way," he said.

"The entire community has got to do this.

"This has got to be called for what it is.

"It's a coward, gutless punch, and that's exactly what it's got to be called from this moment on."

"As long as they are shamed when they hit somebody, irrespective of whether they cause significant damage as they've done with Daniel and they've done with others, or indeed just indiscriminately hitting people on the side of the road, this will be something that I think will remain with them for the rest of their lives," he said.

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Review 15.5

1. Describe how the government has tried to change the public's attitude to alcohol consumption. Why do you think the government wants to change attitudes?
2. How has the alcohol industry responded to the challenge of binge drinking? What has been their motivation?
3. Outline the way that community organisations have tried to deal with the issue of alcohol.
4. The terminology of violence has changed; one reason given is to shame perpetrators. How successful do you think this measure will be?

15.4 Effectiveness of responses

In an evaluation carried out by the NSW Bureau of Crime Statistics and Research (a NSW government authority) and released in April 2015, it was found that the 'lockout laws' and associated campaign had positive results in the Kings Cross Precinct, with assaults down by 32 per cent in the short term. In the Sydney CBD area, assaults dropped by 26 per cent. However, as Bureau director Don Weatherburn asked, were these results due to a reduction in alcohol consumption or a decrease in the number of people visiting the area (because of media coverage and new laws)?

Several bars and hotels in the Kings Cross area have closed and the owners blame the liquor licensing reforms for this, but some coffee shop owners in the area have said that their business has increased as people who are unable to gain access to bars instead go for a coffee. The café owners are also seeing more customers during the daytime as the area is gaining a better reputation.

The evaluation did find that there has been a small increase in violence in Pyrmont, Redfern and Surry Hills, all areas that are not covered by the 'lockout laws', which could suggest that these areas have become alternatives for some people looking for a 'big night out'. In addition, the media has highlighted that Newtown, an inner Sydney suburb with many bars and hotels, has been experiencing greater violence on Friday and Saturday nights.

Figure 15.8 Many public events are sponsored by manufacturers of alcohol.

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Business proprietors and local residents have blamed this on the new laws, complaining that more people are coming to the area, arriving after midnight, and are a different clientele than in the past.

The future

In an article in the Sydney Morning Herald (6 January 2014), Professor Rod McClure, the director of Monash Injury Research Institute, commented that 'all it takes is the community as a whole saying that "enough is enough" and committing to a long term strategic introduction of public safety programs based on safer public environments, safer alcohol use and safer public behaviour, all regulated by legislation that is rigorously enforced.'

It is an opinion that many, including the government, medical community, law makers, police and community groups, agree with; however, as every week someone in the public eye seems to disgrace themselves due to 'drinking too much' and many music events and professional sports teams are sponsored by manufacturers and retailers of alcohol, it would seem that changing the cultural attitudes of Australians will not be an easy campaign for any government or group.

Review 15.6

1 Evaluate the success of the 'lockout laws'. Should these laws apply to other entertainment destinations?
2 What does Professor McClure say is needed for success in curbing alcohol-related violence? Do you think this is achievable in the near future? Why or why not?

Research 15.3

1 Carry out research online to find a case or cases of people who have been convicted under the 'one punch law'. Write a summary of the case.
2 View the DrinkWise website and describe two of the current initiatives/ campaigns.

Figure 15.9 Many members of the medical profession want to see a change in attitudes towards alcohol.

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Chapter summary

- Alcohol-related violence has been a problem in society for many years. In 2012 and 2013, the deaths of two young men who were each 'king hit' in alcohol-fuelled random attacks caused public outrage and moves to address the issue.
- The New South Wales Government in a 'whole of government response' brought about a raft of changes, which involved amending liquor licences, providing better transport links and greater policing, and generally trying to make the Kings Cross and Sydney CBD entertainment precincts safer.
- These changes also included providing tougher penalties for those who inflict violence by one punch and those who inflict violence while under the influence of alcohol.
- In the short term, the response has largely been successful with a decline in assaults in the designated areas.
- Non-legal responses have included government advertising campaigns targeting binge drinking. Community groups have provided counselling for those people with alcohol-related problems, and safe places for those affected by alcohol.
- Community attitudes towards drinking remain an issue and will need a long-term committed approach to create change.

Chapter summary questions

Multiple-choice questions

1 To what does a 'king hit' refer?

A a one hit punch that catches the victim unawares
B a really big punch
C a punch that occurs in the Kings Cross Precinct
D a punch that makes the victim see stars

2 Which of the following are non-legal responses to the issue of alcohol and violence?

A liquor licensing reforms in conjunction with actions taken by the alcohol industry
B lockout laws in conjunction with actions taken by the alcohol industry
C alcohol counselling from the Salvation Army in conjunction with actions taken by the alcohol industry
D liquor licensing reforms and alcohol counselling in conjunction with actions taken by the alcohol industry

3 What restrictions did the 'lockout laws' provide?

A that no new customers would be allowed into a venue after 1:30 a.m. and no alcohol would be served after 3 a.m.
B that a person under the influence of alcohol can volunteer not to be allowed into a venue
C that no new customers would be allowed into a venue after 3 a.m. and no alcohol would be served after 1:30 a.m.
D that no new customers would be allowed into a venue after 3 a.m. and no alcohol would be served after 3 a.m.

4 Why was Barry Lyttle not charged under the 'one punch' legislation?

A He was charged before the new legislation was enacted.
B He had no alcohol in his system.
C You can't be charged for punching a family member.
D He was under the prescribed alcohol limit.

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5 What is the official name of the 'one punch' legislation?
   - **A** *The Crimes and Other Legislation Amendment (Cowards Punch) Act 2014* (NSW)
   - **B** *The Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW)
   - **C** *The Crimes Amendment (One Punch) Act* (NSW)
   - **D** *The Crimes Amendment (Intoxication in Kings Cross) Act* (NSW)

Short-answer questions

1 Describe the incidents that caused the New South Wales Government to scrutinise the laws that cover liquor licensing.
2 Identify the different laws that cover the Kings Cross Precinct. Which of these laws apply to all licensed premises?
3 Account for the reasons that the New South Wales Government wanted the introduction of small bars.
4 What are the lockout laws? Why are they seen as controversial?
5 Outline how the terminology of violence has changed.
6 Explain how the new laws meet the needs of society.
7 Discuss how the new laws do and don't meet the needs of the individual.
8 Analyse the reasons why the alcohol industry will be involved in safe drinking educational campaigns.
9 Evaluate how effective non-legal responses can be in dealing with the issue of alcohol abuse.
10 Evaluate the effectiveness of the government's response to the issue of alcohol-related violence.

Extended-response questions

1 Describe the legal and non-legal responses to the issue of alcohol and violence. Evaluate their effectiveness in dealing with the issue.
2 Evaluate the effectiveness of the law in dealing with the issue of alcohol and violence in regards to protecting both the individual's rights and meeting society's needs.
3 Discuss the legal and non-legal responses to the issue of alcohol and violence.
4 Describe the legal and non-legal responses to the issue of alcohol and violence. Evaluate their effectiveness in protecting the rights of the individual.
5 How has the law met the needs of society in dealing with the issue of alcohol and violence?

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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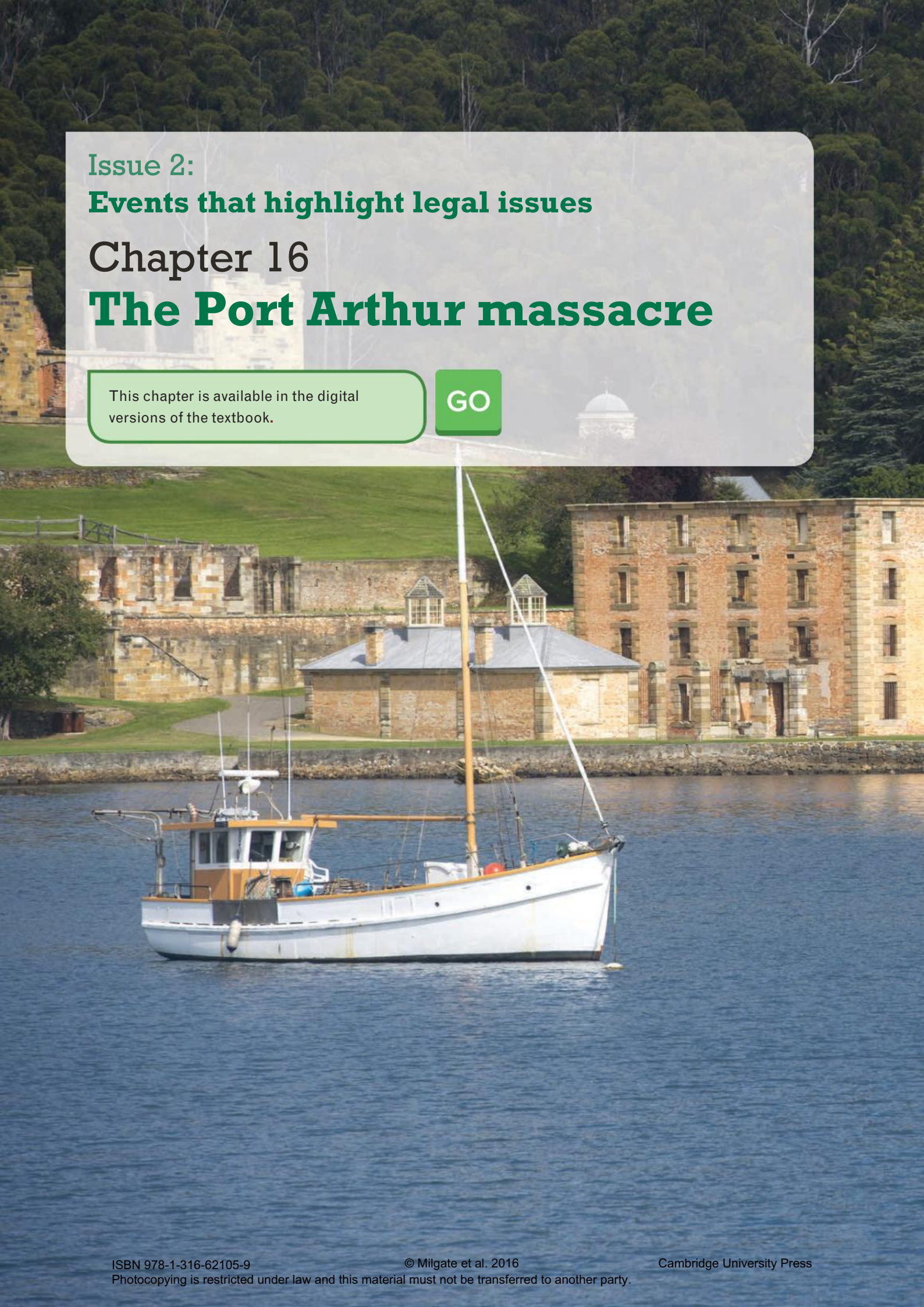

Issue 2:

Events that highlight legal issues

Chapter 16

The Port Arthur massacre

This chapter is available in the digital versions of the textbook.

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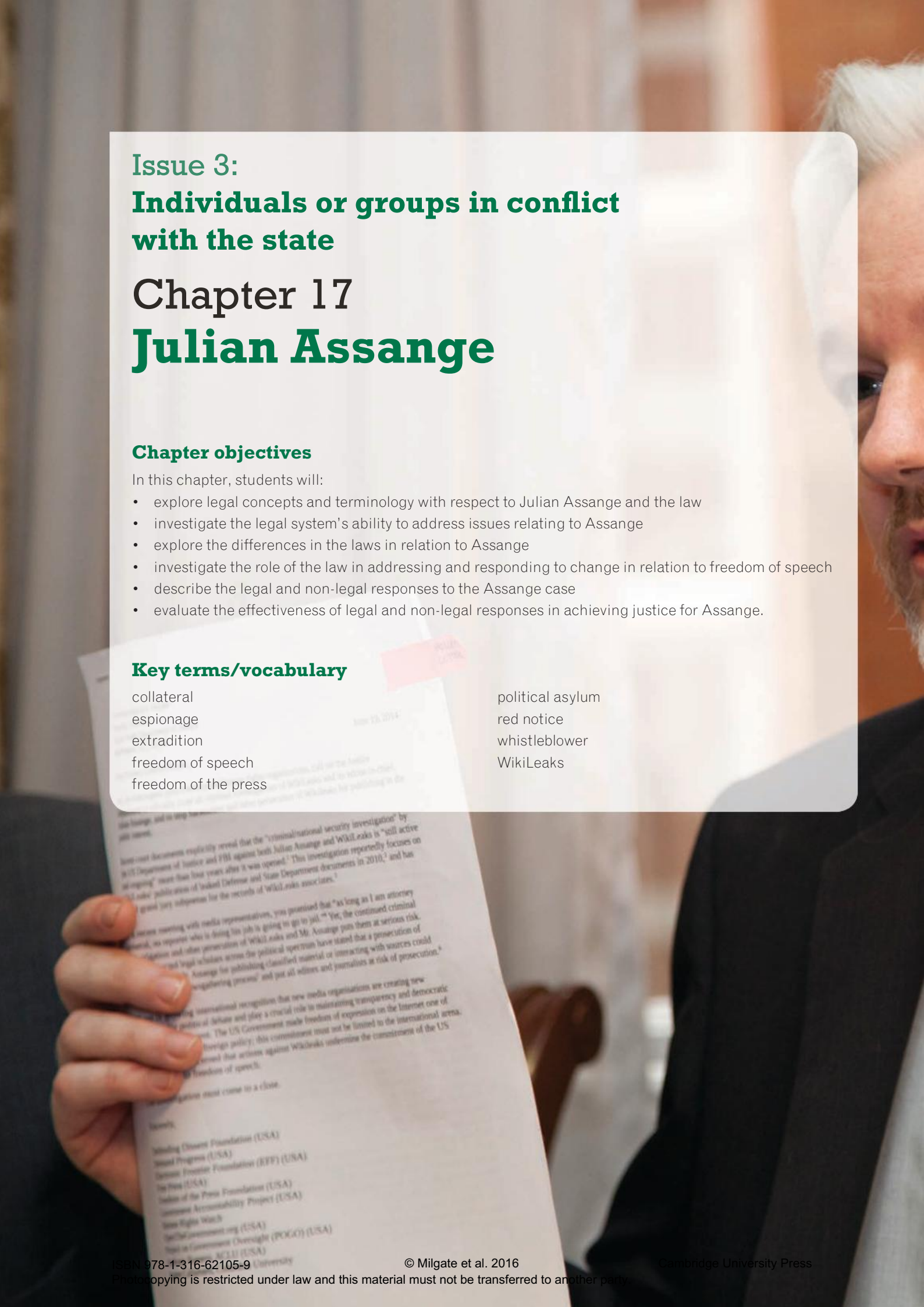

Issue 3:

Individuals or groups in conflict with the state

Chapter 17
Julian Assange

Chapter objectives

In this chapter, students will:

- explore legal concepts and terminology with respect to Julian Assange and the law
- investigate the legal system's ability to address issues relating to Assange
- explore the differences in the laws in relation 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.

Key terms/vocabulary

collateral
espionage
extradition
freedom of speech
freedom of the press
political asylum
red notice
whistleblower
WikiLeaks

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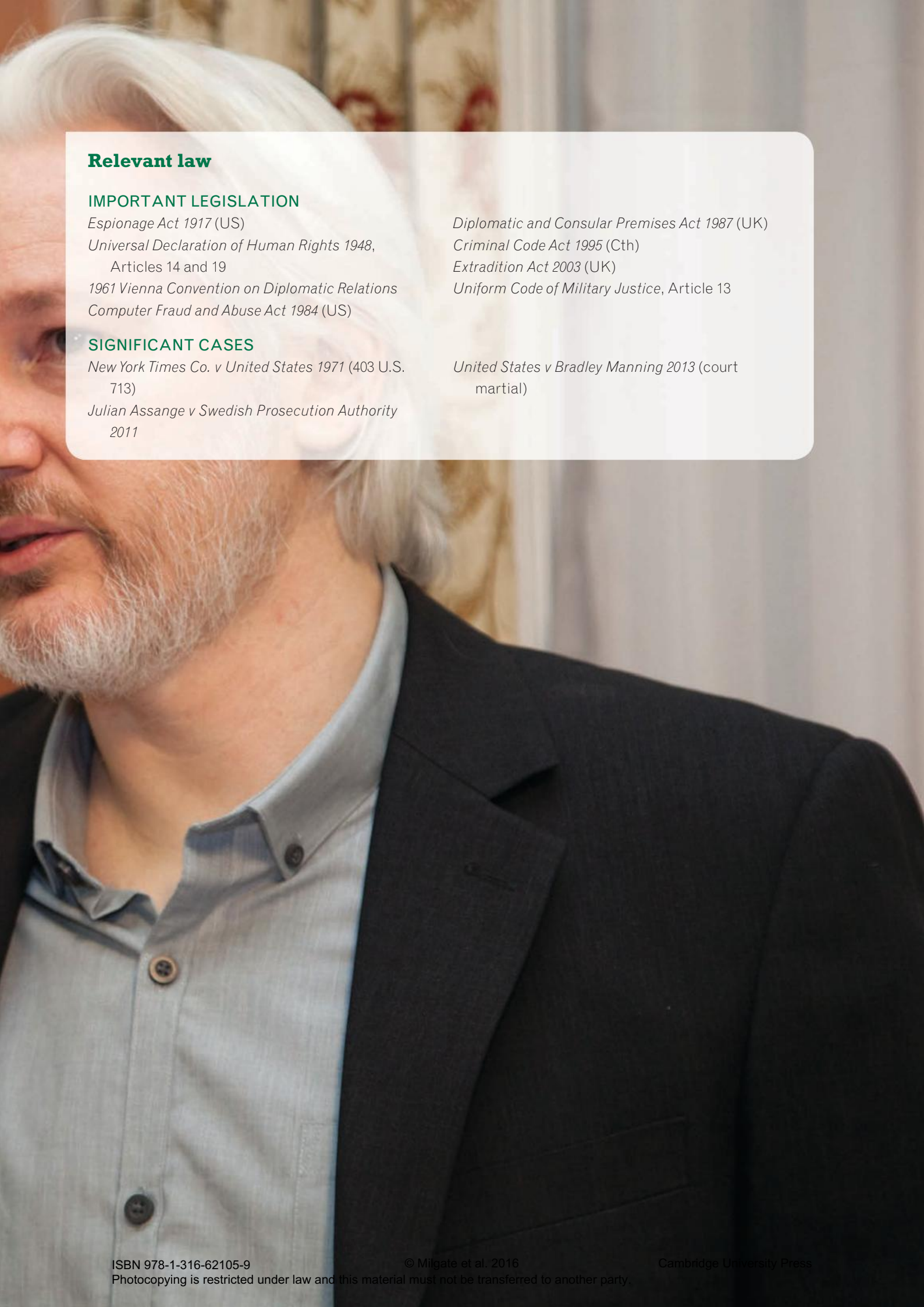

Relevant law

IMPORTANT LEGISLATION

Espionage Act 1917 (US)
Universal Declaration of Human Rights 1948, Articles 14 and 19
1961 Vienna Convention on Diplomatic Relations
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, Article 13

SIGNIFICANT CASES

New York Times Co. v United States 1971 (403 U.S. 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

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.

whistleblower
a person who raises a concern about wrongdoing occurring in an organisation, company or government department

WikiLeaks
an international organisation (originating in Australia) committed to anonymously publishing documents that are unavailable to the public

Since 2010, Assange has been involved in a highly publicised and politicised legal case of international significance, involving Sweden, the United States, United Kingdom and Australia. It relates to a series of releases of highly sensitive information about the behaviour of the US military in Iraq. The information consists mostly of communications between staff and departments that are classified as 'secret'.

His situation is interesting from a legal perspective because it is not clear that he has broken any law. He is an Australian citizen, but he remains inside the Ecuadorian Embassy in the United Kingdom, and has resisted Sweden's extradition request, which relates to sexual assault charges. Ecuador has granted him asylum. Assange is resisting the Swedish **extradition** request because he believes the US Government will seek his extradition from Sweden. However, in December 2015, the Ecuadorian Government reached agreement for Swedish authorities to interview Assange over sexual assault allegations.

Figure 17.1 Julian Assange is the founder, editor-in-chief and director of WikiLeaks.

extradition
the handing over of a person accused of a crime by the authorities of the country where he or she has taken refuge to the authorities of the country where the crime was committed

Assange's situation raises a number of important social and 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. Assange has been painted by some as a man with a brilliant mind and by others as an outstanding journalist. Indeed, he won the 2010 Martha Gelhorn prize for journalism. However, others label him a traitor, a vandal and an irresponsible journalist because his actions compromise the ability of national governments to keep some information secret in order to ensure the security of their citizens.

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)

Assange is now in conflict with at least four countries: they rank his status as anywhere from the 'most dangerous person in the world' to a 'bail jumper' who refuses to face accusations of sexual assault.

Legal Links

Some of Assange's key beliefs and philosophies are revealed in articles and essays he has written. You can read about his ambitions in the article 'The ambitions of Julian Assange', which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6546.

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Hacking

Julian Assange has highly sophisticated knowledge and skills in computer technology, software design and encryption. However, he has a history – dating back to the 1990s – of computer hacking of company databases and government departments, seeking 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 gone to jail for up to 10 years, but the judge took into account his disrupted childhood. Later on, 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.

Figure 17.2 Julian Assange used his extensive knowledge to assist the Victorian Police Child Exploitation Unit.

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 and 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 which we have information about others that may be important. 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 play 'whistleblower' or not? The definition of whistleblowing revolves around wrong or wrongdoing, but it is not always easy to know whether or not something is wrong or whether or not the information should be shared.

There are SHIELD laws (Securing Human Intelligence and Enforcing Lawful Dissemination) in many Western nations that are designed to protect journalists' sources from prosecution and

Figure 17.3 The WikiLeaks logo

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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 business and other groups, can be exposed by news services – this helps the public decide on their future voting (and other) behaviour. Governments usually have a right of reply or are able 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)

Consider this in light of Assange's belief that citizens have a right to know what governments have done so that they can make informed decisions at election time or indeed make governments accountable for their actions.

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 on WikiLeaks of classified diplomatic cables.

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 would 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 *UN's Universal Declaration of Human Rights* (UDHR) underpins this right.

Provided that your information is factual, and your opinion doesn't incite violence or hatred or defame another person or organisation, you are free to speak your mind in public, publish material and challenge authority in legal ways (see the *Anti-Discrimination (Racial Vilification) 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 in order to keep citizens and military personnel safe and military information secret. Indeed, governments do have a responsibility to protect citizens and withhold information that may be to the detriment of their citizens (see Legal Links below).

Legal Links

Governments believe keeping information confidential is necessary, while others believe it violates the Freedom of Information Act. This applied to the debate over whether or not photos of Osama Bin Laden's body should be released. Read the article 'Bin Laden Photos Ruling: Will Defense Department Release 52 Osama Death Photos?', which addresses this issue. The article can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6547.

Opinions will differ on what constitutes protection of citizens and what is considered a national security issue. President Obama stated that releasing pictures of Osama Bin Laden's body could lead to hatred and to revenge attacks on US citizens abroad and at home. If someone such as Julian Assange came into possession of these photographs and published them on the internet, he could be charged with **espionage**, a charge for which the penalty can be 20 years in prison.

espionage
the use of spies or spying to obtain information

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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 now 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, legal opinion is divided in the United States, and Assange may face charges of sedition if he enters that country.

Research 17.1

1. Read the article 'Bin Laden Photos Ruling: Will Defense Department Release 52 Osama Death Photos?' then outline whether you agree or disagree with President Obama's reasons for withholding the photos, and why.
2. Predict what Julian Assange and WikiLeaks may say about the photos. Should they publish them if they were sent to WikiLeaks? Justify your response using the terms 'transparency', 'confidentiality' and 'freedom of information'.
3. Read about the US Espionage Act via the following link: http://cambridge.edu.au/redirect/?id=6548. Use it to evaluate whether or not Julian Assange's actions constitute 'espionage'.

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 250 000 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. The clip can now be accessed on the internet, but it was a highly secret piece of military information not meant for publication.

collateral
(damage) in a military context, damage to or destruction of things other than the intended target such as civilian property and civilians

Later in 2010, WikiLeaks launched another embarrassing set of documents, entitled 'Afghan War Diary'.

US response

Crucial to Julian Assange's conflict with the state is the US Government's treatment of Manning, who has been under arrest since 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 of 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.

Figure 17.4 There is a lot of conflict in the United States surrounding Assange's actions. Many question whether or not it is freedom of speech or putting others at risk.

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Figure 17.5 Chelsea Manning when she was serving in the army as Bradley Manning.

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, 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 the intention to transition from male to female: previously known as Bradley, she asked that she now be referred to by the name Chelsea and that female pronouns be used.

There are unconfirmed reports that at some point in 2012–13, a US Grand Jury (a panel of prosecutors) took place and prepared a prosecution of Assange under the Espionage Act 1917.

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, said that they had had non-consensual sexual relations with Julian Assange.

Assange was interviewed by the Swedish police, but was not detained. He maintained that his encounters with both women were consensual.

Later that year, when Assange was in London, the Swedish authorities issued an 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 variety of notable friends. Interpol issued a **red notice** on him.

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. Osama Bin Laden had a red notice issued by the US Government before he was captured and killed in 2011, and Julian Assange is currently subject to a red notice.

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.

Political asylum

Julian Assange entered the Ecuadorian Embassy in London on 19 June 2012, after breaking his bail conditions in the United Kingdom, and was granted **political asylum** by the Ecuadorian Government.

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.

political asylum
a fundamental human right affirmed by Article 14 of the UN's *Universal Declaration of Human Rights*: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'

Having been granted asylum, Assange was allowed to remain within the embassy, where he could not be arrested by the UK authorities. However, he would not be protected if he left the embassy grounds.

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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.
2009	WikiLeaks establishes its head office in Iceland, a country with liberal internet censorship laws. The US Embassy in Reykjavik becomes one of the first 'targets' of leaked information.
2010	'Collateral Murder' (allegedly leaked by United States 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 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 an EAW for Assange. He surrenders to British police and is detained for 10 days. He is released on bail of A$300 000, which is posted by a variety of notable friends. A red notice is issued by Interpol.
2011–12	A 500-day legal process that involves fighting the EAW ends on 14 June 2012. After a number of lower court appeals, the UK Supreme Court rules Assange must be extradited to Sweden.
2012–13	There are unconfirmed reports that a US Grand Jury (a panel of prosecutors) has decided to prosecute Assange under the *Espionage Act 1917*.
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 resides inside the embassy with London police guarding the embassy 'around the clock'.
September 2015	London police remove 24-hour guard.
December 2015	Ecuador and Sweden reach a bilateral agreement for Assange to be interviewed inside the Ecuadorian Embassy rather than be extradited to Sweden.

Review 17.1

1 Describe the events leading up to the 2012 granting of asylum to Assange by the Ecuadorian Government.
2 Using the timeline above, identify, in chronological order, three of the most important events that occurred between 2009 and 2012. Justify your selection.

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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 of the United Kingdom.

There are numerous other cases in which countries have granted asylum to individuals who fear political and physical persecution from their governments. One example is Cardinal Joszef Mindszenty, who spent 15 years 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 the Second World War. It is not unprecedented for a foreign embassy to grant asylum under the UDHR.

Julian Assange and his legal team are attempting to use a range of legal avenues to avoid being extradited to Sweden; seeking asylum in the Ecuadorian Embassy has so far been a successful one. He is legally entitled, under the 1961 Vienna Convention, to stay within the confines of the Ecuadorian Embassy. Because British authorities are unable to enter the premises of the Ecuadorian Embassy, police kept a 24-hour guard outside the embassy, with the apparent intention of arresting Assange the moment he steps onto UK land. This surveillance ceased in August 2015.

In December 2015, it was announced that Ecuador had come to an agreement with Sweden by which Swedish authorities could interview Assange at the embassy.

However, many observers of the Assange case ponder the question of whether the British Government could legally seize Julian Assange from within the embassy itself. Under the *Diplomatic and Consular Premises Act 1987* (UK), ministers have power to withdraw recognition from diplomatic premises.

Figure 17.6 Julian Assange gives a speech while staying within the Ecuadorian Embassy in London.

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.

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News

Julian Assange may face Swedish interrogation within days

Jessica Elgot

The Guardian, 12 December 2015

The WikiLeaks founder, Julian Assange, may be questioned in London within days about alleged sexual offences after Ecuador indicated it had reached a bilateral deal with Sweden.

Assange has been wanted for questioning by Swedish authorities since 2010, but was granted asylum by Ecuador and has been in the country's London embassy for more than three years. In April, the activist said he consented to the Swedish prosecutor's conditions for the interrogation procedure to take place in the Kensington embassy.

The agreement refers specifically to Assange and Sweden's intention to question him in London and will come into effect "in the coming days", a statement from the Ecuadorian foreign ministry said.

Assange's Swedish lawyer, Per Samuelson, told the Guardian that Sweden needed to formally approve the deal and he understood those discussions would take place on Thursday.

Negotiations began in June this year between Ecuador's acting foreign minister, Xavier Lasso, and the Swedish justice ministry's international affairs chief, Anna-Carin Svensson.

The Ecuadorian government statement said: "The agreement, without any doubt, is a tool that strengthens bilateral relations and facilitates, for example, the execution of such legal actions as the questioning of Mr Assange, isolated in the Ecuadorian embassy in London."

The deal would ensure "the implementation and enforcement of national legislation and principles of international law, particularly those relating to human rights, to further the full exercise of national sovereignty in any event of legal assistance that may be required between Ecuador and Sweden".

The agreement would be the final step towards interviewing Assange in London, with a request to the UK for legal assistance having already been granted, according to previous statements from the Swedish prosecutor's office.

Assange sought refuge at the embassy in June 2012 after losing his final legal attempt to avoid extradition. Sweden's director of public prosecutions, Marianne Ny, said in March this year that she would allow Assange to be interviewed in London if agreement could be reached with Ecuador.

Two women made allegations against Assange five years ago in Stockholm, but no charges have been brought because the prosecutor has been unable to interrogate him.

Assange denies the offences and claims that if he surrendered to Swedish custody he would be indicted for espionage by the US for his work with WikiLeaks, which has released millions of classified documents.

In August, Swedish prosecutors announced they were dropping their investigation into two allegations of sexual molestation and one of unlawful coercion, as the statute of limitations had run out. Investigations into the outstanding allegation of rape continue, and the statute of limitation for that will not expire for another four and a half years.

The Metropolitan police recently announced the end of permanent patrols outside the embassy, which had been in place since Assange arrived, because they were "no longer proportionate".

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The British Government could determine that the asylum granted to Julian Assange is not the intended purpose of the Ecuadorian Government mission and then withdraw the consent or acceptance of using that land for that purpose. The government appeared to be locked in a dilemma between respecting international law and responding to the EAW, up until 2015.

Review 17.2

1. Outline the main factor that led to Ecuador granting Assange asylum.
2. Read the news story, 'Julian Assange may face Swedish interrogation within days on page 285'. Explain what the Swedish, Ecuadorian and British authorities are agreeing to.
3. Discuss the following quote in light of Julian Assange's years inside the Ecuadorian Embassy in London: 'Justice delayed is justice denied'.

United States espionage law

Meanwhile, in the United States a hearing or 'grand jury' is alleged to have taken place, preparing a prosecution of Julian Assange. The hearing was investigating '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 his 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.

The legislation has been challenged and amended since 1917 but was most famously applied, unsuccessfully, in a 1971 case against Daniel Ellsberg (see *New York Times Co. v United States* 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.

Daniel Ellsberg came into possession of the Pentagon Papers in much the same way as Julian Assange came into possession of the documents from Manning. He passed the documents on to *New York Times* correspondent Neil Sheehan, who had given 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. Meanwhile, Ellsberg sent 17 other newspapers copies of the Pentagon Papers. The US Government was furious and sought legal

Figure 17.7 Daniel Ellsberg

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Legal Links

The Daniel Ellsberg case, over 40 years ago, pre-dating the World Wide Web and digital forms of technology, has glaring similarities to Julian Assange and WikiLeaks' conflict with the US Government. The article 'Yes, Julian Assange actually is a criminal' argues for the US Government's right to keep information confidential (access a copy of the article via the following link: http://cambridge.edu.au/redirect/?id=6549). By his releasing of sensitive and important information without prior consent or appropriate authority, Assange is seen as a traitor and a spy. Interestingly, Daniel Ellsberg was not convicted of espionage.

action against the *New York Times*, but in *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.

In 2013, another high-profile whistle-blower, 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 (USA), 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 17.3

1 Discuss the validity of a US grand jury in bringing Assange to justice.
2 Explain the reasons given for the passage of the *Espionage Act 1917* (US).

Research 17.2

1 Read the article 'Yes, Julian Assange actually is a criminal' (see Legal Links). 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 post on your own social media sites.

17.3 Non-legal responses

Media

The Australian Broadcasting Commission (ABC) closely covered the issues in the Julian Assange case as they developed. An episode of its current affairs show *Four Corners* that aired on 12 August 2012 discusses the issues in the case: it can be viewed via the following link: http://cambridge.edu.au/redirect/?id=6550. The Channel Ten network also broadcast the telemovie *Underground: The Julian Assange Story*, which traces the early life and activism of Assange, in 2012.

Politics

In 2012, Julian Assange announced that he would run for the Australian Senate in the 2013 election. 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 are a number of internet-based support groups that are attempting to raise the profile of Julian Assange and encourage support for him in a number of ways. Individuals can make donations to help fund Assange's living and legal expenses. They can also spread the word about his situation and raise more support through social media pages.

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Figure 17.8 Julian Assange has public support worldwide.

Research 17.3

View these three different websites devoted to Julian Assange:

- Justice for Assange, accessed via the following link: http://cambridge.edu.au/redirect/?id=6551
- Defending the human right to a fair trial, accessed via the following link: http://cambridge.edu.au/redirect/?id=6552
- Julian Assange community Facebook page, accessed via the following link: http://cambridge.edu.au/redirect/?id=6553.

Investigate the purpose of each of the organisations/sites. Discuss the contributions each organisation may have made to the Assange case.

17.4 Effectiveness of responses

The Assange case is receiving widespread attention internationally, particularly in the United States, the United Kingdom, Sweden and Australia. The Australian Government has remained relatively inactive in the Assange case. While Julian Assange remains within Ecuadorian territory, there appears to be little the Australian Government can do through international law.

Law professor Natalie Klein, in an article in the *Canberra Times* (6 June 2012), states that while Julian Assange is an Australian citizen, there is a limit to the legal actions the federal government can take because one's nationality does not mean the laws of another country can be ignored when one is overseas.

Legal Links

The Julian Assange case has exploded in the wider media, provoking opposing views on the issue of freedom of speech and international human rights. The public, along with prominent officials and those in the media, have expressed their views through social media and opinion articles. In their *New York Times* opinion piece 'WikiLeaks and free speech', prominent film directors Oliver Stone and Michael Moore express their concern over how the Julian Assange case could perhaps be infringing the basic ideals of free speech. The article can be read via the following link: http://cambridge.edu.au/redirect/?id=6554.

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 oppose Assange brand him a highly dangerous criminal: for them, capturing and shutting down WikiLeaks are paramount. As with his reluctance to face charges of sexual assault in Sweden, they say, Assange is simply avoiding his legal responsibilities.

Conversely, Assange can be perceived as a champion of international relations. If governments all over the world were subject to scrutiny by WikiLeaks or other news organisations, they may be inclined to act more responsibly or indeed make apologies or pay compensation to victims of military activity or government mistakes that in the past may have been covered up.

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Review 17.4

1 Which laws apply to Julian Assange's stay within the Ecuadorian Embassy and his departure from the United Kingdom?
2 Discuss the notion that if Assange were prosecuted in the United States an important precedent would be set for journalists worldwide.
3 Construct a table of two columns, with FOR and AGAINST as headings. From your own perspective, list points under each heading that support or do not support Julian Assange's actions since 2009.
4 How has the national and international community responded to the case of Julian Assange? Have the responses been negative or positive? Choose one from each side and explain why each person or organisation holds the opinion it does.

Research 17.4

Search the internet for any recent developments related to the Julian Assange and Eric Snowden cases.

1 Has Assange returned to Australia? How long did he stay within the Ecuadorian Embassy?
2 Has Sweden made decisions relating to the Assange case? Is Snowden still residing in Russia?

Figure 17.9 In February 2016, a press release from the United Nations Working Group on Arbitrary Detention said they considered Julian Assange had been arbitrarily detained by the Swedish and British authorities.

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Chapter summary

- Julian Assange created the Australian site WikiLeaks as a way to 'whistleblow' on a range of corporate and government activities that would arouse public interest.
- Assange has been painted by some as a brilliant mind and an outstanding journalist. Others label him a traitor, a vandal and an irresponsible journalist, as his actions compromise the ability of national governments to keep their citizens safe. Eric Snowden is another individual also under investigation for the activities known as 'leaking'.
- A red note was issued by Interpol against Assange after he turned himself in to the British police then skipped bail. He then applied for political asylum in the Embassy of Ecuador.
- A free press is important for journalists and news services. Without it they may not be able to present a balanced view of the news.
- WikiLeaks is built on the hope that the publication of otherwise unavailable documents will encourage governments to behave in a more ethical manner and/or make apologies or pay compensation to those who deserve it. WikiLeaks continues to publish documents on a regular basis.

Chapter summary questions

Multiple-choice questions

1 WikiLeaks established itself in Iceland initially because of:
- **A** few censorship restrictions on internet activities
- **B** strict control of internet traffic
- **C** cheap internet data prices
- **D** the Director of WikiLeaks being 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 unfairly treated 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 Pentagon Papers case has similarities to Julian Assange and WikiLeaks because:
- **A** they both involve the *New York Times*
- **B** they both involve government secrets being released without authorisation
- **C** they both led to criminal convictions
- **D** both Daniel Ellsberg and Julian Assange sought political asylum

Short-answer questions

1 What do you understand by the term 'whistleblowing'? When should you or others 'blow the whistle' and how does this term apply to the Julian Assange case?

2 Define the terms 'freedom of speech' and 'freedom of the press'. Does Australia have a 'free press'? Use a media article that criticises a government to help make your argument.

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3 Comment on the Ecuadorian Government's decision to grant diplomatic asylum to Julian Assange. What was the reasoning behind the decision? Do you think it was justified?

4 Explain the circumstances of the issue of a red notice. Identify other individuals who have had red notices issued.

5 Do you think 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.

GO

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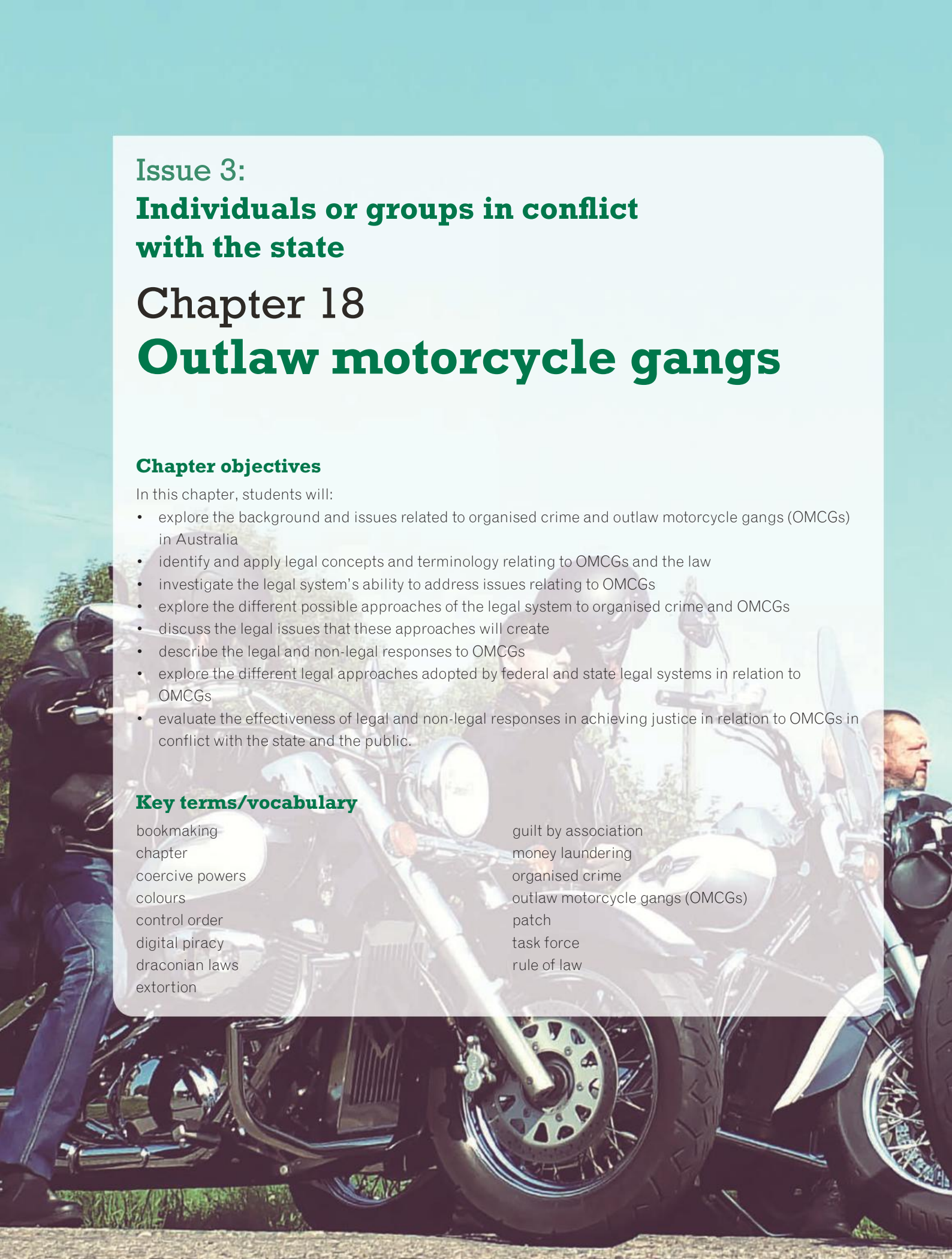

Issue 3:

Individuals or groups in conflict with the state

Chapter 18

Outlaw motorcycle gangs

Chapter objectives

In this chapter, students 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.

Key terms/vocabulary

bookmaking
chapter
coercive powers
colours
control order
digital piracy
draconian laws
extortion
guilt by association
money laundering
organised crime
outlaw motorcycle gangs (OMCGs)
patch
task force
rule of law

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Relevant law

IMPORTANT LEGISLATION

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)
Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010 (Cth)
Crimes (Criminal Organisation Control) Act 2012 (NSW)
Crimes Amendment (Consorting and Organised Crime) Act 2012 (NSW)
Vicious Lawless Association Disestablishment Act 2013 (Qld)
Tattoo Parlours Act 2013 (Qld)
Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment 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 (10 April 2012)
R v Hawi [2014] NSWSC 837 (23 June 2014)

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18.1 Outlaw motorcycle gangs in Australia

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. 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. 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. Concurrently, the New South Wales Government had passed legislation relating to the granting of bail to accused individuals – *The Bail Act 2013* (NSW). This was introduced to reduce the number of accused individuals from being placed on remand and to uphold the principles of the presumption of innocence.

outlaw motorcycle gangs (OMCGs)
organisations whose members use the structure of a motorcycle club as a front for criminal activity

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 towards the death of Zervas and was capable of rehabilitation.

The incident continues to fuel public debate about the danger of crime associated with outlaw motorcycle gangs (OMCGs) in Australia, and potential for all-out war between members of rival motorcycle gangs; in particular, drive-by shootings, manufacture and distribution of the drug 'ice' and the illegal use of firearms. Many states of Australia have made amendments to legislation seeking to ban OMCGs from existing and reducing their presence and profile in public places.

According to the Australian Crime Commission (ACC), a federal statutory body established to investigate and combat serious crime, OMCGs represent a 'real and present danger to the Australian community'.

The ACC estimates that there are about 40 active OMCGs in Australia, with approximately 6000 'patched' members, 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**.

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

OMCGs are not specific to Australia but are present in many countries around the world. Some of the best-known OMCGs internationally include the Hells Angels and the Bandidos. Some 19 groups

Figure 18.1 OMCGs are still an issue in Australia.

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are estimated to operate in New South Wales alone, with some other well-known groups, including 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 the 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 and the USA), 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, television series such as *Underbelly* and *Bikie Wars* recounted the gangland wars in Melbourne in the 1990s and the Milperra (bikie) Massacre in 1984 in Sydney.

organised crime
illegal activities organised by criminal groups or enterprises, most commonly for the purpose of generating financial profit

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 19th-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.

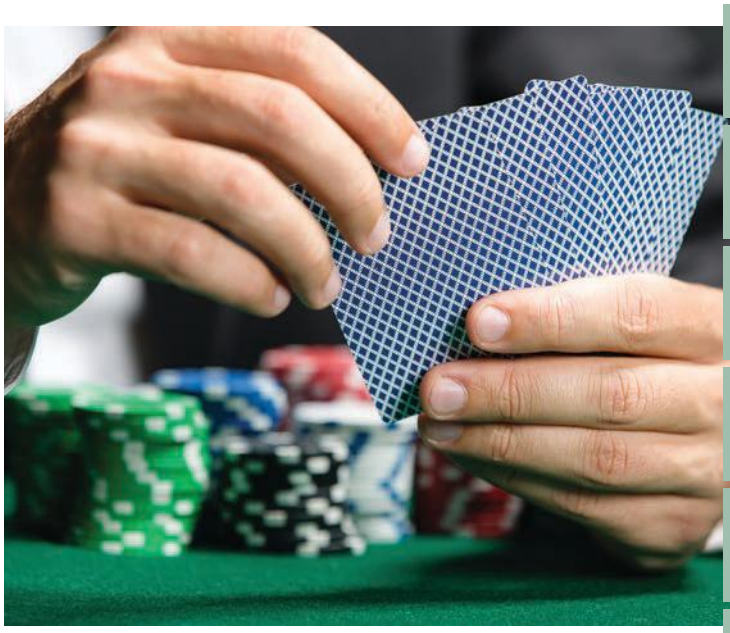

Figure 18.2 Illegal gambling can be a part of organised crime.

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 the areas of organised crime listed above. 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. 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 gangs may arouse unfounded suspicion from the public, or even the police, that an individual is involved in some kind of wrongdoing.

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

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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.

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 general public.

There are hundreds of motorcycling organisations in Australia. Clubs in New South Wales include the Ulysses Club, the Ambassadors and the Vietnam Veterans. 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, Victoria.

Legal Links

- View the website of the Motorcycle Riders Association of Australia, 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. The AMA promotes the interests of motorcyclists generally and organises various motorcycling events.
- The website of the Australian Motorcycle Grand Prix can be accessed via the following link: http://cambridge.edu.au/redirect/ ?id=6555.

Review 18.1

1 What are outlaw motorcycle gangs and how widespread are they in Australia?
2 What is organised crime and how does it relate to OMCGs?
3 Explain the difference between OMCGs and everyday motorcycle clubs using an example such as the Mick Hawi case.

Outlaw motorcycle gangs

Outlaw motorcycle gangs 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.

chapter
a local branch of a motorcycle club

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 the Second World War. A number of motorcycling

Figure 18.3 Only a small portion of motorcycle groups operate as gangs.

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clubs began to emerge in the United States when servicemen returned from the war. They formed clubs to mix with other returned servicemen, 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. 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 per cent' of the riders who had caused the trouble that weekend, and that the other 99 per cent were law-abiding citizens. This distinction between '1 per cent' and '99 per cent' is still used by OMCG commentators today, and '1 per cent' is sometimes even used by OMCG members themselves as a mark of their identity. It represents 1 per cent of bikies who operate outside the law.

Identity

Identity is important to OMCGs. Many motorcycle clubs, both mainstream clubs and OMCGs, will 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. Sometimes in order for a member to earn the club's patch, the club might require a vote and swearing of allegiance to the club, or the performance of tasks. A member losing his (or her) 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 per cent', to clearly distinguish themselves from the norms and values of mainstream clubs; other patches include symbols such as a skull and crossbones. The colours will also act as a crucial identifier for law enforcement agencies seeking to prove OMCG involvement.

Figure 18.4 Club colours are made up of a number of patches. Notice the '1%' patch in the Bandidos' colours.

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

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.

Research 18.1

View the website of the Australian Hells Angels and evaluate the content of the site.

1 Are there any references to criminal activity on the site?
2 What attitudes are conveyed by the photographs posted in the site's photo gallery?

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Case Study

The Hells Angels

The Hells Angels Motorcycle Club originated in Fontana, California, in 1948. Initially, it attracted soldiers returning from the Second World War, and later the Vietnam War. The name 'Hells Angels' had been in use by several US air fighting squadrons during both World Wars.

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 189 chapters in 22 countries.

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, the President is replaced by a Vice-President.

The Sergeant-at-Arms is responsible for the behaviour of members at meetings and special events such as funerals.

The Secretary-Treasurer controls finances, with duties such as collecting fees and paying club expenses, and may sometimes act as 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. It lays down three major rules that apply to all members:

1. No sexual assault.
2. No use of heroin.
3. 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 a photo gallery. It does not list any rules for club members.

Figure 18.5 Hells Angels members

OMCGs and organised crime

As mentioned above, according to the Australian Crime 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.

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On the other hand, OMCG members claim that their clubs are legitimate motorcycle organisations and not used as fronts for organised crime, as claimed by law enforcement agencies. Outwardly legitimate businesses, such as entertainment, private security, finance, transport, natural resources 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 incidents occurred in a Sydney suburb in 1984, in what became known as the 'Milperra Massacre' (see the In Court box).

Since the Milperra Massacre there have been many public and violent incidents involving OMCGs across Australia. Some of the most shocking recent examples include the following:

- In 1999 in Geelong, Victoria, two public bombings within 24 hours were the result of violence: a member of the Comancheros was tortured and murdered by the Bandidos and the rival gang's Sydney clubhouse was firebombed.

In Court

The Milperra Massacre trials

The 'Milperra Massacre' court case was one of the largest criminal trials that had been held in Australia to that time. A total of 43 people were charged with seven counts of murder.

The Milperra Massacre took place on Father's Day 1984 in the Sydney suburb of Milperra. It involved two rival gangs, the Bandidos and the Comancheros, and a number of other motorcycle gangs. The chief conflict between the Bandidos and Comancheros was between Anthony 'Snoddy' Spencer, who 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. In the resulting violence there was a murderous shoot-out that saw four Comancheros and two Bandidos killed, along with a 14-year-old girl caught in the crossfire while she sold raffle tickets. More than 20 others were wounded.

The judge in the case, Justice Adrian Roden of the Supreme Court of New South Wales, 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 violence, but served only five years and seven months. Life sentences were also given to seven other Comancheros, while manslaughter verdicts saw 16 members of the Bandidos serving 14 years. No 'biker' testified in the cases and many of the details of the event are unknown to this day.

Figure 18.6 Milperra Massacre, the aftermath

The massacre resulted in amendments to the *Firearms and Dangerous Weapons Act 1973* (NSW), with the introduction of a new licensing regime for the control of firearms. (The legislation currently in force in NSW is the *Firearms Act 1996*.)

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- In Perth in 2001, former WA Chief Detective Don Hancock and his companion were blown up by a car bomb planted by the Gypsy Jokers, following an incident where one of the Gypsy Jokers' members was shot and killed in a pub.
- In 2006, there was a drive-by shooting of a Sydney nightclub named 'Gas', in which 50 shots were fired into the doors by three men in balaclavas. About 150 people were inside when the shooting broke out. It was alleged the shootings were OMCG related and a warning to the club's owners that they should use their security guards to further the club's drug operations.
- In early 2007, more than 60 Parramatta and Granville members of the Nomads abandoned their affiliation with the Comancheros to join the Bandidos. This lead to more violent clashes between the Comancheros and Bandidos, including drive-by shootings and fire-bombings, resulting in some 340 arrests and 883 charges. NSW Police established Operation Ranmore to break the escalation of violence.
- In 2015, a 29-year-old man was shot dead in his vehicle outside his smash repair business on the NSW Central Coast. Police believe the victim was unknown to OMCGs and that his death may have been a case of mistaken identity.

A 2012 report by the NSW Bureau of Crime Statistics found a 40 per cent increase in the rate of 'drive-by shootings' from 2010 (71 shootings) to 2011 (100 shootings). The Bureau director, Don Weatherburn, said this was one of the state's most serious crime trends, and a matter of concern. By 2015, the number of drive-by shootings had remained static and these are now referred to as either 'discharge weapon into premises' or 'discharge a firearm illegally'.

The above statistics illustrate only the public, violent face of some OMCG activities. The black market criminal activities of OMCG-related business, such as the trade in illegal drugs or firearms or illegal financial activities like money laundering and extortion, are 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 business, 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.

Figure 18.7 OMCG are involved in a multitude of illegal activities at great cost to the public.

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 raised.

One of the main difficulties is that OMCG activities are a nationwide problem, but the problems often

Review 18.2

1. How did OMCGs develop and what is their history?
2. What are some of the characteristics of OMCGs and what is their structure?
3. What are some of the recent cases involving OMCGs and what issues do they present?

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occur and are dealt with on a state-wide basis. Each of the different jurisdictions in Australia has elected to address the issue in different ways. In addition to the legal responses, the approach to OMCGs around the country has been affected by the reactions of interest groups and the general public.

18.2 Legal responses

There are three types of legal responses:

- 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 in the violent incidents mentioned above would have been made under standard criminal laws like assault, murder, firearms offences or offences of dealing in illegal drugs.

One of the biggest issues is that 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. Gathering the 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 of speaking 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. So instead, Australian jurisdictions have preferred to focus on the types of activities OMCGs might be involved in – setting up legislative frameworks that criminalise these activities and that target their businesses and profits. These may feature:

- 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

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.

Figure 18.8 Most jurisdictions in Australia focus on the types of illegal activities in which OMCGs might be involved.

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

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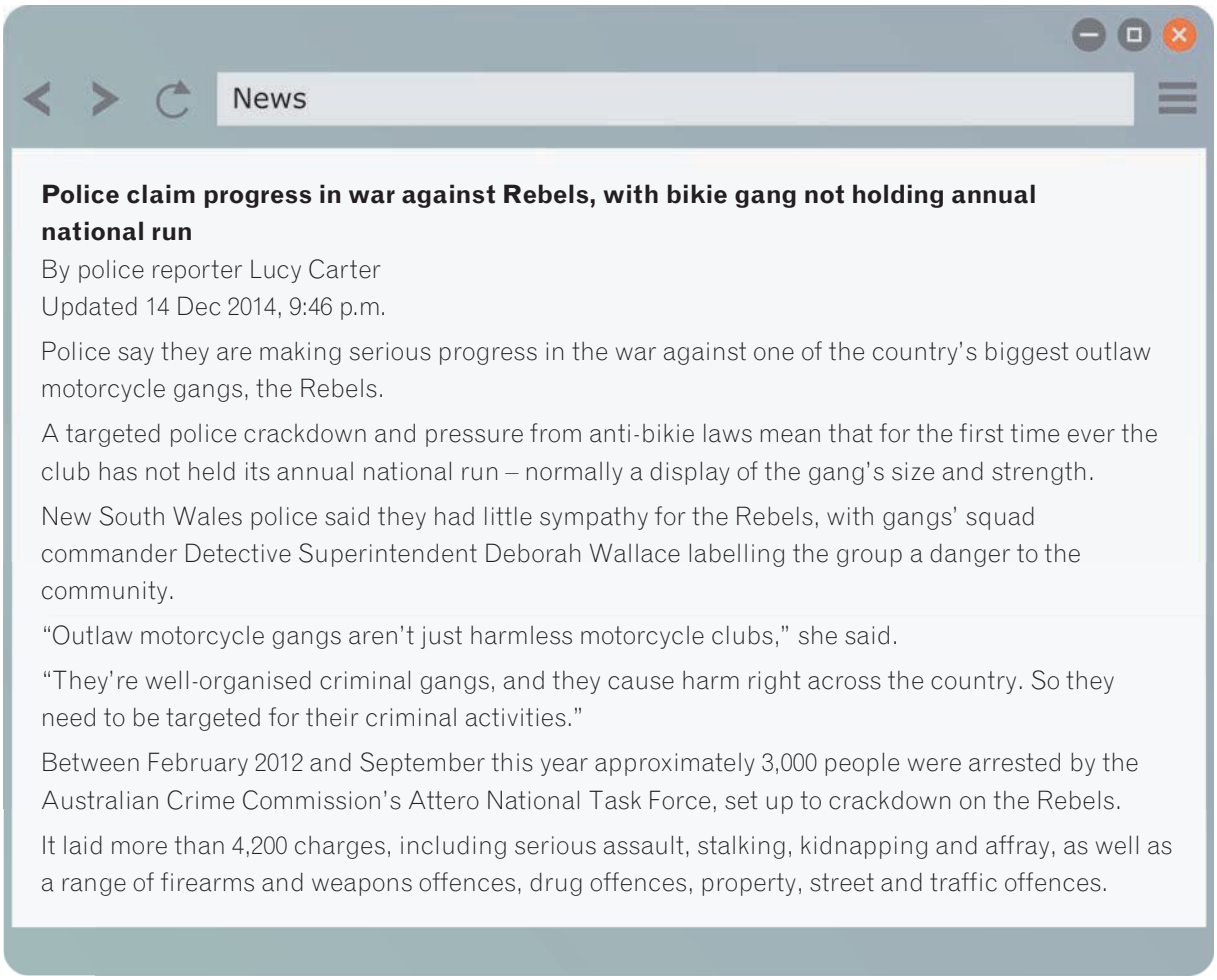
This can be controversial, as some of these powers extend beyond the traditional boundaries of government and law enforcement agencies. Some things, such as using coercion to force witnesses to give evidence, are options normally only available to the courts. So there needs to be a lot of oversight to make sure the task forces do not abuse these powers. 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) is challenged by this approach.

In 2006, the Australian Crime 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 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.

In addition to the federal government, a number of states have set up operations and task forces to deal with organised crime activities. For example:

- In March 2009, the NSW Police 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 seized.
- 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 number of drive-by shootings in Sydney's southwest by the Hells Angels and Nomads OMCGs. In response, law


News

Police claim progress in war against Rebels, with bikie gang not holding annual national run

By police reporter Lucy Carter
Updated 14 Dec 2014, 9:46 p.m.

Police say they are making serious progress in the war against one of the country's biggest outlaw motorcycle gangs, the Rebels.

A targeted police crackdown and pressure from anti-bikie laws mean that for the first time ever the club has not held its annual national run – normally a display of the gang's size and strength.

New South Wales police said they had little sympathy for the Rebels, with gangs' squad commander Detective Superintendent Deborah Wallace labelling the group a danger to the community.

"Outlaw motorcycle gangs aren't just harmless motorcycle clubs," she said.

"They're well-organised criminal gangs, and they cause harm right across the country. So they need to be targeted for their criminal activities."

Between February 2012 and September this year approximately 3,000 people were arrested by the Australian Crime Commission's Attero National Task Force, set up to crackdown on the Rebels.

It laid more than 4,200 charges, including serious assault, stalking, kidnapping and affray, as well as a range of firearms and weapons offences, drug offences, property, street and traffic offences.

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enforcement conducted raids simultaneously on 18 different properties in the Sydney metropolitan area, covering suburbs such as 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 acting under 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, the OMCG Task Force Hydra was established to target OMCGs and resulted in a number of charges for criminal activities.
- 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 Crime Commission, the Australian Federal Police and other bodies.

Laws targeting organisations and membership

Introducing legislation that targets and criminalises 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 clubs, or association with them. Civil liberties groups argue that criminalising people's association with illegal groups would 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 had legal difficulties at a fundamental level, and Australian jurisdictions deal with the issues in different ways. The question involves 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 – this includes 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 – the level of criminal activity that 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 a person must 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 this 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,

Figure 18.9 What involvement with the group must a person have to be considered criminal?

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rather than actually 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 he or she has 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 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

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 himself or herself.

guilt by association
criminal liability imposed for associating with another person who commits a crime, rather than for committing that crime oneself

Three Australian states have recently attempted to enact laws with elements of the approaches outlined above. 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 below.

Research 18.2

Research a task force focusing on OMCG activities that has been established recently. Who has established the task force and for what purpose? Is the task force funded by federal or state governments?

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 his or her participation contributed to the occurrence of criminal activity
- defining 'member' to include anyone identifying himself or herself as a member; for example, by wearing the club's insignia, patches or colours.

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

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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* 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) Amendment Act 2013* (Qld). New tougher penalties were also included such as fines of up to $1000 per day, mandatory prison sentences and stricter checks on the ownership of tattoo parlours.

Research 18.3

Research information about new Queensland legislation targeting organised crime and answer the following questions.

1. Has the law been passed?
2. What changes does it make?
3. How does it differ from the 2007 bill discussed above?

South Australian approach

Following numerous violent incidents involving OMCGs, including the death of a gang member at an Adelaide nightclub, the South Australia Government enacted the *Serious and Organised Crime (Control) Act 2008* (SA). The SA laws aimed to disrupt 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 the federal government following the 11 September terrorist attacks. For example, the *Anti-Terrorism Act (No. 2) 2005* (Cth) introduced two new Divisions into the *Criminal Code 1995* (Cth) allowing **control orders** and preventive detention orders to be made against individuals.

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

The SA 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 SA Attorney-General.

Some of the most critical provisions of the SA 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.

Figure 18.10 The Gypsy Jokers Poker Run protested the removal of the right to associate.

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- The Police Commissioner can apply to the SA 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 provisions of the Act invalid and the South Australia Government appealed this ruling to the High Court of Australia. In 2010, the SA 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 December 2005 Cronulla riots, the New South Wales 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 above. Significantly, the NSW Act did not include an offence for simply being a member of the organisation.

As an immediate response to 2009 killing of Anthony Zervas at Sydney Airport, NSW Premier Nathan Rees introduced new laws that were said to be 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 are:

- Police 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 SA 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 SA 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 stated

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in an interview that he believed the new laws were appropriate: '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 NSW,' he said. 'So of the nearly 40 gangs, nearly half of them are in NSW.'

The High Court of Australia handed down a decision in 2011 that has invalidated the *Crimes (Criminal Organisations Control) Act 2009* (NSW). The court found that the law was contrary to the separation of powers by undermining 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 NSW Parliament. As the law conferred quite wide-ranging powers to enforcement authorities within the state and pre-empted decisions that could be made in the Supreme Court, it has been criticised as infringing fundamental civil liberties.

The NSW 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 that increased the penalties for those involved in firing a weapon at a dwelling/house as part of an organised criminal activity.

Review 18.3

1. What are the three main legal responses to OMCGs and organised crime?
2. What are some of the advantages and disadvantages of each approach?
3. How does the legislation differ between Australian jurisdictions? Which approach or approaches do you think are best and why?

18.3 Non-legal responses

In addition to the responses of law-makers and law enforcement agencies discussed above, there are a number of other responses to consider. These include those of the general public, the media, politicians, interest groups and the OMCGs themselves. Some of these responses are explored below.

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 of 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 New South Wales Government's action to strengthen organised crime laws immediately after the Sydney Airport murder.

The media enables public discussion of laws being proposed – both 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 through demonstrations. In March 2009, about 700 members of clubs, including the Hells Angels, Gypsy Jokers,

Figure 18.11 Media coverage of OMCG activities can influence public perception and support of proposed laws.

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Rebels and Finks, organised a ride through the towns of South Australia's Barossa Valley, accompanied by a police escort, to protest against the *Serious and Organised Crime (Control) Act 2008* (SA). It took place in conjunction with the Gypsy Jokers' annual ride, which had never before been open to other clubs. In a second peaceful protest in May, about 300 members of different gangs converged on Parliament House in Adelaide and presented a petition against the new legislation. In response, SA 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.

Legal Links

In July 2015, motorcyclists around the country held rallies to protest against the anti-association laws. An *ABC* news article about the rallies can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6557.

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.

The party obtained formal political status on 19 March 2009 and is open to anyone who is registered to vote in South Australia. Among its members are a number of motorcyclists concerned about the introduction of the Act. Party spokesperson Paul Kuhn said that the party opposes the Act, but is concerned about a number of other issues as well: Freedom, Rights, Environment and Education (FREE).

The party ran in the 2010 and 2014 South Australian state elections, but did not gain significant results. It is not currently registered as a political party, but its Facebook page suggests it plans to contest the 2017 state election.

Review 18.4

1 Describe some of the non-legal responses to organised crime. How do they influence changes in the law?
2 What non-legal responses do you believe are most effective in dealing with OMCG issues and why?

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 had no intention of introducing new laws. Other states and commentators have claimed that this may create 'safe havens' and 'legislative gaps' for OMCGs to exploit, but there has been no evidence of this to date.

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

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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 – not only in reducing criminal activities and violence associated with OMCGs, but 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 (7th century BCE) whose laws imposed cruel and severe penalties for crimes

Review 18.5

1 How do the responses of different jurisdictions compare in addressing OMCG-related activities? Which legal responses do you think are the most effective and why?
2 How far should the law go in attempting to address the activities of OMCGs and other organised criminal groups? Do you think the responses have been appropriate?

Research 18.4

Search for recent news stories related to OMCGs and answer the following questions.
1 Have there been any recent incidents involving OMCGs in New South Wales or around Australia? What happened in those incidents?
2 What recent arrests or charges have been laid against OMCG members? Do the articles suggest that the new laws have been used or have been effective?
3 Have there been any problems or court challenges associated with the new laws?

Figure 18.12 Motorcycle gangs tend to be targeted as a whole rather than as individuals when crimes are committed that involve their members.

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Chapter summary

- Organised crime is a problem for Australian society and for the law. It operates in many different industries and is associated with many different illegal activities.
- Motorcycle groups have been in existence for over a hundred years and most were formed simply to share a common interest in motorcycles.
- OMCG membership is a growing problem in Australia and there have been many recent public incidents involving OMCGs.
- There are different legal approaches to OMCGs, each with its own advantages and disadvantages.
- These include laws to prosecute individuals for specific crimes, the establishment of task forces, increased police powers, and laws that criminalise the clubs or participation in them.
- Some of these approaches have ramifications with respect to fundamental principles of the criminal law and individual rights.
- Different Australian jurisdictions have adopted different approaches to deal with the issues.
- 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 responses of the law to OMCGs.

Chapter summary questions

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** 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 criminal?
- **A** Police Commissioner
- **B** Supreme Court
- **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

Short-answer questions

1 Discuss the problems of organised crime in Australia. What types of activities are related to organised crime and how widespread are they in Australia?

2 Outline the origins of motorcycle gangs and OMCGs. Are they different, and if so, how?

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3 Outline the different legal approaches to OMCGs.
4 Describe some of the recent changes to Australian laws to deal with OMCGs. How do these differ from previous laws?
5 Do you think some organisations should be criminalised? What level of participation in criminal organisations do you think should be prosecuted?

Extended-response questions

1 '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.
2 Evaluate the responsiveness of the law in dealing with OMCGs. Do you think the legal approaches are fair? Which approaches do you think are most appropriate and why?

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

GO

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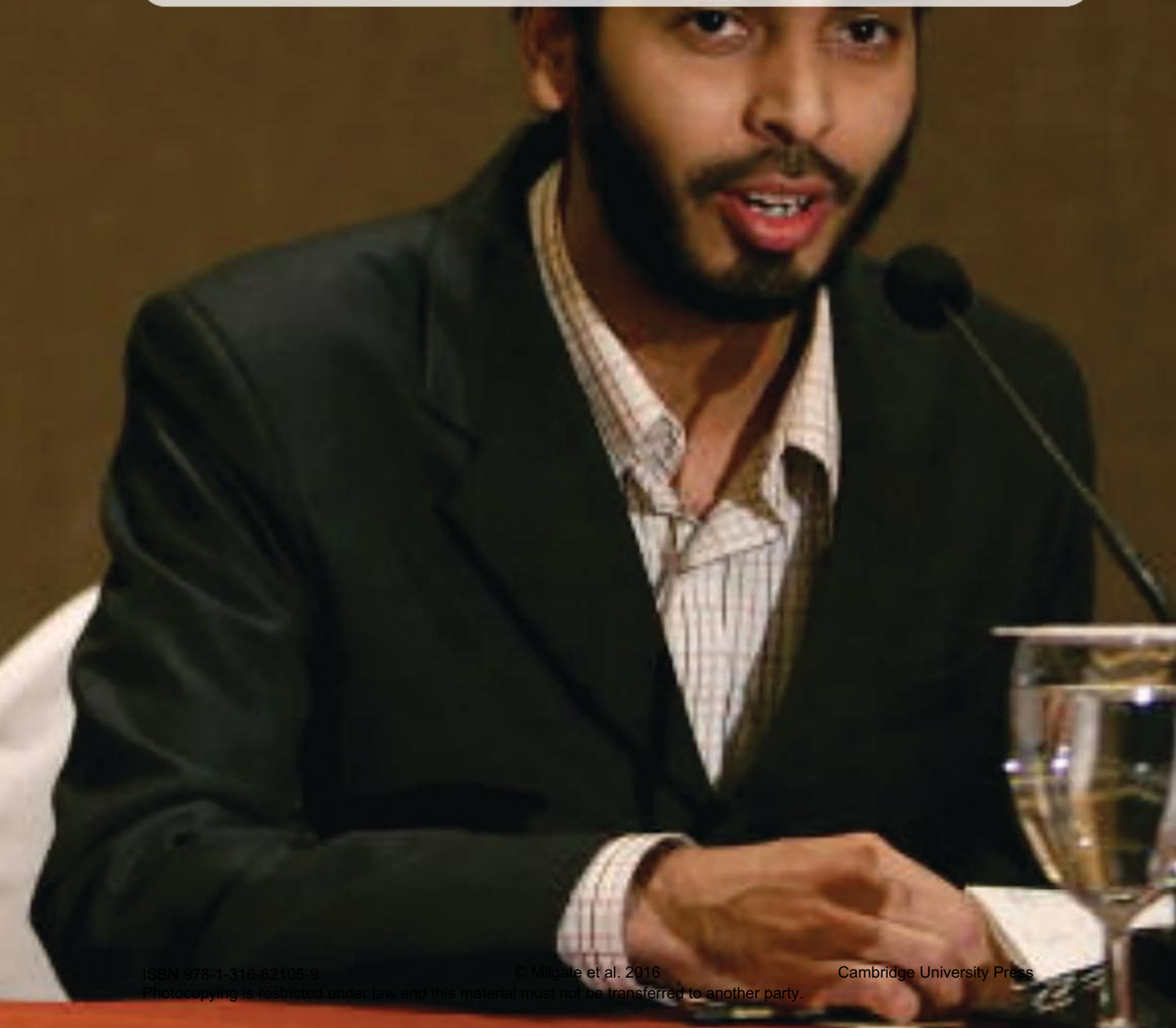
Issue 3:

Individuals or groups in conflict with the state

Chapter 19
Mohamed Haneef

This chapter is available in the digital versions of the textbook.

GO



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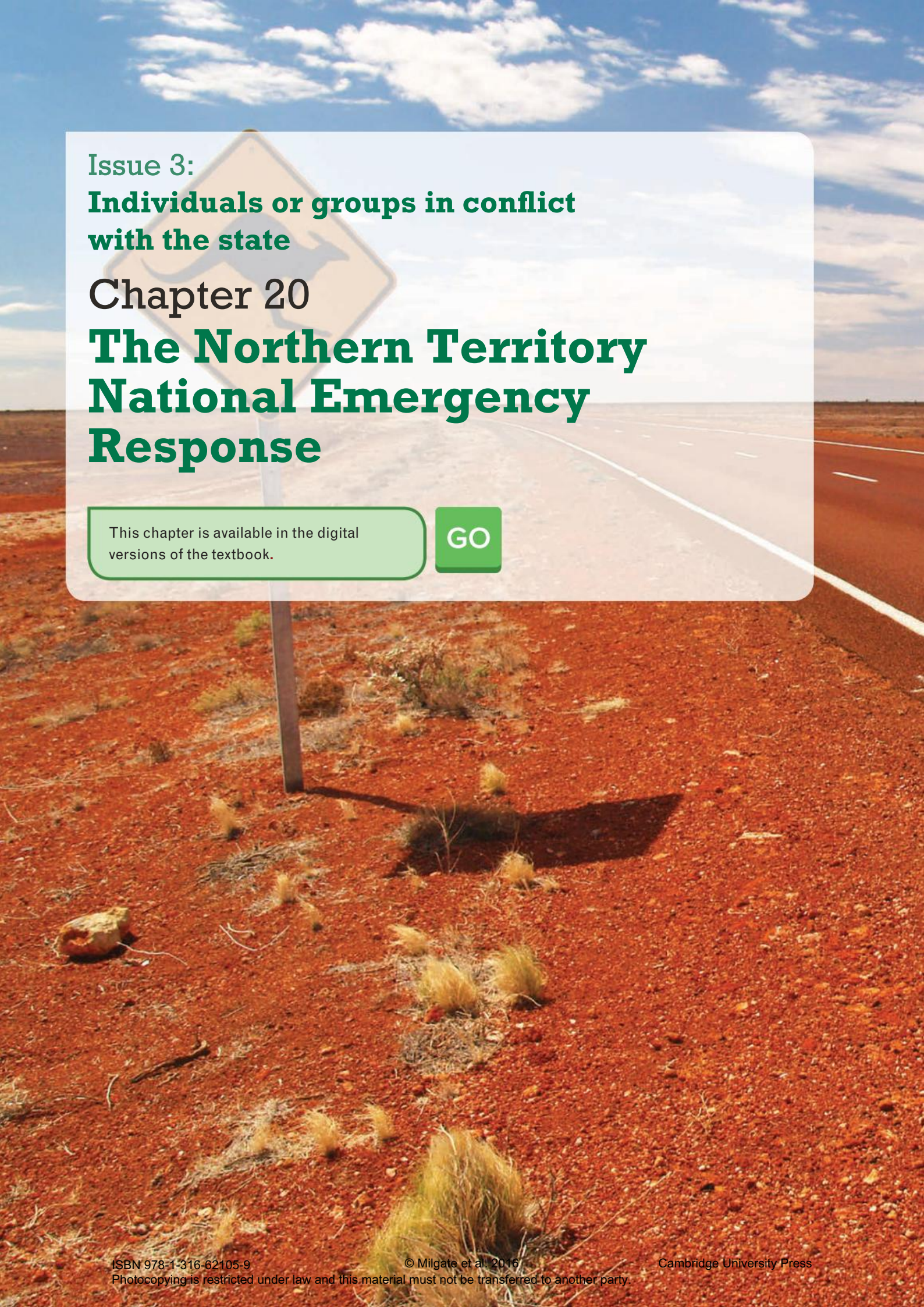

Issue 3:

Individuals or groups in conflict with the state

Chapter 20

The Northern Territory National Emergency Response

This chapter is available in the digital versions of the textbook.

GO

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Issue 4:

Criminal or civil cases that raise issues of interest to students

Chapter 21
Digital piracy

Chapter objectives

In this chapter, students will:

- explore legal concepts and terminology relating to digital copyright and the law
- investigate the legal system's ability to address issues relating to digital copyright
- explore the differences that exist between Australian and international law in relation to digital copyright
- investigate the role of the law in addressing and responding to changes in relation to digital copyright
- describe the legal and non-legal responses to digital copyright infringements
- evaluate the effectiveness of legal and non-legal responses to digital copyright infringements.

Key terms/vocabulary

copyright
copyright infringement
copyright notice
digital copyright
digital piracy
download
extradition
file-sharing
format-shifting
intellectual property
internet piracy
peer-to-peer (P2P) networks
piracy
space-shifting
technological protection measure
time-shifting
upload

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Relevant law

IMPORTANT LEGISLATION

Copyright Act 1968 (Cth)

Copyright Amendment (Digital Agenda) Act 2000 (Cth)

US Free Trade Agreement Implementation Act 2004 (Cth)

Copyright Amendment Act 2006 (Cth)

SIGNIFICANT CASES

A&M Records Inc. v Napster Inc., 239 F3d 1004 (9th Cir 2001)

United States of America v Griffiths [2004] FCA 879

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

MGM Studios Inc. v Grokster Ltd, 545 US 913 (2005)

Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16

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21.1 File-sharing, digital copyright and the law

The internet has given people access to a whole world of information and opportunities to use and interact with it in a way that they never could before. Photos, music, videos and software can be viewed and heard on our own computers or transferred to other devices. The internet makes it possible to **download** these files to keep or share, sometimes for a fee but sometimes without paying for it. In some cases, the act of downloading this material may infringe another person's intellectual property rights.

download
to receive data from a central system to one's own local network or computer

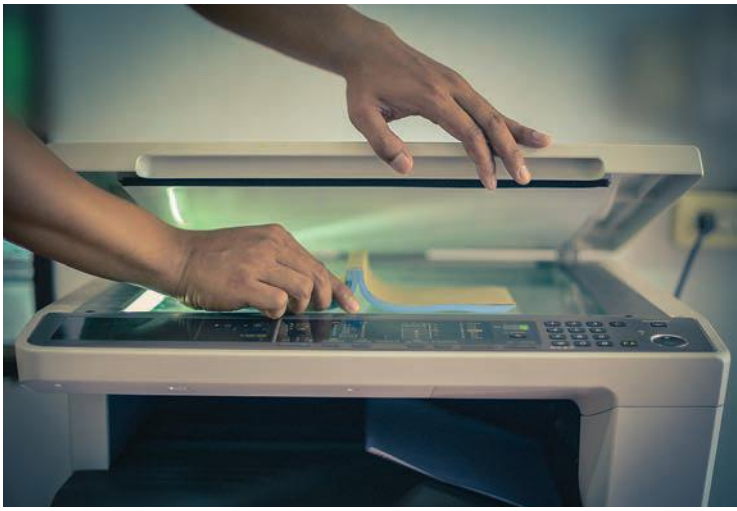

Figure 21.1 Copyright is one of the three types of protection for intellectual property.

Copyright law

This has become an area of concern not just for the owners of the material but also for law-makers on a domestic and international scale. As discussed in Chapter 8, **intellectual property** law protects a person's rights in relation to intellectual works and other intangible, or non-physical, property that this person has created. Three types of legal protection for intellectual property are patents, trademarks and **copyright**.

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

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

Copyright is the area of intellectual property law that protects a person's right to an original expression of an idea. It allows the creator the right to do or prohibit certain acts relating to that expression: to reproduce it, publish it or make an adaptation of it.

Historically, copyright law was confined to text-based material, but over time it has expanded to include rights in a range of works, including books, films, software and music. The arrival of the internet over the past two decades has brought with it many challenges to traditional concepts in copyright law. Copyright law has had to adapt to the new digital environment, and **digital copyright** simply refers to copyright as it applies to this relatively new medium.

digital copyright
copyright as it applies to digital media

File-sharing and digital piracy

Digital technology has enabled the average computer user to make copies of almost anything with ease, much to the discomfort of the music and movie industries. There is a reciprocal relationship between the internet and consumers; that is, internet providers are dependent on the ability of users to **upload**, download and transmit digital text, files, web pages and so on.

However, **copyright infringement** through unauthorised **file-sharing** poses serious challenges for the laws of digital copyright. It has resulted in ongoing legal battles involving individuals, the music, film and television industries, and online file-sharing services.

upload
to send data from a local system or computer to a central or remote system, for other users to view, hear or use

copyright infringement
the unauthorised use of copyright material in a manner that violates the owner's rights

file-sharing
the practice of distributing electronically stored information such as computer programs, music and video files, especially through the use of peer-to-peer (P2P) networks

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Popular portable devices that can easily transfer digital music between computers have allowed users to obtain their entertainment for free, or for only a nominal cost. However, to the music industry and media networks, digital copying is considered **piracy**. The term 'pirate' was used as a term for stealing intellectual property even before the first copyright laws were put in place in England (with the Statute of Anne in 1709). An early reference was made by English writer Daniel Defoe in 1703, when he said of people who were distributing copies of his poem, 'A True-Born Englishman', on the streets: 'It's being printed again and again by pirates, as they call them.' It is claimed that some 80 000 copies were pirated on the streets of England, Ireland and the United States, and that this may even have, ironically, contributed to Defoe's fame by making his work available more cheaply to the general public.

Digital piracy is the unauthorised reproduction and distribution of digital music, software, videos or other material, and the term **internet piracy** is used when this occurs via the internet. This can be done by various means such as file-sharing or **peer-to-peer (P2P) networks**, BitTorrent programs, pirate servers or websites. It can also be done by people known as 'hard goods pirates', who make illegal copies of material for distribution on DVDs, CDs or videotapes for profit.

piracy
(1) an illegal act of robbery of a ship at sea, outside the jurisdiction of any state; (2) the infringement of copyright

digital piracy
unauthorised reproduction and distribution of digital music, software, videos or other material, often for profit

internet piracy
unauthorised downloading or distribution of copyrighted material by means of the internet

peer-to-peer (P2P) networks
computer networks in which individual participants are directly connected to each other, rather than through a central server

Digital copying over the internet grew quite rapidly in popularity, as it allowed users to obtain music and other media files freely, quickly and relatively simply, in the comfort of their own homes, and in an easily transferable and shareable format. It also allowed users to store and transport their own music and media files more easily than on multiple CDs or DVDs, or the earlier and even bulkier videotape and cassette tape collections.

The music and other media industries were often accused of being slow to catch on and offer accessible digital media solutions to meet this rapidly growing market demand. The law was also slow to change. For example, until 2006, it was still illegal under Australian copyright laws for someone to copy legitimately purchased music from his or her own computer to a portable music device, or to upload the contents of a legitimately purchased CD into his or her computer's digital music library. Prior to this time, recording a television program onto a videotape for later viewing or even making a music compilation on a CD or cassette tape still constituted copyright infringement. Despite these laws, the authorities did little to police the average citizen carrying out these activities.

Increasingly, easy access to 'free' file-sharing technologies began to put significant pressure on the legal system to adapt; however, the absence of any adequate reform eventually led to costly legal battles, both local and international, instigated by music industry and other media bodies in an attempt to protect their copyright and alleged loss of profit.

Many of the legal issues relating to digital copyright and file-sharing continue unresolved to this day.

Figure 21.2 Computer users often illegally download overseas television series before their release in Australia, and then watch them on their laptops, or burn them to DVD.

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Review 21.1

1. Outline what is meant by digital copyright and how this fits into the broader area of intellectual property law.
2. Describe what is meant by copyright infringement and piracy and how these can occur in the digital environment.
3. Explain how issues of file-sharing arose and why it has become a problem for industry and for law-makers.
4. Discuss some of the changes to digital copyright that needed to be made to the law and within the relevant industries, in order to respond to the growth of file-sharing technologies.

21.2 Legal responses

There are a number of legal mechanisms in place to protect a copyright owner's rights in his or her material. In Australia, copyright law is complex and comes from many different sources, including legislation, international treaties on copyright protection (which are sometimes enacted into domestic law) and an expanding body of case law. Most of these laws apply to copyright in the digital environment and allow copyright owners to bring civil action against those they believe to have infringed their rights. Many of the cases relating specifically to digital copyright centre on the question of who actually infringed copyright, and how their offence can be proved when it took place in a digital environment.

In addition to civil action by the copyright owners, Australian law also provides for criminal prosecution of copyright infringement, coming under several categories of offence, with penalties including fines or even imprisonment. Currently, these copyright offences are used mainly in relation to piracy of copyright material for trade or profit on a commercial scale.

Legislative protection in Australia

Twentieth-century copyright protection

Copyright and other intellectual property matters are among the enumerated powers of the Commonwealth Parliament (s 51(xviii) of the Australian Constitution) and are, thus, a federal responsibility.

The Act that governs Australia's copyright laws is the *Copyright Act 1968* (Cth). The Copyright Act replaced an out-dated act based on older UK copyright law and it brought together some of the principles from the case law on copyright at the time. The original Copyright Act has been subject to many amendments since it was first introduced to respond to the changing issues in copyright law. It is known for being one of the largest and most complex Australian statutes and currently runs to a total of 646 pages. Australian courts have had to decide how the Copyright Act should be interpreted and applied in greatly different contexts. As a result, trying to work out how copyright applies in a particular situation often requires looking at both the Copyright Act and previous court decisions.

Some countries, such as the United States and Canada, have government-administered systems for the registration of copyright. In Australia, individuals do not need to do anything in order to get copyright protection for their work: if a work meets the requirements for protection in the Copyright Act, it is automatically protected as soon as it is created, without the need for any registration.

Figure 21.3 Many people visit markets in order to purchase pirated DVDs.

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For a person's work to qualify for copyright protection under the Copyright Act, the work must be:

- the kind of thing to which copyright is applicable (e.g. a musical or artistic work)
- the result of some effort and proficiency (created rather than copied from a pre-existing work)
- saved or 'fixed' onto something tangible (such as paper, tape or a computer drive).

Many people also choose to add a **copyright notice** to their work to remind people that it is protected by copyright and to let them know who is claiming copyright. However, for some forms of copyright, especially where copyright exists in the contents of a digital file such as a music or sound file, it is often more difficult for the owner to label the work as copyright protected. Some individuals or companies now add what is known as a digital watermark to files containing copyright material in order to ensure that information about the copyright owner is retained within the file.

copyright notice
a notice added to a work to inform people of who owns the copyright and when the work was created for example, © Random Business Pty Ltd 2011

Updating digital copyright protection in Australia

Since the year 2000, the Australian Government has had to review and amend the Copyright Act a number of times to adapt it to social, economic and technological changes. Some of the most important amendments are as follows.

Copyright Amendment (Digital Agenda) Act 2000 (Cth)

This Act updated a number of provisions of the Copyright Act to include recent changes in digital technology. It amended the definition of 'communication' of a work to include the act of making a work available online or transmitting it electronically, and to cover the technical processes that are used to do so. It also introduced prohibitions on making or distributing devices designed to break **technological protection measures**, which are the digital 'locks' put in place to limit copying or accessing of copyright materials. For example, access might be available only by use of an access code or a process such as decryption or unscrambling, authorised by the copyright owner.

Figure 21.4 Since 2000, the Australian Government has had to review and amend the Copyright Act a number of times to adapt it to social, economic and technological changes.

technological protection measures
tools or 'locks' that copyright owners use to prevent unauthorised copying or access to copyright materials

US Free Trade Agreement Implementation Act 2004 (Cth)

In 2004, Australia entered into an agreement with the United States, called the *Australia–United States Free Trade Agreement* (AUSFTA). As part of the agreement, Australia was required to amend a number of its copyright laws to bring them more into line with US laws and with certain international treaties. One of the main amendments was to extend the expiration of an owner's copyright from 50 years to 70 years after the author's death. Another significant provision affecting digital copyright was to limit the liability of internet service providers for copyright infringements committed by their customers (*Copyright Act 1968* (Cth) Part V, Division 2AA).

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Copyright Amendment Act 2006 (Cth)

This Act introduced further amendments to Australian copyright law that were required under AUSFTA. It also updated a number of technological provisions that were widely seen as out-dated or unfair. Some of the most important amendments to the *Copyright Act 1968* (Cth) were:

- the introduction of new criminal enforcement provisions, including on-the-spot fines for copyright infringement
- provisions permitting the copying of music from format to format or device to device for personal use, known as **space-shifting**
- provisions allowing the recording of television or radio broadcasts for later viewing, called **time-shifting**
- provisions allowing individuals to change the format of copyright materials for personal use, known as **format-shifting**; for example, scanning photos into digital files or printing an article
- widening of the provisions on technological protection measures to make it an offence for individuals to use a device designed to unlock technological protection measures.

space-shifting
transferring music or a sound recording from one format to another or from one device to another; for example, copying a music file from a computer to a portable player

time-shifting
recording a television or radio broadcast for later viewing or listening

format-shifting
copying books, journals, photos or videos from one format to another format; for example, scanning a photo to digital format or printing a newspaper article

Although the Copyright Act has come a long way in addressing some of the developments in digital copyright issues, there are still a number of issues that have been left to the courts or for future legislation to resolve. It is also important to note that many apparently innocuous uses of copyright material, such as downloading or uploading files containing copyright material via the internet or sharing them with friends on a personal website, may still constitute infringement of another person's copyright and therefore may not be legal under Australian law.

Copyright Amendment (Online Infringement) Act 2015 (Cth)

This amendment allows copyright owners to apply for court orders to shut down illegal offshore sites that exist for the purpose of copyright infringement; that is, use music, words and images that they do not own for advertising purposes.

International treaties on copyright

Another important part of Australian copyright law comes from international copyright treaties that aim to ensure that copyright is protected across international borders and that important copyright issues are addressed similarly by different countries. This is particularly relevant to digital copyright, where works are constantly imported and exported between countries through the internet, through portable devices and through trade in music, software and films.

In Australia, international treaties must be incorporated into domestic legislation before they can become binding, and so the most important provisions of Australia's international treaties should already be incorporated into the Copyright Act or other relevant legislation. However, the international treaties themselves are important measures for ensuring copyright protection for Australian copyright holders in overseas jurisdictions, as well as protecting overseas copyright holders from infringements by Australians within Australia. Automatic protection applies to Australian works in

Figure 21.5 International treaties work to protect Australian laws in other countries.

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most other countries, and to works from most other countries in Australia.

As mentioned in Chapter 8, the main treaties relating to copyright include:

- *Berne Convention for the Protection of Literary and Artistic Works* (accepted by Australia in 1928)
- *World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS) (accepted by Australia in 1995)
- *Australia–United States Free Trade Agreement* (AUSFTA) (accepted by Australia in 2004)
- *World Intellectual Property Organization Copyright Treaty* (accepted by Australia in 2007).

Civil law cases on digital copyright

The difficulty in applying digital copyright law and the scale of the file-sharing problem has led to a number of civil cases in recent years. As the internet is international by nature, the court challenges have occurred worldwide, with some of the most important cases in the United States and in Australia. They have involved complex legal arguments attempting to resolve how the laws apply to the different file-sharing technologies and where the liability should lie for infringements committed using those technologies.

Napster case

The first major legal battle relating to file-sharing and copyright infringement was in 2001 and involved an 18-year-old named Shawn Fanning, who set up an online file-sharing service called Napster. Napster was one of the first internet services dedicated to sharing mainly popular music and video files between users. Complaints of copyright infringement had been received from some very high-profile recording artists, including Metallica and Madonna. In the US case *A&M Records Inc. v Napster Inc.*, 239 F3d 1004 (9th Cir 2001), the US Court of Appeals for the Ninth Circuit found that Napster had infringed copyright by allowing its users to upload and download copyright-protected material on its central network. Napster was forced to change its service and business model to prevent its users from infringing copyright.

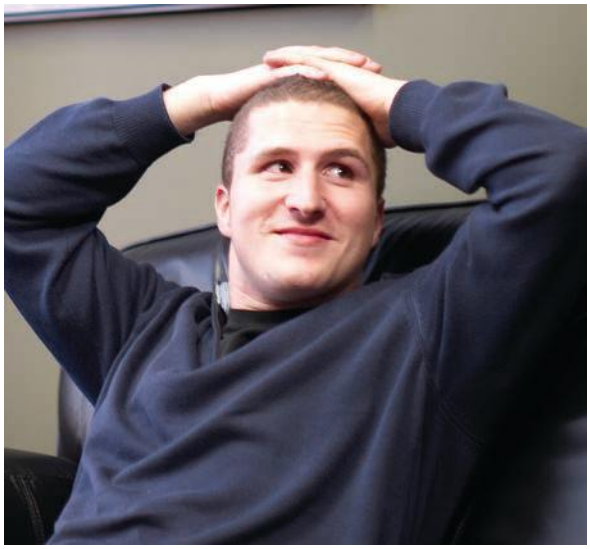

Figure 21.6 Shawn Fanning, who set up Napster.

Kazaa case

Despite the outcome of the case, new file-sharing networks quickly arose, with one called Kazaa emerging as a dominant force. By 2004, Kazaa's program had been downloaded 319 million times. This resulted in some of the most brutal legal battles related to file-sharing. For example, in 2003, the Recording Industry Association of America (RIAA) initiated a series of lawsuits against some 261 individual users of Kazaa for copyright infringement through file-sharing. One of these lawsuits involved a 12-year-old girl who was sued for US$150 000 per song for downloading songs like 'If You're Happy and You Know It Clap Your Hands'. The girl said she thought 'it was OK to download music' because her mother had bought the Kazaa program for US$29.95. Eventually, Kazaa settled the case with the girl's family for the sum of US$2000.

The RIAA continued to bring civil actions against ordinary consumers who engaged in file-sharing, and by 2005 the RIAA had sued 12 000 people. The main difference between Napster and Kazaa was that Kazaa did not hold or store the files centrally, but supplied the software and the means for individual users to share files. One of the most significant cases against file-sharing was launched against Kazaa in Australia in 2005 (see the In Court box on page 322).

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In Court

***Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 (the Kazaa case)**

Sharman Networks is the Sydney-based developer and distributor of Kazaa. A group of 30 record companies, including major international labels, claimed that the Kazaa software encouraged unprecedented levels of copyright infringement because it allowed people to download music without paying.

The Federal Court found that most of Kazaa's music files were shared without copyright owners' permission. It further found although Sharman could have implemented technical measures to limit the sharing of copyright files, the company had not done so. Because Sharman made its money from advertising on the Kazaa system, it wanted to maximise file-sharing using its software to increase its advertising revenue.

The court allowed Sharman to continue distributing its file-sharing software, but only if it adopted certain technical measures to stop and discourage the infringement of copyright using that software.

iiNet case

Issues are likely to multiply as internet technology continues to change and technology expands into more areas traditionally protected by copyright. Although most of the initial civil actions centred on the music industry, the battle has now turned to film and video media and television networks.

Such is Australia's reputation for piracy that international media organisations have decided to pursue legal action against internet providers and their customers. In 2008, 34 film companies started proceedings in the Federal Court of Australia against the country's third largest internet service provider (ISP), iiNet. This case is important internationally because it tests the liability of internet service providers for the copyright infringements of their customers. In February 2010, Justice Cowdroy in the Federal Court found that iiNet was not liable for the copyright violations of its users. Appeals to the Full Court of the Federal Court and in the High Court were unsuccessful. The case was important because it tested the Australia–US Free Trade Agreement and has set a precedent regarding the responsibility of internet providers for the downloading of media.

Dallas Buyers Club case

Further action was taken in 2014 to halt copyright infringements when lawyers representing the producers of the 2013 movie *Dallas Buyers Club* (DBC) launched Australian Federal Court action that sought the details of ISP customers linked to IP addresses that they believed had participated in the unauthorised downloading of *Dallas Buyers Club* via BitTorrent. DBC was seeking damages for the cost of the downloaded film and the cost of detecting piracy activity.

However, a group of internet service providers led by iiNet took counter legal action where they opposed the studio's application for preliminary discovery of customers' addresses on the basis that it could lead to speculative invoicing. This practice would mean that DBC and Voltage Pictures would send a letter to illicit downloaders where they demanded a substantial fee in exchange for indemnity from a potential copyright-related lawsuit.

The Judge presiding over the case compelled the DBC legal team to submit to the court a draft of the letter it intended to send to alleged pirates as well as a telephone script that would be used in contacting ISP customers. They would not be given access to names and addresses until this was provided. At the time of writing, this case was still progressing through the courts.

These court actions do send a message to internet providers that they do need to be more responsible for the actions of their subscribers. The *Copyright Amendment (Online Infringement) Act 2015* (Cth) means that the ISPs can be held legally responsible for allowing their customers to access certain file-sharing sites.

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High Court decision shows government needs to act to keep pace with online environment

Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16, 20 April 2012

Today's decision by the High Court exposes the failure of copyright law to keep pace with the online environment and the need for Government to act, leading film and television industry companies said following the announcement of the decision.

The High Court ruled against leading film and television companies who sued iiNet for failing to take action in response to known infringements by customers using its network.

Representing the film companies, Australian Federation against Copyright Theft (AFACT) Managing Director, Neil Gane, said the judges in the case had unanimously recognised that legislative change was required to address the widespread copyright infringements via Peer to Peer technology in Australia.

'Both judgements in this case recognise that copyright law is no longer equipped to deal with the rate of technological change we have seen since the law of authorisation was last tested. They both point to the need for legislation to protect copyright owners against P2P infringements,' Mr Gane said.

'The Judges recognise the significant rate of copyright infringement online and point to the fact that over half the usage of iiNet's internet service by its customers (measured by volume) was represented by BitTorrent file-sharing which was known to be used for infringing activities,' he said.

'Now that we have taken this issue to the highest court in the land, it is time for Government to act.

'We are confident the Government would not want copyright infringement to go on unabated across Australian networks especially with the rollout of the NBN,' he said.

Mr Gane also said the decision shows that Australian law has been left behind by overseas developments in online copyright protection.

'In the three years since the case commenced, legislators, regulators and courts around the world have mandated that ISPs must play a central role in preventing online copyright theft,' he said.

'Fortunately, many ISPs have come to the conclusion that being involved in online copyright protection is in their commercial interests.

'ISPs are becoming increasingly dependent on monetising legal content and therefore protecting its value.'

Mr Gane said it was too early to comment on the details of the decision but that the copyright owners would be having discussions with Government in due course.

'We thank the actors' union (MEAA), and songwriters, composers and publishers (APRA), who also had concerns about the outcome of this case, for taking the time and effort to express them to the court.

'We would also like to acknowledge all content creators whose movies, music, pictures and words we all enjoy and for whom today's decision must be extremely concerning,' Mr Gane said.

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Review 21.2

1 Identify the domestic and international protection that is provided for Australian owners of copyright materials.
2 How does an artist receive copyright protection for his or her material and how can other people identify it?
3 Explain why traditional copyright law had to change to include digital copyright protection. In what way did this affect ordinary computer users?
4 Describe how the music industry has dealt with digital copyright infringers. How has the market responded?

Research 21.1

1 Look for some further information about the Kazaa case on the internet. What were some of the arguments used by the parties and do you think they were justified? Do you think the outcome of the case was correct?
2 Another important case in the file-sharing wars was the US case of *MGM Studios Inc. v Grokster Ltd*, 545 US 913 (2005). MGM argued that file-sharing software created and actively marketed by Grokster encouraged illegal downloading of movies. Research the file-sharing issues in this case and discuss the results.

Criminal law cases on digital copyright

As mentioned above, Copyright Act provisions make certain acts of copyright infringement illegal, and in some cases include severe fines or possible prison sentences. While prosecutions for digital copyright infringements do not yet appear to be directed at the average computer user, there have been some important cases that need to be considered.

Jose Duarte

For example, in November 2007, Jose Duarte, 21, became the first person convicted in Australia for recording a film from a cinema screen. In Sydney's Downing Centre Local Court, Duarte pleaded guilty to making an illegal copy of *The Simpsons Movie* using the camera in his mobile phone and uploading it to the internet. The film's distributors confirmed that an illegal copy of the movie was on the internet within hours of its global release, but prior to its US release, and within two hours had been downloaded about 3000 times. A criminal conviction under the Copyright Act was recorded against Duarte and he was fined $1000.

Hew Raymond Griffiths

A criminal case in Australia that received media attention relates to the **extradition** of Australian resident Hew Raymond Griffiths for trial in the United States on charges of copyright infringement for illegal software distribution (see the In Court box).

extradition
the handing over of a person accused of a crime by the authorities of the country where he or she has taken refuge to the authorities of the country where the crime was committed

Other cases

There have been many more recent examples of prosecutions for copyright infringement, ranging from smaller violations to very large and expensive piracy operations. Examples of these cases can be seen on the Australian Screen Association website.

Legal Links

The Australian Screen Association provides news articles and updates on criminal prosecutions against movie piracy and copyright infringements in Australia. View the website of the Australian Screen Association for some of the current criminal cases under way against Australians who have infringed film copyright and some of the penalties that have been applied.

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In Court

***United States of America v Griffiths* [2004] FCA 879**

In a case closely watched by the rest of the world, Hew Raymond Griffiths was accused by the United States of being a ringleader in an internet software piracy network called Drink or Die. The case is of interest not just because it sets a benchmark in the prosecution of digital copyright infringement, but also because it involves an Australian resident indicted by a court in the State of Virginia, in the United States, for copyright infringement under the US law. The case highlights the serious consequences for internet users worldwide if they are charged with infringement of internationally protected copyright.

The US Government sought to extradite Griffiths for his infringements, despite the fact that he was not a fugitive and had not committed a violent crime. Griffiths, who lived in a modest house on the Central Coast of NSW, had not taken any money for his activities. Drink or Die specialised in 'cracking' copyright-protected software, movies, games and music by removing the embedded codes, then distributing them free of charge.

The US Government took the case for extradition to the Federal Court of Australia, with lengthy proceedings involving three Australian court cases. The US Government was successful in the Federal Court of Australia and in the Full Court on appeal. Griffiths applied to the High Court of Australia for special leave to appeal, which was refused. Pending the High Court hearing of his application, he was held in custody in Australia. In February 2007, Griffiths was extradited to the United States, where he pleaded guilty in a Virginia court to criminal copyright infringement. Griffiths was sentenced to 51 months in a US prison. This sentence was reduced to account for time served in Australian custody and in March 2008 he returned to Australia.

The extradition was a controversial topic in Australia, as it led to questions about why Griffiths could not be prosecuted in Australia where he had also infringed Australian copyright law. Extradition to a foreign country merely because businesses in that country were affected by the person's acts was seen by some to be a disproportionate response, and one that implied an inappropriate degree of influence over Australia by the foreign country. On the other hand, the decision to extradite Griffiths was praised by some as an important step in enforcing the international protection of copyright.

Figure 21.7 Hew Raymond Griffiths

Review 21.3

1 Discuss whether and in what circumstances criminal prosecution for copyright infringement is an appropriate response.
2 Explain why the case of Hew Raymond Griffiths was important for Australia. Outline the outcome of the case.

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21.3 Non-legal responses

It is usually expensive, time consuming and difficult for those in the music industry to pursue persons who are illegally downloading files. It is also debatable that pursuing ordinary computer users is an effective option. Corporations have tended to take legal action against only serial offenders, as a deterrent, and against those who are making a profit through copyright infringement.

In addition, it would obviously not be possible for a company to bring a lawsuit against every individual who is infringing copyright. Instead, consumer markets have been forced to adapt and offer alternatives to illegal file-sharing to meet the growing demand for downloadable music, movies and television shows. To counter the issue, a number of industry and non-industry bodies have been established, seeking to educate the general public and to report on the ongoing developments.

Market and industry response

Despite attempts to put a stop to file-sharing activities, there has been seemingly unstoppable growth in the market for file-sharing technologies and portable devices with which to use them. Smartphones and iPhones have only increased the problem.

To counter this, music providers have turned to sales and subscription services to allow listeners to gain access to music at a reasonable cost.

Figure 21.8 Industries need to come up with ways to encourage users to legally purchase their content. Price and convenience are major influences in the issue.

The success of these services has seen providers of movies and television shows now using them. The provision of the latest movies, television shows and music at a reasonable price may be the answer to reducing the rate of piracy. The decision by these providers to release movies, television shows and music at the same time globally has also assisted in reducing illegal copying and downloads.

iTunes

One of the largest players in this market has been the popular iTunes Music Store, launched in 2003 by the founder of Apple Inc., Steve Jobs.

By striking a deal with major record labels to offer a legitimate file-download service, iTunes ensured that the music industry could receive payment for their copyright material while giving users a convenient and safe method of purchasing songs via the internet. The store has since expanded to include copyright works from other industries threatened by digital copyright infringements, including television shows, films, radio, software and digital books. The popularity of stores like iTunes and its success in returning a profit to the affected industries has shown that the traditional legal responses are not always the most effective method for bringing about change.

Spotify

Spotify, a Swedish company whose Australian launch was in 2012, has a different approach: it makes music available to consumers through internet streaming. There is a free service, supported by advertising, or consumers can subscribe to an ad-free Premium service, which also allows offline use and higher-quality audio.

Spotify remunerates rights-holders based on their percentage of the total songs downloaded, but there has been some criticism that artists are not being fairly compensated for their work.

Netflix

Netflix Inc is an internet streaming company for films and television shows that operates via subscription (there's no Spotify-style free version). It has had a rapid uptake in Australia since arriving in 2015, as it has allowed viewers to access current and popular television shows and films when and where they want to watch them. A Choice survey in 2015 seemed

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Figure 21.9 The law has to constantly and rapidly keep adapting itself to meet the challenges for copyright law and digital technology.

to indicate that Netflix is having a positive effect on halting copyright infringements; however, as people who have taken part in illegally downloading media will not readily admit to this behaviour, the results of this survey are open to some speculation. Despite this, Netflix and similar services have gone a long way to providing consumers with a reason not to engage in digital piracy.

Agencies and organisations

A number of organisations and interest groups in Australia contribute to the discussion about copyright and digital technology and provide research, advice and education to the public, businesses and the government. Some of these are listed below.

Commonwealth Attorney-General's Department

The Attorney-General's Department holds responsibility for Australia's copyright laws. It provides information about copyright law and works closely with groups and organisations that have an interest in the development of copyright law in Australia.

Australian Copyright Council

The Australian Copyright Council (ACC) is an independent non-profit organisation that issues advice and information about copyright in Australia. The Council also produces publications, carries out research and makes submissions on copyright policy in Australia. The ACC is funded by the Australian Government and the Australian Council for the Arts.

Music Rights Australia

Music Rights Australia (previously known as Music Industry Piracy Investigations – MIPI) acts on behalf of the music industry in Australia to provide investigative services and copyright enforcement, and is highly involved in educating the Australian public about the costs of music piracy to the music industry.

Australian Screen Association

Australian Screen Association (previously known as Australian Federation Against Copyright Theft – AFACT) was set up in 2004 to protect the Australian television and movie industry against the effects of copyright theft. It works with industry, government and law enforcement agencies to achieve its objectives.

Electronic Frontiers Australia Inc.

Electronic Frontiers Australia Inc. (EFA) is a non-profit national organisation, independent of government, representing internet users who are concerned about freedom of expression in the online environment and related issues. It aims to protect and promote civil liberties, advocate change in the law and educate the community about online social, political and civil liberties issues.

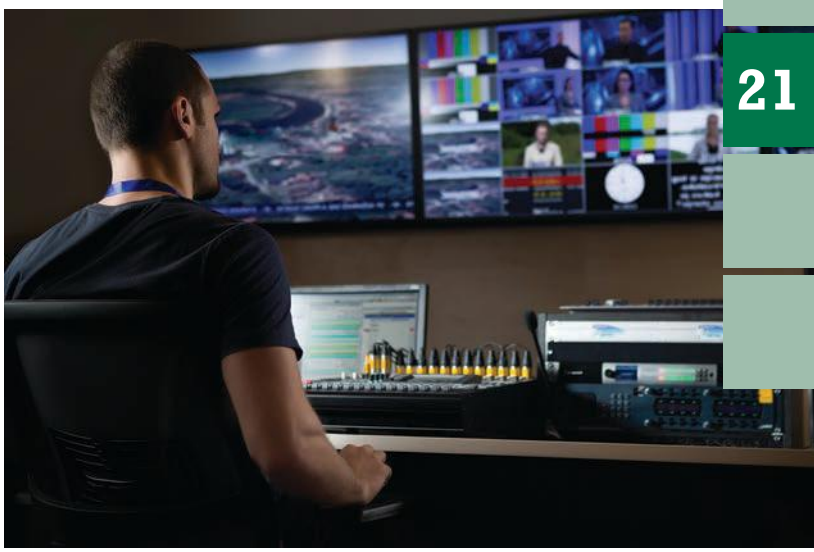

Figure 21.10 Australian Screen Association was set up to protect the Australian television and movie industry against the effects of copyright theft.

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Arts Law Centre of Australia

Arts Law Centre of Australia is a community legal centre that provides legal information, advice and assistance to artists, writers, photographers, musicians and others.

Legal Links

- View the Australian Copyright Council website for information on its activities.
- View the website of Electronic Frontiers Australia for information on current issues.
- View the website of the Arts Law Centre of Australia for information on protecting intellectual property.

Review 21.4

1 Explain the services offered by iTunes, Spotify and Netflix.
2 How will they help in stemming the piracy issue?
3 Outline some of the measures taken by independent agencies to protect copyright.

Research 21.2

1 Investigate some of the options available for legally purchasing online media. Why do you think some computer users continue to download using file-sharing technologies, and do you think this is justifiable? Why?
2 Look at the websites for each of the institutions and agencies listed above and describe the actions each agency is taking against illegal copying and file-sharing.
3 Which institutions and agencies do you think are more successful in achieving their goal of minimising digital copyright infringement? Why?

21.4 Effectiveness of responses

Despite stronger legislation, a constant stream of court actions and the arrival of alternatives to illegal file-sharing, the issue of digital copyright infringement has far from disappeared. A Music Rights Australia study found that in 2010, 27.8 per cent of Australian internet users admitted to downloading unauthorised content, including music. The organisation states that 95 per cent of music downloads are now illegal. This means that many artists are being paid for only 5 per cent of their product. There continues to be a common perception that accessing 'free music' from home does not really hurt anyone, a perception that both the music industry and governments have tried very hard to change. It is not only record companies that are deprived of income by illegal distribution of music, but also the musicians, composers and authors who created the musical works. Due to the 'secretive' nature of downloading, it is difficult to gain more updated statistics on downloading and who does it.

More recently, downloaded music has equalled physical sales of music as listeners are more likely to store and listen to music on mobile devices. So even though music companies are making more money from digital music sales, they are not gaining full remuneration as it has become even easier to share songs through technology such as bluetooth.

Furthermore, an International Federation of Phonographic Industry study in 2015 estimated that 20 per cent of global internet users still access

Figure 21.11 An International Federation of Phonographic Industry Study in 2015 estimated that 20 per cent of global internet users still access file-sharing services to download music.

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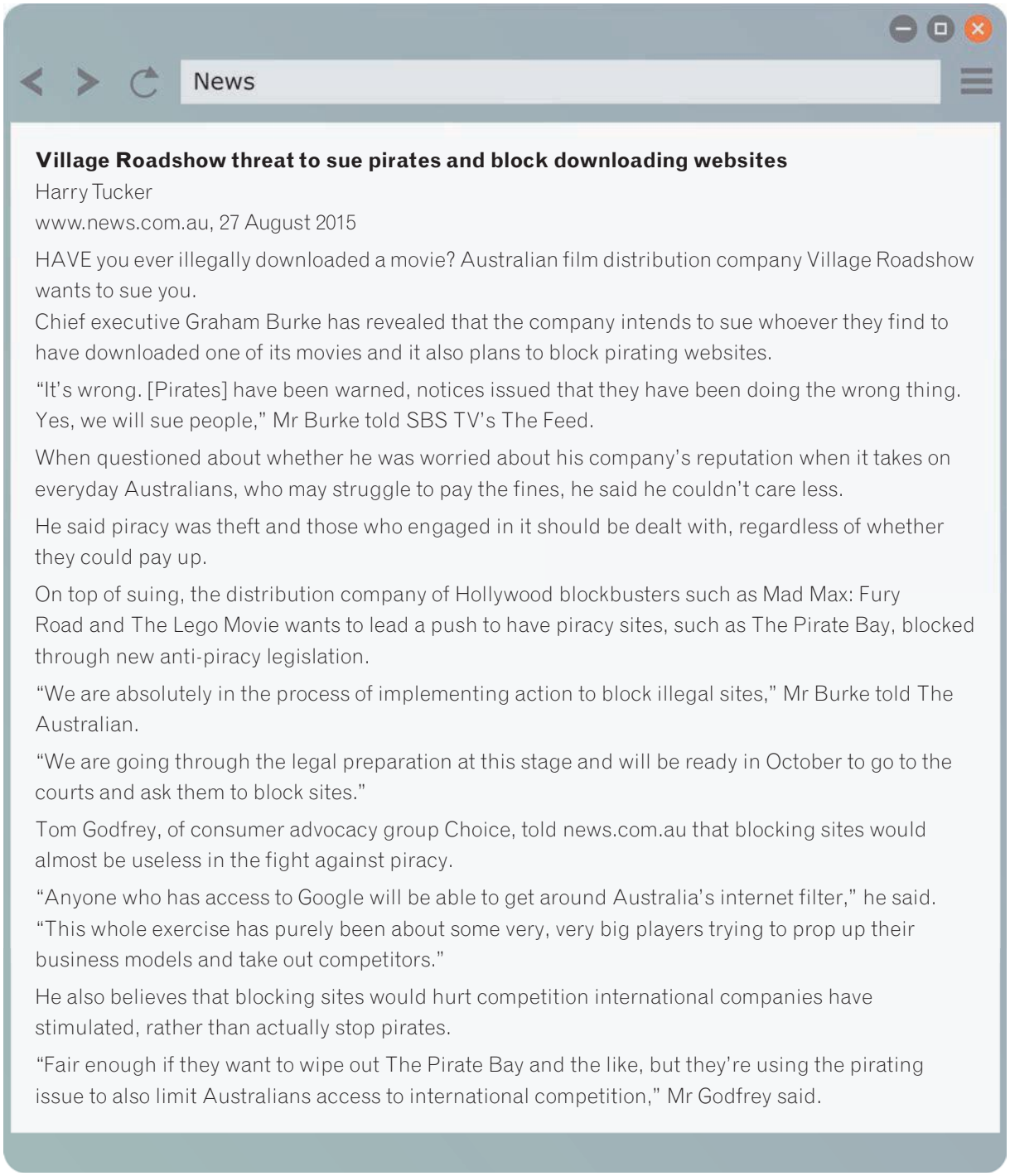
file-sharing services to download music: a drop from 26 per cent in 2013, but still significant.

The future of digital copyright in Australia

While the law has had to adapt very rapidly in recent years to meet some of the challenges for copyright law and digital technology, the effectiveness of many of these laws is yet to be seen, as cases will be played out in the courts in the coming years. As technology continues to change and people become more familiar with how to use it, as well as how to abuse it, the law will continue to adapt. However, as can be seen above, providers of music and screen media have adapted to cater for changes in technology and customer demand. These adaptations, perhaps, will be the most successful way to combat piracy in their industry.



Village Roadshow threat to sue pirates and block downloading websites

Harry Tucker

www.news.com.au, 27 August 2015

HAVE you ever illegally downloaded a movie? Australian film distribution company Village Roadshow wants to sue you.

Chief executive Graham Burke has revealed that the company intends to sue whoever they find to have downloaded one of its movies and it also plans to block pirating websites.

"It's wrong. [Pirates] have been warned, notices issued that they have been doing the wrong thing. Yes, we will sue people," Mr Burke told SBS TV's The Feed.

When questioned about whether he was worried about his company's reputation when it takes on everyday Australians, who may struggle to pay the fines, he said he couldn't care less.

He said piracy was theft and those who engaged in it should be dealt with, regardless of whether they could pay up.

On top of suing, the distribution company of Hollywood blockbusters such as Mad Max: Fury Road and The Lego Movie wants to lead a push to have piracy sites, such as The Pirate Bay, blocked through new anti-piracy legislation.

"We are absolutely in the process of implementing action to block illegal sites," Mr Burke told The Australian.

"We are going through the legal preparation at this stage and will be ready in October to go to the courts and ask them to block sites."

Tom Godfrey, of consumer advocacy group Choice, told news.com.au that blocking sites would almost be useless in the fight against piracy.

"Anyone who has access to Google will be able to get around Australia's internet filter," he said. "This whole exercise has purely been about some very, very big players trying to prop up their business models and take out competitors."

He also believes that blocking sites would hurt competition international companies have stimulated, rather than actually stop pirates.

"Fair enough if they want to wipe out The Pirate Bay and the like, but they're using the pirating issue to also limit Australians access to international competition," Mr Godfrey said.

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"The reason behind piracy in Australia has been clear for a long time and it's cost, timeliness and accessibility.

"Actually give people what they want, when they want and most would stop pirating."

Streaming services, such as Netflix and Presto, have begun to stem the tide of piracy by finally giving consumers what they want: complete seasons of shows on demand at the same time as elsewhere in the world for an affordable price.

However, some content owners continue to try to protect their old business models, locking up content and charging a premium.

"For a long time the market has been under-served by the content industry," Mr Godfrey said.

"That's why there was such a huge appetite for Netflix. Finally you have a company who gets what people want."

If it goes ahead with blocking, Village Roadshow would be the second major company to express its desire to have pirating sites such as The Pirate Bay blocked using the new legislation, after Foxtel said it was preparing for action earlier this month.

A Foxtel spokesman told news.com.au: "The Copyright Amendment (Online Infringement) Bill does nothing more than give copyright holders similar rights in relation to foreign websites, which steal their content, to those they would have if the sites were based in Australia.

"Because these pirate sites do not exist in Australia, rights holders are not able to take direct legal action against them.

"Similar laws exist in Europe, the UK, Singapore and many other jurisdictions.

"Foxtel and other rights holders are currently assessing what action can and should be taken to give effect to the legislation."

While it might seem as simple as presenting the Federal Court with links to illegal content, rights holders have to meet strict criteria to prove that the website's main purpose is to host copyrighted content.

This includes testing whether people would be impacted significantly by blocking the site and blocking the site was in the public interest.

Successful court action would force internet providers such as Telstra and iiNet to block access to those sites from Australia.

However, similar systems have been used overseas in countries, including the UK, with little success. Some of the most popular torrenting sites in the world, including The Pirate Bay and Kickass Torrents, have all been blocked, but locals have continued to find ways to download content.

Typically, within hours of an internet provider blocking a site, hundreds of mirror sites that offer the same content pop up. When the first wave of mirror sites are taken down or blocked, more sites crop up to replace them. It's a never-ending circle.

However, The Pirate Bay, the world's biggest torrenting site, now stops most internet service providers from blocking it. It works by hiding identifying information about The Pirate Bay from internet providers, making it harder for it to be blocked.

Village Roadshow and Graham Burke haven't hid their disdain of pirates in the past, even going as far as comparing them to terrorists and paedophiles.

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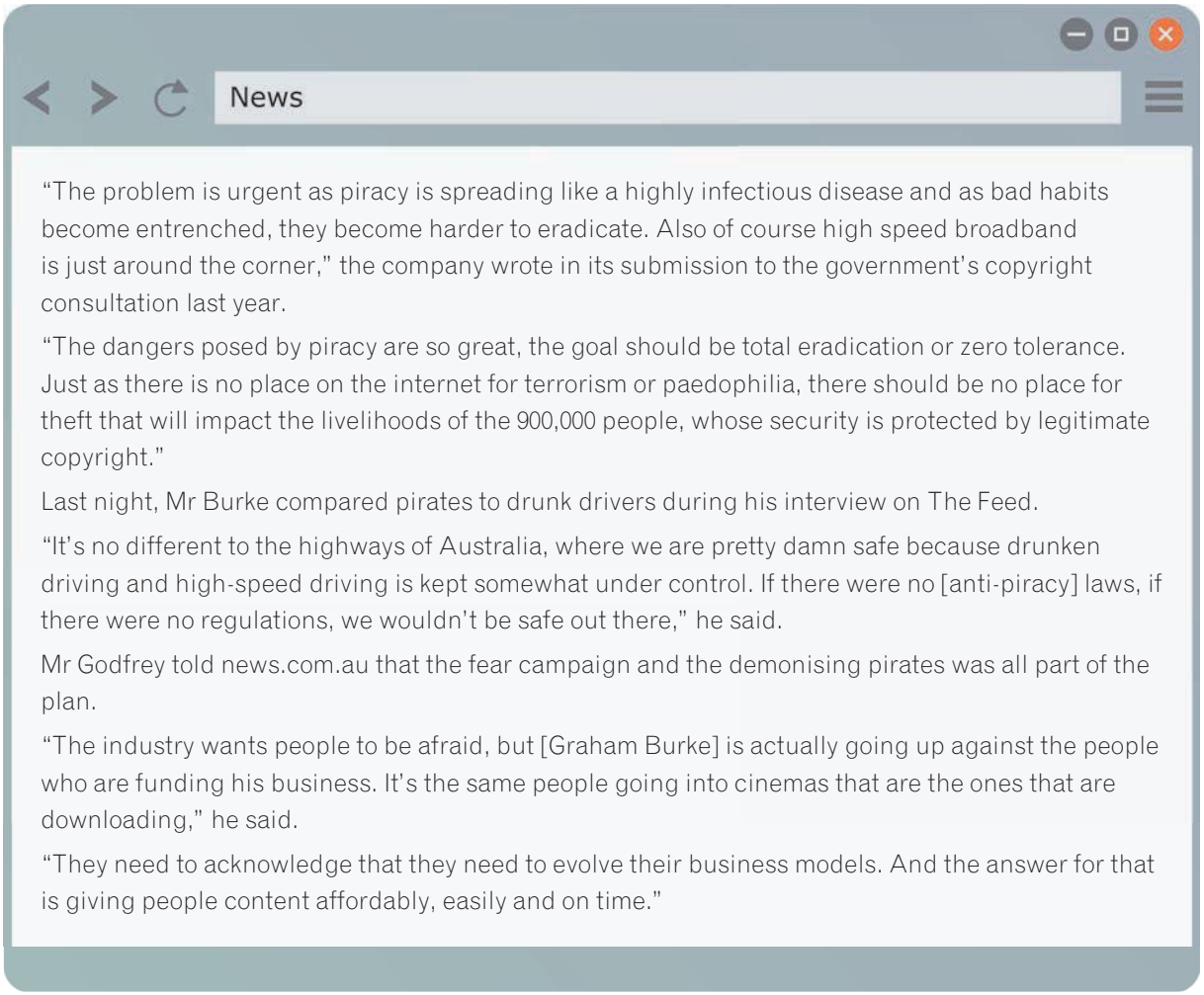

"The problem is urgent as piracy is spreading like a highly infectious disease and as bad habits become entrenched, they become harder to eradicate. Also of course high speed broadband is just around the corner," the company wrote in its submission to the government's copyright consultation last year.

"The dangers posed by piracy are so great, the goal should be total eradication or zero tolerance. Just as there is no place on the internet for terrorism or paedophilia, there should be no place for theft that will impact the livelihoods of the 900,000 people, whose security is protected by legitimate copyright."

Last night, Mr Burke compared pirates to drunk drivers during his interview on The Feed.

"It's no different to the highways of Australia, where we are pretty damn safe because drunken driving and high-speed driving is kept somewhat under control. If there were no [anti-piracy] laws, if there were no regulations, we wouldn't be safe out there," he said.

Mr Godfrey told news.com.au that the fear campaign and the demonising pirates was all part of the plan.

"The industry wants people to be afraid, but [Graham Burke] is actually going up against the people who are funding his business. It's the same people going into cinemas that are the ones that are downloading," he said.

"They need to acknowledge that they need to evolve their business models. And the answer for that is giving people content affordably, easily and on time."

Review 21.5

1 Identify the types of media that are illegally downloaded.
2 Outline the reasons that people are tempted to illegally download television shows.
3 Why, according to the news story 'Village Roadshow threat to sue pirates and block downloading websites', is it difficult to stop illegal downloads? What solution does it suggest?
4 Why will consumers now find it more difficult to illegally download movies and television shows?
5 Discuss whether you think the responses to digital copyright infringement in Australia and around the world have been sufficient and what actions you think might be used in the future.

Research 21.3

A controversial international treaty on copyright infringement called the Anti-Counterfeiting Trade Agreement has been negotiated in response to pirated copyright-protected works.

1 Carry out research on this treaty and consider how it might affect Australian copyright laws when it is ratified.
2 Why is it seen as controversial?

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Chapter summary

- Digital copyright protects against the unauthorised use of copyright material in an online environment.
- Original material (also known as intellectual property) is protected by both domestic and international copyright laws.
- The music and film industries have brought civil actions against persons infringing copyright. Two of the leading cases were the Napster and Kazaa cases in the United States.
- Criminal prosecutions for copyright infringement have also been undertaken, including NSW Local Court case against Jose Duarte for recording a movie in a cinema and *United States of America v Griffiths*, which involved an Australian distributing illegal software and other media for free.
- The average user of the internet does not see illegal downloading as a serious crime.
- Education of the public therefore plays an important role in dealing with the issue.
- In general, those operators that make profits from illegal downloading will be pursued, rather than individual users.

Chapter summary questions

Multiple-choice questions

1 What is the meaning of internet piracy?

A the downloading of movies without the owner's permission
B the downloading of music without parental permission
C the downloading and/or distribution of media without the owner's permission
D the downloading and/or distribution of media without parental permission

2 How are copyright owners protected from internet piracy in Australia?

A by professional standards of ethics in the music and movie industries
B by state and territory laws
C by the *Copyright Act 1968* (Cth)
D by Border Protection Command

3 What effect has the *Australia–United States Free Trade Agreement* had on the protection of copyright in Australia?

A It has helped to develop more uniform copyright laws.
B It allows Australians and Americans to copy each other's media for free.
C It has provided one copyright law for the whole world.
D It has provided an agreement that Australia and the United States will play each other's music on the radio.

4 Why was Australian Federation against Copyright Theft (now Australian Screen Association) established?

A to lobby for the rights of Australians accused of internet piracy in the United States
B to represent Australians concerned about freedom of expression and civil liberties
C to protect the music industry from illegal downloading and educate the public about internet piracy
D to protect the film and television industry from illegal downloading and educate the public about internet piracy

5 Why is the case *USA v Griffiths* so important?

A It involved the creation of enormous wealth through illegal downloading using the internet.
B It involved an Australian citizen being charged in a US court for crimes committed on the internet.
C It involved a case of mistaken identity, as the prosecution assumed Griffiths was from the United States.
D It involved a US citizen being charged in an Australian court for crimes committed on the internet.

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Short-answer questions

1 Outline what is meant by internet piracy and illegal file-sharing and what laws are relevant.
2 Explain why stopping illegal downloading of material and file-sharing is a problem for law-makers.
3 Discuss some of the approaches of law-makers to digital copyright issues. Do you think the law has effectively adapted to protect digital copyright?
4 Outline some of the approaches of industry, organisations and the market to the issue. Which approaches do you think are the most effective and why?
5 Propose a campaign to educate young people about digital copyright, outlining some of the issues and consequences for infringing copyright in Australia.

Extended-response question

'Digital copyright is effectively protected in Australia.' Critically evaluate this statement with reference to some of the legal efforts to protect digital copyright. Also discuss some of the non-legal responses to the issue and their effectiveness.

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

GO

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Issue 4:

Criminal or civil cases that raise issues of interest to students

Chapter 22
Drug testing

Chapter objectives

In this chapter, students will:

- explore legal concepts and terminology in respect to drugs and drug testing
- investigate the ability of the legal system to address issues relating to drug testing
- explore the differences that exist between state and federal law in relation to drug testing
- investigate the role of the law in addressing and responding to change in relation to drug testing
- describe the legal and non-legal responses to drug testing
- evaluate the effectiveness of legal and non-legal responses to drug testing.

Key terms/vocabulary

bodily privacy
consent
employment contract
illicit drug
information privacy
legal drug
prescription drug
privacy

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Relevant law

IMPORTANT LEGISLATION

Defence Act 1903 (Cth)
Privacy Act 1988 (Cth)
Privacy and Personal Information Protection Act 1998 (NSW)
Australian Sports Anti-Doping Authority Act 2006 (Cth)
Road Transport Legislation Amendment (Drug Testing) Act 2006 (NSW)
Work Health and Safety Act 2011 (NSW)
Rail Safety (Adoption of National Law) Act 2012 (NSW)
Rail Safety (Adoption of National Law) Regulations 2012 (NSW)
Road Transport Act 2013 (NSW)

SIGNIFICANT CASES

BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia (WA Branch) [1998] WA IR Comm 130
Candido v Hi Fi Supermarket Pty Ltd [2003] AIRC 993
Shell Refining (Australia) Pty Ltd, Clyde Refinery v CMFEU [2008] AIRC 510
Wendy Day v Sodexo Remote Sites Australia Pty Ltd [2011] FWA 8505
Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; Australian Municipal, Administrative, Clerical and Services Union; Association of Professional Engineers, Scientists and Managers, Australia (C2012/3396)

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22.1 Drug use in Australia

Recent surveys in Australia indicate that drug use is a regular part of life for many people. The most common drug use in Australia involves **legal drugs** such as caffeine, prescribed medicinal drugs, alcohol and tobacco. Although less common, statistics indicate that a significant number of people have also used prohibited drugs at some point in their lives.

For example, a 2013 study conducted by the Australian Institute of Health and Welfare, a federal government agency, found that 12.8 per cent of Australians aged 14 years or older smoked every day (this had declined from 15.1 per cent in 2010) and the overall daily drinking of alcohol declined. The survey also found that around eight million people had used an **illicit drug** at some time, and 2.9 million had done so in the 12 months before the survey. Since 2010, use of pharmaceuticals had risen, while here had been a decline in the use of heroin, GHB and ecstasy.

legal drug
a drug that is not prohibited under the law, although some other restrictions may apply

illicit drug
also called an illegal drug; a drug that is prohibited by law

In the general sense a drug can be defined as any substance that alters bodily function, whether to treat or prevent disease or for other purposes. Of course, the effect on a person will depend on the nature of the drug itself and the quantity and circumstances in which it is used.

A drug's effects might be minimal or temporary such as the stimulant effect of caffeine. However,

Table 22.1 National Drug Strategy Household Survey report, July 2013

Drug use	1993	1995	1998	2001	2004	2007	2010	2013
Tobacco	29.1	27.2	24.9	23.2	20.7	19.4	18.1	15.8
Alcohol	77.9	78.3	80.7	82.4	83.6	82.9	80.5	78.2
Illicit drugs (excluding pharmaceuticals)								
Cannabis	12.7	13.1	17.9	12.9	11.3	9.1	10.3	10.2
Ecstasy	1.2	0.9	2.4	2.9	3.4	3.5	3.0	2.5
Methamphetamines	2.0	2.1	3.7	3.4	3.2	2.3	2.1	2.1
Cocaine	0.5	1.0	1.4	1.3	1.0	1.6	2.1	2.1
Hallucinogens	1.3	1.9	3.0	1.1	0.7	0.6	1.4	1.3
Inhalants	0.6	0.4	0.9	0.4	0.4	0.4	0.6	0.8
Heroin	0.2	0.4	0.8	0.2	0.2	0.2	0.2	0.1
Ketamine	n.a.	n.a.	n.a.	n.a.	0.3	0.2	0.2	0.3
GHB	n.a.	n.a.	n.a.	n.a.	0.1	0.1	0.1	<0.1
Injectable drugs	0.5	0.5	0.8	0.6	0.4	0.5	0.4	0.3
Any illicit excluding pharmaceuticals	*13.7*	*14.2*	*19.0*	*14.2*	*12.6*	*10.9*	*12.0*	*12.0*
Pharmaceuticals								
Pain-killers/analgesics	1.7	3.4	5.2	3.1	3.1	2.5	3.0	3.3
Tranquillisers/sleeping pills	0.9	0.7	3.0	1.1	1.0	1.4	1.5	1.6
Steroids	0.3	0.2	0.2	0.2	-	-	0.1	0.1
Methadone or buprenorphine	n.a.	n.a.	0.2	0.1	0.1	0.1	0.2	0.2
Other opiates/opioids	n.a.	n.a.	n.a.	0.3	0.2	0.2	0.4	0.4
Any pharmaceutical	*n.a.*	*4.1*	*6.3*	*3.9*	*3.8*	*3.7*	*4.2*	*4.7*
Any illicit	*14.0*	*16.7*	*22.0*	*16.7*	*15.3*	*13.4*	*14.7*	*15.0*
None of the above	21.0	17.8	14.2	14.7	13.7	14.1	16.6	15.0

Source: Australian Institute of Health and Welfare

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Figure 22.1 In some circumstances, drugs can lead to long-term health problems.

Figure 22.2 Australian laws impose many restrictions on tobacco products.

in some circumstances, drugs can result in serious side effects or long-term health problems. Because of the negative effects of some drugs and the danger they can pose to users and the people around them, societies have developed laws over time to prohibit certain drugs or to restrict their use.

More recently, technology has enabled testing for the presence of drugs in situations where the drug is prohibited or deemed unsuitable; for example, in the workplace, when driving a car or in some public places. This chapter looks at some of the laws and cases on drug testing in Australia and explores some of the issues relating to the application of those laws, and the effects of the laws on the individual and on society in general.

Drugs and the law

Certain drugs have been restricted or prohibited by societies since far back in recorded history. For example, one of the earliest recorded prohibitions was against the use of alcohol under Islamic sharia law, attributed to passages from the Qur'an from the 7th century CE. In Europe, Pope Innocent VIII issued a prohibition on cannabis in 1484, and one of the first laws against smoking in public places was issued in 1632 in the United States by the Massachusetts General Court.

Even coffee has been prohibited at certain times throughout history. For example, in 1675 King Charles II of England, concerned that the increasing popularity of coffee in coffee houses across the kingdom was causing rebellion among his people and producing 'very evil and dangerous effects', issued a *Proclamation for the Suppression of Coffee Houses*. The law called for the closure of all cafés and prohibited the sale of coffee, tea and even chocolate. Not surprisingly, the law was so unpopular that the people forced the king to overturn it within just one week.

Australia today has both federal and state legislation relating to drugs, as well as local laws. These laws cover various social aspects of drug use and address issues including the trade and supply of drugs, use and possession of drugs, and access to or treatment with medicinal drugs.

The laws will differ depending on whether the drug is a legal drug, such as aspirin, caffeine, tobacco or alcohol; a **prescription drug** such as birth control, antibiotics or antidepressants; or an illicit drug such as cannabis, heroin or ecstasy.

prescription drug
a type of legal drug that can be obtained only by a doctor's prescription

Laws may restrict the sale, advertising or licensing of a drug; prohibit its cultivation or trafficking; or impose restrictions on the age of drug users or the places or situations in which the drug can be used. For example, tobacco is a type of legal drug whose use is subject to a number of conditions.

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A breach of these restrictions will generally result in a fine. The current laws in Australia and New South Wales that impose conditions on the sale or use of tobacco include:

- a prohibition on advertising tobacco products – *Tobacco Advertising Prohibition Act 1992* (Cth)
- compulsory health warning labels on cigarette packs – *Competition and Consumer (Tobacco) Information Standard 2011* (Cth); *Tobacco Plain Packaging Act 2011* (Cth)
- higher taxes on cigarettes – *Excise Act 1901* (Cth)
- making it an offence to sell cigarettes to persons under 18 years old – *Public Health (Tobacco) Act 2008* (NSW)
- a prohibition on smoking in enclosed public places – *Smoke-Free Environment Act 2000* (NSW).

With respect to illicit drugs, different laws will apply depending on the type of drug and the circumstances. Criminal offences range from minor summary offences to more serious indictable offences, with corresponding penalties from a recorded conviction or a small fine to life imprisonment. Prohibited activities include use of certain drugs, possession of specified amounts, cultivation, trafficking and importation. Types of offences and the laws in which they are contained include:

- illicit drug offences under NSW state law, including a list of prohibited drugs – *Drug Misuse and Trafficking Act 1985* (NSW)
- importation of illicit drugs, including a list of prohibited drugs – *Customs Act 1901* (Cth) and *Customs (Prohibited Imports) Regulations 1956* (Cth)
- trafficking of illicit drugs – *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth).

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. 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.

Figure 22.3 Possession of illegal substances is an offence.

Figure 22.4 Some tests can detect traces of drugs in your saliva.

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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 bodily tissue (skin, hair or nails)
- testing of bodily fluids (breath, saliva, blood, urine or sweat).

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 and raises issue 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

1 Look at Table 22.1 on page 336 and answer the following questions.
   - **a** Describe the general trends shown in the survey.
   - **b** Which drugs have shown a consistent decline? Why do you think this has occurred?
   - **c** Which drug category has shown a rise in use? Why do you think this has occurred?

2 Describe some of the history behind drug laws throughout the world. What types of drugs have been restricted by the law and why?

3 What are some of the laws in Australia that restrict or prohibit drugs? What are some of the penalties that can apply for not complying with the laws?

4 What are some of the methods used for drug testing and in what situations do you think they might be used?

5 Explain why drug testing is such a contentious issue. Outline the arguments that employers, employees and trade unions will use in favour of or against drug testing in the workplace.

Research 22.1

There is international concern about drugs. View the Australian Institute of Criminology website via the link http://cambridge.edu.au/redirect/?id=6640 and read about the United Nation's response to drugs. Complete the following tasks.

1 Identify the domestic laws that reflect Australia's recognition of the United Nation's bid to reduce international drug trade.

2 Which bodies oversee international drug laws and treaties? What are their main objectives?

22.2 Legal responses

Drug testing can be seen as an intrusive act. For this reason, in many instances where it has been introduced, laws and policies have had to be adapted, both to permit the testing and to provide a clear and transparent process to follow.

Changes to the law will depend on the context of the drug testing. For example:

- Roadside testing of motor vehicle drivers might require a change in police powers and the introduction of new driving offences.
- Different government employers might require changes to their statutory powers to allow them to test certain employees for drugs.

Private-sector employers might require changes to their staff employment contracts or the introduction of new policies and guidelines (such as the example of Endeavour Energy, described above).

Testing motor vehicle drivers

Probably the most visible instance where drug testing is used is for motor vehicle drivers. Safety

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on the roads is cited as the primary reason for testing in this situation.

As this is an area of criminal law, it is enforced by the police force, and any state or territory police officer in Australia can require a person driving a motor vehicle to undergo a roadside breath test to determine whether there is more than the permitted concentration of alcohol in the blood. Some states and territories, including New South Wales, have introduced random drug testing to identify drivers under the influence of other drugs, such as cannabis, ecstasy, speed or some prescription drugs, that can impair driving ability. In 2006, the *Road Transport Legislation Amendment (Drug Testing) Act 2006* (NSW) was passed to amend the *Road Transport (Safety and Traffic Management) Act 1999* (NSW) (now, the *Road Transport Act 2013* (NSW)). This legislation authorised random testing of drivers.

The testing usually involves two stages: a preliminary oral fluid test plus a secondary test to confirm the results. Where a driver's behaviour suggests impaired driving ability, police may order the driver to undergo more intrusive testing by a medical officer such as testing samples of blood and urine. Penalties for returning a positive reading can vary depending on the circumstances and the drug, including fines, suspension of licence or even a prison sentence.

By November 2010, 75 000 motorists had been tested, with 2.2 per cent returning a positive test in 2010 (this figure was 2.9 per cent in 2007). In 2013, a total of 34 280 roadside drug tests were carried out with 729 drivers found to be affected by illicit substances (2.1 per cent). Given these results, and the safety implications for all people using public roads, there appears to be a need for this type of drug testing. The general public mostly approves of this testing provided that the process and methods used are fair and transparent.

Testing employees in the workplace

As Australia has no national comprehensive drug strategy or legislation governing employers' approach to drugs, the issue of drug testing in the workplace is largely governed by workplace health and safety legislation, which varies from state to state.

Justifications for workplace drug testing

Four main reasons are commonly cited to justify testing individuals for the presence of drugs in the workplace. Whether these reasons are fair and just would need to be assessed according to the particular workplace context and the extent of the testing proposed. They are:

- safety of the individual and others
- productivity of an organisation or individual
- health of individuals using drugs
- integrity or reputation of the company or the group to which the individual belongs.

Safety: The primary reason for drug testing in the workplace is safety – ensuring that employees are fit to carry out their duties. This is especially so in jobs where health or even lives can be put at risk if employees are not alert, such as those involving the operation of vehicles or equipment requiring precision. The use of drugs that impair judgement poses a risk to the user's own safety and to the safety of other employees and/or customers or the general public.

In New South Wales, under the *Work Health and Safety Act 2011* (NSW), there is a general duty for employers to ensure the health, safety and welfare of their employees while they are at work. Employers often point to this duty to justify the introduction of workplace testing.

Productivity: Another reason often cited for carrying out random drug testing in the workplace

Figure 22.5 Workplace safety is one reason put forward to justify random drug testing in the workplace.

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is that helping to identify workers who are using drugs can reduce the cost of time lost due to the effect of drugs, accidents in the workplace and absenteeism, as well as the costs of health care or workers' compensation.

Health: The current or long-term mental or physical health of the individual may be used as a reason for drug testing, especially in schools, sport and the workplace. Drug testing can be used to identify individuals who may need assistance with drug dependency or other health issues caused by their drug use. A significant question here is whether the health of the individual is rightly the concern of an outside party or whether it is a private matter for the individual.

Integrity: One final justification for conducting drug tests relates to the integrity and reputation of the company or organisation to which the individual belongs. For example, over the past few decades, many athletes have returned positive test results for performance-enhancing and other illicit drugs. As a consequence, some sporting associations have claimed their sponsors or the general public are likely to have negative perceptions of their sport or association. Similarly, some companies, organisations, government bodies or even schools may be concerned that reports of employees' or students' drug use will affect their reputation and the way their work practices, culture, discipline or performance are viewed.

Issues

There are a number of important issues to be considered with employee drug testing, including:

- *who is to be tested*: for example, whether it is targeted at one individual or random testing across the entire workforce
- *when and where*: the time and place of testing; for example, at work or home, in private or in front of other people
- *refusal*: what happens when a person refuses to take a test or cannot take a test
- *information*: what is done with the information received and how long is this information kept
- *penalties*: whether the penalties that apply are reasonable or too harsh
- *review*: the reliability and independence of the tests and whether a person has a right to complain or review the process.

Figure 22.6 A company must consider how its information on an employee is kept.

If a company fails to consider these issues from the perspective of its employees, the introduction of drug testing in the workplace can result in civil action. For example, it is important that employers have understandable policies and consequences regarding drug testing and positive results. In the case of *Wendy Day v Sodexo Remote Sites Australia Pty Ltd* [2011] FWA 8505, the courts found in favour of the dismissed employee as the business's policy was confusing and lacking in specifics.

Some other court judgements arising from these circumstances have served to clarify the processes that can be used to ensure that workplace policies are just. A few of these cases will be considered later in this chapter.

Examples

Workplace drug testing might be done by or on behalf of public- or private-sector employers or by the relevant government regulatory bodies for the industry. For example, drug testing of coal mine employees might be done by mining companies or by the NSW Chief Inspector of Coal Mines. Some of the industries where drug testing is carried out are outlined below.

Railway employees

Prior to 2013, employees of the State Rail Authority in NSW had been subjected to drug testing under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*

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Figure 22.7 Drug testing of railway employees ensures the safety of the public and passengers.

(NSW). The most significant reason for this testing is the safety of drivers, passengers and the general public, given the high possibility of danger should something go wrong. However, nationwide laws have been adopted in NSW with the *Rail Safety (Adoption of National Law) Act 2012* and *Rail Safety (Adoption of National Law) Regulation 2012,* introduced in January 2013. This law requires rail operators to test no less than 25 per cent of employees a year. This legislation is stricter than the state legislation with such conditions as zero blood alcohol concentration conditions.

Employees carrying out 'rail safety work' (as defined in s 8 of the *Rail Safety National Law* (NSW)) include drivers; signal operators; workers who couple or uncouple trains; those who work in maintenance, repair or inspection of trains, equipment or infrastructure; and those who manage and monitor safe working systems or passenger safety. All of these employees are subject to the Regulation. These employees can be randomly tested before or during their shifts if there is reasonable cause to believe that there are drugs in their system, or if they have been involved in an accident.

Australian Defence Force

All members of the armed services in Australia are subject to some form of drug testing. Again, the safety of the employees and the general public is the primary concern, in addition to integrity and the Defence Force's reputation nationally and internationally.

Part VIIIA of the *Defence Act 1903* (Cth) authorises drug testing of all armed services personnel as part of the Prohibited Substance Testing Program. A person may also be required to undertake a drug test before appointment or enlistment.

Airline employees

Some Australian airlines conduct pre-employment testing of some employees, especially flight and cabin crew. The federal Civil Aviation Safety Authority (CASA) lobbied for new civil aviation regulations to be introduced, which would allow drug testing of employees in areas in which safety is critical, including air traffic controllers, baggage handlers, refuellers and other ground staff. Under the *Civil Aviation Act 1988* (Cth) (Amended 2011), CASA was given wider powers to drug test airport workers. In 2013, almost 50 airline workers tested positive for drugs (see the news story on page 343).

Review 22.2

1. What are some of the main reasons employers and the public might want to introduce workplace drug testing?
2. What are some of the most important issues for employees who are facing a drug test?
3. What types of workplaces are subject to drug testing in Australia and do you think it is justified? What other workplaces do you think should consider drug testing of employees?
4. What is the Civil Aviation Safety Authority? Why do you think it was keen to introduce drug testing?
5. Which airline and airport employees have to undergo random testing?
6. Read the news story about drug testing of Qantas and Virgin staff on page 343 and answer the following questions.
   - **a** How many employees were found guilty of drug use?
   - **b** How are these tests conducted? How do airlines respond to positive tests?

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News

Fifty Qantas and Virgin airline workers alcohol and drug tested

Bruce McDougall

Daily Telegraph, 13 January 2014

ALMOST 50 airline workers employed in safety sensitive roles by Qantas and Virgin have tested positive to drugs or alcohol in a year, documents obtained under Freedom of Information show.

Qantas tests reveal 20 airside workers tested positive to drugs and a further 16 to alcohol between March 2012 and February last year, showing up in thousands of urine and breath samples taken.

The employment of three of the workers caught by the tests was terminated and three resigned.

Eleven Virgin staff recorded positive tests – seven for alcohol and four for drugs – with nine losing their job and one resigning.

No positive results were recorded for Jetstar staff – the other major airline covered by the testing program.

Staff covered by the tests carried out across Australia include pilots, cabin crew, engineers, refuellers, pit crew and baggage handlers with access to aircraft.

The data, obtained by The Daily Telegraph under FOI laws, does not show whether any pilots have tested positive after turning up for a flight.

A spokesman for Virgin confirmed that none of the airline's pilots were found to have tested positive during the period of the tests but Qantas refused to comment on the results for individual employee groups.

Aviation sources have told the Telegraph they believe no more than "one or two pilots" across the entire industry in Australia test positive for drugs or alcohol in any year.

But they added that "anyone who works on the tarmac (at an airport) and has contact with aircraft has the potential to cause a safety risk".

A Qantas spokesman said: "Qantas and Jetstar have a zero blood alcohol level and a drug-free policy for all employees including contractors while at work or on duty.

"Positive tests by employees, from our head office staff to operational employees such as baggage handlers, are extremely rare across our 35,000 employees."

It is understood the positive drug tests include illicit substances such as cocaine and amphetamines and prescription drugs such as codeine.

Qantas employees who test positive for alcohol or drugs are required to undergo an assessment and treatment program and some face disciplinary measures including the sack.

Some of the positive tests were returned by people seeking work in safety sensitive jobs with the airlines and were not hired as a result. Staff were also tested after accidents and serious incidents. In some cases a positive reading was reversed on medical review.

The Civil Aviation Safety Authority (CASA) conducts its own random alcohol and drug tests recording seven positives for alcohol and two for drugs out of 11,252 samples during the 2012–13 year.

Testing covers pilots, cabin crew, engineers, air traffic controllers, baggage handlers, refuellers and other personnel in safety sensitive positions, a CASA spokesman Peter Gibson said.

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"The number of positive tests results for both CASA's random testing program and the testing conducted by aviation organisations is very low," Mr Gibson said.

"While this is encouraging CASA and the aviation industry will continue to strive in the interests of safety to make aviation alcohol and drug free."

The airlines are required to file reports on the outcome of their testing programs to CASA twice a year and the data is reviewed by the safety authority.

Last year a survey of more than 300 members of the Australian and International Pilots' Association revealed a culture of heavy drinking.

It found one in seven was at risk of significant life problems because of excessive alcohol consumption. Eight pilots scored above the cut-off for alcohol dependence, according to a World Health Organization scale.

The report compiled by former Alcohol and Other Drugs Council of Australia chief executive Dr Donna Bull found three-quarters of international pilots drank at hazardous levels.

Forty per cent admitted to imbibing six or more drinks in a single occasion at least once a month – the accepted definition of binge drinking.

Figure 22.8 Both Virgin and Qantas airline workers tested positive for drugs.

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Testing of athletes

When professional athletes, such as rugby league players, are drug tested, this could be considered a category of workplace drug testing. Drug testing for amateur or semi-professional athletes is generally a matter for individual clubs or sporting associations. The National Anti-Doping Scheme governs drug testing required of athletes who have been selected to compete as representatives of Australia in international sporting competitions. The body that administers the scheme is the Australian Sports Anti-Doping Authority (ASADA), established by the *Australian Sports Anti-Doping Authority Act 2006* (Cth). It can investigate violations of anti-doping rules, offer recommendations on its findings, and present cases at sports tribunals against alleged offenders.

The term 'doping' refers to the use of a drug to improve athletic performance, and drug testing of people in sport involves some different issues from those usually present in the workplace. It typically looks at detecting performance-enhancing drugs, like anabolic steroids, rather than drugs that may impair work performance. The reasons for testing include ethical and practical concerns about fair play between competitors, the reputation of teams and sporting codes, and the health and safety of individual players and the fans who look up to them. As a result, many governing sporting bodies have adopted drug testing in order to stop so-called drug cheats and improve the integrity of their sports.

The laws on drug testing in sport are generally different from those governing drug testing in the workplace. They include state and federal legislation about testing standards and often incorporate codes and policies drafted by individual sporting associations such as those of football leagues. Independent bodies such as ASADA and the Australian Sports Drug Medical Advisory Committee assist in educating, setting standards, and conducting and reviewing sports drug testing.

The *Australian Sports Anti-Doping Authority Act 2006* (Cth) was amended in 2008 to bring it into compliance with the World Anti-Doping Code.

ASADA and the Cronulla Sharks supplements controversy

An example of drug testing in sport was seen in 2013 with the Cronulla Sharks National Rugby League Club implicated in the Australian Crime Commission's report *Organised Crime and Drugs in Sport*. ASADA also became involved in investigating the use of performance-enhancing drugs and the club carried out its own inquiries. The allegations rose from the distribution of banned performance-enhancing drugs in 2011.

Although the club declared that its players were innocent victims of an overzealous fitness coach, who was no longer employed by them, ASADA interviewed up to 14 (unnamed) Sharks players in regard to the distribution of banned substances. These players were offered a six-month ban if they voluntarily owned up. If the investigations found them guilty, they could receive a maximum two-year ban from the sport. ASADA also refuted the fact that the club had no knowledge of the problem, implicating the current coach and trainer in the controversy.

The outcome of the investigations was dire for the club. At the end of 2013, following nearly 10 months of investigations, the NRL CEO announced that the Cronulla Sharks would face the following penalties:

- a 12-month suspension for the head coach
- a $1 million fine for the club
- players banned from playing for six months, including the club's captain
- the deregistration of the club's trainer with an indefinite ban from the NRL.

In addition, several players were implicated in the scandal and suffered a loss of reputation due to this. The club's performance over the next couple of years suffered and it lost fans and sponsorship.

The whole investigation and controversy sent a message to sporting teams to be more careful and more alert when it comes to enhancing player performance.

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News

Sharks players could be stood down following ASADA investigation

Josh Massoud

The Daily Telegraph, 7 March 2013

Tonight's NRL season opener has been reduced to a sideshow with revelations as many as 14 Cronulla players implicated in ASADA's anti-doping investigation have been threatened with immediate suspension.

Current Sharks players who have been contracted since 2011 – when sports scientist Stephen Dank worked at the southern Sydney club – are all part of the investigation.

As bookmakers suspended all Sharks-related markets last night it was revealed former ASADA senior counsel Richard Redman had been hired by Cronulla to help guide the club through the crisis.

There are serious concerns that two separate peptide-based supplements given to Sharks players might have contravened the World Anti-Doping Agency code.

Mr Redman was hired several weeks ago, shortly after Cronulla was identified as one of the six NRL clubs in the Australian Crime Commission report into performance-enhancing drugs, organised crime and match fixing.

According to a Sharks insider, Mr Redman has been reassuring players about their situation for the past fortnight. But the landscape changed dramatically on Tuesday morning when some players received a text message advising them to attend an emergency meeting.

There, Mr Redman gave the players an ultimatum – voluntarily stand down for six months or risk ASADA's maximum two-year ban. It is believed the players were given a 48-hour deadline to make up their minds …

As well as casting a cloud over a number of current players in the Sharks NRL squad, there are also concerns the net could be widened to implicate ex-Cronulla players who have since moved to other clubs.

Sources stated as many as 22 players across the code are under the spotlight. A Sharks source last night said the players implicated in the scandal were concerned, rattled and distressed.

"They had no reason to question the club and its performance staff about what supplements they were taking," the source said.

"They trusted that what they were being given was safe."

Mr Dank left Cronulla after just four weeks, with club doctor David Givney concerned about the supplement program the club's players had been placed on.

The Daily Telegraph last month revealed at least one Sharks player was given the blood-thinning agent Warfarin. Mr Dank also used a room inside a former Bankstown medical centre to treat players away from the club.

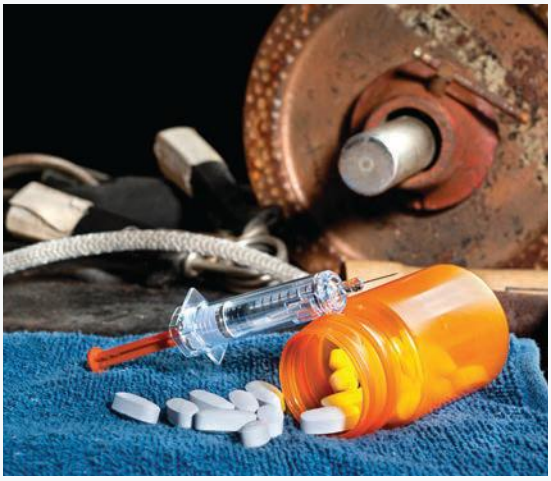

Figure 22.9 The Cronulla Sharks NRL Club was implicated in a larger report on drugs in sport.

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Testing in schools

Reasons often offered for drug testing in schools are the immediate and long-term health of students, and the safety of students in the school environment.

There is little evidence that drug testing is or has been used in Australian schools to date, although it is widespread in the United States. The issues and laws are different from those applicable in sport or the workplace, as the vast majority of persons who would be affected by drug testing in schools are minors; that is, people under 18 years of age. While the school has a duty of care to protect its students, persons under 18 lack the legal capacity to consent to certain invasions of privacy. In Australia, strict laws of privacy apply to protect individuals' rights.

International studies have found that drug testing damages the relationship between students and their school as well as being expensive with little return.

In 2008, a federal government report by the Australian National Council on Drugs thoroughly investigated the advantages and disadvantages of drug testing in Australian schools. The cost of conducting saliva tests on all school students would be about $350 million, and yet it would not always give the right results. After looking at all the issues, including the relevant legal and ethical considerations, the report concluded that drug testing of students is not appropriate for Australian schools.

Review 22.3

1. What are some of the main reasons for drug testing in sport? Do you agree?
2. Do you know of any cases in the media where athletes have been accused of drug use? How do you think the legal and ethical considerations mentioned above in the context of drug testing in sport might apply to the case?
3. What are some of the legal issues relating to drug testing in schools?
4. Do you think that drug testing in schools is necessary or appropriate?

Rights and obligations regarding drug testing

When drug testing is to be carried out, there are three parties to be considered: the person being tested, the person (or organisation) carrying out the testing and the general public. Parties' rights and obligations can come from specific legislation. In sport, they can also come from sporting codes of conduct. Relevant areas of law include employment law and criminal law.

Privacy and consent

Australian **privacy** laws offer some protection to individuals required to undergo a drug test. Several different types of privacy are relevant to drug testing:

- **information privacy** – including rules about the collection and handling of personal data and records
- **bodily privacy** – protection from physically invasive procedures, such as blood or saliva tests, without the person's **consent**
- privacy of communications – protects information that a person sends or receives such as mail, email, text messages or phone conversations
- territorial privacy – limits intrusions into certain environments, such as video surveillance, searches or identity checks, in the workplace or in the home.

privacy
a person's right to be free from unwanted intrusion or public scrutiny

information privacy
protection against inappropriate handling of a person's personal information, with rules for the collection and handling of personal data and records

bodily privacy
protection from physically invasive procedures without the person's consent

consent
free and voluntary agreement by a rational person who is able to understand and make a decision about the matter to which he or she agrees

In New South Wales, the *Privacy and Personal Information Protection Act 1998* (NSW) sets out 12 Information Protection Principles (IPPs) to protect information relating to individuals. These principles relate to the collection, storage, access to, accuracy of, use of and disclosure of information. It also

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Figure 22.10 Drug testing can be carried out without permission when they are suspected of having committed a crime.

provides complaint mechanisms to allow cases to be reviewed by the NSW Privacy Commissioner. The agencies bound by the Act include state government departments, statutory authorities, police and local councils.

The main federal law protecting privacy of personal information is the *Privacy Act 1988* (Cth). It offers similar protection as the NSW Act. Eleven IPPs apply to Commonwealth and ACT Government agencies that collect information about individuals. Ten further IPPs apply to certain private companies (e.g. credit providers and credit reporting agencies, which have access to individuals' personal tax file numbers) and to all health service providers.

Central to the question of whether a person's right to physical privacy or to information privacy has been breached is whether the person freely consented to the physical procedure or the disclosure of information. An individual's right to bodily privacy is entrenched in both the common law and legislation in the form of prohibitions on criminal assault. It is also implied by the tort of trespass to the person. The law may consider a breach of a person's bodily privacy to be an act of assault or trespass unless that individual has voluntarily consented. Only in rare circumstances can a lawful invasion of a person's bodily privacy occur without this consent; for example, in some situations of medical emergency where that person is unconscious or otherwise incapable of consenting.

Legal Links

The office of the NSW Privacy Commissioner is part of the Information and Privacy Commission NSW. It provides advice to employers and individuals on privacy issues and privacy complaints. View the Information and Privacy Commission NSW website for more information.

Under the *Crimes (Forensic Procedures) Act 2000* (NSW), testing can be carried out on a person who is suspected of having committed a crime. Generally, a forensic procedure can be carried out with the informed consent of the person. Intimate forensic procedures (such as taking a blood sample) can be undertaken without the person's consent, but only with an order of a magistrate or other specially authorised officer. Non-intimate forensic procedures (such as a self-administered buccal swab) can be carried out without the person's consent, by order of a senior police officer.

Employer and employee rights

In addition to the issues of privacy and consent, the rights of an employee are protected by his or her **employment contract**. This may be a collective agreement negotiated by the employees at a company or by their trade union, or an individual contract applying to the individual worker. Workplace agreements are legal and binding contracts and require both parties to abide by their conditions.

employment contract
a contract between an employer and employee(s) which sets out matters including the pay, hours, working conditions, benefits and obligations of the employee and the rights and responsibilities of the employer

Where there is a requirement not to use certain drugs at or away from work, or where drug testing is a requirement of employment in a workplace, this will often be a term of an employment contract.

Where workers in a particular industry belong to a union, the union can assist employees in negotiating fair workplace conditions. Unions usually have more power than individual employees to change or

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negotiate employment terms, and can often provide the most security against such things as dismissal where an employee refuses to take a random drug test or tests positive.

For employers, employment contracts will often form the basis for justifying the use of drug testing, as it can be claimed that employees agreed to this when they first accepted the job. Discussion with unions when drafting appropriate policies can strengthen an employer's justification for instituting drug-testing programs.

As mentioned earlier in this chapter, drug policies are often instituted under the occupational health and safety (Work Health and Safety) policy of a workplace. In NSW, the *Work Health and Safety Act 2011* (NSW) places obligations upon employers to ensure that the workplace is safe and fit to work in.

Legal Links

WorkCover NSW is responsible for overseeing workplace health and safety laws in New South Wales. Information on Work Health and Safety laws can be found on their website.

Review 22.4

1 Describe and evaluate the ways that employees are protected against random drug testing in the workplace.
2 How are employers' rights protected?
3 Propose a constructive approach to a workplace drugs and alcohol policy. What would you include in the policy and why?

22.3 Non-legal responses

When the introduction of drug testing in a workplace is proposed, a number of factors outside the law may need to be considered. These might include the degree of employee or community support for the proposal, and whether there are other alternatives available such as targeted education programs about drugs and workplace safety, peer support, employee assistance or counselling programs for people affected by drugs. Other agencies may be

Figure 22.11 Many people rely on cold and flu medicine to help them get better. It would be unfair to test a person on such a substance.

helpful in assessing the benefits and drawbacks of drug testing, and in addressing drug issues in other ways. These include trade unions, commercial interests, the media, and interested government and non-government organisations.

Community support

Community reaction is important when considering drug testing. As discussed at the beginning of this chapter, the community would be unlikely to support, for example, a prohibition on caffeine or aspirin, or the testing of individuals for the presence of these substances.

Public support of drug-testing proposals can often be critical to their success. For example, in a 2013 survey conducted by the Australian Government Office of the Privacy Commissioner, respondents were asked about their attitudes towards random drug testing. Of the respondents, over 90 per cent of employees believed that drug tests were acceptable on employees who operate heavy machinery (96 per cent), handle dangerous substances (95 per cent) or work directly with children and young people (91 per cent).

Trade unions

As discussed above, trade unions can play an important role in negotiating employment contracts and workplace drug-testing policies. Unions may be able to provide additional support such as mediation or counselling services, provide a voice for concerns

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about the way a policy is being implemented, or help to persuade organisations to change or update their drug-testing policies if required.

Commercial responses

Another area of relevance is the emergence in recent years of a market in drug testing. A number of companies in the commercial sector now offer drug testing and consultancy services; for example, assistance in legal compliance and drafting of drug-testing policies. In addition, the manufacturers and retailers of commercially available drug-testing products have an interest in the introduction of compulsory drug testing in the workplace. Commercial interests may also include the interests of the company or organisation itself in promoting or being seen to promote productivity in the workplace. Commercial interest is an important consideration in the growth of drug testing in the workplace and it should be carefully weighed against the real necessity or reasonableness of the testing in each individual case.

Legal Links

Medvet is an example of an Australian laboratory that conducts drug-testing services for Australian businesses. View the Medvet website via the link http://cambridge.edu.au/redirect/?id=6558 and read about how the laws you have learned about apply.

The media

A further consideration, especially where issues of integrity and reputation are important, is the media. The media can play an important role in informing the public about drug testing, and media coverage, both positive and negative, can be important in encouraging or discouraging its spread.

Media coverage is especially influential with respect to drug testing in sport. It can have a significant impact on the perceived integrity of high-profile sports figures or sporting clubs. While the exposure and condemnation of illicit drug use can be considered a positive consequence, media coverage and commentary can also have a detrimental effect on clubs or even individual careers, especially where allegations of drug use cause long-lasting damage to reputation but are not based on factual evidence.

Government and non-government organisations

A number of government and other organisations are instrumental in providing research, commentary, advice or assistance for the public and for the parties involved. In addition to the New South Wales and federal Privacy Commissions and WorkCover NSW, some other organisations are listed in the 'Legal Links' box below.

In addition, sporting codes have players' associations to advocate for the rights of players.

Legal Links

The Australian Drug Information Network website gives access to drug and alcohol information from prominent Australian and international organisations.

The NSW Roads and Maritime Services website provides information and advice in relation to roadside drug testing of motor vehicle drivers.

The Australian Sports Anti-Doping Authority (ASADA) and the Australian Sports Drug Medical Advisory Committee (ASDMAC) assist in educating, setting standards, conducting and reviewing sports drug testing. The ASADA has a number of tools to assist athletes and coaches. Access the websites for more information.

Review 22.5

1. List some areas of work in which the general community feels that drug testing of employees is acceptable.
2. Explain why commercial interests may be a factor when drug testing is being considered.
3. What are some of the organisations that individuals can turn to for support or advocacy regarding drug testing? What do they offer?

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22.4 Effectiveness of responses

As we have seen, there are several ways in which the Australian legal system addresses drug testing. There is legislation prohibiting or restricting certain drugs and creating offences for certain dealings with those drugs. There is legislation relating to drug testing in individual workplaces; for example, in the Australian Defence Force or RailCorp NSW. Drug testing in sport is overseen by a different legislative regime and advisory bodies, as well as individual sporting codes and sporting tribunals. For other workplaces, more general laws relate to issues of information privacy and bodily privacy, especially in relation to consent.

Although we know that both public- and private-sector organisations are carrying out workplace drug testing in New South Wales, the full extent of this practice and the effectiveness of current laws in protecting the parties' interests are difficult to measure. Particularly in the private sector, the extent to which drug-testing practices are routinely carried out is not clear, especially where drug testing is carried out by a company before the person actually begins working for it.

While technological methods for performing drug tests have improved, there is little evidence as to their effectiveness in deterring drug use or preventing injury or crime. For example, a 2006 review by the NSW Ombudsman into the use of sniffer dogs, titled *Review of the Police Powers (Drug Detection Dogs) Act 2001*, found no evidence that sniffer dogs deterred drug use or reduced drug-related crime. The review also found that sniffer dogs were only successful in targeting drug dealers in 1.4 per cent of cases; in other words, they targeted mostly recreational users, and only by chance might they detect a supplier.

For employers and employees, one of the most important methods of oversight is provided by state and federal industrial relations systems that cover disputes between employers and employees. Judgements of these industrial relations tribunals have been able to provide some guidance on best practice in the use of drug-testing programs. One case brought before the Western Australian Industrial Relations Commission in 1998 illustrates the importance of consultation with employees when drafting a drug-testing policy (see the In Court box on page 352). It was one of the first Australian cases involving compulsory drug testing in the workplace.

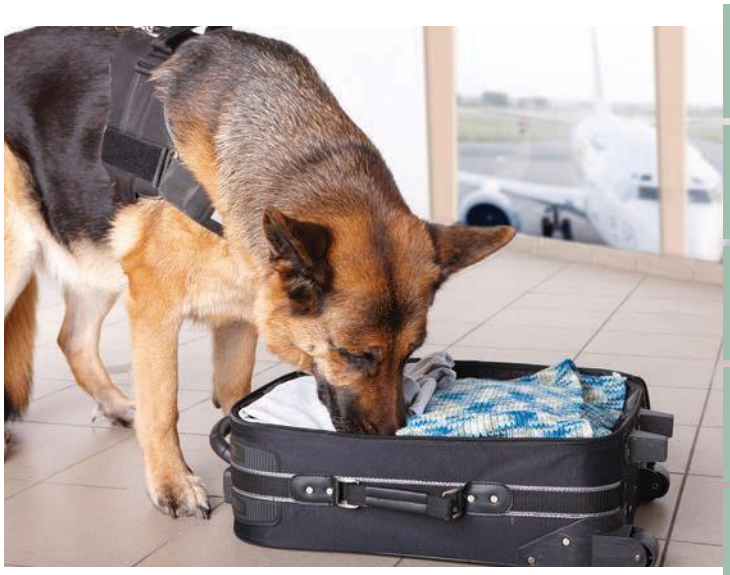

Figure 22.12 The effectiveness of sniffer dogs has been called into question.

More recent cases have tested the fairness and consistency of random employee drug-testing policy. For example, in 2003 in the case *Candido v Hi Fi Supermarket Pty Ltd* [2003] AIRC 983, the Australian Industrial Relations Commission (AIRC) ruled that the dismissal of a salesperson for smoking marijuana at work was unfair because the two other employees caught smoking marijuana were only given a warning.

In another important case from the AIRC, *Shell Refining (Australia) Pty Ltd, Clyde Refinery v CMFEU* [2008] AIRC 510, the relevant union, while not disputing the role played by drug testing in workplace safety, argued that the testing of urine samples detects drug use over a longer period than do oral samples – not merely recent use. Impairment caused by drug use tends to last for hours, not days. Therefore, urine samples could be seen as an unnecessary invasion of privacy and saliva samples should be sufficient. Shell's position was that the policy was designed to address habitual drug use as well as actual impairment, and that urine testing provides more information. The AIRC held that because urine testing has a longer 'window of detection', which may interfere with employees' privacy, it would be unjust and unreasonable to use that method when a more precise method is available. Saliva testing indicates actual impairment, and is unlikely to detect drug use that doesn't affect

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In Court

***BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia (WA Branch)* [1998] WA IR Comm 130**

The employer, a mining company, wished to introduce a drug-testing program for all employees. While it had sought the input of employees and most of the employees had agreed to the program, the union was opposed to it. The union argued that there was no evidence that such a drastic program was needed as there had been no drug-related incidents, and a positive urine test did not reliably indicate actual impairment on the job. They said the drug testing constituted an unreasonable invasion of the employees' privacy.

BHP argued that it needed to implement the program to meet its obligations under the *Mining Safety and Inspection Act 1994* (WA), which prohibited a person being in a mine while under the influence of alcohol or drugs, and its Occupational Health and Safety duty to maintain a safe workplace. The Commission found that the drug-testing program proposed by BHP was reasonable. BHP had undertaken a consultation process, and the policy was acceptable to the majority of employees.

The Commission also considered it reasonable for the company to put in place a compulsory drug-testing scheme rather than having to wait until a staff member showed signs of impairment to test him or her. With respect to the invasion of privacy, it was noted that safeguards against wrongful use of the test results had been put in place and that BHP had agreed to review the policy if new technologies allowed for less intrusive testing methods.

employees' performance. In the same case, the Commission also found that it was appropriate for Shell to conduct drug testing for some employees and not others.

Conclusion

Drug testing continues to be an area of concern for many Australians. As it is a relatively recent practice, states have attempted to adapt existing laws such as those relating to privacy and consent in order to afford protection for the parties involved. Where laws have not been adequate, both legislators and the courts have acted to ensure that drug-testing policies remain fair, protect all the parties' interests and decrease the incidence of disputes.

Where drug-testing policies are introduced, care is required to ensure that the reasons for the policy are clear and justified, that the methods and processes are carefully considered, that consultation and monitoring take place, and that the consequences of a positive test result are fairly applied. As technologies evolve and drug testing expands into different areas of society, the law will continue to develop to provide greater clarity in relation to parties' rights and obligations.

Review 22.6

1. Explain why it is difficult to assess the effectiveness of drug-testing laws.
2. List the reasons why the Western Australian Industrial Relations Commission found BHP's proposed drug testing program to be reasonable.
3. Explain the argument made by the union in *Shell Refining (Australia) Pty Ltd, Clyde Refinery v CMFEU*. What was the finding of the Commission?

Research 22.2

What are some of the recent cases involving drug testing in the workplace? Outline the main points arising from these judgements.

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Chapter summary

- Use of many different types of drugs is common in Australia, some of which are restricted or prohibited by law.
- Drug testing has arisen as a way to prevent some of the negative effects of drug use.
- Drug-testing laws differ depending on the context.
- In the workplace, safety, productivity, health of employees and company reputation are the main reasons offered for drug testing.
- Issues of concern include privacy considerations and employees' rights, especially if companies are thought to be implementing drug testing as a way of exerting control over their employees.
- Drug use in sport is different from other contexts, in that prohibited substances are used to enhance performance.
- Drug testing in Australian schools is generally believed to be unnecessary and inappropriate.
- Non-legal considerations relating to drug testing include community support, the views of employees and their unions, and commercial interests.
- It is difficult to judge the effectiveness of drug testing and the applicable laws, but the courts have been able to provide some guidance on best practice.

Chapter summary questions

Multiple-choice questions

1 What are illicit drugs?
- **A** drugs that the law restricts
- **B** drugs that you can only buy with a medical prescription
- **C** drugs that the law prohibits
- **D** all of the above

2 Why might employers randomly test workers for drugs?
- **A** to keep samples of workers' DNA on file
- **B** to see whether workers are able to carry out their work duties responsibly and safely
- **C** to abide by laws set down by the government
- **D** to show workers that drugs are not acceptable in the workplace

3 Which of the following is NOT a reason for drug testing in sport?
- **A** to ensure that no athlete enjoys an unfair advantage provided by performance-enhancing substances
- **B** to protect athletes' health and safety
- **C** to protect sporting clubs' reputation and integrity
- **D** to ensure that professional athletes are earning no additional income from illicit drug dealing

4 Which type of privacy is most important to consider in drug testing?
- **A** territorial privacy
- **B** bodily privacy
- **C** privacy of communications
- **D** information privacy

5 What issue was the dispute about in *Shell Refining v CMFEU*?
- **A** whether employees could take recreational drugs on their holidays
- **B** whether all employees should be tested
- **C** whether urine or oral samples should be tested
- **D** whether all employees should be tested and whether urine or oral samples should be tested

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Short-answer questions

1 Construct a table that shows some of the most important considerations for employees and employers in drug testing.
2 Outline some of the rights and obligations for each party. Describe the basis of these rights and obligations.
3 Explain how you would go about formulating a workplace drug and alcohol policy. What would it include and how would you notify workers about this policy?
4 Investigate a workplace where drug testing is used. Write a report of your findings including arguments for and against the testing, any legislation that applies and any other issues.
5 Evaluate the need for drug testing in various social contexts.
6 Do you think the police should become involved if someone tests positive to a drug test? Justify your answer.

Extended-response questions

'The technology of drug testing is being permitted to shape the limits of human privacy and dignity. The situation should be the other way around' (Privacy Committee NSW 1992). Evaluate this statement, drawing on arguments for and against random drug testing.

Evaluate the effectiveness of the legal system in achieving justice for both employees and employers in the area of random drug testing.

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

GO

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Issue 4:

Criminal or civil cases that raise issues of interest to students

Chapter 23

Facebook privacy issues

This chapter is available in the digital versions of the textbook.

GO

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Answers to multiple-choice questions

Part I

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Chapter 2
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Chapter 3
1 B 2 B 3 A 4 A 5 C

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Topic 1 – 1 A 2 B 3 B 4 A 5 B
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1 C 2 A 3 B 4 D 5 A

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1 A 2 C 3 B 4 A 5 A

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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. It also severs the legal relationship that existed between the adoptive child and his or her 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 England and Australia, which 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
policies designed to address past discrimination and thus improve the economic and educational opportunities of women and minority groups

alternative dispute resolution (ADR)
dispute resolution processes, such as mediation, arbitration and conciliation, that do not involve courts

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 (ADVO)
a court order used for the protection of a person involved in an intimate, spousal or de facto relationship

apprehended violence order (AVO)
court order to protect a person who fears violence or harassment from a particular person. In NSW, 'apprehended personal violence orders' prohibit violence between members of the public; 'apprehended domestic violence orders' prohibit violence in the context of a family.

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

Australian Federal Police (AFP)
the federal police agency of the Commonwealth of Australia, set up to enforce the federal laws and to protect the interests of Australia both domestically and internationally

BAC
blood alcohol concentration measured in grams of alcohol per 100 millilitres of blood

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 in order for a plaintiff to succeed in proving the case against the defendant

beyond reasonable doubt
the standard of proof required in a criminal case in order 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

bill of rights
a statement of basic human rights and privileges

bipartisan
having the support of the two major political parties

bodily privacy
protection from physically invasive procedures without the person's consent

bookmaking
the activity of calculating odds on sporting and other events and taking bets

bridging visa
a permit to stay in Australia for a temporary period of time so that arrangements can be made either to leave or to apply for permanent residency

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

C Class licence
C stands for Car: an unrestricted driving licence often known as a 'black' or 'full' licence in terms of restrictions on speed, mobile phone use, passengers carried and blood alcohol readings

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
a Latin term which loosely translates to 'buyer beware', meaning that buyers are responsible for their actions

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CERN
the European Organization for Nuclear Research

chapter
a local branch of a motorcycle club

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 which are protected by law; for example, religion and freedom of speech

civil litigation
court action brought to remedy a wrong or breach of contract law

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 make/give an organisation or an activity more public awareness for financial gain

committal hearing
inquiry held in the Local or Magistrate's 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

Commonwealth Director of Public Prosecutions (CDPP)
independent prosecuting agency established by a federal Act to prosecute alleged offences under federal laws

complainant
a person alleging that a sexual assault has been committed against him or her

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 them.

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 he or she agrees

conspiracy theory
speculation that there is a cover-up of the information surrounding a significant event by government or other authorities

contempt of court
words or actions that show a disregard for the authority of the court or interfere with its powers

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

conveyancers
people who deal 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

copyright infringement
the unauthorised use of copyright material in a manner that violates the owner's rights

copyright notice
a notice added to a work to inform people of who owns the copyright and when the copyright was created; for example, © Random Business Pty Ltd 2011

coronial inquest
investigation into a death that has occurred in unusual circumstances, held in the Coroner's Court and overseen by a magistrate called the Coroner

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

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 Mental Health Review Tribunal has not classified as an involuntary patient

courts of equity
historically, courts whose decisions were more discretionary and based on moral principles, and which served as an antidote to the inflexibility of the common law

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

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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

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 pages 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/program where collected data is organised and stored

de facto relationship
(from the Latin term meaning '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 health care 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 copyright
copyright as it applies to digital media

digital divide
the gap between those with reasonable access to digital technology and the internet and those without; can exist between rich and poor nations and between groups within nations such as different socioeconomic groups, races, cultural groups, and between males and females

digital dossier
all the types of information about a person that he or she has 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

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 which 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
a Latin term meaning 'incapable of wrong'; the presumption that a child under 10 years of age cannot be held legally responsible for his or her 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

download
to receive data from a central system to one's own local network or computer

draconian laws
laws that are excessively harsh or severe – from Draco, a Greek legislator (7th century BCE) whose laws imposed cruel and severe penalties for crimes

Dreaming, The
the source of Indigenous Australian customary law

drug mule
a person who transports drugs in their luggage, by ingesting them in pouches, or having them strapped to their body or concealed in some other way

e-communication
(electronic communication) any transmission of communication using computers or other digital products

elders
older men and women of recognised wisdom and authority, who are the keepers of traditional knowledge within Indigenous communities; they are responsible for such things as initiations and the handing down of punishments when community laws are broken

Electronic Frontier Foundation
(EFF) an organisation that seeks to protect the privacy of individuals online by running campaigns to educate users

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electronic monitoring
any form of surveillance using electronic devices such as cameras, microphones and computers

employment contract
a contract between an employer and employee(s) which sets out matters including the pay, hours, working conditions, benefits and obligations of the employee, and the rights and responsibilities of the employer

entered into force
(of a treaty) having become binding upon those states which have consented to be bound by it

equal opportunity
the right to equivalent opportunities regardless of race, colour, sex, national origin, etc.

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, which investigates the nature of values and of right and wrong conduct

ex parte
(Latin) 'from one side'; in a case this means the other side is absent or unrepresented

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

express consent
consent given directly, either orally or in writing

express rights
civil and political rights that are clearly and absolutely outlined in the 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 he or she has taken refuge to the authorities of the country where the 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

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

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

femme sole
a single woman

file-sharing
the practice of distributing electronically stored information such as computer programs, music and video files, especially through the use of peer-to-peer (P2P) networks

First Australians
Aboriginal and Torres Strait Islander peoples; the original inhabitants of Australia

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

format-shifting
copying books, journals, photos or videos from one format to another format; for example, scanning a photo to digital format or printing a newspaper article

foundling
a deserted infant whose parents' identity is unknown

fraud
a dishonest act, done intentionally in order to deceive

freedom of information (FOI)
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. FOI legislation governs the process of obtaining this information, at state and federal level.

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

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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

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 for English printer T. C. Hansard (1776–1833), who first printed a parliamentary transcript

harmonisation
agreement among the laws of different jurisdictions

health care system
the network of facilities and other agencies that organise and meet the health care needs of people

homelands
small communities which were established so that Indigenous peoples can maintain their connection to their land and culture

homicide
the act of killing another human being

hung jury
a jury that is unable to reach agreement

Hypertext Markup Language (HTML)
a language for web pages that allows links hidden behind the text to be denoted as lists, links, headings, paragraphs, embedded images and other content

Hypertext Transfer Protocol (HTTP)
a language used by web browsers to transmit HTML along with images, sound and other content

identity theft
obtaining or using the identity of another person in order to commit a range of fraudulent activities, usually to obtain financial gain

illicit drug
also called an illegal drug; a drug that is prohibited by law

implied rights
civil and political rights that can be inferred from the Constitution, rather than being expressly stated

in camera
(Latin) privately; only specified persons such as the judge can be present during the testimony or proceeding

incarceration
being detained or imprisoned as punishment for 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 a greater penalties than non-indictable offences

indirect discrimination
practices or policies that appear to treat everyone in the same way, but which adversely affect a higher proportion of people from one particular group

Indonesia National Police (INP)
in Indonesia they are called the Kepolisian Negara Republik Indonesia, which is abbreviated to POLRI.

information privacy
protection against inappropriate handling of a person's personal information, with rules for the collection and handling of personal data and records

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 which 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

internet piracy
unauthorised downloading or distribution of copyrighted material by means of the internet

Internet Service Providers (ISPs)
companies that offer customers access to the internet

invasion of privacy
to violate an individual's privacy by intruding into their private affairs

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

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

laissez-faire
a French word literally translated as 'allow to do', used to describe economic philosophies that government should not intervene in business; may also be used in a broader 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, which 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 drug
a drug that is not prohibited under the law, although some other restrictions may apply

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

legislative powers
the legal power or capacity to make laws

libertarian
an advocate of minimal government control or interference in the lives of individuals

lockout laws
a general term used to describe the liquor licensing reforms that were brought in to deal with the issue of alcohol and violence in the Kings Cross area

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 he or she believes to be at 'risk of harm'

martial law
law enforced by the military over civilian affairs; overrides civil law

massacre
the intentional killing of a large number of people in society

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

metadata
the data about data; it is information that identifies individuals through phone and internet activity giving a detailed picture of their lives and relationships

ministerial discretion
power granted to a minister under an Act to make a specified decision or order

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

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

native title
the right of Indigenous people to their traditional lands

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 present your case, the right to freedom from bias by decision-makers, and the right to a decision based on relevant evidence

negligence
carelessness; a tort that involves breach of a duty of care resulting in harm that could be 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 his or her trial

one hit punch
(also known as king kit or coward punch) a blow made with a closed fist, usually made without warning so that the recipient has no time to prepare or defend him or herself

one punch laws
general term used to refer to changes to mandatory sentencing in response to alcohol-related violence

online predator
person with malicious intent, such as sex offender or paedophile, who gives false and misleading identities with the aim of enticing their victims into harmful encounters online or in real life

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

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opened for signature
(of a treaty) having negotiations concluded and ready for parties' signatures. Many treaties, especially those convened by the UN, will be open for signature only until a certain date; others, such as the Geneva Conventions, are open for signature indefinitely

operational area
local government areas that can apply for police to be given additional powers under the *Children (Protection and Parental Responsibility) Act 1997*

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 (OMCGs)
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 which is new, inventive or useful

peer-to-peer (P2P) networks
computer networks in which individual participants are directly connected to each other, rather than through a central server

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

permit system
a system that requires people to have permits to enter or remain on Indigenous land

piracy
(1) an illegal act of robbery of a ship at sea, outside the jurisdiction of any state; (2) the infringement of copyright

plaintiff
the person who initiates a civil action

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 UN's *Universal Declaration of Human Rights*: '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

poverty line
the minimum level of income needed to meet basic necessities and below which a household is defined as poor; the poverty line is different in different countries

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

prescription drug
a type of legal drug that can be obtained only by a doctor's prescription

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
a person's right to be free from unwanted intrusion or public scrutiny

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
Latin term meaning 'for the public good', 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

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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

protectionism
a government's power to control and limit the behaviour of a group of people in the name of protecting them

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

quarantining
a system under which the government can allocate a portion of welfare income for specific uses such as food and clothing

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

R
'R' at the beginning of a case name refers to Regina (Latin for 'Queen'). Since Australia is a constitutional monarchy this refers to our head of state, on whose behalf the prosecution case is run. When the head of state is a male, as was the case in 1935, the 'R' stands for Rex, which is Latin for 'King'.

racial hatred
abuse or denigration of a person because of his or her race, or verbal abuse or denigration of a race generally

racial vilification
a public act based on the race, colour, national or ethnic origin of a person or group of people which 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

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 upon it

reckless
able to foresee negative consequences of doing something, but carrying on with the act regardless. Recklessness implies a state of mind that is not as strong as an intention to do something, but for some criminal offences it is considered equivalent to intention for the purpose of establishing fault.

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. Osama Bin Laden had a red notice issued by the US Government before he was captured and killed in 2011, and Julian Assange is currently subject to a red notice.

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

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 Constitution

responsibilities
legal or moral obligations to others

rights
legal or moral entitlements or permissions

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

s
abbreviation for 'section' of any legislation; 'ss' is the abbreviation for 'sections' (plural)

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

sedition
words or acts said or done with the intention of urging others to use force against the government

self-determination
the right of people to determine their political status or how they will be governed based on territory or national grouping

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self-executing
(of a treaty) automatically becoming binding on a state party to the treaty as soon as the treaty has been ratified

separation of powers
the doctrine that the powers and functions of the judiciary are separate from those of the legislature and the executive

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 communication 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

space-shifting
transferring music or a sound recording from one format to another or from one device to another; for example, copying a music file from a computer to a portable player

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 him or her 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 in order for the plaintiff (in a civil case) or the prosecution (in a criminal case) to prove their case

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

state
a politically independent country

state police
law enforcement agencies with statewide 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
criminal offence that can be dealt with by a single judge without a jury and does not require a preliminary hearing

surety
a sum of money provided to support an accused person's undertaking that he or she will return to court for hearing at a later date, as a condition of granting bail; it is agreed that the money will be forfeited if the accused fails to appear

table
to place on the table for 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

techno-utopianism
a belief that society is revolutionised by technological change and that digital technology will increase personal freedom for the individual; particularly in the area of government control

technological protection measures
tools or 'locks' that copyright owners use to prevent unauthorised copying or access to copyright materials

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. It has been judged 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

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

time-shifting
recording a television or radio broadcast for later viewing or listening

tort
civil wrong involving breach of a duty; torts include negligence, defamation, nuisance, and trespass to the person, goods or land

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

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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

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

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

unito caro
'one in flesh', meaning that when a woman married, in the eyes of the law, she assumed the legal identity of her husband

upload
to send data from a local system or computer to a central or remote system, for other users to view, hear or use

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

warning
formal notice given to a young offender, usually for a first minor offence

whistleblower
a person who raises a concern about wrongdoing occurring in 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'.

whole of government response
actions that go beyond just changing laws and include all areas of government such as transport and policing

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 NSW to work in child-related employment

World Wide Web
a system of documents that are accessible on the internet and that are connected to each other through hyperlinks the user can click on to be taken to another location; the World Wide Web is not the same thing as the internet.

young people
in NSW, persons aged 16–18 years

Youth Justice Conference
a measure to divert young offenders from the court system through a conference that addresses the offender's behaviour in a more holistic manner

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Additional resources

Topic 4:
Young drivers and the law

Chapter 5
Law reform in action

Key terms/vocabulary

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW) (section 52A(1))
Children (Criminal Proceedings) Act 1987 (NSW) (section 19(1))
Children (Detention Centres) Act 1987 (NSW) (section 28)
Road Transport Legislation Amendment (Car Hoons) Act 2008 (NSW)
Road Transport Act 2013 (NSW)

SIGNIFICANT CASES

SBF v R [2009] NSWCCA 231 (10 September 2009)
TG v R [2010] NSWCCA 28 (2 March 2010)

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5.13 Conditions that led to law reform relating to young drivers

For most Australian youth aged 17–25, learning to drive a car and gaining a licence to drive without adult supervision is considered a rite of passage. Being able to drive means 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. These were times in which no photo identification, written tests or logbooks were required. More recently, drivers received a learner's permit at 16 years and 9 months and practised their driving with relatives or instructors. During the 1980s, it was possible to be granted a provisional licence (P plates) on a seventeenth birthday if a driver passed a practical and written test. After one year on P plates, drivers were automatically granted a C Class licence. However, in recent years there have been a number of tragic accidents, and media and public criticism of young drivers, and new restrictions have been placed on provisional drivers, summarised in the following points:

- P-platers are four times more likely than other licensed drivers to be involved in fatal accidents.
- Only 15 per cent of licence holders are aged under 17, but 36 per cent of road fatalities involve these drivers.
- One P-plate driver dies in NSW every 6 days.
- Seventeen of them will crash today.
- 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'.
- Car crashes kill 1.2 million globally – the population of Adelaide.
- Thirty-three per cent of drivers crash in their first year of driving.
- Restricting red P-plate drivers to one passenger saves 18 lives a year.

Over the past few years, obtaining a driving 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, speeds and the number of passengers allowable. For example, learner drivers in NSW must record 80 hours of driving with at least 20 of these hours being at night. Learner drivers in NSW may drive to a 90 km/h maximum, but South Australia allows 100 km/h. Many states do not restrict the number of passengers a provisional licence driver can carry, but in NSW, P1 drivers are restricted to just one passenger between the hours of 11 p.m. and 5 a.m. In Western Australia, P-plate drivers cannot drive between midnight and 5 a.m., except for work or family reasons.

C Class licence
C stands for Car: an unrestricted driving 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 5.22 Young drivers are now required to complete more hours of driving time while learning to reduce their risk of accidents.

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The responsiveness of the legal system

Records of NSW road fatalities have been kept since 1908. Comparisons are done by dividing the number of fatalities in a year by the population to calculate the number of deaths per 100 000 persons. The highest point was in 1970, when 28.98 fatalities per 100 000 was recorded – 1309 people in total. In 2015, the rate of annual deaths per 100 000 population was 5.0. While the annual road toll has hovered around this figure since the 1990s, laws and restrictions for young drivers in NSW are continually changing in order to try to minimise fatalities and injuries on our roads.

Legal Links

Read the article entitled 'Four teenagers killed in car crash', which goes into detail about the accident near Byron Bay. Access the article via the following link: http://cambridge.edu.au/redirect/?id=6559.

Two car accidents causing multiple fatalities occurred in 2006. The first, in October, was a horrific motor accident on the NSW north coast. The other was in Sydney's south and also involved the tragic death of passengers. Both young drivers received jail sentences for their actions.

In Court

***TG v R* [2010] NSWCCA 28 (2 March 2010)**

In 2006, 17-year-old driver TG was driving late at night, with four of his mates in the car, from Byron Bay to Lismore, on the NSW far north coast. The driver was speeding, driving at 115 km/h in an 80 km/h zone, and was overtaking another vehicle on a wet road. He lost control of his vehicle at a bend and collided with a tree, killing all four of his passengers. TG suffered minor injuries.

TG was charged with four counts of dangerous driving occasioning death. He received a sentence of four years' jail with a two-year non-parole period. The New South Wales Government subsequently introduced new limitations on provisional licences: between 11 p.m. and 5 a.m., P1 drivers were not allowed to carry more than one underage passenger. Judge Charters noted that this change might not be enough.

In Court

***SBF v R* [2009] NSWCCA 231 (10 September 2009)**

On 7 November 2006, 17-year-old SBF drove a vehicle at high speed, and an accident resulted in two young people, MA and DF, being killed and a third, KL, being seriously injured. In 2008, after SBF pleaded guilty, the District Court issued a sentence of seven years 10 months' imprisonment, with a non-parole period of four years 3 months.

SBF appealed on four grounds, including that the sentencing judge did not assess the aggravating features of the offences correctly, and that the sentence was plainly excessive. The Court of Criminal Appeal quoted from the District Court sentencing judge:

'These offences are of course extremely serious. This case is yet another example of young people failing to heed the warnings regarding the dangers of speed, whilst driving motor vehicles. There was on the part of the offender, and it is so conceded by his learned counsel, a complete abandonment of responsibility. As a result of this appalling incident of driving, two young men have lost their lives and another young woman has been seriously and permanently impaired. The grief and loss consequent upon these deaths and injury can barely be imagined but some idea can be gained from the victim impact material.'

All four grounds of appeal were dismissed by the Court, and the sentence from 2008 was upheld.

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Review 5.10

1 Compare and contrast the two court cases. Suggest reasons for the higher sentence in the second one, despite having been fewer deaths.
2 After reading the article 'Four teenagers killed in car crash', describe your understanding of the terms 'justice', 'law' and 'society' in relation to this motor vehicle accident.

5.14 Agencies of law reform relating to young drivers

The NSW Roads & Maritime Services Authority (RMS) – formerly the Roads and Traffic Authority – administers laws relating to NSW drivers under the *Road Transport Act 2013* (NSW). This Act sets 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) some drivers have served time in jail. Accidents also change the lives of victims' families as they deal with the loss of or serious injury to loved ones, usually passengers. The law tries to satisfy society's desire to see offenders punished for breaches of the law in terms of driving a vehicle responsibly.

VicRoads is the statutory authority that administers laws relating to drivers in Victoria.

Figure 5.23 Using a mobile phone while driving distracts drivers and leads to unsafe use of the road. It is punishable by hefty fines throughout Australia.

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. Its 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 in order to lower the road toll and ensure that all drivers are safe on Australian roads. Each agency has its own mechanisms, but they all have similar law reform objectives.

Review 5.11

1 Account for the increasing complexity of restrictions on drivers since the 1980s.
2 Outline some similarities and differences between states in relation to P and C Class licences. Justify different restrictions across the states of Australia.
3 Outline the relationship between law, justice and society in relation to young drivers.

5.15 Mechanisms of law reform relating to young drivers

The *Road Transport Act 2013* (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 are able to obtain a Learner's licence (L plates). They must then do 80 hours of driving that is supervised by someone with a full Australian driving licence. All of the driving must be recorded in a logbook and verified by the person who supervised it. At Stage 2, when they are 17, drivers can sit for their **P1** licence (red provisional licence) (P plate). At 18, drivers can progress to a **P2** (green provisional licence) after passing a Hazard Perception Test. In NSW, this system has been changed on numerous occasions.

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Figure 5.24 Learner and Provisional licence holders must display the appropriate plates on the car when they are driving.

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 at May 2016 are summarised below. They have been changed significantly in response to pressures from the media, the public and the families of victims who lost their lives in horrific crashes. Despite NSW 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 5.25 Twenty hours of a learner's 120 hours must be from driving at night.

The development and reform of law as a reflection of society

In response to accidents, the New South Wales 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

A summary of restrictions on L and P plate drivers in NSW

Speed: L-plate drivers must not exceed 90 km/h, P1 drivers must not exceed 90 km/h and P2 drivers must not exceed 100 km/h; any L or P-plater caught speeding (either by exceeding those 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 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 p.m. and 5 a.m.: a breach of this rule will incur a loss of three demerit points – a fine may be also be awarded.

Vehicle restrictions: P1 and P2 drivers are not allowed to drive a range of six cylinder vehicles known as 'high performance' vehicles.

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.

Logbooks: Learner drivers must log 120 hours of supervised driving in a logbook. Each entry must be signed by a person with a full Australian driving licence or a driving instructor. Twenty hours of driving must be at night.

Progression: Drivers must pass a Hazard Perception Test (HPT) in order to progress from a P1 (red) licence to a P2 (green) licence.

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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 RMS, drivers can reduce their chances of a crash by 30 per cent by increasing the number of supervised driving hours.

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.
>
> 'L-plates, Logbooks and Losing out: Regulating for safety – or creating new criminals?' (*Alternative Law Journal*, vol. 32, no. 2, 2010)

In 2008, the Roads and Traffic Authority of NSW published *An Investigation of Aboriginal Driver Licencing Issues*, in which they found that the problems Aboriginal 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%). In New South Wales, Aboriginal people are twice as likely to be killed or injured in a crash compared with non-Aboriginal people.

By 2015, the RMS had responded by supporting Aboriginal communities around the state in 18 places such as Orange, Bourke, Lake Cargelligo and Moree. There have been 445 individual young drivers enrolled in programs resulting in 164 provisional licences being issued along with 17 C class licences. A total of $5 million over five years has been provided to make roads in and around Aboriginal communities safer.

The importance of the rule of law

The RMS claimed it had caught 32 learner drivers falsifying log books 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 more lives and injuries on our roads.

Legal Links

'Fudging the log book' explains the response some people have had to the logbook system. This article is available via the following link: http://cambridge.edu.au/redirect/?id=6560.

Review 5.12

1. Read the quotes from Magistrate Stephanie Tonkin and the response by the NSW Roads & Maritime Services Authority. Discuss 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 with reference to the accident in Sydney's Royal National Park.

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5.16 Effectiveness of law reform relating to young drivers

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 licence

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 sons and daughters from accessing private transport.

Restrictions on P1 drivers

In 2007, just 48 hours after the passing of legislation restricting the number of passengers P1 drivers may carry, a young female passenger was killed in Sydney's Royal National Park. A 19-year-old learner driver lost control of his vehicle around a bend known as the 'saddle', killing 17-year-old Kim O'Brien and injuring another three passengers. The tragedy highlights the intention of the legislation relating to numbers of passengers: it restricts P1 drivers under the age of 25 to no more than one passenger who is under the age of 21 between 11 p.m. and 5 a.m.

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 the matching of driving skills and perhaps to test the performance of engines 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) (now incorporated into the *Road Transport Act 2013* (NSW)) because of the danger it poses to both drivers and the public.

A 'burnout' – intentionally spinning the wheels of a vehicle at high revs to burn the rubber of the tyres, creating smoke and a distinctive smell – is also considered 'hoon' behaviour. The risk of cars becoming out of control is high, which is why it is outlawed. 'Aggravated burnout' is also an offence: it covers the friends of a hoon driver if they willingly join or urge others to join hoon activities, including photographing or filming to promote or organise hoon activity.

Under the legislation, the court can impose a fine of $3300 for a first offence. A second or subsequent offence can receive a fine of $3300 and/or nine months' imprisonment. Anyone convicted of this offence receives an automatic 12-month disqualification.

Despite the penalties for these offences, street racing continues to create problems for police, victims, families and the general public, as highlighted by the cases in the article in Research 5.8 (page 380).

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 and driver inexperience. The fine – $3300 – can seem a very small price to pay compared with the price TG and SBF paid: incarceration for a number of years.

Figure 5.26 Street racing is extremely dangerous and creates problems for families, police and the public.

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Research 5.8

1 Read the article 'Street race death horrifies NSW minister'. Outline the minister's response to the street racing accident. The article can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6561.
2 Explain the importance of driving within the speed limit.
3 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.

Review 5.13

1 Compare the fines and penalties for street racing with those of speeding and mobile phone use while driving. Do you think they are justified? Give reasons to support your opinion.
2 'Police should not be able to confiscate vehicles under any circumstances.' Research the legislation regarding confiscation of vehicles and discuss the key issues surrounding the role of the state in governing driver behaviour.

Figure 5.27 Driving remains a rite of passage for many teenagers.

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Topic 4:
Young drivers and the law

Topic 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.
- The Roads & Maritime Services Authority (NSW) administers NSW drivers under the *Road Transport Act 2013* (NSW).
- The *Road Transport Act 2013* (NSW) outlines a graduated licensing system.
- Support has been provided for disadvantaged communities to access a driving licence.
- Despite the penalties and the law, street or drag racing and 'hooning' are still activities that some young drivers participate in.
- 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 summary questions

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 passengers.
- **B** P2 drivers have a 0.02 blood alcohol restriction.
- **C** P1 plate drivers aren't required to display plates.
- **D** P2 plate drivers have a higher speed limit.

3 Approximately how many hours did learner drivers of the 1970s complete before driving unsupervised?
- **A** 20
- **B** 50
- **C** 120
- **D** no number specified

4 What proportion of P-plate drivers report speeding 'most of or all the time'?
- **A** 10 per cent
- **B** 25 per cent
- **C** 90 per cent
- **D** 100 per cent

5 Zero alcohol readings for all L, P1 and P2 drivers came into force in which year?
- **A** 1970
- **B** 2004
- **C** 2006
- **D** 2010

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 Give an example of a case involving criminal prosecutions. What were the details of the case?
5 Discuss the four-time increase in learner driver hours since the 1970s.
6 Evaluate the law as it relates to young drivers and their rights to a driving licence.

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Additional resources

Chapter 8
Contemporary issue: The individual and technology

8.1 The impacts of technology on the individual [additional content]

The history of the internet

The development of computers

The origin of computers can be linked to the invention of the earliest calculators, but the most significant steps towards the modern-day computer were taken around the beginning of the 20th century with punch card technology that made use of electricity. In 1880, an 18-year-old engineer named Henry Hollerich developed a better way to tabulate the results from the census by inventing a machine that consisted of a set of punch cards interacting with a set of spring-mounted needles to create an electrical loop. Hollerich's new machine was used in the 1890 Census and cut down the time to tally the results from the census from seven years to two and a half years. Hollerich's new Tabulating Machine Company soon expanded into many other areas of activity, such as payroll, inventory and billing activities for large companies. In 1924, Hollerich's US company became known as International Business Machines, or IBM.

Before and during World War II, there were separate developments in England, Germany and the United States that involved replacing the mechanical parts of calculating machines with electronic circuits. The Z3, the Atanasoff-Berry Computer, the Colossus computers and the ENIAC used circuits made from valves. However, these early computers were very different from today's personal computer (PC). For instance, the ENIAC, or Electronic Numerical Integrator And Calculator, used 18 000 vacuum tubes, occupied an area of over 200 square metres and weighed over 50 tonnes. In 1948, IBM's Selective Sequence Electronic Calculator made calculations on the moon's position that were used in the 1969 Apollo flight to the moon. By the end of the 1940s, there were a number of large government-owned and run mainframe computers. Then, in 1951, the first commercial computers appeared. In England, the computer known as the Lyons Electronic Office solved clerical problems, while in the United States

Figure 8.1a Operator console of the UNIVAC 1

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the UNIVAC 1 was made by Remington Rand for the US Census Bureau. It occupied a floor space of 943 cubic feet. Forty-six more of these were made and sold for $1 million each.

In 1953, IBM entered into the growing computer business with its first electronic computer, the 701 EDPM Computer, and in the following three years produced 19 computers for aircraft companies, the US Government and research laboratories. In 1954, the IBM 650 magnetic drum calculator became the first mass-produced computer and 450 were sold in this year. By 1959, IBM had produced the 7000 series mainframes, which were its first fully transistorised computers, and by 1961 the company had over an 80 per cent share of the market while demand for its new series, the 1400, soared to 1200. By 1964, IBM was selling over 1000 of its latest version computers a month. Other competitors, such as Commodore Business Machines (CBM) and AT&T, had entered the computer production market by the end of the 1960s.

Meanwhile, the research laboratories set up at Palo Alto Research Center in California in 1970 attracted many talented scientists and a host of new inventions came from here that transformed computers such as the PC graphical user interface, Ethernet and the laser printer.

The PC hit the scene when in 1976 Steve Wozniak designed the Apple I, which was followed swiftly in 1977 by the Apple II, an instant success that could produce brilliant colour graphics when connected to a television monitor. This was followed in 1981 by IBM's release of its own PC, which used Microsoft's MS-DOS operating system. In 1982, Commodore introduced its Commodore 64, which lasted until 1993, when it was discontinued. Over 22 million of these PCs were sold, along with thousands of custom-made software titles. In 2006, it was recognised by the Guinness Book of Records as being the greatest selling computer of all time, selling over 22 million.

Personal computing was further revolutionised in 1984 with Apple's Macintosh affordable computer, which was the first computer with a mouse and a graphic user interface. It took IBM until 1987 to introduce the mouse with its new PS/2 machines, which ran on a new operating system, the OS/2, and for the first time included Intel's 80386 chip, a microprocessor that was then used for many years in PCs. The era of the PC was born. Over the following decade, the various computer companies competed to produce increasingly innovative, cheap and user-friendly PCs. By the mid-1990s, computers were becoming entrenched in many homes in Australia, the United States and other Western countries, and advanced Asian nations such as Japan. In 1995, in the United States 50 per cent of adults reported regularly using a computer at home or work.

Myriad technological developments had led to the development of home computers that were cheap and user-friendly. However, as pointed out by internet commentator Jonathan Zittrain in *The Future of the Internet and How to Stop It*, one development that has been overlooked in the technological frenzy of the computer age was the significance of the separation of hardware from software. Up to 1969, all hardware in IBM computers was packaged with the company's own software. However, due to pressure from its competitors, who sued IBM under US anti-monopoly laws (known as antitrust laws), IBM announced it would unbundle its computers from its software. This meant that it was now possible to buy an IBM computer without its software. This then opened the floodgates for anyone to develop any type of software for any computer. The PCs that had evolved were in effect generative platforms rather than appliances. A generative platform is one that invites innovation by others. This means that users are free to use software created by anyone or even create their own software and thus tailor their computers to their own requirements. The generative PC invites innovation.

The arrival of the internet

The first true network linking computers in 40 different locations was established in 1972 by Advanced Research Projects Agency Network (ARPANET). A new program was trialled that enabled the sending of individual messages across the network. This we now call 'email'. Then, in 1974, the scientist who developed the ARPANET, along with scientists from Stanford University, created a common language, known as Transmission Control Protocol/Internet Protocol (TCP/IP), which enabled computers from different networks to communicate with each other. Computer networks then developed in a number of different places, with different and competing systems, yet ARPANET remained the backbone that held the systems together. In 1981, the

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term internet was coined to refer to this collection of interconnected networks. By the time ARPANET adopted the TCP/IP system, in 1982, the internet was set for a massive expansion.

Up to this time, the development of the internet had been led by technological innovations that resulted from scientific breakthroughs. However, from this time, non-scientific developments led to the further expansion of the internet. Firstly, in 1983, the Domain Name System (DNS) was invented, which made the internet easier to navigate by translating user-friendly host names into IP addresses. The new system introduced some organisation into US internet addresses by assigning education sites with '.edu', government sites with '.gov', commercial sites with '.com' and international organisations with '.org'. Countries were also given designations such as 'au' for Australia, 'ca' for Canada and 'uk' for the United Kingdom. This development made the names of host computers easier to remember. Secondly, the UK and US governments began to encourage their universities and educational institutions to use the internet. These two developments led to an explosion of internet usage in these countries. In the United States, the number of host computers on the internet increased in 1986 from 5000 to 28 000. The commercial sector, which up to this point had been excluded from the internet, was starting to show some interest and some workshops were conducted to explore the commercial potential of the internet. However, for the following few years it was governmental and educational institutions that drove the expansion. From 1989 to 1990, the number of hosts tripled, from 100 000 to 300 000.

The birth of the World Wide Web

In 1990, the first internet browser/editor for finding and retrieving computer files using the **Hypertext Markup Language (HTML)** and **Hypertext Transfer Protocol (HTTP)** systems was developed by Tim Berners-Lee at **CERN** in Geneva, Switzerland. Berners-Lee coined the term World Wide Web for his program. The World Wide Web worked by combining HTML, a language for web pages, with HTTP for web browsers. This new mark-up language of HTTP became popular because it was easy to copy. So HTML documents were transmitted from a web server to web browsers using HTTP. By 1991, the World Wide Web was a reality. By 1992, there were one million hosts on the internet and the term 'surfing the net' was coined. From 1994, commercial websites began to proliferate all over the internet. Between 1995 and 1997 the number of host computers increased from three million to 19.5 million. By the late 1990s, the commercialisation of the internet was continuing at an exponential rate.

Hypertext Markup Language (HTML)
a language for web pages that allows links hidden behind the text to be denoted as lists, links, headings, paragraphs, embedded images and other content

Hypertext Transfer Protocol (HTTP)
a language used by web browsers to transmit HTML along with images, sound and other content

CERN
the European Organization of Nuclear Research

The expansion of the internet and the World Wide Web continued into the new millennium, with a growth to two million host computers on the internet and 840 million users by 2002. The pace of expansion has not yet slackened. Currently, there are around 3.17 billion internet users in the world. The internet and the World Wide Web have become integral parts of the lives of millions of people in developed countries. Developing countries also realise that they must do something about increasing their access to the internet and World Wide Web or else risk falling further behind. The '**digital divide**' has

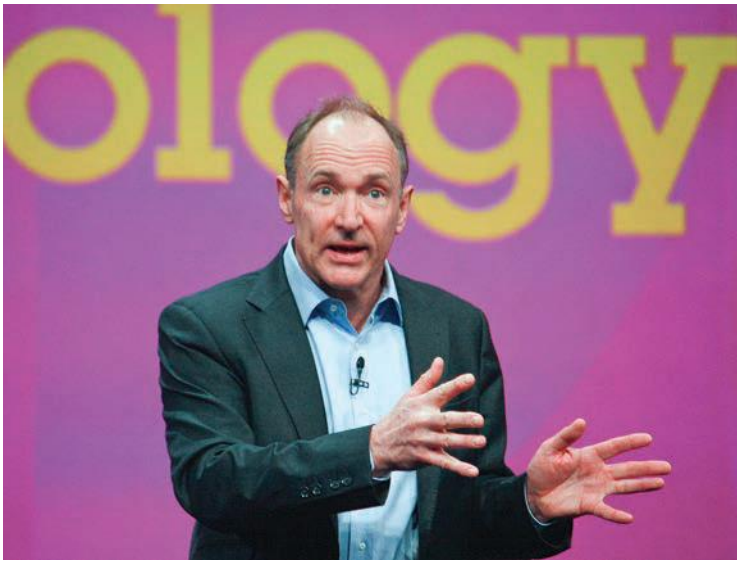

Figure 8.1b Tim Berners-Lee, inventor of the World Wide Web

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become another factor preventing about one-half of the people in the world from rising out of poverty. So, as the peoples in the world who are currently left out of the globalised economy and the World Wide Web gain access, the increase in the number of people connected will likely continue to be dramatic in the near future.

digital divide
the gap between those with reasonable access to digital technology and the internet and those without; can exist between rich and poor nations and between groups within nations such as different socioeconomic groups, races, cultural groups, and between males and females

Research 8.0

Research the history of the internet by using the Computer History Museum website, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6562. Create a timeline of key events.

Visions and visionaries of the World Wide Web

Very early in the development of the World Wide Web an optimistic vision emerged that declared that this new area of human activity and interactions was somehow unique. As Jack Goldsmith and Tim Wu put in their book *Who Controls the Internet?* the idea of this new realm created by the internet tapped into a deep-seated human desire to be liberated from the world around us and also led to a hope that it could also 'somehow liberate us from the human condition'.

The idea developed that the internet and World Wide Web could and should remain free of government interference and, indeed, free of law. The reason that such an idea could be seen as a serious proposition was because all the key technological innovations that gave birth to the internet and the World Wide Web had come from the initiative of private individuals with a passion for spreading ideas and knowledge and for creating mechanisms to ease digital communication between like-minded people. **Techno-utopianism** abounded and was the reason behind this vision. According to Goldsmith and Wu, behind it 'lay the hope that connecting every human on earth might make the world a better place. Humanity united might do better than our lousy systems of government, throw away the construct of the nation-state, and live in some different but better way.'

techno-utopianism
a belief that society is revolutionised by technological change and that digital technology will increase personal freedom for the individual; particularly in the area of government control.

This hope that something better for the human race could come from the internet was shared by those with libertarian philosophies, who hoped things would be better with no government interference, and those with an internationalist perspective, who believed that if international laws replaced the laws of states in cyberspace then there was the potential to improve human affairs. However, within a short time of these visions being articulated they were tested in the courts.

Architecture of the internet

The main reason that the internet is such a rambling haphazard structure is that much of its architecture was the creation of a group of private citizens who acted on their own initiative. The founding engineers of the internet were men such as Vinton Cerf, Jon Postel, Dave Clark, Larry Roberts and Robert Kahn. They were mostly US academics and computer scientists. It was from this group that we got the TCP/IP protocol, a successful universal language that has become the foundation of the internet as we know it today. The astounding thing about this innovation was that it was an open architecture. This means that it was open to anyone to join. Any type of computer or network could join and it required very little in return from the computer users who did join. It was also neutral in regard to applications, which meant that new and better software applications could be designed by anyone and used on the internet, and they could replace old and out-dated applications. The designers did this deliberately because they distrusted centralised governmental control. This TCP/IP protocol now so dominates data networking that there are no serious competitors. The TCP/IP protocol has spread like a universal language.

In 1986, a group of these internet engineers, led by Vinton Cerf, set up the Internet Engineering Task

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Force (IETF) to be the central standards body for the internet. These internet engineers believed in a 'bottom-up' approach to internet governance. As Dave Clark, one of the engineers, said in 1992:

> We reject: kings, presidents, and voting. We believe in: rough consensus and running code.

IETF had demonstrated that lots of difficult problems on the internet could be solved without government involvement. Many people therefore came to believe that a cyberspace free of government-imposed law was possible.

8.2 Legal implications [additional content]

Cybercrimes [additional content]

Hacking [additional content]

In Court

***The United States of America v Alexey Ivanov*, 2000**

In November 2000, Alexey Ivanov and his colleague Vasily Gorshkov were arrested in Seattle and charged with conspiracy, fraud, hacking and extortion. Ivanov was a Russian computer whiz who earned his living hacking the computer networks of US companies. He set up a company that supposedly gave protection from hackers and offered its services to companies, but only after he had secretly hacked into their network. If the company refused his 'offer of help', he would send them a blunt email threatening to delete all their email files or publish all their credit card information online. In fact, Ivanov and Gorshkov had tried to extort money from many US companies and they had a database of an estimated 50 000 credit cards.

The obvious difficulty in dealing with hackers like this is that they are based in foreign countries. Also, there is no international law or mechanism that is effective in bringing them to justice. Often, governments have to act unilaterally to deal with hackers and, in this case, that is exactly what happened. Before their arrest, the pair was lured to a fake job interview in Seattle. At the 'interview', they were asked to demonstrate their skills. The Federal Bureau of Investigation (FBI) monitored their keystrokes and was able to discover their passwords. After the interview, the FBI counter-hacked Ivanov's company network in Russia and gathered all the evidence they needed to charge him. Gorshkov was sentenced to three years' jail and had to pay back $692 000 in illegal funds. He later returned to Russia. Ivanov served three years and eight months in jail and currently owes more than $800 000 in fines.

Research 8.1a

For a full account of the case of hacker Alexey Ivanov, read the article that can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6563.

1. Who was Ivanov?
2. What was Ivanov's crime?
3. How were Ivanov and Gorshkov arrested?
4. How did the FBI gather evidence on Ivanov?
5. What was Ivanov's sentence?

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Research 8.1b

For further examples of cybercrime cases see the FBI website via the following link: http://cambridge.edu.au/redirect/?id=6564.

1 Each member of the class is to research a case involving hacking and report back to the class.
2 Discuss the extent to which cooperation between governments helped or hindered the investigations.

Spam [additional content]

In Court

***Department of Internal Affairs v Atkinson and Others*, 19 December 2008 (CIV20084091002391/ 2008)**

A New Zealand man, Lance Atkinson, was found guilty in a New Zealand court of sending two million unsolicited email messages to New Zealand computers between 2007 and 2008 using Inet Ventures, an Australian-registered company. These emails encouraged people to visit websites that used false claims in an attempt to entice the user to buy prescription drugs as well as 'male enhancement' products and 'weight-loss' pills. However, this was only a small part of Atkinson's spam operation. It is estimated that up to 10 billion spam email messages were sent each day using a 'botnet' of 35 000 computers. A 'botnet' is a large number of compromised computers using software robots, or bots, that run automatically to send emails to bulk addresses. The emails were aimed to market Herbal King, Elite Herbal and Express Herbal brand pharmaceuticals, which were sent from Tulip Lab of India.

The Federal Trade Commission (FTC) of the United States has also pressed charges, shut down the spam network and frozen Atkinson's assets. Atkinson had already been fined $2.2 million by the FTC in 2005 for running a similar spam network. The network that Atkinson ran was the largest in the world, with connections to Australia, New Zealand, India, China and the United States, and at its height was responsible for a third of all spam. The FTC received over three million complaints about the operation.

One of the interesting aspects of this case is that it highlights the inability of any international law or mechanism to deal with spam that adversely affects all users of the internet globally in some way. The only action that can be taken by states is to make their own laws against spam and unilaterally pursue the culprits for the breaches that they have made to their law. Often, there is cooperation between states to track down the criminals responsible, though this cooperation is not always guaranteed and is in reality only going to come from states who hold similar values and who have the necessary legal and enforcement capabilities to pursue the case. Obviously, failed states would have a difficult time cracking down on spam even if they had the political will to do so.

Review 8.1a

1 What did Lance Atkinson do?
2 Identify the size of Atkinson's operation.
3 State the laws Atkinson violated.
4 Outline the ingredients for the successful prosecution of criminals like Atkinson.

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Cyberterrorism [additional content]

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
- the 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.

Sadly, it may be that governments will never be fully prepared for serious cyberterrorist attacks. As Zittrain said in *The Future of the Internet and How to Stop It*, we have not yet experienced a 9/11 on the internet. 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.

Figure 8.5a Cyberterrorists could attack the stock market.

Research 8.3a

Research the threat posed by cyberterrorism. Make notes from recent scholarly articles on the subject. Discuss to what extent it is a real danger. For links to some literature, refer to the Australian Institute of Criminology website, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6565.

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Additional resources

Chapter 9
Children and young people

9.2 Legal responses [additional content]

Civil law in relation to children and young people [additional content]

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 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 through the *Family Provisions Act 1982* (NSW).

The *Status of Children Act 1996* (NSW) clarifies issues of parentage for children in New South Wales.

Figure 9.5a Children are considered equal, regardless of whether or not they were born in or out of wedlock.

There is a **presumption of parentage** if a child is born within a marriage. In addition, if a child is born 44 weeks after the death of the husband, the child is presumed to be the child of the deceased man.

presumption of parentage
outlines a specific condition whereby a man and/or a woman are presumed to be the parents of a child

For couples who live together but are not married, 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.

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, the Act states that the intended 'social parents' are also the legal parents. In the case of a married or de facto couple, there is a presumption of knowledge of the procedure, but this can be challenged in court on the balance of probabilities. 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, the above provisions are irrefutable.

The *Family Law Act 1975* (Cth) and the *Marriage Act 1961* (Cth) are consistent with the approach used in

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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 Family and Community Services (Community Services NSW) 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 Community Services NSW to assist in cases where the family is experiencing difficulties. Intervention by the state can include preventative services such as family support and respite child care, 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 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 *UN Convention on the Rights of the Child* 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.
- Emotional abuse – this can result from things that are said or implied.
- Neglect – this can involve children not receiving adequate food, clothing, shelter and health care.

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 the 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.

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 Community Services NSW 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 1998 (NSW)

The guiding principles for administering this Act 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.
- 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 her or his family.

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Under the Act, a child or young person is considered at **risk of harm** when:

(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 in which 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.

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

Reporting of children and young people at risk

Under section 23 of the Act, any person who has reasonable grounds for believing that a child or young person is at risk of harm may make a report to Community Services NSW. **Mandatory reporting** is a responsibility of all paid workers who are involved in delivering welfare services, health care, children's services, education, residential services or law enforcement, partly or fully to children. They must make a report to Community Services NSW if they become aware during the course of their work that a child is at risk of harm.

mandatory reporting
a person working in child-related employment must, by law, report to care and protection agencies a child he or she believes to be at 'risk of harm'

Criminal law in relation to children and young people [additional content]

Crimes Legislation Amendment (Police and Public Safety) Act 1998 (NSW)

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 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.

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

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 government can apply to the Attorney-General's Office to become an **operational area**. They must demonstrate that they have adequate crime prevention and youth support programs.

operational area
local government areas that can apply for police to be given additional powers under the *Children (Protection and Parental Responsibility) Act 1997*

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.

9.4 Effectiveness of responses [additional content]

Children and young people and the criminal justice system [additional content]

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 as a result of the extra powers given to police. The NSW Ombudsman's Office also 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 the increased powers of the police led to an increase in arbitrary stop and search procedures and that the legislation had led to only a modest increase in searches that uncovered a knife in the first year of operation. It also showed that there was an enormous increase in searches where no knife was found. The report indicated that, by halfway through 1999, 81.9 per cent of people searched carried no weapon that would be a threat to public safety. 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 per cent 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.

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

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Figure 9.8a People often stereotype groups of young people in public.

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 the *Children (Protection and Parental Responsibility) Act 1997* (NSW) contravened CROC in a number of ways:

- impeding young people's rights of freedom of association and assembly
- discriminating against young people due to their visibility in public space
- 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 that the legislation has problems. It outlined that police can scrutinise the behaviour of children and young people even if it is not criminal, and can act on stereotypes about young people.

Research 9.3a

View the NSW Bureau of Crime Statistics and Research website via the link at http://cambridge.edu.au/redirect/?id=6638.

Study the 2000 paper 'Knife Offences and Policing' by Jacqueline Fitzgerald and outline the effect the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) has had on assaults and robberies involving knives.

Public spaces are very important to young people, given that there are very few places that they can get together to meet and spend time together. Young people congregating in groups are easily 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 and supposedly making the community safer. Given this, and the diminishing ratio of public space available due to the increase in privately owned shopping malls, the civil rights of children and young people are frequently being infringed.

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 governmental 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.

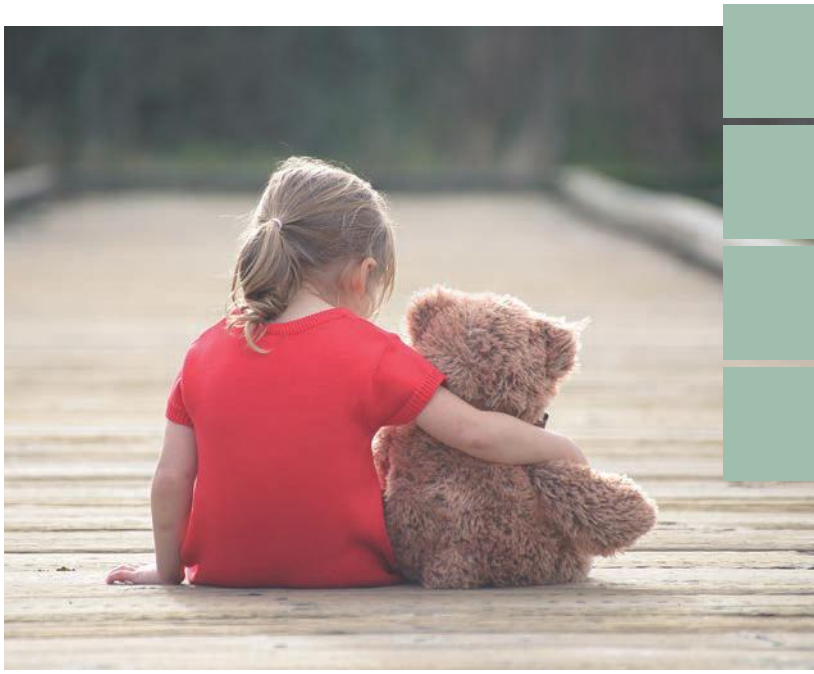

Figure 9.9a There is a need for improvement on how cases involving children are handled.

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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 are good predictors of each happening.

The situation of child abuse portrayed by the 2008 statistics is even more disturbing in Indigenous communities across Australia. The rate of all types of abuse in 2008 was estimated to be much higher in the Indigenous population than the non-Indigenous population. Indigenous children were six times more likely than non-Indigenous children to be removed from their families. The Howard government's intervention into remote Indigenous communities was justified on the ground that the rate of abuse of Indigenous children was unjustifiably high. The Australian Law Reform Commission has also found that in 2008 Australian Indigenous children were no safer than they were 10 years prior.

In further developments, Justice James Wood, who in 2008 headed the Special Commission of Inquiry into Child Protection Services in NSW, has 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 has proposed a new category of mandatory reporting, whereby the more serious matters only will be referred to Community Services NSW. Many of the non-urgent reports that are being made to Community Services NSW can be handled by the police, teachers and doctors, according to Justice Wood.

Research 9.3b

Follow the link: http://cambridge.edu.au/redirect/?id=6639 and make a list of the risk factors and prevention strategies as outlined in Marianne James's paper.

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 it offers. The two main issues, as outlined earlier, are that the incidence of work-related injuries and the incidences 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 CROC, 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 in the school holidays. As these reports are made they continue to be investigated by unions and governments.

International issues [additional content]

Child executions

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.

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'.

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In Court

***Roper v Simmons* (2005)**

In this US Supreme Court case, it was found that the execution of child offenders is a violation of the US Constitution. Even though in 1989 it had ruled that executing 16- and 17-year old offenders was constitutional, in 2005 the court found that there was now a national consensus against this. It 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.

The Amnesty International report quotes Mary Robinson, 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

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), USA (1)
1991	0	2086	
1992	6	1708	Iran (3), Pakistan (1), Saudi Arabia (1), USA (1)
1993	5	1831	USA (4), Yemen (1)
1994	0	2331	
1995	1	3276	Iran (1)
1996	0	4272	
1997	2	2607	Nigeria (1), Pakistan (1)
1998	3	2258	USA (3)
1999	2	1813	Iran (1), USA (1)
2000	6	1457	Democratic Republic of Congo (1), Iran (1), USA (4)
2001	3	3048	Iran (1), Pakistan (1), USA (1)
2002	3	1526	USA (3)
2003	2	1146	China (1), USA (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)

Source: Amnesty International

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> 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.

Between 1990 and 2013, Amnesty International has recorded 91 executions of child offenders, 19 of them in the United States (see Table 9.1). But even in the United States, such executions are not widespread: 19 of the 38 US states whose laws retain the death penalty exclude its use against child offenders, as does the US Government, and only three states – Oklahoma, Texas and Virginia – have executed child offenders since 2000.

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.

Child executions also breach international treaties such as:

- *International Covenant of Civil and Political Rights*, Article 6: 'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age.'

Figure 9.10a Mary Robinson, former United Nations High Commissioner for Human Rights, was quoted in the Amnesty International report *Stop Child Executions.*

- *Convention on the Rights of the Child*, Article 37: 'Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.'

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Additional resources

Chapter 10
Women

10.1 Women and the law [additional content]

Progress and challenges for women [additional content]

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***, which meant 'one in flesh'.

unito caro
'one in flesh', meaning that when a woman married, in the eyes of the law she assumed the legal identity of her husband

William Blackstone, author of in 'Commentaries on the Laws of England, 1765', said that in a marriage the husband and wife are a single person in law:

> 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 femme-covert.

The effect of this type of legal reasoning and attitude was far-reaching. Almost all women before the 20th 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). The NSW legislation covers people in relationships where they are not married, including de facto and same-sex couples. These aspects of marriage and other relationships will be covered in the HSC course under family law.

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

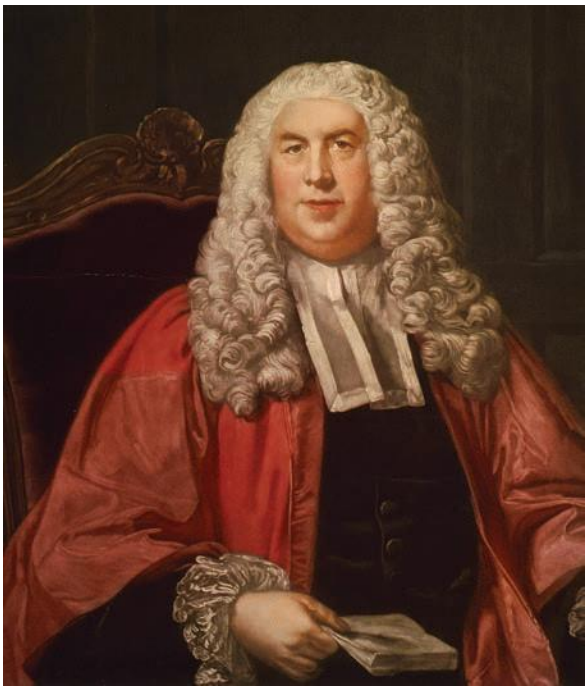

Figure 10.4a William Blackstone said 'the husband and wife are one person in law'.

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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 upon it

This situation continued until the Married Women's and Property Act was passed in 1870 and 1872 in the UK, and later a similar act was passed in New South Wales, the *Married Persons (Property and Torts) Act 1901*. 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, de facto or 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 up 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 her or his job. As a result, many women who had been contributing in the home, but 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

A ***femme 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. 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.

femme sole
a single woman

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

Figure 10.4b A woman was not allowed to enter a contract without her husband's authority.

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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**) had always symbolised the fundamental right of all members of a democratic society. But until the early 20th 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, it was Emmeline Pankhurst who was the driving force behind the **suffragette** movement. Suffragette marches on parliament grew in size from approximately 300 in 1906 to 4000 in 1907. They chained themselves to pylons and gates and disrupted many political meetings.

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

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.

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 10.3a, women in South Australia gained the vote in 1894, and all women were allowed to vote in Commonwealth elections in 1902. The rest of the states soon followed. Indigenous women did not gain the right to vote in federal elections, in every state, until 1962. Until that time they had been excluded by the *Commonwealth Franchise Act 1902* (Cth).

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.

Table 10.3a Years in which voting rights for 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

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Figure 10.4c Women are now allowed to take part in jury duty.

During debate in parliament over the introduction of the *Jury Act 1977* (NSW), the Attorney-General, F. J. Walker, said:

> ... 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.

exemption
being immune from certain duties and obligations

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', the responsibility to serve on juries was extended to all those enrolled to vote. This, of course, included all women.

10.2 Legal responses [additional content]

International law [additional content]

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 Discrimination against Women* (CEDAW) has been important for forwarding the rights of women throughout the world. In 2004, there were 174 parties to the CEDAW.

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.

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 the CEDAW.

Australia has a responsibility under the Convention 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. Having a federal structure of government 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 CEDAW Committee has limited powers to promote the implementation of the treaty.

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***United Nations Convention on the Elimination of all Forms of Discrimination against Women* (UN CEDAW)**

The main provisions in Articles 1–16 of the Convention are:

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 a responsibility of both men and women.

Article 6 To eliminate all forms of traffic in women and exploitation of prostitution of women.

Article 7 To eliminate discrimination against women in the public and political life in regard to voting, participation in government and non-government organisations.

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 To eliminate workplace discrimination against women. This includes equality of opportunity, equal pay and conditions. This also includes the elimination of discrimination on the basis of pregnancy and maternity.

Article 12 To eliminate discrimination in the area of health care and ensure adequate services throughout pregnancy, confinement and the post-natal period.

Article 13 To eliminate discrimination against women in economic areas such as family benefits and finance, and also participation in areas of social life such as sports and cultural activities.

Article 14 To eliminate discrimination against women who face particular problems in rural areas.

Article 15 Equality with men before the law. This includes all aspects of civil law, in particular rights in respect to contracts.

Article 16 To eliminate discrimination against women in marriage and family relations. This can include equal rights with men in respect to entering a marriage and dissolution of a marriage. It also includes the same rights and responsibilities as parents.

Review 10.4a

1 Select five Articles of the CEDAW above. Outline some domestic state or federal legislation that has provisions consistent with the CEDAW.

2 View the CEDAW website via the link http://cambridge.edu.au/redirect/?id=6568 and identify some countries that are not signatories to the treaty. Put forward a hypothesis on why this might be the case.

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Domestic law [additional content]

Sex Discrimination Act 1984 (Cth) [additional content]

The Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) is the new name of the Human Rights and Equal Opportunity Commission (HREOC). 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. The sex discrimination unit works closely with Customs on this issue.

When people have complaints under the *Sex Discrimination Act 1984* (Cth) they lodge these with the complaints-handling section within the AHRC.

Figure 10.7a Complaints of sex discrimination are lodged with the Australian Human Rights Commission.

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.

Research 10.1a

View the UN Women website and read the 'About Us' section.

1. Write a summary of the role of UN Women.
2. Identify some of the issues facing women in the world today.

In Court

Sex discrimination cases

The following material has been sourced from the Australian Human Rights Commission annual reports. These are real-life case studies with the names of individuals and organisations removed for privacy reasons. The cases outline the events that led to a complaint being filed and the outcome.

Complaint of pregnancy discrimination in employment

The complainant said that when the respondent university was informed about her pregnancy, her casual employment as a tutor/lecturer was finalised. She claimed her supervisor said she had "found that right person who is not pregnant".

On being advised of the complaint, the university indicated a willingness to try to resolve the matter by conciliation. The complaint was resolved with an agreement that included the university pay the complainant $7,500 less applicable tax and write to her expressing sincere regret for any hurt, distress or anger she experienced. The university also agreed to direct the complainant's former supervisor to attend anti-discrimination training.

(Annual Report 2014–15)

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In Court

Complaint of sexual harassment in employment

The complainant, aged 18, was employed in a customer service role with the respondent fast food outlet. She alleged that her manager sexually harassed her by asking her to sit on his lap in the workplace, slapping her bottom and asking for a nude photo of her. The complainant said that when she was unable to attend work because of illness, her manager would make comments of a sexual nature about the reasons for her absence. She said she felt she had no option but to resign.

On being advised of the complaint, the respondents indicated a willingness to participate in conciliation.

The complaint was resolved with an agreement that the company would pay the complainant $10,000, provide her with a Statement of Service and deliver annual staff training on sexual harassment and discrimination. The manager also agreed to attend specialist external training on sexual harassment and discrimination.

(Annual Report 2013–14)

Alleged discrimination on the grounds of sex and family responsibilities

The complainant advised that she is employed on a part-time basis as an administrative officer with the respondent Commonwealth department. The complainant claimed she was asked to increase to full-time hours and work fixed hours of 9:00 a.m. and 5:30 p.m. She said she agreed to work full-time, but requested flexible working hours to accommodate her family responsibilities. The complainant claimed her request for flexible hours was refused and she was moved to another part-time position. She claimed the person who took over her position on a full-time basis was not required to work the same fixed hours.

The department said the complainant told them she could only work full-time if the hours were 7:00 a.m. to 4:00 p.m. and these hours did not match operational requirements for the position.

The complaint was resolved with an agreement that the department would convert the complainant's existing position to full-time and allow her to work her hours between 7:00 a.m. and 7:00 p.m. The department also provided the complainant with a statement of regret.

(Annual Report 2008–09)

Allegation of sex discrimination on the basis of breastfeeding

The complainant was breastfeeding her baby while in a courtroom watching proceedings. The complainant claimed that a staff member of the respondent government department asked her to leave the courtroom because she was breastfeeding.

The respondent department confirmed that the complainant was asked to leave the courtroom because she was breastfeeding. The department advised that this was an error and the individual staff member concerned had been counselled. The department apologised to the complainant in writing and offered to meet with the complainant to apologise in person.

The complaint was resolved by the department providing a personal apology to the complainant. The department also agreed to display a "Breastfeeding welcome here", sticker at the courthouse.

(Annual Report 2006–07)

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Government agencies [additional content]

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 Families, Housing, Community Services and Indigenous Affairs **portfolio**. WGEA's main objective is to promote and improve gender equality in the workplace.

portfolio
a key area of government responsibility headed by a minister

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.

In the 2011–12 reporting period, there were nine reporting organisations registered with WGEA that did not comply with the Act due to non-submission of their report or submitting a non-compliant report.

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. Some of these issues will be discussed in greater detail later on in this chapter.

Table 10.3b In 2011–12 reporting organisations employed 2 924 730 people and 47.7 per cent, or 1 394 040, were women. The proportion of women in these organisations is shown by employment category.

	2008–09	2009–10	2010–11	2011–12
CEOs	10.6	10.8	10.9	11.8
Managers (total)	33.7	32.4	33.8	34.4
Employees (total)	47.8	47.2	47.9	47.7
Full-time employees	36.1	34.2	35.0	35.1
Part-time employees	77.0	76.6	76.2	75.4
Casual employees	56.6	57.0	57.9	57.1
Part-time managers	77.7	80.6	77.0	75.8
Casual managers	57.6	46.8	43.6	44.4

Source: Workplace Gender Equality Agency

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Case Study

Discrimination – the basis for the torture of women

One of Amnesty International's campaigns at present is the 'Stop violence against women' campaign. The following information supplied by Amnesty International outlines the facts and issues on how discrimination can be sourced as 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 organizations 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 marginalized 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.

…

[The following case is one of many millions throughout the world.]

Indravani Pamela Ramjattan was sentenced to death in May 1995 in Trinidad and Tobago for the murder of her common law husband in 1991. During her trial, the lawyers introduced evidence of the years of abuse and violence she had suffered – including beatings, death threats and rape. Despite this evidence she was convicted of murder, for which there is a mandatory death sentence. In 1999, an appeal court reduced her murder conviction to manslaughter and sentenced her to a total of 13 years' imprisonment based on psychiatric evidence which showed that at the time of the murder she was suffering from "Battered Women's Syndrome".

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10.4 Effectiveness of responses [additional content]

Domestic [additional content]

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, but since the 1970s this gap has been closing. For many advocates of economic equality for women, pay equity is an issue yet to be resolved.

Major developments in pay equity for women came about as a result 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, preventing women achieving pay equity with men.

Some of the reasons for a lack of pay equity with men are as follows:

Figure 10.12a Women currently retire with considerably less superannuation than their male counterparts.

- Women are less likely to be the recipients of over-award payments than men. Women receive approximately 54 per cent of these type 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, in which pay lags behind trades such as plumbing. In essence, women's work in these occupations is 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.

The pay equity gender gap is still a cause for concern for the federal government.

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.

Ten years later, not a lot had changed. In 2015, approximately 50 per cent of women were still concentrated in four occupations. These were clerks, sales assistants and personal service workers

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(55 per cent of women). Only 25 per cent of women make up the skilled workforce. It can be said that generally women tend to work in occupations with lower rates of pay than men.

In 2011 in New South Wales, there is still a significant gender imbalance of nursing professionals and teachers. In contrast, in science, building and engineering professionals a high percentage are 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 in that young women have sufficient role models to encourage their participation in that industry.

In addition to this, Australian women currently spend about 36 hours per week on unpaid work – the second shift (men spend around 14.5 hours).

Patterns of employment

More women than men are likely to work part-time; hence, women earn less and are less likely to access work benefits. In 2012, women comprised 45.6 per cent of all employees: 54 per cent of women worked full-time (24.7 per cent of all employees) and 46 per cent worked part-time (20.9 per cent of all employees). This affects women's 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 Australia 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.

At the beginning of 2012, women working full-time earned 17.4 per cent less than men working full-time. For many women, economic equality is still a long way off and is a symptom of a lack of equality of opportunity in the workplace.

Review 10.7a

1. Define pay equity and 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 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 non-traditional areas of employment.

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 (formerly the EOWA) 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 EOWA census results showed that any significant change was melting away. It found that only 3 per cent of the top companies had a female chief executive officer. Anna McPhee, a previous EOWA director, has been quoted as saying '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' (Source: *Daily Telegraph* 28 October 2008).

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It is clear that women are confronted by the glass ceiling. This refers to a situation in which women can see a career path, but they are unable to progress past a certain level for a variety of reasons. Evidence suggests that it is indirect discrimination that contributes to this effect as it creates barriers to equal employment opportunities, and that it is rife in both the private and public sectors.

According to the EOWA, at the current rate of progress, employment equity for women will come in approximately 177 years. They also estimate that fewer than 20 employers have 'made significant achievements in reshaping their workplaces to make them more accommodating of a diverse workforce, including the needs of parents'.

It was also suggested that most of the employers who reported to EOWA were doing the minimum to get by under the Act. 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 rewards, and where women have less access to training and promotion, need sustained affirmative action if real change is to occur.

At the same time, the Act does enjoy sufficient community support to ensure that companies comply. The naming sanction ensures a high rate of compliance.

This support, 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 EOWA (and now 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 underrepresented in these areas.

According to the federal Employment Advocate, family-friendly practices are the key to equitable workplaces:

> 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.
>
> HREOC Paid Maternity Leave submission, July 2002

Paid maternity leave is also one way to minimise 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 2016.

Quality, affordable child care is another critical issue in finding the balance between work and family. The costs of having children in long day care is an economic hurdle that women and their families weigh up before returning to the workplace.

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.

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The federal government has taken a positive step forward in setting up an inquiry, 'Balancing Work and Family'. Submissions from individuals and organisations have been taken to hear what the pressing issues and barriers to achieving this balance are. The decisions around juggling work and family should not be the sole responsibility of women. It is about how to achieve the best outcomes for all members of families. Giving more flexibility to share the load is just as important for men as for women. Essentially it is about choice.

In Court

***Australian Iron and Steel v Banovic* (1989)**

This landmark case of indirect discrimination revolved around Australian Iron and Steel's retrenchment policy of 'last on, first off' (i.e. those employees who had been hired last were 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 cannot 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 10.7b

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 WGEA (formerly the EOWA) has been in achieving attitudinal change in the organisations that report to it.
5. Outline why paid maternity leave and quality affordable child care are important issues for women in the workplace.

Research 10.3a

1. View the WGEA website and find the Media Releases section. Select two media releases from 2015 and prepare a short fact sheet to present to the class.
2. Look up 'gender quota systems in the workplace' using an internet search engine. What are quota systems in respect to equal opportunity? Brainstorm the advantages and disadvantages of having a quota system as is currently used in the United States.

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Additional resources

Issue 1:
Groups or individuals suffering disadvantage

Chapter 11
Migrants

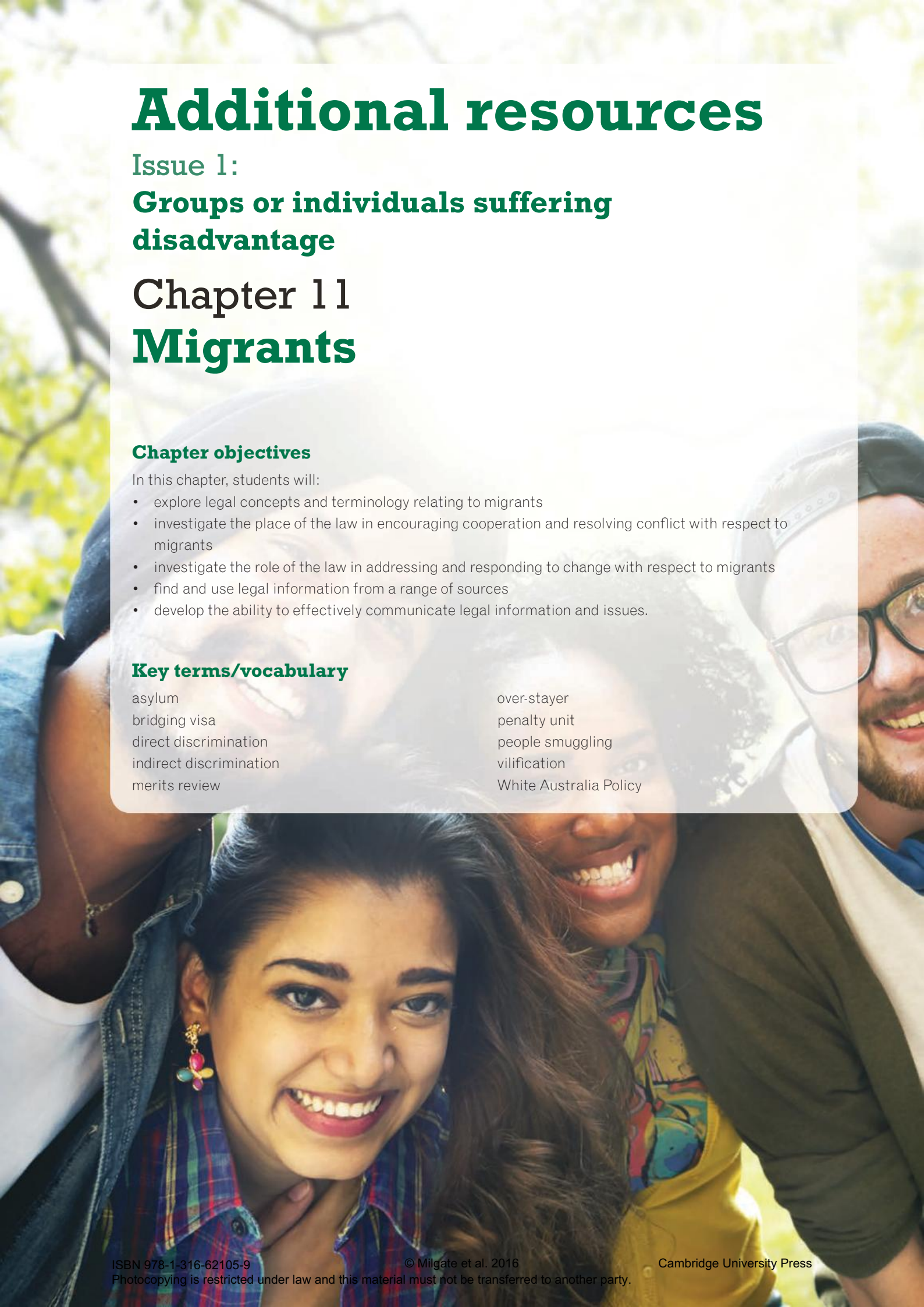
Chapter objectives

In this chapter, students will:

- explore legal concepts and terminology relating 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.

Key terms/vocabulary

asylum
bridging visa
direct discrimination
indirect discrimination
merits review
over-stayer
penalty unit
people smuggling
vilification
White Australia Policy



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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 1985 (Cth), formerly the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)
Discrimination Act 1991 (ACT)
Racial Hatred Act 1995 (Cth)

SIGNIFICANT CASES

A v Australia (1997) CCPR/C/59/D/560/1993

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11.1 Migrating and multiculturalism

Australia has had a long history of migration since the arrival of the First Fleet in 1788. Events, including gold rushes and world wars, have seen Australia's migrant intake swell, as well as changing the nature of Australian society.

Like other countries, Australia has restrictions on the types and numbers of people who can enter and settle permanently. In 2013–14, the number of new migrants who settled permanently in Australia was around 184 000 people.

For 2014–15, the Australian migration program was set at 190 000 places, made up of:

- 60 885 places for family migrants: people with family members already in Australia who will sponsor them
- 128 550 places for skilled migrants: people who have business or work experience, skills or qualifications, or who are sponsored by a business
- 565 places for special eligibility migrants: people who were previously citizens or permanent residents, and who have maintained close personal, cultural or business connections with Australia.

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.

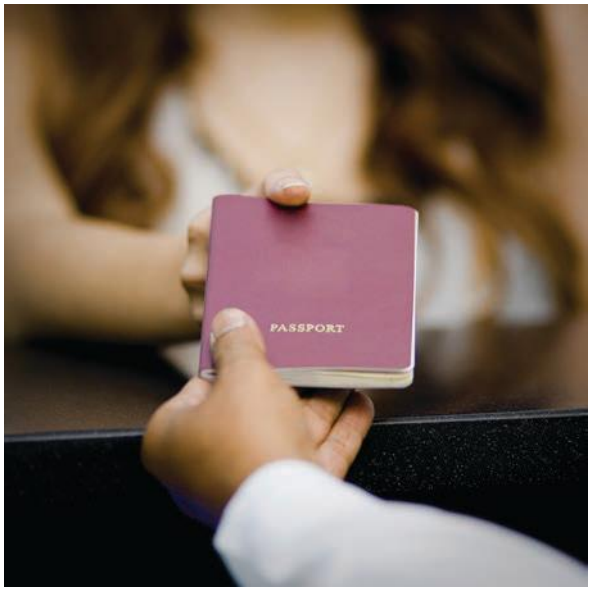

Figure 11.1 There are many reasons people come to Australia.

Section 51(xxvii) of the Australian Constitution gives the Federal Parliament the power to make laws about immigration. Permission allowing people to travel to, enter and remain in Australia is given by the federal government in the form of a visa. For those who wish to come 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 as well as 200 regulations. In Australia the Department of Immigration and Border Protection (DIBP) assesses all applications of people who wish to migrate to Australia.

Multiculturalism

Multiculturalism has enriched Australian society. It has given the Australian people access to a diversity of such things as 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. 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 weren't 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

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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 1978 in the Galbally Report, named for 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.

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'

Research 11.1

View the Department of Immigration and Border Protection website and answer the following questions.

1 What types of information does the site offer?
2 Choose one of the areas on the home page and write a review evaluating its ease of use for a prospective applicant.

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.

11.2 The migration program

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 'Migration Occupations in Demand List' on the Department of Immigration and Border Protection website. In 2015, these occupations included accountants, construction project managers, health care workers, 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.

Streams

Skilled stream

Prospective migrants who can contribute to the economic wellbeing of Australia are accepted under the *Migration Act 1958* (Cth) as independent or skilled migrants. These people must pass a points test which allocates points according to the age, qualifications, work experience and language ability of the applicant. An age limit of 45 years applies to independent migrants and they must have proficient English skills. Thus the points test favours young, English-speaking professionals and tradespeople. There are several independent immigration schemes, including business migration, employer nomination, investment linked and distinguishing talent. In 2008, the Rudd Labor government finalised the need to address the shortage of certain skills in the different Australian states, reflecting their different economic focuses.

Figure 11.2 Skilled workers might be brought into Australia to fill a skill shortage.

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As a result, the 2012–13 skilled migration program aimed at providing the skills required by the economy, and increasing the number of visas granted to people already employed in Australia. The Global Financial Crisis and its effects on the economy have seen a decline in the number of visas offered in the past few years; however, the 2012 program offered more places than the previous year.

Family-sponsored immigration

The category of 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 2015, there were 60 855 family stream visas provided. Under the family migration program, certain people can apply to migrate to be with family members. These include spouses, fiancés, fiancées, 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.

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 of time (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 above 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 Review 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 in 2015 was $550 and a prospective marriage visa was $6865.

Special eligibility stream

This stream provides an opportunity for eligibility if a person has:

- been an Australian permanent resident for nine of his or her 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.

Review 11.1

1. Briefly describe the three streams of the migration program.
2. Identify which applicants may have their migration sponsored by a relative who has permanent residency in Australia.
3. Why do you think Department of Immigration and Border Protection makes it easier for some family members to reunite than others? Do you agree with this policy? Justify your answer in half a page.
4. Describe the legal and social problems that prospective migrants encounter in trying to gain residency in Australia.

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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 will 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 will behave or encourage others to behave in a way that will bring contempt or hatred to members of Australian society.

Health requirements

Australia has strict health standards that all applicants must meet: this is to protect Australia from high health costs and risks, and overuse of health resources. These health standards are set out in the Migration Regulations 1994. To ensure that Australia's health requirements are met, applicants and dependent family members will be asked to 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 applicant).

Figure 11.3 People wishing to migrate to Australia need to be of good character.

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*. It was amended by the *Australian Citizenship Amendment (Citizenship Testing) Act 2007* in September 2007 to allow the testing of prospective citizens.

The then Australian Government reviewed this Act and the tests in 2008. 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.' As a result of the review, the test has undergone several changes to eliminate weaknesses.

The conditions of becoming an Australian citizen can be viewed on the Australian Government Department of Border Protection website, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6569. Changes to the requirements and practice tests are found at this site.

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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 placed. 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.

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. What types of areas are assessed?
3 Read the Case Study 'What happens if your character does not pass the test?' and answer the following questions.
   - **a** Who has been denied a visa to enter Australia? For what reasons is he well known?
   - **b** Who denied him the visa? What reasons were given?
   - **c** What problems has he met with around the world?
   - **d** Should we allow someone whose views we disagree with to enter Australia?

Research 11.2

Well-known identities (such as rapper Snoop Dog) have had their application for a visa to visit Australia turned down. Carry out some research to find out why.

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 *UN Convention and Protocol Relating to the Status of Refugees* (1951, 1968) (the Refugee Convention): a person who is outside his or her 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 he or she returns to that country of origin. Refugees are different from migrants. Migrants can choose

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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.

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 him or her permanent residency in Australia.

Under its refugee program, the DIBP seeks to help overseas people in humanitarian need to resettle in another country 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, discussed above, there is also onshore protection.

asylum
protection granted by a state

Figure 11.4 Many refugees have their applications processed while staying in centres and camps outside of Australia.

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 included the following:

- Refugee visas – people who fall under the definition of 'refugee' in 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 visas – 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 visa 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 visa under this category were:
  - secondary movement relocation visa – 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 – 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, but 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.

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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, which were 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 the facilities, with the promise of assistance by the Australian Government.

Asylum seekers were not detained under Australian law, or 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 asylum seekers in Nauru and Manus Island were assessed by either the UN High Commission for Refugees (UNHCR) or the Australian Government. The result saw resettlement in countries such as Australia, New Zealand, Sweden, Canada, Denmark and Norway.

The 'Pacific Solution' was wound up by the Rudd Labor government in 2008 and the last remaining asylum seekers 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. The current Liberal government has implemented tough border protection measures under its policy of 'Turn back the boats'. This controversial policy has stemmed the flow of unauthorised migrants into Australia, but has incited much discussion and even condemnation within Australia and from abroad. It is highly recommended that students keep up to date with changes in migration policy, as it is such a political issue.

Onshore component

Persons 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 Refugee Review Tribunal or 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.

Proving refugee status can be difficult. The DIBP 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 he or she will be given asylum with his or her 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 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 below.

merits review
analysis of the facts presented in a case, and often the policy choices that led to the decision

Onshore protection

When a person has arrived in Australia, they can apply for a protection visa (PV) to be recognised as a refugee. The asylum seeker must show that she or he satisfies the definition of 'refugee' and that there

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is an obligation by Australia to protect him or her. There is only an obligation if:

- the person has a fear of persecution on grounds that are well-founded, and covered by the Refugee Convention
- the person cannot be given protection that is effective in another country
- the person is excluded from the Convention's operation (e.g. because of concerns about security).

Whether the person gets a permanent or a temporary visa will depend on how he or she entered Australia.

Permanent protection visa

Permanent protection visas (PPV) are for people who came to Australia on a valid temporary visa (such as a student 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 health care.

bridging visa
a permit to stay in Australia for a temporary period of time so that arrangements can be made either to leave or to apply for permanent residency

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, 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 Permanent Protection Visa. However, the number of applications received was greater than the number of available visas; for example, in 2013–14, more than 54 000 people applied but only 13 750 were granted visas. If someone did not meet the conditions for refugee status, he or she could be removed from Australia.

In 2014, the Abbott Liberal government sought to reintroduce the Temporary Protection Visa. Despite much opposition from the other political parties, the TPVs were reinstated in December 2014.

Review 11.3

1 For whom is the offshore component of the humanitarian program designed? What are the two categories of people that it covers?
2 What criteria must someone meet in order to be classed as a refugee?
3 Migration and border security is a very political issue in Australia. Why do you think this is the case?

Research 11.3

Australia is not the only country having issues with unauthorised migrants. Find a media item about another country experiencing border security problems.

11.4 Unlawful non-citizens

Under s 14 of the *Migration Act 1958* (Cth), people who are in Australia without the correct visa are termed 'unlawful non-citizens'. If they do not leave Australia voluntarily, they can be detained (s 198) and removed from Australia (s 189). 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.

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Over-stayers

The first includes those who enter Australia on temporary visas but do not leave when the visa expires. This group, known as over-stayers, makes up the largest number of unlawful non-citizens in Australia.

Border applicants/asylum seekers

The second group comprises 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'. The majority of these unauthorised entrants since the 1990s have come from Afghanistan and Iran. Many arrive as a result of **people smuggling**.

To many, the term 'asylum seekers' is preferable to 'illegal immigrants' when referring to border applicants – especially as people fleeing their countries may face a death sentence there, 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.

people smuggling
the organised illegal movement of people across international borders, usually for a fee

News

In a rare disclosure, Abbott government admits turning back 633 asylum seekers

Nicole Hasham – Environment and immigration correspondent
Sydney Morning Herald, 6 August 2015

Boats carrying more than 630 asylum seekers have been turned back under the Abbott government, including a vessel that was returned to Vietnam last month, Immigration Minister Peter Dutton says, in a rare release of usually secret details of "on-water operations".

The disclosure marks more than one year since an asylum seeker boat has arrived in Australia. It came as Foreign Minister Julie Bishop claimed neighbourly relations with Indonesia were back on track after a diplomatic freeze partly brought about by boat turn-backs.

It also follows official advice that Australian authorities saved lives in May when they turned back a distressed boat whose crew was allegedly paid $5000 each to return to Indonesia.

Mr Dutton on Thursday said it has been a year since a successful operation by "evil people smugglers" seeking to bring asylum seekers to Australia.

The last boat containing 157 Tamil asylum seekers who had fled Sri Lanka arrived in June last year. It was intercepted near Christmas Island and the passengers were detained on a Customs boat for a month, before being transferred to the Curtin detention centre, then Nauru.

Figure 11.5 An asylum seeker boat off Christmas Island in 2013, containing mostly Iraqi, Iranian and Pakistani men

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News

Since December 2013 when the turn-back policy began, 633 people on 20 boats have been turned away and thousands more dissuaded from making the perilous journey to Australia, Mr Dutton said.

"If people smugglers see ventures getting to Australia successfully, that is a green light for the people smugglers to be back in business," he said.

"We are not going to allow the deaths at sea to recommence."

The government has previously revealed that 12 boats arrived in the six months to May last year. It means eight boats have been turned back in the past 14 months, indicating the rate is slowing.

It is widely accepted that the turn-back policy, described as cruel by critics, has dramatically stemmed the flow of asylum seeker boats headed to Australia.

At Labor's national conference last month, Opposition Leader Bill Shorten headed off an attempt by the Left faction to amend the party's platform to prohibit a future Labor government turning boats back to Indonesia.

Labor frontbenchers Anthony Albanese, Tanya Plibersek and Penny Wong opposed the move – division the government has seized on to claim the party lacks conviction on the issue.

On Thursday, Mr Dutton said Labor was "split down the middle … you need to have the resolve to stare these people smugglers down and the Abbott government has had that resolve".

Mr Dutton confirmed 46 people on a boat from Vietnam were returned last month – the government's first admission of the boat's existence.

Late last month, Prime Minister Tony Abbott would not say if the government was in talks with Vietnam about the return.

Mr Dutton said on Thursday Australia had "negotiated their return".

"We have been able to stare down that venture and it's a significant outcome," Mr Dutton said, adding the operation was a "good outcome for the sovereignty of our nation."

Greens senator Sarah Hanson-Young said there were no guarantees the Vietnamese asylum seekers were safe.

She said disclosing the number of asylum seekers turned back "proves nothing but how callous these policies are by sending people back to danger".

"If the government wanted to be honest about what is really happening on the high seas, they would tell the Australian people what happened to the people who are turned back," she said.

"The government trumps turn-backs as saving lives. But ... it merely forces people back to unsafe situations where they are faced with other life-threatening dangers."

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Review 11.4

1 What avenues are available to someone who has entered Australia without a visa, but fears persecution in his or her country of origin?
2 What happens if a border applicant does not meet the criteria for refugee status?
3 Why might someone not obtain the correct visa if he or she wants to seek asylum in Australia?
4 The article above demonstrates both sides of the refugee argument. Write a paragraph setting out these arguments and highlighting the language used by the opposing sides in stating their opinions.

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 as follows:

- 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 below. 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 people 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 page 423). 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.

Research 11.4

View the UN High Commissioner for Refugees website and carry out the following research.

1 What work does this agency do?
2 Profile its work in one of the identified geographic regions.
3 How does it help: a) asylum seekers; and b) refugees? Write a summary about one of the 'asylum seekers in the news' 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.

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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.

Other amendments limited the power of the courts to use the common law in favour of asylum seekers. Section 474 of the Migration Act 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 s 190 states that they can be detained if they fail to do so.

It is not clear how making it more difficult for asylum seekers to gain entry to Australia, or measures against them such as detention (discussed below), 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 asylum seekers 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 more just than taking action against the asylum seekers.

Figure 11.6 People smugglers exploit people in need, and often put many lives at risk by using boats in poor condition.

One such international initiative began in February 2002. The serving 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.

Some amendments to the Migration Act do target people smugglers. Sections 233A to 233E provide for criminal penalties of 10–20 years' imprisonment or 1000–2000 **penalty units**, or both, for bringing people to Australia.

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

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Review 11.5

1 Recount the MV *Tampa* incident.
2 How did the MV *Tampa* incident change Australian migration laws?
3 What has been the outcome for asylum seekers who are processed offshore?

Research 11.5

Information about people smuggling is available on the website for Amnesty International, which can be accessed via the link http://cambridge.edu.au/redirect/?id=6570 and the Australian Federal Police website, which can be accessed via the link http://cambridge.edu.au/redirect/?id=6571.

1 What do the Australian Federal Police and Amnesty International agree on with respect to people smuggling?
2 What do they disagree about?
3 Write a one-page report summarising the points made and evaluating the arguments.

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 Constitution definitions of 'immigrant' or 'alien'.

Section 200 of the *Migration Act 1958* (Cth) gives DIBP 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. DIBP 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 relate to 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 Immigration. Changes to the Migration Act 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.

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 have resided 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 his or her application is assessed.

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

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Research 11.6

There has been much media coverage of the government's ability to deport long-term permanent residents of Australia. Many of these residents came to Australian when very young and know no other life. Do you think this is acceptable? Outline your arguments.

These articles may assist with your ideas:

- 'Christmas Island riot: Immigration Minister Peter Dutton defends detention of New Zealanders' accessed via the following link: http://cambridge.edu.au/redirect/?id=6572
- 'New Zealand PM to speak to Malcolm Turnbull about citizens held in Australian detention centres' accessed via the following link: http://cambridge.edu.au/redirect/?id=6573

who lives in Australia. A person will only be extradited if the crime of which he or she is accused carries a punishment of 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 him or her 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 he or she has 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, mandatory detention was applied to asylum seekers who came to Australia without a visa – 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 his or her 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, Chinese, Indonesian, Sri Lankan, Palestinian, Korean, Vietnamese and Bangladeshi.

The current 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 felt 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

Figure 11.7 Many people believe keeping children in detention centres is wrong.

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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.

Australia's main types of detention centres are the following:

- Immigration detention centres, which are used to hold people who are refused entry at Australian international airports, people who have breached their visa conditions, and **over-stayers**. Those currently operating in Australia are at Villawood in New South Wales (established 1976), Maribyrnong in Victoria (established 1966), Perth (established 1981), and near Darwin, which accommodates mostly persons caught fishing illegally in Australian waters. There is also a detention centre on Christmas Island, used for unauthorised boat arrivals.
- Immigration residential housing, makes 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, which houses people who are low security risk. There are facilities in Brisbane, Melbourne and Adelaide.

over-stayer
a person who comes to Australia on a temporary visa but continues to stay when their visa expires

Table 11.1 People in immigration detention centres (IDC) and alternative places of detention[1] as at October 31, 2015

Place of immigration detention	Men	Women	Children	Total
Christmas Island IDC	205	0	0	205
Maribyrnong IDC	97	10	0	107
Perth IDC	24	12	0	36
Villawood IDC	326	38	0	364
Yongah Hill IDC	405	0	0	405
Christmas Island APODs	0	0	0	0
Mainland APODs	439	89	69	597
Total IDCs / APODs	**1496**	**149**	**69**	**1714**
Perth immigration residential housing	4	4	5	13
Sydney immigration residential housing	7	8	12	27
Adelaide immigration transit accommodation	21	4	0	25
Brisbane immigration transit accommodation	22	22	8	52
Melbourne immigration transit accommodation	66	34	18	118
Total in immigration residential housing and immigration transit accommodation	**120**	**72**	**43**	**235**
Total facility	**1616**	**221**	**112**	**1949**
Total community under residence determination	**161**	**117**	**354**	**632**
Total community on bridging visa E (including people in a re-grant process)	**21629**	**3377**	**4013**	**29019**
Republic of Nauru (RPC)	413	113	95	621
Manus Province, Papua New Guinea (RPC)	929	0	0	929
Total RPCs	**1342**	**113**	**95**	**1550**

1 Immigration detention as set out under s 189 or s 249 of the *Migration Act 1958* (Cth).
2 Includes detention in the community in private houses/correctional facilities/watch houses/hotels/apartments/foster care/hospitals with a person designated under the Act.
Source: Department of Immigration and Citizenship

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Review 11.6

1 Identify the circumstances under which a person can be deported from Australia.
2 The Minister for Immigration now has stronger powers to cancel the visas of permanent residents. Many of these residents have lived in Australia since childhood. Do you think that the deportation of these people is fair? Justify your reasons.
3 Write a definition of 'extradition'. Under what circumstances does extradition take place?
4 Which cultural groups make up most of the population in detention centres?
5 What are the types of detention centres and where are they located?

Research 11.7

The majority of people held in detention centres 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 has been to leave their country of origin, and the ways that they came to arrive in Australia.

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. In reality, however, 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*, 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.

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
practices or policies that appear to treat everyone in the same way, but which adversely affect a higher proportion of people from one particular group

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. Getting the bond and other money together is a hurdle. They have even greater difficulty in saving and borrowing the money necessary to purchase a home.

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, and this only adds to the problems faced by migrants trying to provide adequate housing for themselves and their families.

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,

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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 family-sponsored migrants must be supported by their sponsor. Social security payments can only be claimed by a migrant 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 being discriminatory, as it restricts access to those in need and only serves to further isolate migrants from society.

Issues of court access

While the courts should be a mechanism by which all Australian citizens and residents achieve justice, there are factors that contribute to them being less than 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 see the 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 socioeconomically 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 get 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 can also draw out the whole 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 they are targeted by police.

Challenging immigration decisions

Everyone living in Australia is subject to Australian law. Migrants, however, are also subject to other processes within Australia, including deportation, extradition and immigration detention.

Bringing other cases before the courts

Migrants have the same rights as other people in Australia to take a case to court. However, as

Figure 11.8 Breaching Australian law may result in deportation.

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discussed above, limited knowledge of legal rights and court processes, fear of police and financial issues will often mean that 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.

Review 11.7

1. Explain what is meant by 'indirect' discrimination.
2. What factors contribute to the difficulty migrants experience when seeking court access?
3. Suggest how the difficulty of accessing courts can affect one's 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 below.

Commonwealth legislation

The *Racial Discrimination Act 1975* (Cth) prohibits any behaviour that discriminates against a person because of race. 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 he or she has been treated differently or unequally because of his or her 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 Act 1986* (Cth) established the Human Rights and Equal Opportunity Commission (HREOC; now called the Australian Human Rights Commission). 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 Commission.

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.

NSW 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 his or her race.

A migrant who feels that he or she has suffered discrimination as covered by the Anti-Discrimination Act 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.

Figure 11.9 A migrant who feels that he or she has suffered discrimination can contact the NSW Anti-Discrimination Board.

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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) (ICCPR), which asserts the right to vote, freedom of expression and the right to a fair trial
- *International Covenant on Economic, Social and Cultural Rights* (1976) (ICESCR), a treaty that 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) (CEDAW), which is discussed in Chapter 10
- *Convention Relating to the Status of Refugees* (1951), discussed above
- *Convention on the Elimination of All Forms of Racial Discrimination* (1965) (CERD), 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 ICCPR, and CERD 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. Australia acceded to the First Optional Protocol to the ICCPR in 1991, which contains that procedure, and recognised the complaints process under CERD in 1993. Australia has also acceded to the Optional Protocol to CEDAW.

Recourse to these 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 of the textbook on the Human Rights Committee's decision in *Toonen v Australia*.

Review 11.8

1. Write a definition of '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. In what ways are migrants limited in their access to social security benefits? Do you think this is fair? Justify your answer.
5. Outline the conditions 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.

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Australian Human Rights Commission

As stated above, the Australian Human Rights Commission (AHRC) is a national government body, set up under the *Australian Human Rights 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 Commission is education about human rights. The Commission 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?* released in May 2004, the Commission (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 adequate health care and education, and protection of unaccompanied children and those with disabilities. The recommendations of the report centred on the following principles, summarised by the Commission:

- 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 *Convention Relating to the Status of Refugees*.

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.

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. To worsen matters, the NSW Refugee Advice and Casework Service had to close in 1996 due to lack of funding. The Immigration Advice and Application Assistance Scheme does provide advice to asylum seekers during their application process, but 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 also include a merits test (whether the case is likely to succeed). LawAccess NSW provides telephone information, referral and advice, including how to apply for legal aid. Legal Aid can also represent persons who claim they have experienced racial discrimination. Migrants can also seek legal advice and assistance from community legal

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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 Australian Institute of Multicultural Affairs (AIMA) was established in 1979 by the Commonwealth Parliament. Its purpose was to raise awareness of cultural diversity and to promote social cohesion, understanding and tolerance. AIMA was replaced by the Office of Multicultural Affairs in 1986. It was part of the Department of the Prime Minister and this meant that multiculturalism was given a national prominence. This office has since closed.

In 1989, a statement of policies and goals titled *National Agenda for a Multicultural Australia* was produced by the federal government. It is supported by all political parties 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*. 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 time frame to meet its goals. The Australian Multicultural Council has superseded this body and is overseen by the Minister for Social Services.

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.

Figure 11.10 Embracing cultural diversity promotes social cohesion.

Use of interpreters

The Translating and Interpreting Service (TIS) is provided 24 hours a day by the DIBP. 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 English-speaking and non-English-speaking parties and the TIS interpreter. This can be done face-to-face or using telephones.

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.

Other organisations

Non-government bodies such as church and community groups and migrant organisations also offer support and provide networks to assist new migrants. For example, migrant resource centres run

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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 against the detaining of children in detention centres. Can you recommend any arguments for keeping children in detention centres?
2. How did HREOC respond to the outcry over children in detention centres?
3. What were the findings of its report?
4. Outline some informal responses to migrants in Australia and assess their effectiveness.

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. This review, called *Human Rights and the Migration Act 1958*, was critical of the limited availability of independent review of migration decisions.

Under its recommendations, a system of merits review 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 (MIRO), whose role was to provide independent internal review of a decision; and the Immigration Review Tribunal (IRT), which reviewed decisions by MIRO 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 IRT and MIRO 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 Court, 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.

The review process

If prospective family-sponsored and independent migrants feel that their applications have been decided incorrectly by the DIBP, 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 DIBP. 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 DIBP will be considered.

If an applicant fails in an appeal to the AAT, he or she may choose to challenge the decision in the Federal Circuit Court. This is not an avenue open to most unsuccessful applicants, as it is time-consuming and expensive, and not advisable without legal representation.

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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 Magistrates' Court 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 Tribunal 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 as a result of his work for the party. The Tribunal wrote to SZKCQ under s 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 and giving him 14 days to provide comments on the information. In the Tribunal's opinion, the letter from Mr A was not genuine, and as Mr K made no reference 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 Tribunal 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 Tribunal 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 set aside.

The Federal Circuit Court 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.)

Review 11.10

1. Explain the system of review.
2. Discuss the limitations of the review process.
3. Describe the role played by the Federal Court of Australia in the review process.
4. Summarise the case *SZKCQ v Minister for Immigration and Citizenship*. Was this a merits review or a judicial review of the Refugee Review Tribunal decision?

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 legal 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 of time.

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

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Figure 11.11 Detention centres are often protested against due to cases where refugees' human rights are breached or ignored.

and torture. There have also been criticisms relating to the fact that border applicants who are detained only have the right to appeal to the Migration Review 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, they are not always informed of this right by immigration officers.

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) (ICCPR). Article 9(4) provides for the rights of people in detention to seek a determination on the legality of that detention without delay.

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 undertook 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* (CROC), 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 CROC. 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.

Research 11.8

What progress 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 What criticisms of Australia's detention policies have been made?
2 What international convention was the benchmark against which HREOC's inquiry measured Australia's treatment of the children of border applicants?

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With increasing public protest and pressure, changes have been 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 Australian Human Rights Commission released a report in 2015 titled 'The Forgotten Children', which looked at children in migrant detention centres. The report was damning in its appraisal of the psychological and physical impact on children when they were held indefinitely in the centres. Unfortunately, the report has been dismissed by the government as being politically motivated (at the time of writing).

Legislation 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 above; the *Anti-Discrimination Act 1977* (NSW) s 20C; and the *Discrimination Act 1991* (ACT) s 66.

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 NSW 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.

Research 11.9

View the Australian Human Rights Commission website. Choose one of the areas that are 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 take this into account.

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 reforms. 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 around the world
- reforming the rules regarding mandatory detention.

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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 in response to identification of certain advantages brought to Australia by migrants.
- The refugee program allows immigration to Australia if the person meets the definition in the UN Refugee Convention.
- 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.
- 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 *Racial Discrimination Act 1975* (Cth) and the *Anti-Discrimination Act 1977* (NSW).

Chapter summary questions

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 Australia is a party to which of the following treaties?

A *International Convention on the Elimination of All Forms of Racial Discrimination*
B *Convention on the Rights of the Child*
C *Convention Relating to the Status of Refugees*
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 administrative merits review system involve?
   - **A** an unsuccessful candidate being allowed to seek merits review from the Migration Review Tribunal if his or her application is rejected by Department of Immigration and Border Protection (DIBP)
   - **B** an unsuccessful candidate being allowed to appeal to the High Court if his or her application is rejected by the Migration Review Tribunal
   - **C** an unsuccessful candidate being allowed to appeal to the Federal Court if his or her application is rejected by DIBP
   - **D** an unsuccessful candidate being allowed to appeal to the Migration Review Tribunal, but only on questions of law, not merits

7 How has the treatment of migrants changed over the past 100 years?
8 What does the term 'multiculturalism' mean? When did this term start to be used?
9 In what ways do migrants face discrimination in the following areas?
   - **a** employment opportunities
   - **b** finding housing
   - **c** being granted refugee status

10 Summarise the review process for immigration decisions.
11 Make a judgement about how effective legislative sanctions have been against discriminatory behaviour. Justify your opinion.
12 Propose other action, legal and non-legal, which could be taken to eliminate racial discrimination.

Short-answer questions

1 Make a timeline of important dates and events in this chapter.
2 Who is responsible for immigration law in Australia?
3 Explain what refugee status means and who determines it.
4 Discuss the amendments made to the *Migration Act 1958* (Cth) in 2001. What changes were made? What were the reasons or motivations for the changes?
5 Analyse how you think the MV *Tampa* incident affected Australia's international reputation. Justify your opinion in one to two paragraphs.
6 Define an unlawful non-citizen. By what other names are they known?

Extended-response questions

1 Outline the legal issues facing refugees and border applicants. Evaluate the effectiveness of the legal system in responding to the needs of each.
2 Is multiculturalism compatible with a strong national identity for Australians? Discuss.

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

GO

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Additional resources

Issue 1:

Groups or individuals suffering disadvantage

Chapter 12

Aboriginal and Torres Strait Islander peoples

Chapter objectives

In this chapter, students 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 differing perspectives and interpretations of legal information and issues
- communicate legal information using well-structured responses.

Key terms/vocabulary

affirmative action
assimilation
dispersal
dispossession
equal opportunity
martial law
native title
nomadic
racial vilification
reconciliation
treaty

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Relevant law

IMPORTANT LEGISLATION

Australian Constitution, section 51
Australian Constitution, section 127
National Parks and Wildlife Act 1974 (NSW)
Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Aboriginal Land Rights Act 1983 (NSW)
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
Native Title Act 1993 (Cth)
Native Title Act Amendment Act 2007 (Cth)
Native Title Act Amendment Act (Technical Amendments) 2007 (Cth)
Northern Territory National Emergency Response Act 2007 (Cth)

SIGNIFICANT CASES

R v Williams (1976) 14 SASR 1
Mabo v Queensland (No. 2) (1992) HCA 23
Walker v NSW (1994) 69 ALJR 111
Wik Peoples and Others v The State of Queensland and Others [1996] HCA 40

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12.1 Aboriginal and Torres Strait Islander peoples and the law

History of government policy

Australian students, through their school studies, have a good understanding of Australian Indigenous populations and their history. From these studies, students are also aware that Aboriginal and Torres Strait Islander peoples have not been treated as equally, or fairly, as other Australians in many situations. In this topic, you will look at the role of the legal system in their treatment.

The term 'aboriginal' is an indication of the treatment of Indigenous Australians by the white settlers who came after 1788. The term 'aboriginal' is a generic one meaning 'native', and by applying it to the Indigenous Australians, the British showed that they had no real interest in the groups of people who were the traditional owners of the lands that made up the enormous island of Australia.

The map in Chapter 2 makes it clear that Indigenous people lived in distinct clans and language groups, and therefore it is not accurate or fair to categorise Indigenous people into one cultural group. When the First Fleet arrived, the belief at the time was that Aboriginal and Torres Strait Islander people were 'savages', with no concept of land ownership. There was no evidence of fences, landlords, tenants or farms to be observed, and so the British government declared the land '*terra nullius*' (land belonging to no one, or uninhabited land).

A range of government policies and laws in relation to Indigenous peoples has been in place since 1788; these are summarised in Table 12.1. The law-makers at this time believed that Indigenous people needed looking after as they were not able to make meaningful decisions for themselves. Many of the 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?

Each state government appointed a Protector of Aborigines. This role resulted from a recommendation of the British House of Commons in 1838. In a report it was recommended that Protectors of Aborigines should be engaged with Indigenous people and that they would be required to learn the Aboriginal language. Their duties would be to watch over the rights of Aboriginal people by guarding against encroachment on their property and protecting them from acts of cruelty, oppression and injustice. The reality of how protective this role really was has been debated by modern academics. 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?

When considering the laws and their outcomes, as outlined in Table 12.1, we can see that the term 'protection' did have a very different meaning in the eyes of colonial and past Australian law than it does today.

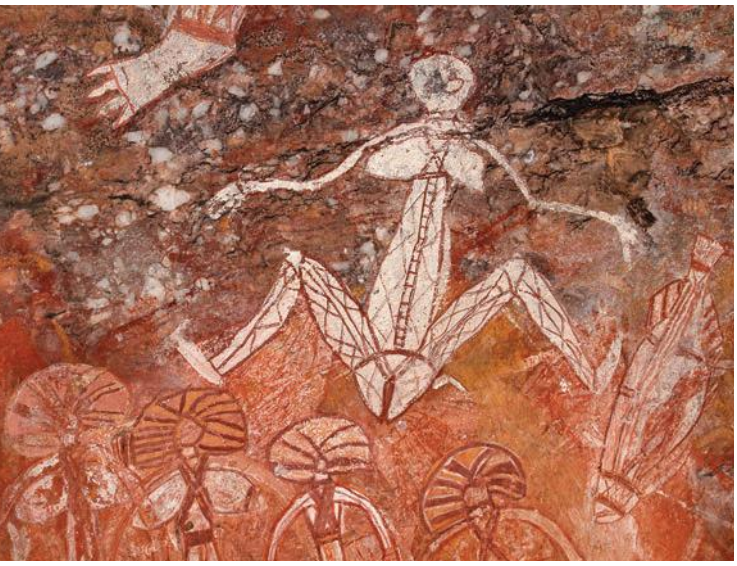

Figure 12.1 Aboriginal rock art

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Table 12.1 Laws and policies relating to Indigenous Australians

Policy/law	Effect/outcome
Dispossession/**dispersal** (1788–1800s) Since Indigenous Australians were not recognised as citizens, it was not a criminal offence to hunt, shoot and kill them. The general belief was that Indigenous people would eventually 'die out'.	A massive reduction occurred in the Indigenous population. Traditional Indigenous areas were converted to farming lands.
1816 Martial Law (NSW) *1824 Martial Law* (Tasmania)	If an Aboriginal 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 Aboriginal people.
Protection (1869–1909) *Aborigines Protection Act 1869* (Vic) *Aborigines Protection Act 1909* (NSW)	These Acts allowed the appointment of a 'protector' of Aboriginal people. This included the power to remove children from homes to be placed in missions.
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'.
Assimilation and integration (1900–1970s) By this time, Indigenous populations were a long way from 'dying out', and 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 Indigenous population to be 'white'. This was met with both submission and resistance. The 1967 referendum recognised that Aboriginal and Torres Strait Islander people should be counted in the Census numbers and transferred responsibility for Indigenous affairs to the federal government.
Self-determination (1970s onward) Self-determination is the right of peoples to determine their own political status, and meet their own economic, social and cultural needs. Self-determination is defined in the *United Nations Covenant on Economic, Social and Cultural Rights* (1966) and also explicitly mentioned in the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).	This policy is increasingly guided by recognition that the Indigenous population are Australia's first peoples, and 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 the 2008 apology to the Stolen Generations.

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

native title
the right of indigenous people to their traditional lands

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Review 12.1

1 Outline your knowledge of the operation of the legal system in relation to Indigenous Australians prior to 1788.
2 Identify the Latin term for 'land belonging to no one'. Why did the British have this belief about Australia?
3 Describe the three main policies of Australian governments in relation to Indigenous people from 1788 to 1967. List one effect or outcome of each policy.

Legal status

Before the 1967 referendum

The doctrine of *terra nullius* meant that in the eyes of the law, Indigenous Australians 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 highlighted the legal status of Indigenous people since 1788. There were no criminal laws for European people to abide by in terms of harming or killing Indigenous people and, in the first 50 years or so, the government policy of dispossession and dispersal tended to condone violence. Indeed, **martial law** in both Tasmania and New South Wales allowed Aboriginal people to be shot and killed. One of the most significant and tragic events of the 1800s occurred in New South Wales at Myall Creek, near Bingara when in May 1838, 40 Aboriginal people set up camp on a cattle station.

martial law
law enforced by the military over civilian affairs; overrides civil law

On 10 June 1838, they were brutally attacked and killed by stockmen who were angry about the theft of their cattle. Twenty-eight men, women and children were slaughtered, and the Governor of New South Wales ordered an investigation into the massacre. Such a legal process was probably the first of its kind. Initially, 11 men were found not guilty of the crime. However, a second trial sent seven men to their death by hanging. As a result of this event, farmers perceived the message that if you did kill Aboriginal people, you should hide any evidence, rather than telling the authorities. As a result, practically all further massacres were not recorded.

In the ensuing years, Aboriginal people were seen to be childlike and so needing care and 'guidance' in decision-making. 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 Aboriginal people 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.

Indigenous Australians had no recognised legal status until 1838 and only limited recognition for the rest of the century. Until the 1967 referendum, the Constitution referred to Aboriginal people in only two sections – s 51 and s 127. Section 51 gave the responsibility for Aboriginal affairs to state governments. Since there were no federal laws governing the welfare of Indigenous people, different states interpreted their rights and legal status in various ways. While most Aboriginal people were killed or removed from Tasmania by the 1840s, New South Wales at the same time sentenced seven white men to death for the Myall Creek massacre.

Section 127 of our Constitution excluded Aboriginal people from the Census. They were also denied fundamental citizenship rights. These citizenship rights involved being able to enjoy

Figure 12.2 Uluru was known as Ayer's Rock after the land was taken from its traditional owners. It has since been returned under a native land title.

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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 Aboriginal and Torres Strait Islander 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 s 51 and to totally remove s 127 of the Constitution. Over 90 per cent of the population voted 'yes' to these requests and, from this point on, Aboriginal affairs became a federal issue and Aboriginal and Torres Strait Islander peoples' information was recorded in the Census.

After the 1967 referendum

Despite this recognition, progress 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 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 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. That year, the government established the Department of Aboriginal Affairs in response to the failure of the Gove land rights case. A Royal Commission into Aboriginal land rights under Justice Woodward was established, and its findings led to the drafting of the *Aboriginal Land Rights Act 1976* (NT). This legislation established a procedure for land claims, which meant that land listed as available could be claimed by traditional owners.

Between 1982 and 1992, Eddie Mabo and four other men challenged the Queensland Government in the Supreme Court (*Mabo v Queensland* 166 CLR 186, 8 December 1988) and the federal government in the High Court (*Mabo v Queensland [No. 2]* (1992) 175 CLR) over their people's rights to access Murray

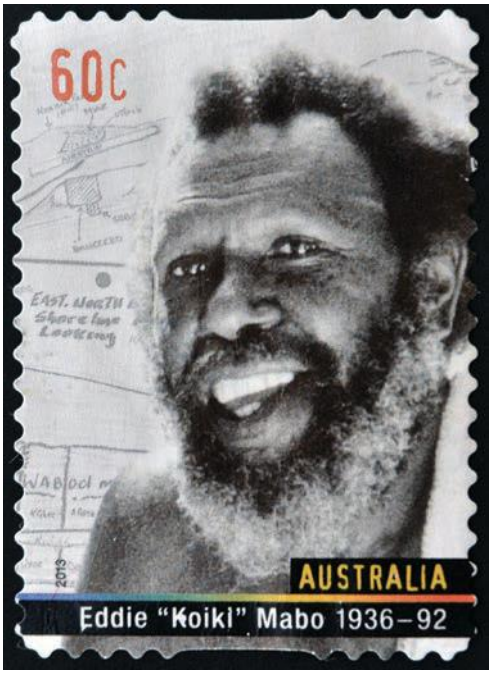

Figure 12.3 Eddie Mabo fought for recognition of Indigenous land rights.

Island (Mer). Although Eddie 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 Indigenous people 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 Indigenous people 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 Indigenous people 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

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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.

Review 12.2

1. Describe the changing legal status of Aboriginal and Torres Strait Islander peoples prior to 1967 and up to 1993. Why do you think laws have changed?
2. Explain the importance of the 1992 Mabo decision for the legal status of Aboriginal and Torres Strait Islander peoples.
3. Evaluate the statement made by Prime Minister Paul Keating in 1993 on the passing of the Native Title Bill.

12.2 Areas of disadvantage for Indigenous Australians

Compared to non-Indigenous people, Indigenous Australians are more often involved in the criminal justice system, while on average having lower levels of health, education, employment and housing. This is seen in the statistics outlined below. The Royal Commission into Aboriginal Deaths in Custody drew attention to this disadvantage, with Commissioner Elliot 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.

Health

Life expectancy (2013)

- Indigenous males: 69.3 years (compared to all Australian males: 79.9 years)
- Indigenous females: 73.9 years (compared to all Australian females: 83.4 years)

General health (2011–13)

About 25 per cent of Indigenous people reported their health as 'fair or poor' (22 per cent), which is at least twice as many as non-Indigenous Australians.

Two-thirds (66 per cent) of Indigenous people aged 15 years and over were overweight or obese. This total was similar to the general population, but looking at obesity alone, the rate was 1.5 times higher than non-Indigenous people. In terms of chronic disease, nearly twice as many Indigenous as non-Indigenous Australians reported suffering from asthma, and they were 3.3 times as likely to report some form of diabetes. There was also a higher prevalence of hearing conditions for Indigenous children.

Education (2011)

School retention – 49 per cent of Indigenous students continued to Year 12 compared to 81 per cent of non-Indigenous students.

Figure 12.4 There have been many investigations into finding ways to ensure Indigenous children are given the same opportunities as non-Indigenous children.

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Care and protection of children

The rate of removal of Indigenous 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 Indigenous children in care than non-Indigenous children. As the availability of foster families in the Indigenous community is very low, these children may experience alienation from their culture, in addition to other disadvantages that are sometimes faced by children in care (such as social and economic disadvantage and abuse).

Employment

The 2011 Census showed the unemployment rate was 17.2 per cent for Indigenous adults compared to 5.5 per cent for non-Indigenous adults. This is an improvement from 2001 (20 per cent Indigenous unemployment) but higher than 2006 (16 per cent).

Criminal justice system

An Amnesty International report from 2014, *A Brighter Tomorrow*, stated that Indigenous Australian young people between 10 and 17 years of age were 26 times more likely than non-Indigenous juveniles to be in juvenile detention.

Racial vilification

The *Racial Discrimination Act 1975* (Cth) was amended in 1995 to include the *Racial Hatred Act 1995* (Cth) and 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). Mr Bowman shouted abuse from his front veranda to his Aboriginal neighbour, Mr McMahon, because he tried to retrieve his children's ball from Mr Bowman's front yard. The magistrate noted that passers-by could have heard them. Mr Bowman was ordered to pay $1500 in compensation, in addition to the complainant's (Mr McMahon's) legal costs. Visit the Australasian Legal Information Institute website for details of the case, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6574.

There are exceptions to the Racial Discrimination Act, 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.

racial vilification
a public act based on the race, colour, national or ethnic origin of a person or group of people which 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

Research 12.1

See the Australasian Legal Information Institute website to view the racial vilification cases on record; it can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6575.

1. Choose three cases. Describe the events of each case and the judge's decision.
2. Evaluate the effectiveness of the law in dealing with racial vilification.

Closing the gap

In 2015, Prime Minister Tony Abbott released a report called *Closing the Gap*. This report looked at progress made in terms of key indicators for Aboriginal and Torres Strait Islander people. These included education, employment and life expectancy. The report noted that, apart from infant mortality rates

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and Year 12 completion rates, targets had achieved limited progress.

Review 12.3

1. With reference to the statistics outlined previously, outline the differences in life expectancy between Indigenous Australians and non-Indigenous males and females.
2. Describe the differences in general health between Indigenous and non-Indigenous people.
3. Discuss the reasons for the overall disadvantage differences as outlined by Commissioner Elliot Johnston QC.
4. Suggest why targets aimed at reducing the gap between Aboriginal and Torres Strait Islander people and non-Indigenous Australians have shown little progress.

12.3 Legal responses

Criminal law

As with all law, Aboriginal and Torres Strait Islander people 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.

In both cases, the prisoners were dismissed. However, in the latter case, Justice Forbes reversed his decision and found the defendant guilty after consulting with three other judges. Throughout all of the 20th century and into the 21st, Aboriginal and Torres Strait Islander people continue to be significantly over-represented in rates of arrest, charge and jail sentencing. It is estimated that Aboriginal and Torres Strait Islander people 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, Aboriginal and Torres Strait Islander people in New South Wales appeared in criminal courts four times more frequently than non-Indigenous people. In terms of incarceration, 16 per cent of Indigenous people who appeared in court received jail sentences, compared to just 6 per cent of non-Indigenous people.

It has been estimated that if all Indigenous people who were sentenced to jail for fewer than six months were released, Indigenous jail population numbers would fall by 56 per cent over 12 months (Jopson 2003). In addition, 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.

In recent years, a range of measures and policies to counter the statistics listed above have been put in place, including circle sentencing, which tries to identify a more appropriate form of punishment after an Indigenous person has been found guilty in an ordinary court. While circle sentencing continues in Dubbo and Nowra, there are still criminal cases whereby Indigenous people are not excused from the current criminal justice system of assigning punishment.

Civil law

Australia's adversarial legal system means that taking civil action against another person or company can be an extremely costly experience. The

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chances of winning a case with self-representation are extremely low and, as a consequence, very few Indigenous 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 people of Cape York challenged, in the High Court, the legality of pastoral leases or land formerly under pastoral leases.

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. In a judgement known as 'the Wik decision' 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 judgement, the federal government introduced the 10-point plan for native title, with the *Native Title Amendment Act 1998* (Cth).

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 *Anti-Discrimination Act 1977* (NSW) make this behaviour towards Indigenous people 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, etc.

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.

Figure 12.5 It is illegal to discriminate against someone for being Indigenous.

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.

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' describes the provision of legal services to socially and economically disadvantaged people at no or very little cost to them. The government pays for legal aid so that people who cannot afford to pay a solicitor themselves are still able to access the legal services they require. Legal aid in New South Wales is provided by a number of different organisations, including the Legal Aid Commission of New South Wales, community legal centres generally and the Aboriginal Legal Service. All of these are funded by either or both the Commonwealth and NSW government. Legal aid helps people who

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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 Aboriginal and Torres Strait Islander 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 Aboriginal and Torres Strait Islander people.

The Aboriginal Legal Service (NSW/ACT) Limited (ALS) provides legal aid services to Indigenous Australians in New South Wales and the ACT 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 ACT. The ALS replaced the six Aboriginal and Torres Strait Islander Legal Services (ATSILS) and their peak body, the Coalition of Aboriginal Legal Services (COALS). The ALS won the government contract to provide legal services to Indigenous Australians in New South Wales and the ACT on 28 April 2006, and receives government funding to do so.

Special commissions

Aboriginal and Torres Strait Islander Commission

In 1989, the Commonwealth Government legislated the Aboriginal and Torres Strait Islander Commission Act to establish a body known as Aboriginal and Torres Strait Islander Commission (ATSIC). The purpose of ATSIC was to grant more political power to Indigenous people by allowing them greater participation in Indigenous affairs.

Government funding was provided to establish head and regional offices for the purpose of providing services such as health, 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 (NIC), but this body was widely denounced for its ineffectiveness, and member contracts were not continued by the Labor government after 2007. 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 Indigenous deaths in police custody and jail in Australia.

In summary, the 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 Aboriginal and Torres Strait Islander peoples, the police and the wider community. The Commission made 339 recommendations to assist in the reduction of custodial deaths. You can read the Commission's findings at the Australasian Legal Information Institute website via the following link: http://cambridge.edu.au/redirect/?id=6576.

Land councils and trusts

The *Aboriginal Land Rights Act 1983* (NSW) set up a mechanism to compensate Indigenous Australians for their loss of land. The Preamble of the Act (as edited by the *Aboriginal Land Rights Amendment Act 2014* (NSW)) stated that:

> (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.

The aim of the Act was to compensate New South Wales Aboriginal people for losing their connection to the land. It established a network of New South Wales Aboriginal land councils with three tiers:

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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 Mabo was challenging the Queensland Government, and highlights the nature and operation of the Australian legal system with respect to Indigenous land rights and native title. At this point it is worth differentiating between these two terms.

Land rights

Land rights granted to Indigenous people gives legal rights to a parcel of land, 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 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 Indigenous 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 12.4

1. Clarify the difference between land rights and native title. Why do you think a distinction has to exist?
2. Identify at least one problem for Indigenous communities with the abolition of ATSIC.
3. Explain how extending the time period where lawyers are able to lodge complaints to the Anti-Discrimination Board from six months to a 12-month period will benefit lawyers and their clients.
4. Suggest why the chances of winning a case with self-representation are so low.

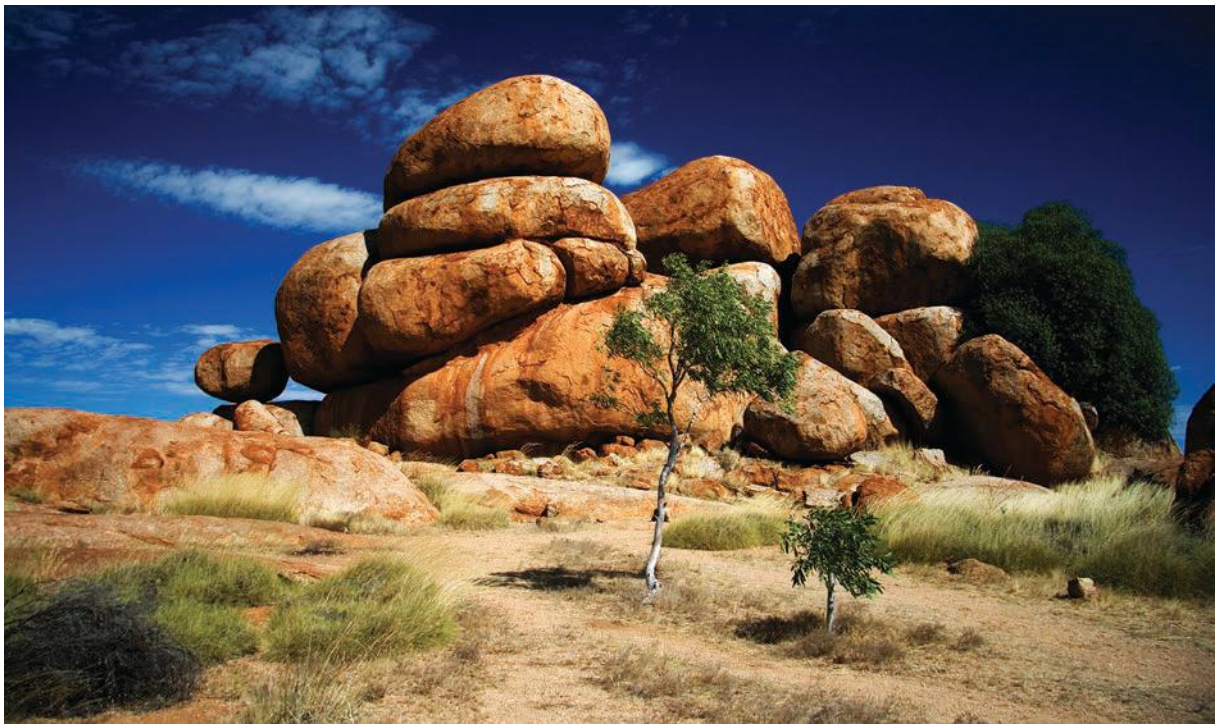

Figure 12.6 Native title recognises the land rights of Indigenous Australians.

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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 Aboriginal and Torres Strait Islander people as Members of Parliament (MPs).

In 2003, Linda Burney became the Member for Canterbury in New South Wales. She was the first Indigenous Australian to be voted into the 158-year-old NSW Parliament. Ms Burney became the eleventh Aboriginal MP and only the fourth Indigenous woman elected to any Australian parliament.

Another way of wielding political power is 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 Indigenous communities. However, since the abolition of ATSIC in 2005, a number of questions have arisen. According to Ms 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.

Self-determination, including treaties

Article 1 of the *United Nations Covenant on Economic, Social and Cultural Rights* (1966) states that: '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 Indigenous rights to self-determination in Australia.

> 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.

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

Former Prime Minister John Howard was known to oppose the recognition of Indigenous Australians as having a unique culture, religion, customary laws and communities. In 1988, he expressed his view that they should be integrated into mainstream

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Australian society, and in 2002 he said that the state of Indigenous communities remained disgraceful, and that 'There are plenty of Aborigines, Indigenous Australians, who are fully integrated. But there are still quite a lot who aren't.'

Many Indigenous people have debated and discussed having a treaty between Indigenous 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.

reconciliation
getting two parties to correspond, or make peace

Review 12.5

1. Read the opinions of author Tim Rowse. Do you agree or disagree with these opinions in relation to self-determination? Discuss your views in class.
2. Discuss the advantages and disadvantages of a treaty between the federal government and Indigenous Australians.

12.5 Effectiveness of responses

Misunderstandings due to ignorance and differences in points of view

The Australian legal system is based on an adversarial process, whereby opposing sides argue their cases with a judge acting as a 'referee'. The adversarial system is one of many justice systems used around the world, and it is certainly not the only system. As such, it is a system that does not sit well with Aboriginal and Torres Strait Islander peoples who traditionally had a customary system of law and justice based on tribal elders settling disputes or handing out punishments (see the In Court box on page 453).

The adversarial system is complex, expensive, time consuming and quite foreign to Indigenous Australian cultures. Indeed, many would argue that it is difficult for any person without legal training to comprehend all of the rules and processes. It is, therefore, easy to see that misunderstandings due to ignorance are common. This is compounded by the views of mainstream Australia, with some people arguing that Indigenous people are the proper owners of all land in Australia, while others argue that Indigenous people should have no special rights. Thus, it is not easy for Indigenous Australians to gain the sympathy and support of 'everyday Australians' in some of their claims.

Indigenous peoples have lived on the Australian continent for at least 50 000 years and, prior to

Figure 12.7 Sometimes Indigenous Australian cultures conflict with Australia's law system.

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colonisation, there were approximately 500 different cultural and language groups. To categorise Indigenous people 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. These misunderstandings continue today.

There is evidence to suggest that not all Indigenous peoples were **nomadic**. Some groups lived a sedentary lifestyle, with permanent dwellings and clear physical boundaries. Indeed, as Eddie Mabo successfully demonstrated, the Meriam people (on the Torres Strait island of Mer) had a system of land ownership with identifiable boundaries, whereby land was passed down through generations.

nomadic
a term used to describe people who tend to travel and change settlements frequently

As a general rule, Indigenous cultural beliefs emphasise the group rather than the individual. Indigenous Australians have a strong connection to the land and the physical environment, believing 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.

For Indigenous people 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. Placing an Indigenous person within four walls for an extended period of time (such as in a prison) may be viewed as more cruel and inhumane than for a non-Indigenous person because of the different cultural backgrounds discussed.

Customary law involves discussion, mediation and direct action, and a physical punishment may be administered. While this may also be viewed as cruel and harsh, it means punishment is dealt with quickly and does not involve incarceration. The 1976 case *R v Williams* highlights the recognition of customary law by a South Australian judge.

Review 12.6

1 Outline Indigenous Australian systems of justice and punishment.
2 Explain how non-Indigenous systems of law and punishment may be harmful to Indigenous offenders.
3 Justify the decision of the court in the *R v Williams* case. In your answer, consider whether the punishment for manslaughter was sufficient.

In Court

***R v Williams* (1976) 14 SASR 1**

During the course of this criminal trial in South Australia, Justice Wells heard evidence that a woman taunted Mr 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 one of manslaughter. Justice Wells 'suspended' 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 the elders.

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The extent to which governments have recognised and responded to issues and rights

State and federal governments have recognised and responded to Indigenous issues in Australia in a range of ways. It is difficult to identify the most important issue, as opinions vary widely, but land ownership, recognition of customary law and an apology from the Federal Government for 'stealing' children from their homes will be dealt with in this section.

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 that your home had been part of your great-grandparents' home, where your grandfather and your mother grew up, for example. This situation has some similarity to the issue of native title and land rights. Some citizens see the practising of Indigenous culture to be far less important than the economic gains of farming, forestry, fishing and mining. How do we decide whether access should be granted to Indigenous people?

What if a major deposit of a mineral is discovered on land owned by an Indigenous community and they do not wish mining to occur, despite 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 cases demolished the notion of *terra nullius* and established the Native Title Act; however, the Wik case and the government's 10-point plan (*Native Title Amendment Act 1998*) now means that while Indigenous peoples can be consulted on a land-use issue, they have no legal power to veto a decision about land. In relation to the issues of customary law and self-determination, while some judges have recognised social, cultural and legal differences, the High Court dismissed the 1994 appeal by Denis Walker, as explained in the In Court box.

Deaths in custody recommendations

The 1987 Royal Commission into Aboriginal Deaths in Custody was established in response to the unacceptable number of Indigenous deaths in police custody and jail. The 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. However, the number of Indigenous people in jail in 2005 and subsequent deaths in custody remains approximately 17 times higher than the number for non-Indigenous inmates. While the number of deaths in custody has remained steady, of concern is the fact that, since the Royal

In Court

***Walker v New South Wales* (1994) 69 ALJR 111**

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 Australian governments 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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Commission over 20 years ago, the proportion of Indigenous prisoners has almost doubled from 14 per cent in 1991 to 26 per cent in 2011 (Australian Institute of Criminology Monitoring Report No.20, 2013).

One of the main recommendations for reducing deaths was to decrease the number of Indigenous 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 on 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 Indigenous Australians. In his Social Justice Report of 2000, Aboriginal and Torres Strait Islander Social Justice Commissioner Dr William Jonas stated that the past 10 years had seen Indigenous issues become highly publicised and discussed, and the wider community had become more aware of a 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 Indigenous people did suffer at the hands of our custody system. Of particular importance was the documenting of the impact of the forcible removal of Aboriginal and Torres Strait Islander 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.

Forcible removal of children from their families

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 general public until key Indigenous agencies and communities began making efforts for the recognition of needs of the victims and their families and the provision of services. 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 Aboriginal and Torres Strait Islander 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 Indigenous children, and take into account the principle of self-determination when advising any changes.

The final report, entitled *Bringing Them Home*, made some recommendations:

Figure 12.8 A memorial to the Stolen Generations in Sherwood Arboretum

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- Compensation for individuals and families affected, including reunion and counselling services. This included an apology from all organisations involved in this policy.
- Enacting legislation ensuring that Australia abides by the *United Nations Convention on the Prevention and Punishment of the Crime of Genocide*. 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.

Finally, and most importantly, the problems faced by Indigenous Australians in accessing the legal system to achieve justice are very complex, and an improvement in a range of statistics is not necessarily satisfactory. Aboriginal and Torres Strait Islander cultures have social and spiritual needs that are not catered for within the policy of practical reconciliation.

Successful native title cases

Since the Mabo decision of 1992, and enactment of the *Native Title Act 1993* (Cth), there have been a number of successful native title cases. Some successful cases include:

- *Yanner v Eaton* [1999] HCA 53. 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] HCA 56. 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.

There have also been many unsuccessful claims, including:

- *Fejo v Northern Territory* [1998] HCA 58, which confirmed that native title is permanently extinguished if freehold title has been granted
- *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, in which the High Court held that a break in observance of traditional customs and laws meant that native title ceased to exist.

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 Indigenous Australians 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 has since been criticised by Indigenous leaders for the slow rate of policy change, this apology officially recognised inequalities and injustices and began to heal the breach between Indigenous and non-Indigenous Australians.

Figure 12.9 One of three posters produced by Batchelor Press/Batchelor Institute to commemorate the day Australian Prime Minister Kevin Rudd apologised to the Stolen Generations (13 February 2008).

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The Gillard Labor government proposed an 'Act of Recognition' to acknowledge Indigenous peoples in the Constitution, for, as it currently stands, it has no recognition of Aboriginal and Torres Strait Islander peoples. When it was drafted at the end of the 19th century, Indigenous peoples were not consulted; nor were they mentioned in the final document. However, in order for the Constitution to be changed, a national referendum must be held. At this point in time, no date has been set, although the former Liberal Prime Minister, Tony Abbott, suggested holding a referendum in 2017 on the anniversary of the 1967 vote, which successfully removed many discriminatory references.

Case Study

Kevin Rudd's 'sorry speech'

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. 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 via the following link: http://cambridge.edu.au/redirect/?id=6577.

Review 12.7

1 Identify the basis of Denis Walker's appeal to the High Court in 1976.
2 Describe one or two of the 'foundational myths' referred to by Dr William Jonas.
3 Justify the request for the federal government to make an official apology to the Stolen Generations.
4 Carry out some research into Indigenous incarceration and deaths in custody. Have the numbers increased or decreased? What possible reasons might have caused this change?

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Chapter summary

- There has been a range of legal challenges and changes since the 1960s, including constitutional change and land rights challenges by the Yolngu people.
- The Mabo cases of the 1980s and 1990s were the first successful legal challenges in Australia and led to the abolition of *terra nullius*. The *Native Title Act 1993* (Cth) was passed as a result of this High Court decision.
- The Wik decision was also important for Indigenous people, as it led to the concept of co-existence between pastoralists and customary Indigenous practices.
- The *Native Title Amendment Act 1998* (Cth), passed in response to the Mabo and Wik cases, reduces the power and rights of Indigenous Australians.
- Indigenous people in Australia 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 the Indigenous and non-Indigenous population.
- The Anti-Discrimination Board of New South Wales and legal aid programs provide support to Indigenous people.
- ATSIC was established in 1989 and abolished in 2005.
- The *Aboriginal Land Rights Act 1983* (NSW) recognised that land was owned by Indigenous people prior to 1788. Currently, the NSW Aboriginal Land Council aims to administer land now held on behalf of Indigenous people.
- Political power can be exerted in a number of ways, including direct representation in parliaments, peaceful protests and through government agencies or departments such as ATSIC or the NSW Department of Aboriginal Affairs.
- Self-determination is a concept that is difficult to define, but involves recognition of Indigenous customary law and the rights of Indigenous people to practise their traditional way of life, language and culture.
- The different languages and cultures of Indigenous peoples may or may not be recognised by the law. Some court cases, such as *R v Williams*, demonstrate recognition of customary rights.
- The Royal Commission into Aboriginal Deaths in Custody handed down 339 recommendations in response to the unacceptable number of Indigenous deaths in police custody and 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 Indigenous children. The report *Bringing Them Home* called for compensation, and reunion and counselling services for the victims, as well as an apology from the federal government.
- Practical reconciliation has emerged as the federal government policy, and involves shared relationship agreements. It has been widely criticised for lacking sufficient funding and having a shallow understanding of the problems faced by Indigenous Australians in the past, present and future.

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Chapter summary questions

Multiple-choice questions

1 What does the doctrine of *terra nullius* mean?
- **A** land unoccupied
- **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** Indigenous people were granted land rights for the first time.
- **C** It allowed the Constitution to be changed.
- **D** It allowed co-existence on 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** 1979
- **D** 1989

Short-answer questions

1 Describe the significance of the cases *R v Ballard* and *R v Murrell*.
2 Explain the possible causes of the over-representation of Indigenous people in the criminal justice system.
3 Explain what you understand by the term 'co-existence' in relation to Indigenous people and pastoral leases.
4 Describe the major difference between the Wik and Mabo cases.
5 Identify some statistics that highlight the disadvantage of Indigenous Australians.
6 Outline the role of legal aid in improving access to the legal system.
7 Explain two ways in which Indigenous Australian peoples can gain political power.
8 Outline the different outcomes of the Williams and Walker cases.
9 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 its main findings.
10 'Indigenous peoples should be able to determine their own social, political and economic future.' Discuss.
11 Carry out research to see what progress has been made with the 'Act of Recognition'. Write a paragraph about this.

Extended-response question

Evaluate the effectiveness of the legal system in achieving justice for Indigenous Australians 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.

GO

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Additional resources

Issue 1:
Groups or individuals suffering disadvantage

Chapter 13
People who have a mental illness

Chapter objectives

In this chapter, students will:

- explore legal concepts and terminology with respect 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 mental illness.

Key terms/vocabulary

correctional patient
deinstitutionalise
disability
Disability Support Pension
discrimination
domestic environment
forensic patient
guardian
health care system
incarceration
mental illness
plea in mitigation
pro bono

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Relevant law

IMPORTANT LEGISLATION

Australian Charter of Healthcare Rights
Mental Health (Forensic Provisions) Act 1900 (NSW)
Anti-Discrimination Act 1977 (NSW)
Australian Human Rights Commission Act 1986 (Cth)
Disability Discrimination Act 1992 (Cth)
Mental Health Act 2007 (NSW)
Public Health Act 2010 (NSW)
Public Health Regulation 2012 (NSW)

SIGNIFICANT CASES

Coroners Act 2009 Adam Quddus Salter File # 3333/09

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13.1 People with mental illness and the law

Although mental health is not a new issue in Australia, greater awareness has led to a wider acceptance and understanding of it and, as a result, the incidence and impact of **mental illness** in the Australian population has become more recognised. The *Australia's Health 2014* report said that common mental health conditions would be suffered by 45 per cent of Australians aged 16–85 (around 7.3 million people) at some point in their lives. A 2015 study by the University of Western Australia, *The Mental Health of Children and Adolescents*, found that in the previous 12 months, 13.9 per cent of Australians aged 4–17 (approximately 560 000) had experienced a mental disorder. Mental illness is one of the leading causes of **disability** 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 which can limit a person physically, emotionally and psychologically

So where does this sit within the legal framework? In 2012, 38 per cent of prison entrants reported that they had been told by a medical professional that they had a mental health disorder (including drug and alcohol abuse) in their lifetime. This indicates that many people suffering from a mental health issue will experience some legal action and possible **incarceration**. This chapter will examine the responsiveness of the law to people experiencing mental health issues.

Figure 13.1 Society has gained a greater understanding of mental illness over the last 20 years.

incarceration
being detained or imprisoned as punishment for a crime

Changing attitudes to mental health

Society has gained a greater understanding of mental illness over the last 20 years. In the past there was a tendency to lock up or hide away anyone who showed signs of mental illness, but community attitudes and behaviour have changed as a result of greater awareness of different types of mental illnesses and greater access to assistance.

The current stance on 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 when they are asked about it, many people still have a 'not in my backyard' attitude when it comes to the reality in their own community. 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 in helping them cope in society. This will be looked at in more detail later in the chapter.

domestic environment
the household a person lives in

deinstitutionalise
to remove people from long-stay psychiatric hospitals and provide outpatient mental health care for them in their communities (they visit the health professional and then return home, rather than staying in a hospital)

Research 13.1

SANE Australia is a national charity that runs campaigns, education and research aimed at providing a better life for Australians affected by mental illness. SANE has compiled statistics in order to help Australians be more aware and accepting of mental illness. View the factsheets on the SANE website at http://cambridge.edu.au/redirect/?id=6578 and identify the different mental health problems that people can experience. Which illness do you think is the most common?

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Figure 13.2 Callan Park Hospital was a residential treatment facility for the mentally ill from 1878 (when it was known as Callan Park Hospital for the Insane) to 1994.

Definitions of mental illness

Legal definition of mental illness

In New South Wales, the legal definition of mental illness is set out in the *Mental Health Act 2007* (NSW). '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 one. It relies on the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). Under this definition, a person will be diagnosed as mentally ill if their behaviour is not found to be an 'expectable' response to a particular situation or event: it must then be viewed as the expression of a behavioural, psychological or biological dysfunction.

Some people suffer from a long-term mental illness; others experience a one-off mental illness. It is likely that we all know, or will know, someone who falls into one of these categories.

Legal versus medical definition

The legal and medical interpretations of mental illness are clearly not the same, with the medical definition being much broader. When a crime has been committed, the courts must decide whether the defendant (the person accused of the crime) is suffering from a mental illness. The burden of proof lies on the defendant, and the test of mental illness is very rigorous.

This conundrum can be seen in the case described in the news story on page 464, where according to the prosecutor the accused does not meet the legal definition.

Review 13.1

1 Outline the difference between the legal and medical definitions of mental illness.
2 Read the news story by Jessica Kidd on page 464 and write a short summary about it. Identify the ways that the accused meets the medical definition. In what ways might the accused not meet the legal definition?

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News

Man who allegedly punched baby near Sydney's Central train station to have psychiatric assessment

Jessica Kidd

ABC, 19 June 2015

A magistrate has ordered a homeless man who allegedly punched a baby in a pram in central Sydney to be admitted to hospital for a psychiatric assessment.

Nicholas Bolas, 28, is accused of punching the 16-month-old girl as she sat in her pram next to her parents at a cafe near Central Station about 11:30am on Thursday.

Bolas was arrested shortly afterwards and charged with assault occasioning actual bodily harm.

He was remanded in custody and appeared today in Sydney's Central Local Court.

Bolas appeared topless in the dock with corrective services officers telling the court he refused to put on a shirt for the hearing.

Figure 13.3 The assault took place at a café near Central Station

The court heard Bolas was involuntarily admitted to Sydney's St Vincent's hospital for acute psychosis between May 5 and 11.

Bolas was discharged on May 13.

The court also heard an arrest warrant had been issued in Queensland after Bolas left without permission from a mental health unit there.

Bolas' solicitor argued the 28-year-old should be dealt with under the Mental Health Act.

But the prosecutor argued Bolas did not fit the definition of a mentally ill person, as defined in the act.

Magistrate Les Mabbutt asked Bolas whether he wanted to go to hospital to which he replied, "No, not really, I'm fine".

But Bolas could not say when he last took medication for his psychosis.

Magistrate Mabbutt ordered Bolas be admitted to St Vincent's hospital for a psychiatric assessment.

He said Bolas would return to the court system if he was found to be mentally fit.

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13.2 Legal responses

Access to the health system

The Australian Charter of Healthcare Rights

In July 2008, each state and territory's Health Minister, and the Commonwealth Health Minister, agreed to the *Australian Charter of Healthcare Rights*. Although it is not a law and thus is not legally enforceable, the Charter is a first step towards having a legally binding set of rights. Since all levels of Australian government – state, territory and Commonwealth – have agreed to the Charter, this makes it a strong starting point when trying to guarantee rights in the **health care system**.

health care system
the network of facilities and other agencies that organise and meet the health care needs of people

Under *The Australian Charter of Healthcare Rights*, everyone living in Australia has the right to::

- Access health care
- Get health care that is safe and of high quality
- Be shown respect, dignity and consideration when getting health care
- Be informed about health care services, treatment, options and costs in a clear and open way
- Be included in decisions and choices about their health care
- Privacy and confidentiality of their personal information
- Comment on the health care they receive and to have their concerns addressed.

(Summary from *The Mental Health Rights Manual*)

In New South Wales, this 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. People with mental health issues are also covered by the provisions of the *Mental Health Act 2007* (NSW).

Problems

While it may be fair to assume that a person who is educated and of 'sound mind' may have some understanding of their rights in the area of health, we cannot assume that someone who has limited literacy or who is suffering a mental illness will have 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 have definitions in the Act, which may not be the same as elsewhere).

The Act also refers to hospital treatment, both voluntary and involuntary, and to how individuals and their carers are involved in decisions about 'care, treatment and control'.

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. It also allows the authorities to suspend some of the rights of the 'patient'.

So 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 Mental Health Rights Manual*)

Figure 13.4 People with mental illness have the right to health care that is safe and of high quality.

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Access to the law

Criminal proceedings

In New South Wales, the *Mental Health (Forensic Provisions) Act 1990* (NSW) lays down how the courts manage criminal proceedings in which the defendant is suffering from a mental disorder. This Act also covers mental illness as a legal defence in criminal cases, as well as with **forensic** and **correctional patients**. In addition, it sets out the role of the Mental Health Review Tribunal and its powers to review forensic and correctional patients.

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 Mental Health Review Tribunal has not classified as an involuntary patient

Courts

Different courts deal with mental illness in different ways.

The District and Supreme Courts can decide that the accused is 'not guilty due to mental illness' or is 'not fit to plead'. However, if the question has been raised as to whether their 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 them to the Mental Health Review Tribunal. The court may also determine that they become a forensic patient.

The Local Court in New South Wales does not have a process for dealing with a person who is 'not fit to plead' in criminal cases. This means that an accused person cannot plead guilty because of mental illness. However, the magistrate will usually deal with a person with a mental illness by making an order under s 32 or s 33.

A s 32 order allows a magistrate to release the defendant. The magistrate will have been given a treatment plan that a health care professional, or other suitably qualified person, has designed for the defendant. The release will normally require that the defendant agree to attend a specified facility for treatment or go into the care of a particular person (called a **guardian**). Under these conditions, no conviction is recorded. Under s 32, the magistrate can also release the defendant with no attached conditions. If the defendant is found not to be following the s 32 order, they can be brought back before the court to face the original criminal charges.

guardian
a person who is legally responsible for another person who is unable to take care of themselves

A s 33 order only applies if the defendant is found to be mentally ill as defined by the *Mental Health Act 2007* (NSW). Under a s 33 order, the defendant will be 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 have been found not to be mentally ill they may be returned to the Local Court.

If the magistrate does not deal with the defendant under s 32 or s 33, the details of the mental illness can be used as part of a **plea in mitigation**. Health care professionals and community mental health services can provide reports to be included in the plea. Before making a sentencing decision, the magistrate may also ask for a pre-sentence report (usually prepared by the Probation and Parole Service), which can also include information from health care professionals and community mental health services.

plea in mitigation
any type of information that can help the court decide on an appropriate sentence

Legal advice and other representation

People with mental illnesses who face criminal charges have access to the same legal advice as everyone, in theory; however, as noted above, they may not be in a position to get or use legal representation. They may have limited funds, be homeless, or suffer from a mental illness that affects rational thinking, and so may even reject legal advice.

Free or 'budget' legal help is available in the following formats:

- Legal Aid offers advice and some representation in criminal matters. All NSW Local Courts have Legal Aid 'duty solicitors' to help people who have a matter at court that day and do not have their own lawyer.

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- Aboriginal and Torres Strait Islanders can contact the Aboriginal Legal Service (ALS) NSW/ACT for advice and representation. The ALS in New South Wales provides advice and representation in criminal matters, apprehended violence order (AVO) matters (an AVO aims to protect domestic violence victims who are afraid of future violence or threats to their safety) and care and protection matters (advice to people who have a genuine concern for the safety, welfare and wellbeing of a child or young person; for example, family members or carers).
- Some law firms provide legal services at no or low cost to the client, known as ***pro bono***. Information about, and access to, these services can be found through the Public Interest Law Clearing House (PILCH) NSW. The term 'public interest' is interpreted to include issues that particularly affect disadvantaged, vulnerable and marginalised groups, as well as issues of broad public concern.
- Some Community Legal Centres have lawyers who provide free legal advice and representation.

pro bono
Latin term meaning 'for the public good', 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

Community Legal Centres

Community Legal Centres (CLCs) provide free legal advice and representation to the local community, especially the disadvantaged, and people with special needs. The specialist CLCs that are likely to work with legal problems related to mental illness are the:

- Australian Centre for Disability Law
- Intellectual Disability Rights Service (IDRS)
- Mental Health Legal Services Project (at the Public Interest Advocacy Centre [PIAC])
- Homeless Persons' Legal Service (HPLS)
- Aged Care Rights Services (TARS).

Protection of individual 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. For example, **discriminating** against someone because of their mental health is against the law under such legislation as the *Australian Human Rights Discrimination Act 1986* (Cth), 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. The following bodies provide free legal advice:

- Community Legal Centres
- Legal Aid NSW
- Law Access (a free NSW government telephone service that provides legal information, advice and referrals).

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

Centrelink

People with mental illness will 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 be on a **Disability Support Pension**. However, the symptoms of the mental illness may make it difficult for such people to follow the rules for receiving that pension or another benefit.

Disability Support Pension
financial support for people who suffer from mental illness and/or intellectual disability

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

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Figure 13.5 People who have mental illness may be supported by Centrelink and/or other services.

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 will be difficult for someone with an illness, limited funds or education to see them through to a happy conclusion.

NSW Civil & Administrative Tribunal – Guardianship Division

People with mental health issues can be placed in the care of a guardian (as noted earlier). The Guardianship Tribunal of NSW was established in 1989 to ensure fairness in this area, and in 2014 these functions were taken over by the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT).

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 appointment of guardians and financial managers, and consents to medical and dental treatment. The appointed guardian may be a family member or friend, or it could be the NSW Public Guardian, who is a statutory official within the Department of Justice.

Review 13.2

1. Identify the health legislation that covers a person suffering a mental health illness in New South Wales.
2. Describe what happens if a person is placed under 'control'.
3. What law covers a person who has a mental illness and is accused of a crime?
4. Describe the ways that the different levels of courts will deal with accused people who are suffering a mental illness.
5. Explain the difference between a s 32 order and a s 33 order.
6. Outline the problems with access to legal advice that mentally ill people face. Identify the support that is available.
7. Outline the role of Community Legal Centres.
8. What issues may a mental health sufferer face in trying to obtain welfare benefits? How can this be resolved?
9. Describe the role of the NSW Civil & Administrative Tribunal – Guardianship Division.
10. Construct a table showing the different agencies that are available to assist a person with a mental illness. Include information about what each of these agencies does.

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Cambridge University Press

Research 13.2

1 Access the NCAT Guardianship Division website via the following link: http://cambridge.edu.au/redirect/?id=6579. Answer the following questions.
   - **a** What are some of the responsibilities of the Division?
   - **b** Choose one and describe its role in the mental health area.

2 Find the NCAT Guardianship Division decisions on the NSW CaseLaw website via the following link: http://cambridge.edu.au/redirect/?id=6580. Choose one of the decisions and answer the following questions.
   - What was the dispute?
   - Who was involved?
   - What was the decision and what were the reasons for it?
   - Do you think it was a fair decision? Why, or why not?

13.3 Non-legal responses

Funding of mental health issues

Despite all the good intentions around integrating people with mental health issues into society, if there is not adequate funding, the policy will fail. Initiatives since 2011 indicate that there is awareness among policy makers that greater funding is required in the area of mental health. Most of these are long-term plans, so it remains to be seen whether or not they are efficient and effective uses of resources.

Personal Helpers and Mentors services

The 2011–12 federal budget allocated $154 million over the five years from 2011–12 to 2015–16 for new and/or expanded Personal Helpers and Mentors services (PHaMs) to assist around 3400 people with severe mental illness. There were 425 new personal helpers and mentors engaged, and $50 million of the funding was allocated to assist up to 1200 people with a mental illness who receive government income support payments (e.g. Disability Support Pension) but are looking to gain employment. With PHaMs assistance, these people can overcome any personal, non-vocational issues that are preventing them from participating in work or training. While this funding was a step forward, recent budgets have only maintained this funding and not increased it.

The Australian Government Department of Social Services provides the following explanation of the PHaMs program:

> PHaMs provides increased opportunities for recovery for people aged 16 years and over whose lives are severely affected by mental illness, by helping them to overcome social isolation and increase their connections to the community. Participants are supported through a recovery-focused and strengths-based approach that recognises recovery as a personal journey driven by the participant.
>
> PHaMs workers provide practical assistance to people with severe mental illness to help them achieve their personal goals, develop better relationships with family and friends, and manage their everyday tasks. One-to-one and ongoing support ensures the individual needs of the program participants can be addressed. Participants are assisted to access services and participate economically and socially in the community, increasing their opportunities for recovery.

Research funding

In October 2012, the 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, to look at mental illness among young people.

The minister said, 'We need to improve our knowledge and understanding of mental health issues through research to ensure Australians are able to live healthier and happier lives. … This research will support the implementation of the government's $2.2 billion mental health reform plan by building the evidence base for a stronger and better mental health system. … We know that 1 in 4 young people will experience a mental health issue this year, making it the single biggest issue facing young Australians.'

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The National Disability Insurance Scheme

In May 2013, the Australian Prime Minister, Julia Gillard, announced that she had gained the support of all states and territories for the introduction of the National Disability Insurance Scheme (NDIS), funded by an increase in the Medicare levy from 1.5 to 2 per cent from 1 July 2014.

This nationwide scheme aims to provide lifetime support to people affected by disability, with support based on a person's individual's needs. As well as taking a lifetime approach to care, the NDIS also provides for early intervention, particularly when it can be identified that support will make a substantial difference to a person's life. The NDIS aims at providing greater choice about care for people with disability, their families and carers.

For more information about this scheme, go to the National Disability Insurance Scheme website.

Non-government organisations

In Australia, much of the raising of mental health care and awareness lies in the hands of non-government charitable organisations. Some receive government funding. These organisations include:

- SANE
- beyondblue
- Black Dog Institute.

Figure 13.6 The National Disability Insurance Scheme has the potential to give many people with disabilities increased independence and support.

Review 13.3

1. Outline the role of PhaMs.
2. Justify the importance of funding for research into anxiety, eating disorders, depression and other mental health conditions.

Research 13.3

View the websites of a non-government organisation that deals with mental health care and awareness.

1. What type/s of mental illness does it deal with?
2. List the major services and activities it offers.

13.4 Effectiveness of responses

As we have seen in this chapter, people with a mental illness are often distanced from their families, do not make it to medical appointments and have problems when dealing with bureaucracy. 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.

The legal system has in many ways not provided justice for people with mental illnesses. This can be seen in the response of police to people who exhibit signs of mental illness and in the number of people suffering mental illness who are incarcerated.

Police

Police officers across Australia continually have to deal with people behaving in a violent or threatening manner who are showing symptoms of mental ill-health. When the policy of deinstitutionalising people with mental illness was brought in during the late 1970s, police in some states were not given proper training on how to deal with mentally ill people when making inquiries or arrests. The media drew the community's attention to this problem by

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Figure 13.7 Police need to be trained in dealing with mental health issues.

reporting incidents between the police and offenders who were suffering mental illnesses.

An example of this was the fatal shooting of Roni Levi in 1997. Mr Levi was seen on Bondi Beach, behaving in a threatening manner while carrying a knife, and the police were called. They surrounded Mr Levi and shot him four times, killing him.

This type of incident was not occurring just in New South Wales – in Victoria, seven people with a mental illness were shot dead between 1990 and 1995 (Jude McCulloch, 'Policing the Mentally Ill' *Alternative Law Journal*, 25(5), October 2000). Police there are now trained to negotiate with people who display signs of mental illness.

The NSW Police Force has tried to be more proactive in dealing with mental health issues. It has established the Mental Health Intervention Team (MHIT), with the goal of training 10 per cent of all operational police by the end of 2015. The aims of MHIT are:

- Reducing the risk of injury to police and mental health consumers when dealing with mental health-related incidents;
- Improving awareness amongst front line police of the risks involved in the interaction between police and mental health consumers;
- Improved collaboration with other government and nongovernment agencies in the response to, and management of, mental health crisis incidents, and;
- Reducing the time taken by police in the handover of mental health consumers into the health care system.

Case Study

The deaths of mentally disturbed man Adam Salter (in 2009) and Brazilian student Roberto Laudisio Curti (in 2012) suggest that training still has a long way to go.

Adam Salter

In November 2009, Sydney police received a call that 36-year-old Adam Salter was stabbing himself with a knife. A member of the response team shot him in the back and killed him. She 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 she had intended to user her taser, but had fired the gun by mistake.

Roberto Laudisio Curti

In March 2012, Roberto Curti died after seven Sydney police officers chased him down Pitt Street, tasered him several times, sprayed him with almost three cans of OC spray, handcuffed him and restrained him on the ground.

In a coronial inquest into this death, NSW Coroner Mary Jerram condemned the officers for the chaotic and violent struggle, saying they showed little or no understanding of how this could supposedly be averting a particular threat or crime. She recommended that the police should review their procedures to be sure that if police are called on 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.

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Mental illness and prisoners

Why are there so many people with a mental illness in prison? An Australian Institute of Health and Welfare Study in 2010 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 allow people with a mental illness to maintain a healthy lifestyle 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 than many others to come under police surveillance. Unemployment and poverty only increase these problems.

When such people commit crimes, the magistrate or judge usually has very limited options. Prison may be the only option, as there is no alternative system to address the needs of these people.

As stated above, the public mental health system has limited resources, and can be unwilling to take on the complicated issues of a mentally ill person arrested for criminal behaviour. So even when a judge recommends that the person with a mental illness be treated by a health service, they may be denied the treatment, and very soon appear in court again.

Inadequate government funding of community-based health services, and a lack of special facilities for people with mental illness within the justice system, also mean that many people with mental illness end up imprisoned.

Figure 13.8 Many people with a mental illness end up imprisoned.

The report 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 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 medication.

NDIS

The impacts, positive or negative, of the NDIS cannot be judged yet. Will it make a substantial difference to the life of someone with a mental health issue? It is too early to judge.

The news story on page 473, from May 2015, looks at progress so far.

Conclusion

The legal system does have policies and procedures in place to try to support and provide justice to people suffering from mental health issues. However, both society and the law will continue to have problems providing adequate support due to the very nature of mental illness: some sufferers will not be able to (or want to) access these mechanisms. Lack of funding, and lack of understanding by those who write, maintain and enforce the law, makes things worse.

Review 13.4

1. Describe the measures that the NSW Police Force has taken in regard to dealing with people suffering from mental illnesses.
2. Outline the coronial inquest findings into the shootings of Adam Salter and Roberto Curti.
3. Explain why people with mental health issues may end up in prison.
4. It is difficult to find up-to-date information on mental health issues in prison. Provide two or three reasons why you think that this may be.
5. Read the news article about the NDIS on page 473, and list some of the areas of concern.

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NDIS citizens' jury finds scheme successful so far, but with work to do

Norman Hermant

ABC Online, updated 16 May 2015

The National Disability Insurance Scheme (NDIS) citizens' jury has found it is already giving people living with disabilities more independence and an improved quality of life, but there is room for improvement in its roll out.

Last February, a citizens' jury spent four days examining the NDIS and 12 randomly selected people spent three days hearing from scheme participants in trial sites.

The goal was to figure out if the scheme, which will eventually cost $22 billion a year, had been working.

The jury found overall the NDIS was already a success in the trial sites.

Simone Stevens, from Geelong, travelled to Sydney to appear as a witness as the NDIS went on trial.

Ms Stevens lives with cerebral palsy and has a slight intellectual impairment.

She said she was pleased with the verdict.

"They've captured a lot of people's perspective. You could just tell when you walked in they wanted to hear about how you found it [the NDIS]," Ms Stevens said.

Kristen Laurent, from Canberra, was on the jury. The only requirement was that jurors had nothing to do with the NDIS.

"I filled in a basic form, never really expecting to hear back again, but then I was randomly selected," she said.

Ms Laurent said the jury found the NDIS was doing far more things right than wrong.

"I think the positive that really stood out from hearing from the participants was those people who felt for the first time their voice had really been heard."

Concerns services being withdrawn too quickly

But the jury found there was work to do, especially when it came to planners who met with NDIS participants to set up care plans.

Ms Stevens agreed with issues raised about their experience levels by the jury.

"They're not very good at communicating with people with intellectual disabilities," Ms Stevens said.

"[It's] really quite difficult, because people with intellectual disability or mental illness, they need to be heard as well."

President of People With Disability Australia, the group that coordinated the NDIS jury, Craig Wallace said he was satisfied with the verdict.

"I would certainly say it's a strong pass, with areas for improvement," he said.

Mr Wallace said attention should be paid to another jury criticism: that some services for people with disabilities were being withdrawn too quickly, because the NDIS was rolling out so fast.

"If there's one key failing in this, I think the speed of the roll out means we're sometimes compromising," he said.

"The good news is we have overwhelmingly more support, reaching more people, that desperately need at this time."

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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 mentally ill people in New South Wales.
- Despite this, many people with a mental illness will find themselves facing court, being placed in care or sent to prison.
- A lack of funding has exacerbated this problem.
- The National Disability Insurance Scheme aims to give greater choice about care for people with a disability, their families and carers.
- The NSW Police Force has policies and training in place to increase awareness of police dealing with mentally ill people; however, recent incidents and coronial inquest criticisms suggest that more is needed in this area.

Chapter summary questions

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?
- **A** the main legislation that covers health care in New South Wales
- **B** a United Nations Charter accepted by Australia
- **C** the main legislation that covers health care for the mentally ill in Australia
- **D** a charter that sets out the rights to health care for all people living in Australia

3 Which of the following 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 some representation
- **B** the local court centre where the magistrates provides advice
- **C** the law book section of the local library
- **D** a legal service provided by Legal Aid officers

5 What is the role of the Guardianship Tribunal?
- **A** to protect all minors under 18 years of age
- **B** to enforce the rights of minors to pocket money
- **C** to represent mentally ill people in court
- **D** to appoint guardians to people 16 years and older who cannot make rational decisions about their own lives

Short-answer questions

1 Outline the differences between the legal and medical definition of 'mental illness'. Explain why this is the case.

2 Explain the purpose of the Australian Charter of Healthcare Rights and how it benefits people with mental illness and their families.

3 How are the individual rights of people with mental illness protected? List any acts or organisations that help ensure that people with mental illness have a good life.

4 In a paragraph, outline the role of the Personal Helpers and Mentors services (PHaMs).

5 In your own words, explore why there is a connection between people with mental illness and prisons.

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Extended-response questions

1 Why has justice for people suffering a mental illness been difficult to achieve?

2 To what extent is the law effective in achieving just outcomes for those suffering a mental illness?

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

GO

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Additional resources

Chapter 14
The Bali Nine

14.2 Legal responses [additional content]

Imprisonment and rehabilitation [additional content]

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 that the Bali Nine were arrested, Corby had spent six months in Kerobokan Prison where she 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 given a 20-year sentence. Also, 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.

With a population of nearly 800 people, Kerobokan Prison was quite overcrowded in 2005, but compared to other prisons in neighbouring countries like Thailand or the Philippines, it was not too bad. However, it has received bad press with the publication of books like Kathryn Bonella's *Hotel Kerobokan*. About half of the population of the prison was there for drug crimes.

Figure 14.5a Kerobokan Prison in Bali

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 is recruited from the national police force.
- Seventy-two hours before the execution, inmates are moved to isolation cells.
- Family members and religious counsellors are permitted to visit up to a few hours prior to the execution.
- Prisoners have their hands and feet tied, but may choose whether they wish to stand, kneel or sit before the firing squad.
- There are 12 marksmen aiming rifles at each prisoner's heart, but only three of them have live ammunition in their rifles.
- Medical personnel are present, and will pronounce the prisoner dead after execution.
- Family members wait outside the prison, and the bodies are cleaned and handed over to them after the execution.

In the early hours 29 April 2015, Andrew Chan, 31, and Myuran Sukumaran, 34, were on the island prison of Nusakambangan, along with six other

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Figure 14.7a Nusakambangan Island in Central Java

death row prisoners. They were all led outside and made ready for the execution. All eight prisoners took the decision not to 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 their hearts. After a volley of shots all eight men were dead.

14.4 Effectiveness of responses [additional content]

Australian–Indonesian cooperation [additional content]

Arguments for and against sharing information without conditions

A briefing paper 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.

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.

Similarly, although Lorraine Finlay's 2011 article, 'Exporting the Death Penalty?' questioned why after the arrest the AFP sent information without requesting an exemption from the death penalty, she ultimately argued that the AFP cannot 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.

It may have been lawful, but others suggest that it was not moral and it did not fit in with Australia's obligations under international law.

However, others disagree wholeheartedly and believe both that the AFP could have done better and that Australian can and should put conditions on the information shared with our neighbouring countries. Ronli Sifris' 2007 article 'Balancing Abolitionism and Cooperation on the World's Scale' 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

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abolition of the death penalty. Sifris goes even further, stating that:

> 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.

Sifris also says:

> 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.

Legal Links

View the full text of the articles mentioned above at these websites:

- 'Partners against crime: A Short History of the AFP–POLRI relationship', *Australian Strategic Policy Institute (ASPI)*, March 2014, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6581
- Lorraine Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia', 2011, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6582
- Sifris, Ronli, 'Balancing Abolitionism and Cooperation on the World's Scale: The Case of the Bali Nine' [2007] FedLawRw 3; (2007) 35(1) Federal Law Review 81, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6583

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Additional resources

Issue 2:

Events that highlight legal issues

Chapter 16

The Port Arthur massacre

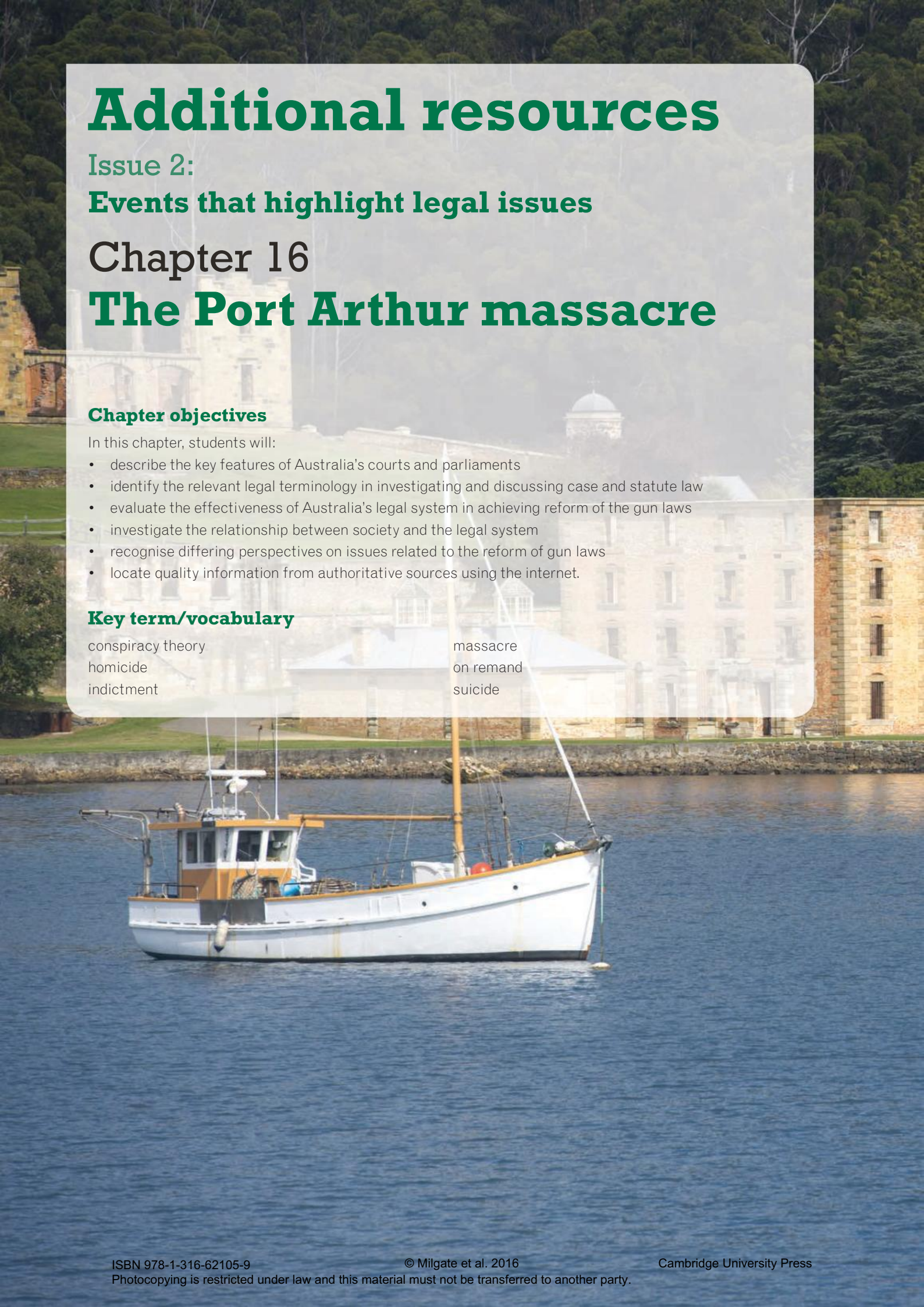
Chapter objectives

In this chapter, students 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 the gun laws
- investigate the relationship between society and the legal system
- recognise differing perspectives on issues related to the reform of gun laws
- locate quality information from authoritative sources using the internet.

Key term/vocabulary

conspiracy theory
homicide
indictment
massacre
on remand
suicide



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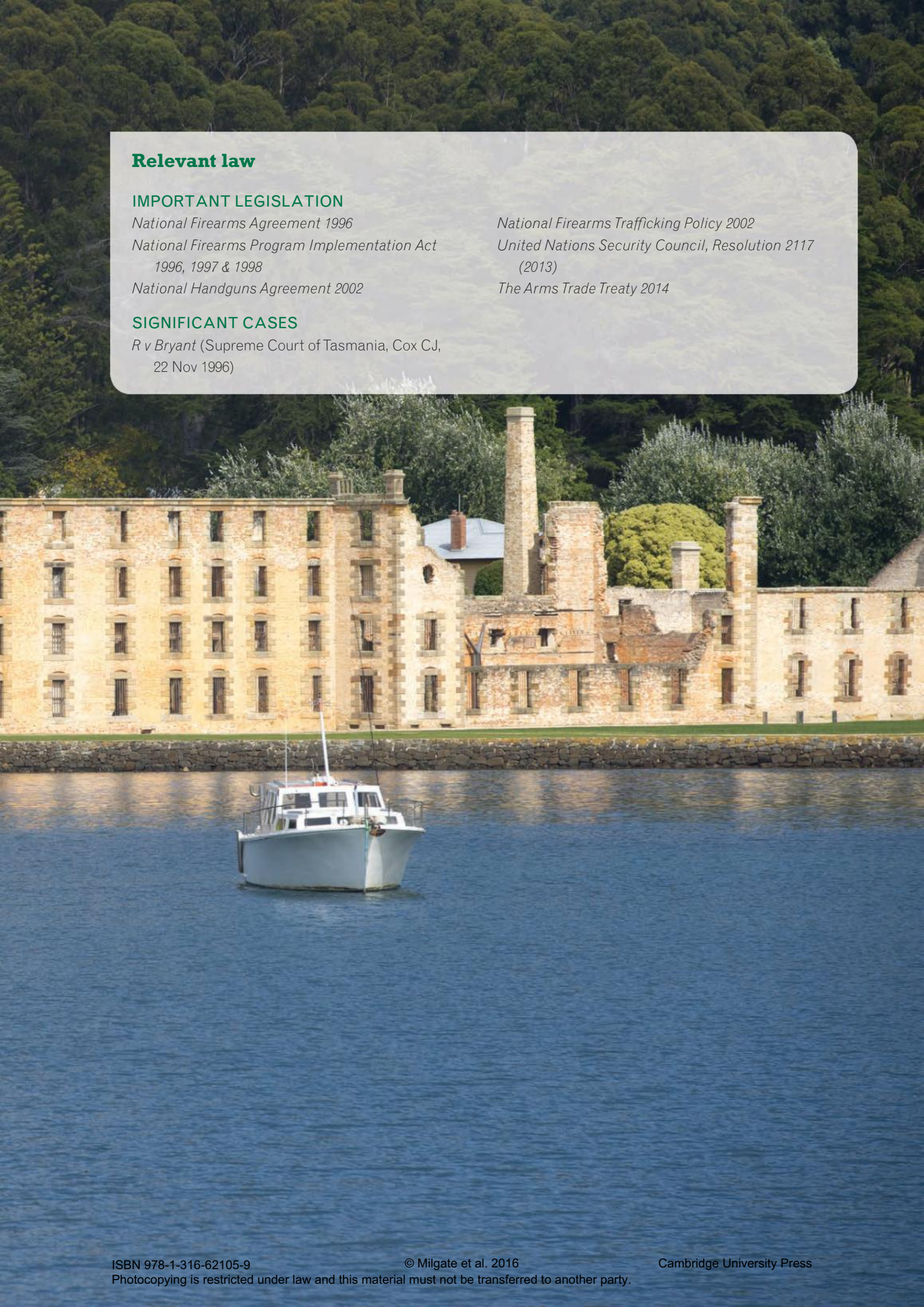

Relevant law

IMPORTANT LEGISLATION

National Firearms Agreement 1996
National Firearms Program Implementation Act 1996, 1997 & 1998
National Handguns Agreement 2002
National Firearms Trafficking Policy 2002
United Nations Security Council, Resolution 2117 (2013)
The Arms Trade Treaty 2014

SIGNIFICANT CASES

R v Bryant (Supreme Court of Tasmania, Cox CJ, 22 Nov 1996)

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16.1 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.

The horrific **massacre** at Port Arthur sent shock waves around the nation. Mass murder on such a scale was something Australians had never experienced before. The Port Arthur massacre also set in motion a chain of events that eventually led to a complete reform of Australia's gun laws. This reform revealed a significant division in Australian society between those for and against gun control. Not everyone agreed with the reforms, or saw gun control as a solution to the incidence of violence. Other critics even suggested that a conspiracy was in play and that the massacre had been orchestrated as a catalyst for law reform. The swift response of the Australian legal system to the problem of automatic weapons engendered enormous international interest, winning both praise and condemnation. In the United States, anti-gun coalitions took heart and redoubled their efforts towards reform of gun laws, while leaders in the gun lobby thundered out warnings that the US Government might try to do the same as Australia.

Figure 16.1 The crime scene at the Broad Arrow Café, Port Arthur

massacre
the intentional killing of a large number of people in society

The effectiveness of gun law reform in Australia in the wake of the Port Arthur massacre stands in stark contrast to the failure thus far in the United States. In his visit to the United States, Pope Francis made a speech to the Joint Session of Congress, on 24 September 2015, in which he identified a number of concerns about the United States and the world. On the issue of guns, the Pope criticised them as 'deadly weapons' and said that we all had a duty to stop the arms trade. He asked the congress members sitting before him: 'Why are deadly weapons being sold to those who plan to inflict untold suffering on individuals and society?' The answer he said was greed. It was for money, the Pope said, and this money was 'drenched in blood, often innocent blood'. The Pope in this speech echoed the hopes of many in the United States who have been crying out for commonsense gun reform legislation. Only time will tell whether the future leaders of the United States can end the gun violence that plagues their country.

In the international context, Australia's experience in dealing with guns contrasts with the failure to achieve significant progress in controlling the trade in small arms. Most of the small arms available to every armed group, militia or criminal around the world are used to maim, injure or kill innocent civilians. Recently, on the international scene, some progress was made with the Arms Trade Treaty that entered into force in 2014. Australia played an active role in this adoption of the treaty, and also, while a temporary member of the UN Security Council, led negotiations on the first ever resolution on small arms (UNSC 2117). However, small arms and light weapons still 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 threat of guns to civilian populations, and Australia showed in its time in the Security Council (2013–14) that it was willing to play a global role on this issue.

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Figure 16.2 Pope Francis meeting with US President Barak Obama in March 2014 in the Vatican. The Pope was later invited to the United States where he addressed a Joint Session of Congress on 24 September 2015. Pope Francis has been an outspoken critic of guns and the global arms trade.

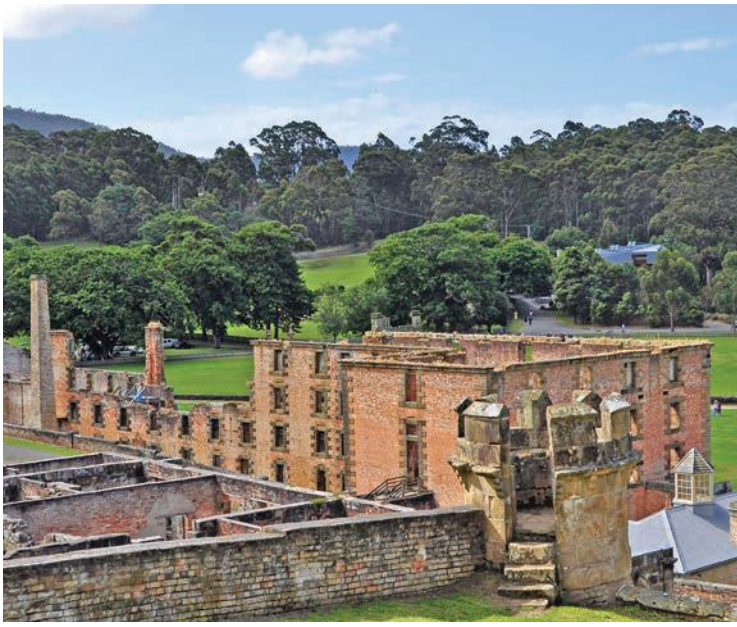

Figure 16.3 The Penitentiary at Port Arthur, near where Bryant went on his killing rampage

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 settlements in the early 1800s. As was common, on the day in question, Port Arthur was overflowing with tourists.

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 p.m. 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 systematically 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 were injured.

Bryant continued into the car park behind the café. People could hear 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, then got into his car and drove past the tollbooth and onto the main road. Before exiting, he had killed seven more people, including Nanette Mikac and her two young daughters, Madeline and Alannah, aged three and six. Bryant chased Alannah behind a tree in order to kill her. Bryant then drove up the main road to a service station located at a general store. He used the BMW he was driving – having 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 went in chase of Bryant a few minutes later.

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 p.m. police officers arrived, but were forced to take shelter for a few hours in a ditch while Bryant fired on them with an automatic weapon. At 9 p.m. a

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Figure 16.4 An early memorial to pay tribute to the victims who died in the Broad Arrow Café during the Port Arthur massacre.

Special Operations police team arrived from Hobart. An 18-hour stand off 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. He was arrested and taken to hospital under police guard.

Legal Links

An ABC *7.30 Report* program in which witnesses and victims recount their stories of Martin Bryant's killing spree can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6584.

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 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 of attempted murder, four of aggravated assault, eight of wounding, three of causing grievous bodily harm, one of arson and one 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. 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 continue today, as does curiosity about his life in prison.

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. Avery's behaviour and the magazine's publication of the material were condemned by the legal community and many in the media as being both professionally questionable and inconsiderate of the feelings of victims and their families. In 2009, journalists Robert Wainwright and Paola Totaro published *Born or Bred? Martin Bryant*

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– *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 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.

conspiracy theory
speculation that there is a cover-up of the information surrounding a significant event by government or other authorities

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. Their merit may be at least partly determined by noting which organisations hold them. For instance, the Holocaust-denying, Australian-based Adelaide Institute continues to peddle the conspiracy line.

Review 16.1

1. From the information above, create a timeline of events on the day of the Port Arthur massacre until Bryant's arrest.
2. Do you think people will ever know why Martin Bryant did what he did? Why are a murderer's motives a continuing source of fascination?

Research 16.1

The articles written on the 10th anniversary of the shootings – 'Bryant is an Overweight Zombie', which can be accessed via the link http://cambridge.edu.au/redirect/?id=6585 and 'Inside the Mind of a Mass Murderer', which can be accessed via the link http://cambridge.edu.au/redirect/?id=6586 – attempt to provide some insight into who Martin Bryant is and explain his motivations. Read the articles and answer the questions below.

1. How does Bryant's mother describe her son's imprisonment at Risdon Prison?
2. Do the comments made by the psychologist and defence lawyer shed any light on what motivated Bryant?
3. Is there any way to assess from the information in these articles whether Bryant feels any guilt for his actions?
4. Why was Bryant's decision to enter a guilty plea considered a controversial one?
5. Does speculation about a murderer's motivations serve any useful purpose? Discuss.

16.2 Legal responses

Indictment and sentencing

On 5 July 1996, a total of 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 an unprecedented 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

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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 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*, Supreme Court of Tasmania, Cox CJ, 22 November 1996**

Comments on passing sentence

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 thirty-five persons;
- of twenty attempts to murder others;
- of the infliction of grievous bodily harm on yet three more; and
- of the infliction of wounds upon a further eight persons.

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;
- and for 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 AR15 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 twelve 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 1 minute after firing the first shot. In that period of 90 seconds, 29 rounds were fired, causing the deaths

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In Court

of twenty people and injuries, many of them severe, to another twelve 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 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 AR15 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. In the vicinity of 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.

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 completely 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 thirty-three 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 world-wide. His selection of victims was indiscriminate. He killed and injured men, women and even

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In Court

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 it to say that there were many, many people who were severely affected by their distressing experiences 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

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In Court

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.

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 thirty-five 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.

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In Court

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.

Review 16.2

Read the sentencing report in *R v Bryant* and write a report that addresses the following questions.

1. What comments did the judge make 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. What comment did the judge make about remorse on the part of Bryant?
4. What comment did the judge make about Bryant having pleaded guilty? Did this affect Bryant's sentence?
5. What comments did the judge make in weighing up Bryant's crime with the mitigating factors such as his upbringing, social isolation, intellectual capacity and mental state?
6. Summarise the final sentence.

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 to be 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 and many of the inmates had made death threats against him.

on remand
(of an accused) in custody pending and/or during his or her 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 the slain Port Arthur victims were outraged that Bryant would be serving his sentence in such a facility. First, they objected because they felt they should have been told of the move prior to its occurrence.

Second, 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.

Their biggest objection, however, was the idea that Bryant would be free 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,

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Figure 16.5 Martin Bryant in Risdon Prison, September 2015

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. 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 16.3

1. Identify the arguments for and against Bryant serving part of his sentence in a mental health facility rather than a prison. What facts does the answer depend on? Discuss in small groups.
2. What issues were 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, what are the aims of the criminal sentence imposed? Justify your answer.

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 fairly 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 a total of 32 deaths. Each of these incidents was premeditated and all were carried out 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. This action was opposed by the Sporting Shooters Association of Australia (SSAA), an organisation formed to promote sports such as target shooting and hunting and which also represents the interests of gun owners. The Association organised a protest march by 27 000 of its members through the streets of Melbourne.

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Figure 16.6 In the 1980s, many of Australia's four million guns were owned primarily for hunting and by farmers, who used them to kill pests.

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, a gunman shot six people in a shopping mall at Strathfield, NSW, with an ex-military semi-automatic rifle that he had easily obtained. Widespread outrage and debate followed. In 1992, the New South Wales Government introduced tougher gun laws. Many pro-gun groups bitterly opposed these laws, particularly since prior to the Strathfield massacre the NSW Liberal government had been ready to introduce softer laws. The tougher gun laws led to the formation of the Shooters' Party in NSW. 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.

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, Prime Minister John Howard initiated a discussion on tougher gun law reforms. He was backed by Deputy Prime Minister Tim Fisher.

On 10 May 1996, a special meeting of the Australasian Police Ministers Council agreed to some resolutions that evolved into the National Firearms Agreement 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. 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.

This was followed up by the National Firearms Program Implementation Acts of 1996, 1997 and 1998.

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, a buy-back scheme and amnesty were

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Figure 16.7 Guns handed in during the buy-back scheme in 1997 were destroyed at scrap-metal yards.

introduced by the Howard government in the aftermath of the Port Arthur massacre. 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.

Legal Links

The Parliamentary guide that outlines the federal government's legal responses to firearms since 1996 and up to 2007 can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6587.

Review 16.4

1. Make a list of Australian gun law reforms from 1980 to 1987.
2. Investigate the gun massacres that occurred in Australia in 1987. How did governments respond to these?
3. Outline the gun law reforms that have occurred from 1997 to 2007.
4. Evaluate the effectiveness of the government's response to public concern about gun use both before and after 1996.

16.3 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, were particularly devastating. Australians were reminded of the fragile nature of human life and the destructive potential of guns.

Walter Mikac lost his wife and daughters. 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. HRH Crown Princess 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.

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Figure 16.8 This simple commemorative plaque was installed in 2000 to remember those who were killed in 1996. Nowhere on any signage in Port Arthur is there any mention of the name of the killer and no locals in the area mention his name. One way of dealing with their grief has been to refuse to give any publicity to the killer.

16.4 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. It is a statutory body that, in partnership with other law enforcement agencies, 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.

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. In the 1980s the deaths per year from gun-related causes averaged 700. By 1999 they were around 300, and from 2004 to 2012 they were below 250, with 2011 having only 187.

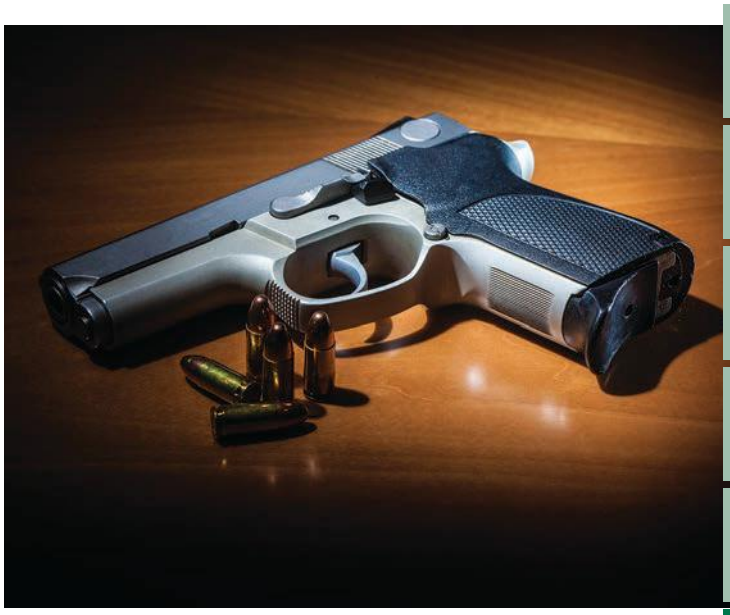

Figure 16.9 Handguns are the new emerging threat in crime.

suicide
the intentional taking of one's own life

homicide
the act of killing another human being

Legal Links

A paper written in 2000, titled 'Australia's New Gun Control Philosophy: Public Health is Paramount', by Rebecca Peters and Roland Browne in *The Drawing Board: An Australian Review of Public Affairs*, argued that Australia took a public health approach to gun law reform instead of a criminal justice approach. The authors argued that this led to a more rational philosophy of gun control, which is more effective in reducing the number of firearm-related deaths. Access a copy of the paper via the following link: http://cambridge.edu.au/redirect/?id=6588.

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Research 16.2

Read the abstract for 'Firearm related deaths in Australia, 1991–2001' via the following link: http://cambridge.edu.au/redirect/?id=6589.

Answer the following questions:

1. Identify the percentage decrease in firearm-related deaths in the period 1991–2001.
2. What proportion of deaths involved males?
3. What age group has the highest risk?
4. What was the most common weapon used?
5. What other weapon has seen increased use?
6. Which accounted for the most deaths: homicide, accident or suicide? What are the implications of this finding for health professionals?

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. In 2015, an article called '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 a million guns were handed in after 1996, the national gun inventory has crept back to 1996 level 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.

Comparison: firearms in the United States

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. In fact, various websites have been set up to track gun crime and mass shooting in the United States. One such website, 'Mass Shooting Tracker', was mentioned in an article after one of the many mass shootings in 2015. Websites such as these reveal startling statistics on the extent and the cost of gun crime in the United States.

Research 16.3

Despite the Port Arthur massacre being one of the world's worst single non-wartime shootings, the United States can be said to have the most frequent occurrence of shootings.

Search the internet for the following two articles from Australian newspapers and then answer the questions below:

- 'Death tolls from world's worst shootings', *The Daily Telegraph*, 3 June 2010.
- 'Oregon Shooting: 274 days and 294 mass shootings in the US this year', *Sydney Morning Herald,* 2 October 2015.

1. Draw up a table based on the first article showing country, gunman, location, weapons, killed and wounded. Add in at least three more recent events (you can use the 'Mass Shooting Tracker' referenced in the second article, or do a general internet search).
2. How does Port Arthur compare with other similar massacres?
3. Identify similarities in location, motivation of the killer and the availability of weapons.

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Legal Links

For further information about the issue of guns in the United States, view the website of the Brady Campaign to Prevent Gun Violence (an NGO).

You can also read the following news articles on gun deaths in the United States:

- Nicholas Kristof, 'Lessons from the Virginia Shooting', *New York Times*, 26 August 2015, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6592
- Inga Ting, 'Gun violence killed 428 times more Americans than terrorism over the past decade,' *Sydney Morning Herald*, 3 October 2015, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6593
- Michael Pascoe, 'Obama was wrong: Australia is not like the US,' *Sydney Morning Herald*, 3 October 2015, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6594.

Research 16.4

1. View the 2002 documentary *Bowling for Columbine*. What are the main points it makes about guns in the United States?
2. Investigate the Second Amendment to the Constitution of the United States. Why do you think gun law reform might be more difficult to achieve in the US in light of this clause?
3. View the website of the National Rifle Association (NRA). See what information you can find about how the NRA can continue to oppose gun law reform even in the face of a massacre like the one at Columbine High school.
4. In January 2016, President Obama announced some new measures to combat gun violence in the United States. Outline the latest developments in gun law reform in the United States.
5. Discuss: Why has the United States been unable to tighten gun control laws? Are there any signs that effective law reform might occur in the United States in the not-too-distant future?

Conclusion

It can be argued that Australia's legal system has been effective in dealing with the issue of deaths from firearms since tough measures were introduced in the aftermath of the Port Arthur massacre in 1996. The dangers posed by both legal and illegal guns, however, are something that we can never become complacent about. Tragic accidents and suicides will continue to occur and there will still be homicides committed with firearms. Since 2002, the proliferation of handguns, both legal and illegal, has gained the attention of our nation's law-makers. Also, in 2015 there was controversy over plans to review the National Firearms Agreement that came about as a result of the Port Arthur Massacre. It seems that pro-gun lobby groups continue to wage a campaign to weaken Australia's post-1996 gun laws. Given the right circumstances, the gun laws debate could easily ignite again.

The 20th anniversary of the Port Arthur Massacre was on 28 April 2016. After 20 years, it was time to

Figure 16.10 The Pool of Reflection behind the former Broad Arrow Café

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take stock and to consider what could have been if the government of the day had not taken the lead in reforming Australia's gun laws. This study has been an example of how law reform cannot only change society for the better but also prevent it from descending into a spiralling cycle of violence with no end in sight, as is the case with the United States. Twenty years on it is clear that Australia's gun reform laws have worked. Perhaps it is time that other world leaders looked to the Australian example for inspiration and ideas for tackling gun deaths in their own countries.

Review 16.5

1. What event prompted the formation of the Australian Crime Commission (now known as the Australian Criminal Intelligence Commission)? Explain the role of the Commission.
2. How does the level of gun ownership in Australia now compare to that after the buy-back scheme?
3. Name the main lobby group in the United States that is blocking gun law reform.

Figure 16.11 Flowers laid at the base of the memorial cross for the victims of the Port Arthur massacre.

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Chapter summary

- The Port Arthur massacre on 28 April 1996 was the worst gun massacre in Australian history.
- The Port Arthur massacre set in motion a chain of events that led to gun reform in Australia at both state and federal levels.
- The Australian Government – when compared to the governments of other countries, especially the United States – can be said to have acted quickly and decisively to enact gun law reform.
- Media coverage of the Port Arthur massacre was concerned with Martin Bryant's motives and trying to understand how and why he 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 the states and territories. The Victorian Government introduced tougher laws after the Hoddle Street and Queen Street massacres. These reforms were opposed by the Sporting Shooters Association of Australia.
- After the Port Arthur massacre, a National Agreement on Gun Laws was signed by state and federal governments at the end of 1997.
- From 1998, Australia has experienced a decrease in gun deaths. Despite this decrease, it is difficult to effectively measure the success of the gun buy-back scheme.

Chapter summary questions

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:
- **A** Australian political leaders have refused to speak publicly about the massacre.
- **B** Martin Bryant was denied natural justice.
- **C** Pro-gun groups here 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

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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

Short-answer questions

1 Summarise the events on the day of 28 April 1996 in your own words.
2 How was Martin Bryant brought to justice?
3 Suggest why Martin Bryant has been the subject of controversy since his imprisonment.
4 Suggest why the Port Arthur massacre has generated claims of a conspiracy.
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 What was Tasmania's attitude to gun law reform before 1996?
8 What was the National Agreement on Guns? How did it propose to toughen up the gun laws in Australia?

Extended-response questions

1 Describe the massacre at Port Arthur in 1996. Outline the responses of the police, the courts and the political leaders.
2 Discuss the controversies surrounding Martin Bryant's sentencing and his imprisonment.
3 Evaluate the effectiveness of the Australian legal system in dealing with the problem of gun-related deaths.
4 Explain the failure of political leaders in the United States to use law reform to reduce gun deaths.
5 Explain the difficulty of achieving reform on laws related to small arms on the global level.

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

GO

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Additional resources

Issue 3:
Individuals or groups in conflict with the state

Chapter 19
Mohamed Haneef

Chapter objectives

In this chapter, students will:

- explore legal concepts and terminology with respect to Dr Mohamed Haneef and the law
- investigate the legal system's ability to address issues relating to Dr Haneef
- explore the differences in the laws in relation to Dr Haneef
- investigate the role of the law in addressing and responding to change in relation to terrorist threats
- describe the legal and non-legal responses to Dr Haneef's case
- evaluate the effectiveness of legal and non-legal responses in achieving justice for Dr Haneef.

Key terms/vocabulary

Australian Federal Police (AFP)
Commonwealth Director of Public Prosecutions (CDPP)
guilt by association
ministerial discretion
pro bono
reckless
separation of powers
surety
terrorism

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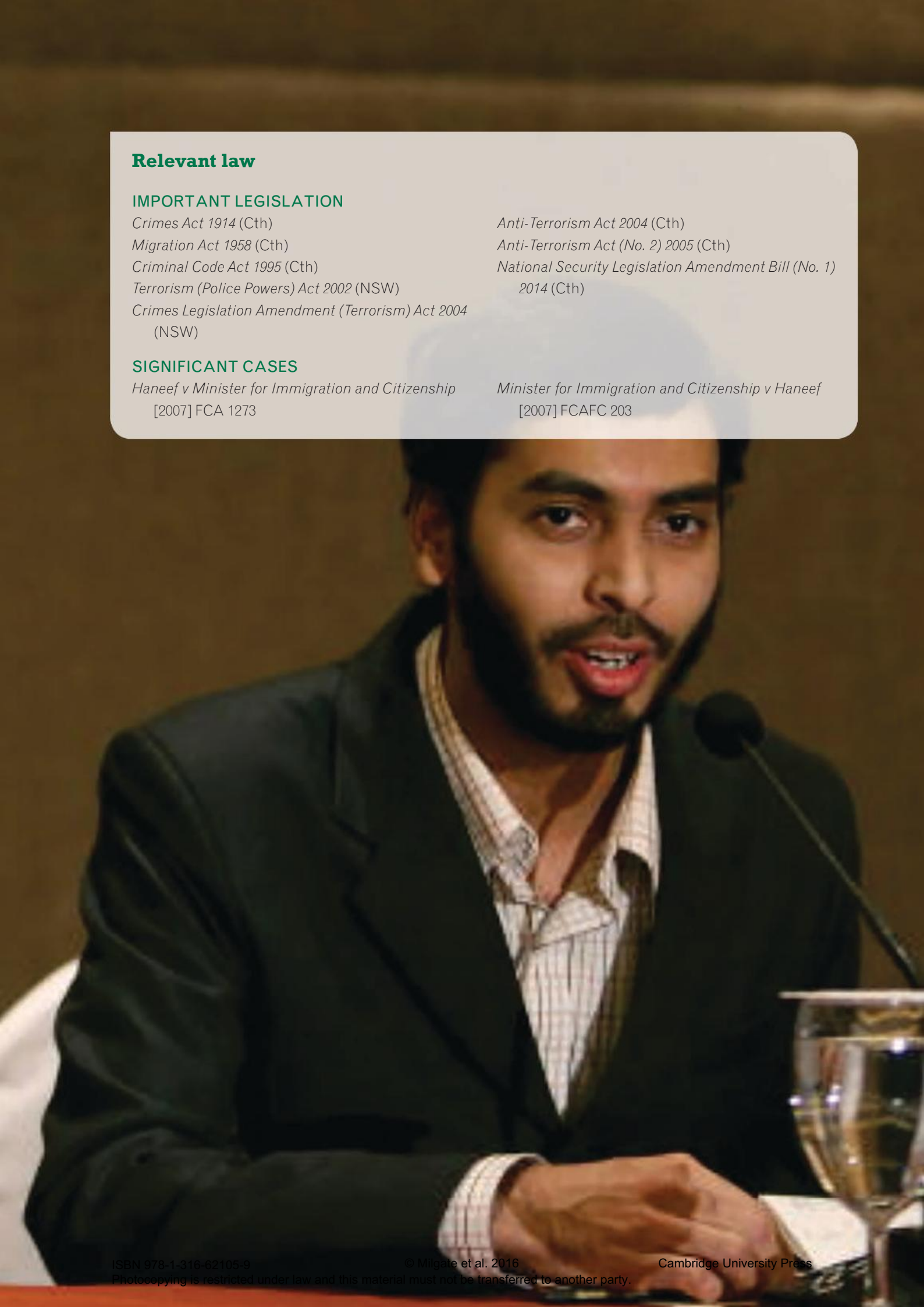

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1914 (Cth)
Migration Act 1958 (Cth)
Criminal Code Act 1995 (Cth)
Terrorism (Police Powers) Act 2002 (NSW)
Crimes Legislation Amendment (Terrorism) Act 2004 (NSW)
Anti-Terrorism Act 2004 (Cth)
Anti-Terrorism Act (No. 2) 2005 (Cth)
National Security Legislation Amendment Bill (No. 1) 2014 (Cth)

SIGNIFICANT CASES

Haneef v Minister for Immigration and Citizenship [2007] FCA 1273
Minister for Immigration and Citizenship v Haneef [2007] FCAFC 203

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19.1 A brief history of the Mohamed Haneef case

The case of Dr Mohamed Haneef was, at the time, one of the most highly publicised and politicised incidents in recent Australian legal history. The facts of the case and the context in which it took place are not only interesting from a social and political perspective, but also raise a number of important legal issues for Australia relating to the separation of powers, the presumption of innocence and guilt by association. In response to an increase in global terrorist attacks, the Australian Government enacted the *Anti-Terrorism Act (No. 2) 2005* (Cth). This amended existing legislation by allowing short-term detention without evidence or charges. The first time this power was used was in the arrest and detention of Dr Haneef. He was also the first person to have his detention extended to 12 days without being charged with a crime.

Dr Haneef, a medical doctor from India, first arrived in Australia in 2006 on a temporary skilled working visa and was employed at the Gold Coast Hospital in Southport, Queensland for almost a year before his case became international news. Dr Haneef's arrest and detention on 2 July 2007 on suspicion of terror-related activity (specifically in relation to the Glasgow International Airport attack) caused a great deal of controversy in Australia and India.

Figure 19.1 The attacks on 11 September 2001 caused widespread fear and fuelled the 'war on terror'.

In order to understand these events, it is necessary to place them in the broader social and political context: a post-September 11 climate characterised by pervasive fear of further terrorist attacks against Western democracies. This public anxiety motivated governments to use the full force of their legal systems and law enforcement agencies to tackle the terrorist threat on their doorstep.

Terrorism

Terrorist attacks are nothing new. Throughout history, individuals, political and religious organisations have committed terrorist attacks in an attempt to achieve certain political and social objectives. The word **terrorism** is often politically and emotionally charged. Terrorist acts are designed to coerce or intimidate a government or other group into taking a course of action it would not otherwise take. These acts are considered particularly heinous because in addition to the crime of harming or killing innocent civilians, they are intended to influence political events. Most people believe that political change, on either a national or international level, should take place as a result of discussion, argument and negotiation, not violence.

terrorism
violence or the threat of violence, directed at a 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

As we saw in Chapter 11, terrorism has become a global phenomenon. The brief list of major terrorist attacks below gives some idea of the frequency and severity of attacks in the wake of 11 September 2001. Not only did these events kill and injure thousands of innocent people, they also fuelled a 'climate of fear' around the world.

12 October 2002 – Bali bombings

In this attack on the Indonesian island of Bali, three bombs were detonated – two near nightclubs in the tourist district of Kuta, and one outside the United States consulate – and 202 people were killed. Several members of a radical Islamist group called Jemaah Islamiyah were convicted for involvement in the attack.

11 March 2004 – Madrid bombings

This attack took place aboard four commuter trains in Madrid, Spain, killing 191 people and wounding

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a further 1800. In total, 10 separate explosions were recorded. A loose group of Moroccan, Syrian and Algerian Muslims was suspected of having carried out the attacks. Eighteen people, most from northern Africa, have been convicted in Spain for taking part in the attacks.

7 July 2005 and 21 July 2005 – London bombings

Both sets of bombings were coordinated attacks on London's public transport system. On 7 July suicide bombers were responsible for killing 52 people and injuring a further 700. A group of British Muslims unhappy with Britain's involvement in the Iraq War was later identified as having been responsible for the attacks. The 21 July attacks were a second series of four explosions on the London Underground and on a bus. Fortunately, the main explosive charges failed to detonate during this attack and no casualties were recorded.

1 October 2005 – second Bali bombings

These attacks occurred at two sites, Jimbaran and Kuta, on the island of Bali. Three suicide bombers were responsible for killing 20 people and injuring 129 more. As with the bombings in 2002, Jemaah Islamiyah is believed to be responsible for the attacks.

10 July 2010 – Suicide bombing in Pakistan

Over 100 people were killed by a Taliban-backed group who were protesting against the Pakistan government's attempt to rid the Mohmand district of militants.

December 2014 – Sydney Siege

Two people and the gunman were killed in a 24-hour siege at the Lindt café in Sydney's CBD. It was believed to be a terrorist attack.

October 2015 – Sydney shooting

A 15-year-old boy shot dead a police employee outside a police station in Parramatta, Sydney. The shooting was deemed a terrorist attack by police sources.

November 2015 – Paris attacks

One hundred and thirty people were killed in shooting raids and suicide bombs. The majority were killed inside a theatre after hostages were taken.

Glasgow International Airport attack

During the spate of international terrorist attacks described above, there was an attempted bombing at Glasgow International Airport in Scotland on the afternoon of Saturday 30 June 2007.

The incident involved a Jeep Cherokee loaded with canisters containing explosive propane gas, which was driven into glass doors at the airport terminal entrance. The propane canisters failed to explode; however, the car was set ablaze. The car was prevented from entering the terminal by security bollards that had been installed outside the entrance. Although nobody was killed at the scene, the car's driver suffered severe burns to 90 per cent of his body and later died, and a number of injuries were sustained by members of the public, including those who helped police detain the car's occupants.

The attack was said to be the first such terrorist attack to target Scotland and was linked to a failed attack in London the previous day. The London attempt had involved two separate car bombs in the centre of the city, which were detected and disabled before they could explode. The Glasgow attack occurred only three days after Gordon Brown, a Scottish-born MP from Glasgow, was appointed Prime Minister of the United Kingdom.

Within three days, eight people suspected of involvement in the Glasgow and London incidents had been taken into custody. The two men in the

Figure 19.2 The aftermath of the attack on Glasgow International Airport.

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car at Glasgow International Airport, arrested at the scene, were identified as passenger Bilal Abdullah, a British-born medical doctor of Iraqi descent, and driver Kafeel ('Khalid') Ahmed, an engineer who was born in Bangalore, India, raised in Saudi Arabia, and was studying for a PhD at Cambridge University in the United Kingdom. A suicide note left behind indicated that the two had intended to die in the attack.

On 2 August 2007, Kafeel Ahmed died of the third-degree burns he sustained, while Bilal Abdullah was later found guilty in the United Kingdom of conspiracy to commit murder and was sentenced to 32 years in prison. Kafeel's brother, Dr Sabeel Ahmed, was also later sentenced in the United Kingdom to 18 months' jail after pleading guilty to failing to disclose information that could have prevented an act of terrorism. Sabeel had received an email message from Kafeel and details of his will before the attack, but was later cleared of having any actual knowledge of the bombings.

Mohamed Haneef

On 2 July 2007, two days after the Glasgow attack, a 27-year-old junior medical doctor Mohamed Haneef was arrested by the **Australian Federal Police (AFP)** at Brisbane Airport, on suspicion of a link to the Glasgow International Airport attack.

Australian Federal Police (AFP)
the federal police agency of the Commonwealth of Australia, set up to enforce the federal laws and to protect the interests of Australia both domestically and internationally

Dr Haneef was the first person detained in Australia under newly introduced anti-terrorism laws. His detention without charge by police became the longest in Australia's recent history and the case became a cause for controversy in both Australia and India. Dr Haneef was eventually released and all charges withdrawn, but the case brought to light important questions about the law and its application by both police and the Australian Government, and its implications for Australian law will continue into the future.

Background

Mohamed Haneef was born in 1979 and raised in Mudigere, a small town surrounded by coffee plantations in the state of Karnataka, India. Following his father's death in a motor vehicle accident when Mohamed was 18 years old, his family moved to Bangalore, the state capital, where he completed his education and eventually attained a medical degree with first-class honours in 2002 from Dr B. R. Ambedkar Medical College.

Figure 19.3 Dr Mohamed Haneef

After graduation, Haneef completed his internship in India, and then moved to the United Kingdom, where he worked in a hospital at Runcorn, Cheshire in north-west England. After seeing an advertisement in the *British Medical Journal*, he applied to work in Australia under Australia's temporary skilled worker scheme and obtained a job as a medical doctor at Queensland's Gold Coast Hospital.

Dr Haneef and his wife, Firdous Arshiya, came to Australia on 11 September 2006, and he commenced work at the Gold Coast Hospital on 18 September, moving into a nearby apartment in Southport. His wife later became pregnant and in March 2007 she returned to India for the support of her family leading up to the birth. Dr Haneef stayed at the hospital in Australia and on 26 June 2007 their daughter was born in Bangalore. Shortly afterwards a series of events began that would change both their lives and leave a permanent mark on Australia's legal history.

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Figure 19.4 Gold Coast Hospital

Detention and allegations

The Australian Federal Police arrested Dr Haneef at Brisbane Airport on 2 July 2007, following information received from UK intelligence agencies that Australian police believed linked him to the Glasgow Airport attack. Some of the facts and allegations that influenced the AFP's belief were as follows:

- *Family relationship*: Dr Haneef was a distant relative of both the driver involved in the Glasgow International Airport attack, Kafeel Ahmed, and Kafeel's brother Sabeel Ahmed, who at that stage was only a suspect in the case. Dr Haneef was the brothers' first cousin once removed; that is, they shared the same great-grandparents.
- *SIM card*: During investigations into the Glasgow incident, UK police discovered a mobile phone SIM card in Sabeel Ahmed's flat, which was registered to Mohamed Haneef. Dr Haneef had left the SIM card with friends in his old flat when he departed from the United Kingdom in 2006, as it still contained credit. Sabeel Ahmed later moved into the flat.
- One of the critical issues in the case was an allegation made by the AFP and Commonwealth prosecutors that the SIM card was actually found inside the Jeep Cherokee used in the attack. This allegation later turned out to be false. It was revealed that UK police had originally told the AFP that the card was in the Jeep, but this was later clarified. Some concerns were expressed about AFP's handling of the information.
- *One-way ticket*: When Dr Haneef was arrested at Brisbane Airport, he had a one-way airline ticket to Bangalore, India, paid for by his father-in-law. This made it look as if he was attempting to flee the country and may have been involved in the terrorist attacks. This view gained strength when it was discovered that Dr Haneef had received a phone call from the brothers' mother telling him that the police wanted to speak to him about 'some problem' involving his SIM card. However, this is still a tenuous connection.
- As stated by Dr Haneef in his interviews with police, there was another significant reason for his departure: he wanted to be with his wife and newborn daughter, who had been born by caesarean section only days before and was not well. It is possible that he also felt frightened and alone in Australia after he learned there could be a problem with his old SIM card, and wanted the support of his family.
- *Shared flat*: In a formal court statement, the AFP claimed that Dr Haneef had told them that he had lived in the United Kingdom at his Liverpool flat with two of the suspects of the Glasgow attack. However, the record of Dr Haneef's interview with police shows that he told them that he had lived at the Liverpool flat with several named doctors, none of whom was a suspect in the Glasgow incident. Dr Haneef had moved out of this flat before Sabeel Ahmed moved in. He had visited Cambridge on two occasions in 2004 while in the United Kingdom to stay with Kafeel Ahmed, for a total of six days. This error was not corrected by the AFP.
- *Contact with suspects*: The AFP also alleged that Dr Haneef had been in continuing contact with both of the suspects of the Glasgow attack. Dr Haneef's laptop was seized by police and details of financial transactions investigated. Links between Dr Haneef and other terror suspects were also alleged, and later proved to be false.

At the time of Haneef's arrest, the Federal Police Commissioner, Mick Keelty, acknowledged that he 'may have done nothing wrong and may at the end of the day be free to go'. Despite this, from the time of his arrest to the day of his release on 27 July, Dr Haneef would spend a total of 25 days

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in detention, only to then be released without any charge. During this time the then Federal Minister for Immigration and Citizenship, Kevin Andrews, also made the controversial decision to cancel Dr Haneef's Australian working visa, a decision that was later appealed in the Federal Court of Australia and overturned.

The case resulted in intense media speculation and commentary, and eventually a full inquiry into the affair, ordered by the Federal Attorney-General after the change in government following the 2007 federal election. A timeline of all the major events in the case of Dr Haneef is set out in Table 19.1.

Table 19.1 Timeline of events

Date	Event
11 September 2006	Dr Mohammed Haneef arrives in Australia with his wife, Firdous Arshiya, under a temporary skilled working visa.
18 September 2006	Dr Haneef commences work as a registrar at the Gold Coast Hospital in Queensland.
26 June 2007	Firdous Arshiya gives birth to their first child in Bangalore, India.
29 June 2007	An attempted terrorist attack in London fails after car bombs intended to explode are discovered and disabled.
30 June 2007	The attack takes place at Glasgow International Airport; a distant relative of Dr Haneef's, Khafeel Ahmed, is identified as the driver involved.
2 July 2007	Dr Haneef is arrested by the AFP at Brisbane Airport as he is preparing to board a plane to Bangalore, India. Dr Haneef is detained under Australia's new anti-terrorism laws pending further investigation.
14 July 2007	The AFP formally charges Dr Haneef for the offence of 'recklessly providing support to a terrorist organisation', punishable by up to 15 years' imprisonment.
16 July 2007	Brisbane Magistrates' Court grants Dr Haneef bail under 'exceptional circumstances', with bail set at $10 000. Federal Minister for Immigration and Citizenship Kevin Andrews decides to cancel Mohamed Haneef's visa. Queensland's Department of Health suspends Dr Haneef's employment without pay pending the outcome of the charges. Dr Haneef remains in custody without exercising his bail.
18 July 2007	Dr Haneef's barrister, Stephen Keim SC, confirms that he was responsible for leaking a transcript of the first AFP interview with Dr Haneef. He did this to counter the damaging allegations being made by law enforcement agencies.
27 July 2007	Commonwealth Director of Public Prosecutions withdraws the charge after a $3.2 million investigation against Dr Haneef, citing 'no reasonable prospect of a conviction'. This followed an admission by the AFP the week before that the SIM card had not been found at the location of the Glasgow attack as previously alleged. Dr Haneef is released from custody.
29 July 2007	Dr Haneef voluntarily returns to India, no longer with a valid Australian working visa.
21 August 2007	The Federal Court of Australia overturns the Minister for Immigration and Citizenship's decision to cancel Dr Haneef's visa.

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Date	Event
21 December 2007	The Full Court of the Federal Court of Australia confirms the judgement overturning the visa cancellation.
13 March 2008	The Federal Attorney-General announces an inquiry into the case of Dr Haneef, called the Clarke Inquiry.
21 November 2008	The findings and recommendations of the Clarke Inquiry are presented to the government.
23 December 2008	The Clarke Inquiry report is presented to the public.
15 December 2010	Dr Haneef is compensated by the federal government for an undisclosed sum.
2011–2016	An apparent heightening of terrorist activities relating to the rise of Islamic State (ISIS) impacts on Australia and globally.

Review 19.1

1. Describe the international events leading up to the 2007 Glasgow International Airport attack. What were some of the incidents that had occurred in Australia and abroad?
2. What was some of the evidence that police alleged linked Dr Haneef to the Glasgow attack and attempted London bombings? How were these claims argued and do you believe they were plausible?
3. Outline TWO major terrorist attacks since 2012, one each from Australia and overseas. What are the major motives for such attacks?

19.2 Legal responses

The laws applied in the case of Mohamed Haneef fall into three main categories:

- anti-terrorism laws which had made it possible for Dr Haneef to be held without charge for 12 days
- anti-terrorism laws under which Dr Haneef was eventually charged, and later released after the charge was dropped
- Australian migration law relating to the cancellation of Dr Haneef's visa, and the later overturning of that decision.

Anti-terrorism laws

One of the features of the case that made it so controversial was the use of recently introduced anti-terrorism laws.

The *Anti-Terrorism Act (No. 2) 2005* (Cth) was passed by the federal parliament in December 2005 amid much public and political debate. It and other laws were introduced in an effort to restrict the activities of any potential terrorists in Australia, and it included numerous provisions that were seen as a departure from accepted standards of the criminal law and the separation of powers. They were widely criticised as being 'rushed', and in one incident a confidential draft of the legislation was published online by the ACT Chief Minister, Jon Stanhope,

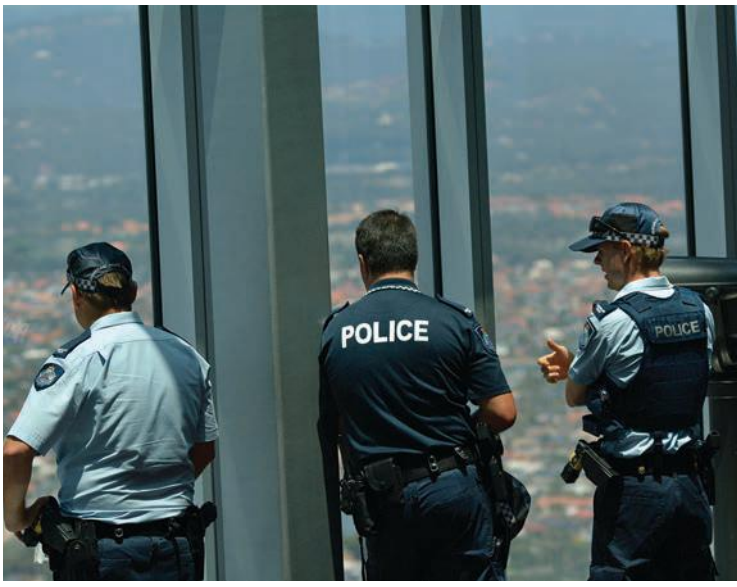

Figure 19.5 Anti-terrorism laws, while intended for safety, faced wide criticism.

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who stated that 'law of this significance made in this haste can't be good law'. Nevertheless, the laws were passed without the full support of the parliament or the public, and without incorporating many of the amendments and protections proposed.

Schedule 4 of the Act amended the *Criminal Code 1995* (Cth). The changes included the introduction of preventative detention; that is, short-term detention for named individuals without evidence or charges. The object of these amendments was 'to prevent an imminent terrorist act' or 'to preserve evidence of or relating to a recent terrorist act'. Under a preventative detention order, a person has the right to contact a lawyer, one family member or household member, his or her employer, and one employee or business partner, but only to let them know that he or she is safe and cannot be contacted. The person being detained is not allowed to tell them that he or she is under a preventative detention order.

The Act also introduced new crimes with severe punishments, including supporting or recklessly providing funds to a potential terrorist. Under the new s 103.2(1)(b) of the *Criminal Code 1995* (Cth), the individual did not need to know that the person receiving the funds was a terrorist; only that he or she was **reckless** about the possibility.

reckless
able to foresee negative consequences of doing something, but carrying on with the act regardless. Recklessness implies a state of mind that is not as strong as an intention to do something, but for some criminal offences it is considered equivalent to intention for the purpose of establishing fault.

Anti-terrorism laws and Dr Haneef

Following the terrorist attack at Glasgow International Airport in June 2007, Dr Haneef became the first person in Australia to be detained under the rules enacted by the *Anti-Terrorism Act (No. 2) 2005* (Cth). Dr Haneef also became the first person to have his detention extended under the Act and the first to be charged with supporting a terrorist organisation.

Probably the most controversial aspect of the case was those first 12 days of Dr Haneef's detention, as they involved detention of a suspect without charge. Although the *Anti-Terrorism Act (No. 2) 2005* (Cth) only permits detention without charge for 48 hours, complementary state legislation implementing the preventative detention scheme could be passed, under which someone could be detained for up to 14 days without charge. This was agreed between the Commonwealth and state governments in September 2005. In NSW, the *Terrorism (Police Powers) Act 2002* (NSW), as amended by the *Crimes Legislation Amendment (Terrorism) Act 2004* (NSW), permitted exactly that, provided that the police obtained a preventative detention order from the NSW Supreme Court to prevent an impending terrorist act or safeguard evidence of a recent terrorist act.

Dr Haneef was not even permitted to contact his wife until he had been held in detention for nine days. It was not until 14 July 2007 that the AFP made the decision, following consultation with the **Commonwealth Director of Public Prosecutions (CDPP)**, to formally charge Dr Haneef under s 102.7(2) of the *Criminal Code 1995* (Cth) with the offence of providing support to a terrorist organisation.

Commonwealth Director of Public Prosecutions (CDPP)
independent prosecuting agency established by a federal Act to prosecute alleged offences under federal laws

This new approach represents a significant departure from accepted law regarding involuntary detention and the **separation of powers** between the government and the courts. In the case of *Lim v Minister for Immigration* [1992] HCA 64, the separation of powers was interpreted by the High Court of Australia as preventing involuntary detention by the government, unless it was a direct result of a court's finding of criminal guilt. Some exceptions are possible; for example, a short period of detention following a person's arrest before he or she can practically be brought before a court, or when awaiting trial on remand following a charge if bail is refused by a court. It has been argued that state legislation that gives a state court a power that is incompatible with constitutional restrictions on federal courts (such as the power to grant a preventative detention order) is also a new and disturbing departure from the principles enunciated in *Lim* and in *Kable v DPP* (NSW) [1996] HCA 24.

separation of powers
the doctrine that the powers and functions of the judiciary are separate from those of the legislature and the executive

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As discussed above, serious deficiencies were later discovered in the evidence used by the AFP to detain Dr Haneef and repeatedly to extend that detention. The decision to charge Dr Haneef was also controversial and involved questions about the quality of the evidence against him and the soundness of the decision by the AFP and Commonwealth prosecutors. This is particularly relevant where the reliance on certain tenuous evidential links by the AFP and prosecutors, as outlined earlier in this chapter, suggests that the case against Dr Haneef may have been one of **guilt by association** rather than any real evidence linking him to the crime accused.

guilt by association
criminal liability imposed for associating with another person who commits a crime, rather than for committing that crime oneself

Perhaps an earlier indication of this was evident in the granting of bail by the Brisbane Magistrates' Court to Dr Haneef following formal charges by the AFP. Under the terrorism legislation, ostensibly for the protection of the public interest, bail could only be granted for terrorism offences under 'exceptional circumstances'. In an emotional hearing during which Dr Haneef reportedly wept, Dr Haneef's barrister, Stephen Keim SC, argued for his release on bail, as the prosecution's case was 'extremely weak'. Commonwealth prosecutors argued that Dr Haneef should remain behind bars. The magistrate made the decision to grant Dr Haneef bail on the condition that he would provide a $10 000 **surety**.

surety
a sum of money provided to support an accused person's undertaking that he or she will return to court for hearing at a later date, as a condition of granting bail; it is agreed that the money will be forfeited if the accused fails to appear

These deficiencies highlight some of the dangers inherent in the anti-terrorism laws and their potential to severely restrict a person's liberty. Following the bail hearing, the Queensland Department of Health suspended Dr Haneef's employment without pay pending the outcome of the charges. Although bail was granted, Dr Haneef elected to remain in custody without exercising his right to bail, probably due to the high dollar amount required for bail and the government's decision to cancel Dr Haneef's visa, as discussed below.

Migration law

Another significant aspect of the case involved the cancellation of Dr Haneef's working visa under Australian migration law. In Australia, the governing statute is the *Migration Act 1958* (Cth). It is enforced by the Federal Minister for Immigration and Citizenship and overseen where necessary by the federal courts.

Dr Haneef was in Australia on a 'business (long stay)' visa under the sponsorship of his employer, the Queensland Department of Health. The visa ran from 30 August 2006 to 30 August 2009. On the day of

Figure 19.6 Dr Haneef (centre) with his former lawyer Peter Russo (left) and barrister Stephen Keim SC (right)

Figure 19.7 Migrants to Australia must meet various expectations in order to be granted a visa.

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Dr Haneef's bail hearing, 16 July 2007, immediately following the decision to grant Dr Haneef bail, the then Minister for Immigration and Citizenship, Kevin Andrews, used his power of **ministerial discretion** under s 501(3) of the Act to cancel Dr Haneef's visa.

ministerial discretion
power granted to a minister under an Act to make a specified decision or order

The direct consequence of the Minister's decision was severe. As a result of his visa being cancelled, Dr Haneef effectively became an 'unlawful non-citizen' under the Act, which meant that he became liable to detention by the Department of Immigration pending his removal from Australia. In effect, this meant that if Dr Haneef accepted his right to bail and release from custody, he could be liable for further detention under different laws. The grounds for this decision were questioned not only by Dr Haneef's legal team but also by many commentators. The Minister had made his decision on the basis that Dr Haneef had not passed the 'character test' necessary for the granting of the visa, based on a reasonable suspicion that he had an association with terrorists. Dr Haneef's legal team brought the decision before the Federal Court of Australia for review.

The charges against Dr Haneef were withdrawn by the Commonwealth Director of Public Prosecutions on 27 July 2007, citing 'no reasonable prospect of a conviction', and Dr Haneef was immediately released from custody and his passport returned to him. The Minister stated that he was seeking advice on Dr Haneef's visa and did not intend to detain him but that he had a responsibility to act in the national interest. Without a valid Australian visa to remain, and most likely without any desire to remain after these events, Dr Haneef voluntarily returned to India on 29 July 2007.

However, the Federal Court case challenging the Minister's decision went ahead and on 21 August 2007, Justice Spender of the Federal Court of Australia set aside the decision on the basis that the Minister had erred in applying the wrong test of 'association'. Justice Spender also noted that the circumstances had since changed.

The government appealed to the Full Court of the Federal Court but the judgement was upheld on 21 December 2007. In an interesting comment in the case, Justice Spender had questioned the character grounds of associating with terrorists underpinning the Minister's decision. 'Unfortunately I wouldn't pass the character test on your statement because I've been associated with people suspected of criminal conduct,' Justice Spender said to the Immigration Department's counsel.

Review 19.2

1. What were the three main categories of law applied in the case of Dr Haneef?
2. What were the anti-terrorism laws applied in the case of Dr Haneef and why were they controversial?
3. Describe the legal events surrounding the cancellation of Dr Haneef's Australian visa. Do you think that the cancellation was justified on the facts?

19.3 Non-legal responses

Media and politics

As is true of many high-profile cases, the Australian media were highly influential in shaping public opinion with respect to the case of Dr Haneef. Media coverage at the time was generally highly critical of the government's position and the lack of evidence in the case, and there was much analysis of the impact of the government's new anti-terrorism laws.

Perhaps the most important event in the reporting of the case occurred when Dr Haneef's barrister, Stephen Keim SC, leaked a 142-page transcript of Dr Haneef's first AFP interview to the media. According to Keim, the transcript clearly showed 'the very thin case that the police are claiming to have'. Both John Howard, the then Prime Minister, and Mick Keelty, the then Federal Police Commissioner, expressed outrage at the leak.

Before the source of the leak was identified, Prime Minister Howard had publicly condemned it, saying, 'Whoever's been responsible for leaking this document is not trying to make sure that justice is done. Whoever's responsible for this is trying to frustrate the process and it should be condemned.'

Initially, Mr Keelty took the unusual step of publicly criticising Mr Keim and suggested that

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he would pursue legal action to charge the source of the leak with contempt of court since the court proceedings had already commenced and so the leak undermined judicial process.

Mr Keim, however, successfully argued that his client, 'pursuant to the legislation under which he was detained and questioned, has a legal right to a copy of that document, and that document was provided to him, without any restrictions whatsoever. He was perfectly entitled, through me, to release that document.' Mr Keim argued that the government was applying a double standard, in that government authorities had also leaked parts of the transcript to the media to suggest that the case against Dr Haneef was stronger than it actually was. Mr Keim was later cleared of any professional misconduct and was given a civil rights award for his effort. He was also named 'Australian of the Year' by the *Weekend Australian* magazine.

Following Dr Haneef's release on 27 July 2007, in an interesting comment on political influence in the case, prominent barrister Lex Lasry QC stated that mishandling of the case against Dr Haneef may have been a result of political pressure, since it was an election year. 'I think there were pressures probably on the offices of the DPP and to some extent on the AFP, probably resulting in converting whatever suspicion there was into a charge which was not supported by any evidence. I think this case demonstrates a couple of things and one of them is that politicians ought to keep out of these cases and leave the police to do their work.'

Figure 19.8 The media in Australia were highly influential in shaping public opinion in the Haneef case.

Legal Links

The ABC closely covered the issues in the Mohamed Haneef case as they developed. An episode of its current affairs show *Four Corners* was aired on 1 October 2007 discussing the issues in the case. Further information about the Haneef case and a viewable copy of the original episode can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6596.

Community support

Throughout the case, a number of political organisations, community groups and professionals provided assistance as well as commentary.

The support of people in the legal community is evident from the fact that Haneef's legal team, including Stephen Keim SC, agreed to represent him ***pro bono***; that is, at no cost.

pro bono
a Latin term meaning 'for the public good', 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

In addition, many other organisations provided valuable commentary and expert opinion to media reporters and in some cases staged demonstrations in support of Haneef. Some of these organisations, including links to their respective websites, are listed in the Research 19.1 box.

Research 19.1

1 View the websites of the organisations listed below and investigate their purpose.
   - Australian Lawyers Alliance
   - Amnesty International Australia
   - Australian Muslim Civil Rights Advocacy Network
   - Law Council of Australia
2 Discuss the contributions each organisation may have made to the case of Dr Haneef.

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Members of the Australian public fiercely debated the case, with some arguing that the federal government would not have treated someone in this fashion if they knew he was innocent, and others suggesting that the Howard government was trying to capitalise on terrorism to gain support in an election year.

International response

The Haneef case was not only controversial in Australia, but also received widespread attention internationally, particularly in Dr Haneef's home country of India and, not surprisingly, in the country where the original terrorist attacks took place, the United Kingdom.

In the United Kingdom, a *Guardian* editorial condemned the 'grubby' Howard government's 'demonising' of Haneef as 'irresponsible electioneering' to push it to victory in the federal elections of 2007. In India, *The Hindu* newspaper accused the Australian Government of 'high-handed action verging on vengefulness'. The paper, usually more restrained, called the investigation a 'shambles' and claimed the Howard government's fight against terrorism was based on an 'authoritarian mind-set and indeed bloody-mindedness'.

The Indian Government became heavily involved in the case following a direct appeal to the Indian Prime Minister by Dr Haneef's wife, Firdous Arshiya. It was reported that Prime Minister Manmohan Singh was so worried about Dr Haneef after this that he was unable to sleep. The Indian involvement resulted in direct discussions between the two countries about the facts and progress of the case and included a number of exclusive visits to Dr Haneef by officials from the Indian High Commission in Australia while Dr Haneef was still in custody.

Figure 19.9 Community support for Haneef during the case was strong, and the Indian Prime Minister Manmohan Singh became directly involved.

Review 19.3

1. How did the media shape public opinion in response to the case of Dr Haneef? Were there any allegations about political influence on the case? If so, describe them.
2. How did the national and international community respond to the case of Dr Haneef? Were the responses negative or positive?

19.4 Effectiveness of responses

One of the most significant outcomes of the case of Dr Haneef was the decision by the then newly elected Rudd government to institute an inquiry into the whole affair, to establish the facts and determine what went wrong in the application of the laws. The inquiry would include recommendations as to how to improve the law and law enforcement agencies so as to prevent such a situation occurring in the future.

The Clarke Inquiry

On 13 March 2008, the Commonwealth Attorney-General, Robert McClelland, announced an investigation into the Dr Haneef's case, to be conducted by the former NSW Supreme Court Justice, the Hon. John Clarke QC.

The Clarke Inquiry lacked a number of powers; for example, it had no power to compel witnesses to answer questions and was impeded by the classified status of documents and difficulties negotiating the national security concerns of the various agencies. Despite these limitations, the report included a number of crucial findings and recommendations. One of the main findings was the conclusion that

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the material used as evidence in the case against Dr Haneef was 'completely deficient'. The report stated that the main AFP officer responsible for the investigation, Commander Ramzi Jabbour, had 'lost objectivity' and was 'unable to see that the evidence he regarded as highly incriminating in fact amounted to very little'.

The report included numerous recommendations to improve the effectiveness of the laws. The main recommendations included:

- the provisions of the *Crimes Act 1914* (Cth) relating to terrorism offences, introduced by the *Anti-Terrorism Act 2004* (Cth), be comprehensively reviewed by an independent reviewer
- the government take steps to review and determine ways to clarify the roles and responsibilities of different government agencies relating to counter-terrorism and the information that they collect
- s 102.7 of the *Criminal Code* (Cth), under which Dr Haneef was charged, be amended to remove uncertainties about the element of fault or intention
- the Minister for Immigration and Citizenship be informed of the relevant evidence in a counter-terrorism case to ensure proper cooperation regarding visas
- ways to educate officers involved in counter-terrorism cases about the various roles and responsibilities of agencies and departments, and about the investigation and prosecution of terrorist offences in Australia be developed.

Research 19.2

Conduct internet searches to find the official report of the Clarke Inquiry into the case of Dr Mohamed Haneef (Law Council of Australia website) and the Australian Government's official response to the Clarke Inquiry (Commonwealth Attorney-General's website).

1. Has the government made any changes to the anti-terrorism laws following the findings of the Clarke Inquiry?
2. Has the government implemented any of the recommendations of the report?

For the most part, the government has agreed to the recommendations made by the Clarke Inquiry. However, many of the recommendations are complex and will take time to implement.

Events since the Clarke Inquiry Report

Following the public release of the Clarke Inquiry Report on 23 December 2008, a number of events relevant to the case have taken place.

In an interview with ABC Radio shortly after the release of the report, Dr Haneef said, 'I'm very, very pleased and very relieved.' Dr Haneef, then based in Dubai, said the Clarke Inquiry had finally proved his innocence. While he said it was too early to talk of a return to Australia, he suggested that an apology from the Australian Government would be appreciated. He said that the case had done great damage to his reputation, not only in Australia but also in India and around the world. Dr Haneef also said that he might seek substantial compensation for loss of income and damage to his reputation.

Dr Haneef's legal team, including Bernard Murphy, chair of the national law firm Maurice Blackburn, and barrister Stephen Keim SC, have also gone on record several times calling for a public apology from the government. In December 2008, Queensland Premier Anna Bligh broke ranks with the Labor Party to call publicly for a government apology to Dr Haneef.

On 2 September 2009, Mick Keelty announced his intention to resign from the position of Australian Federal Police Commissioner. While some, including the Commonwealth Attorney-General, Robert McClelland, rejected suggestions that the fallout from the Clarke Inquiry was responsible for his resignation, many others, including Dr Haneef's lawyers, welcomed the decision, stating that the AFP had been an 'organisational disaster' under Mick Keelty.

In 2010, Dr Haneef returned to Australia for mediation talks with the federal government. His legal team negotiated a compensation payment that was undisclosed. It is estimated the payment was somewhere in the $1 million category, despite the government spending over $8 million during his 25-day ordeal. The federal government also issued a letter of apology to Dr Haneef's family. Kevin Andrews, who was the Minister for Immigration and

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Figure 19.10 Mick Keelty, former Australian Federal Police Commissioner

Figure 19.11 French anti-terrorist forces following the Paris attack on 13 November 2015

Citizenship at the time, has refused to apologise for his part in the case.

Review 19.4

1 Has Dr Haneef received any compensation from the Australian Government for his time in detention? Explain your answer.
2 Has the government made any formal apology to Dr Haneef or to the public for the AFP's handling of the case? Explain your answer.

The future for Australia

The Clarke Inquiry included some damning condemnation of the handling of the Haneef case and of the laws used to detain and prosecute him. This is particularly true of the controversial anti-terrorism laws introduced in 2004 and 2005, as discussed above. Between 2001 and 2015, the federal government introduced 61 anti-terror laws – the most of any nation. Professor George Williams of UNSW labelled such laws as 'hyper-legislation' and formed the opinion that many of these laws are already embedded in longstanding criminal codes. However, in recent years, the rise of Islamic State, conflict in Syria and deaths to Australian citizens from terrorist activities on home soil have gone some way to justifying continued anti-terrorist laws. Confirmed by the Sydney Siege in 2014, the Parramatta shooting and the Paris attacks of 2015, terrorist activities appear to be on the rise.

Media commentary and the involvement of interested groups has increased public awareness of the laws and shed light on some of their deficiencies and the potential dangers that the changes to the law represent. The question that must be considered is whether these laws are truly necessary responses to terrorist threats. However, these threats cannot be seen in isolation from the impact of such laws on the liberty of the individual and the rule of law. The case of Dr Haneef provides a clear illustration of the dangers inherent in such laws and their potential for abuse. It remains to be seen whether there will be changes to the laws as recommended by the Clarke Inquiry.

One final comment on the case was that of former Queensland Premier Peter Beattie, speaking after Dr Haneef's release on 27 July 2007. Congratulating the Commonwealth DPP for reviewing and dropping the charges against Haneef, Beattie reiterated the importance of people 'having the guts to stand up and make the point' about unjust laws. The outcome of the case 'proves the system works … this is an indication that Australia is fair-minded', he said, and as such, it 'vindicates the Australian way of life'.

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Chapter summary

- Recent terrorist attacks have changed legal and political systems around the world and governments have gone to various lengths to try to eradicate terrorism.
- Individuals such as Dr Mohamed Haneef who are accused of terrorist activities may be subject to questionable legal processes as a result of governments' zeal to catch and prosecute.
- The Australian Government recently introduced new anti-terrorism laws and Dr Haneef was the first person to be detained under the *Anti-Terrorism Act (No. 2) 2005* (Cth) and the first to be charged with supporting a terrorist organisation.
- Some Australian counter-terrorism laws can be in conflict with fundamental principles relating to the rights of individuals.
- The Commonwealth Director of Public Prosecutions eventually withdrew the charges against Dr Haneef, citing 'no reasonable prospect of a conviction'.
- The decision of the Minister for Immigration and Citizenship to revoke Dr Haneef's visa was overturned by the Federal Court.
- There was considerable media, legal and community support for Dr Haneef in Australia and internationally.
- While the laws have come under close scrutiny and criticism, debate continues over whether they are adequate to deal with terrorist threats while upholding the legitimate rights of individuals.

Chapter summary questions

Multiple-choice questions

1 The granting of bail in the Haneef case demonstrates:
- **A** the seriousness of the charge
- **B** support for the anti-terrorism laws
- **C** a lack of sufficient evidence
- **D** none of the above

2 Dr Haneef was charged on the basis of:
- **A** a SIM card given to his relative
- **B** involvement in the Madrid bombings of 2004
- **C** the cancellation of his working visa
- **D** all of the above

3 The Clarke Inquiry found that:
- **A** Dr Haneef was guilty of aiding terrorism
- **B** the evidence against Dr Haneef was not sufficient
- **C** the AFP and ASIO had acted properly in the case
- **D** Minister Andrews had no right to cancel Dr Haneef's visa

4 The Minister for Immigration and Citizenship cancelled Dr Haneef's visa because:
- **A** Dr Haneef had overstayed his visa
- **B** Dr Haneef had given his relative his old SIM card
- **C** Dr Haneef was involved in the Glasgow International Airport attack
- **D** Dr Haneef failed the character test

5 The new anti-terrorism laws challenge the rule of law because:
- **A** suspects like Dr Haneef can now be arrested arbitrarily and investigated for a terrorist activity
- **B** state laws have been superseded
- **C** bail now has a higher threshold
- **D** sedition now has a new definition

Short-answer questions

1 Outline the alleged links between Dr Haneef and his cousins in the United Kingdom.
2 What do you understand by the term 'guilt by association'? How does this term apply to the Haneef case?

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3 Comment on the Minister's decision to cancel Dr Haneef's visa. What was the reasoning behind the decision and do you think it was justified?
4 Explain the circumstances of Dr Haneef's detention for 25 days. Under what laws was he detained?
5 Do you think we need different laws for terror suspects? Explain your response using the Haneef case as an example.

Extended-response questions

1 'Australia's new terrorist laws severely erode civil liberties.' Discuss this statement in light of the Haneef case.
2 Consider whether Dr Haneef should have received compensation from the federal government. Explain why and discuss what amount you think would be fair and reasonable. Why are the details of compensation payments kept secret?

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

GO

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Additional resources

Issue 3:
Individuals or groups in conflict with the state

Chapter 20
The Northern Territory National Emergency Response

Chapter objectives

In this chapter, students will:

- explore the background of and issues related to the Northern Territory intervention
- identify and apply the legal concepts and terminology that relate to the Northern Territory intervention
- investigate the legal system's ability to address issues relating to the Northern Territory intervention
- explore the possible approaches of the legal system to the Northern Territory intervention
- discuss the legal issues that these approaches will create
- describe the legal and non-legal responses to the Northern Territory intervention
- evaluate the effectiveness of legal and non-legal responses to the Northern Territory intervention.

Key terms/vocabulary

homelands
permit system
protectionism
quarantining

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Relevant law

IMPORTANT LEGISLATION

Australian Constitution, ss 51(xxxi) and 122
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) *United Nations Declaration on the Rights of Indigenous People*
Northern Territory Aboriginal Act 1910 (SA)
Aboriginal Ordinance 1911 (Cth)
Aboriginal Ordinance 1918 (Cth)
Racial Discrimination Act 1975 (Cth)
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
Native Title Act 1993 (Cth)
Northern Territory National Emergency Response Act 2007 (Cth)
Stronger Futures in the Northern Territory Act 2012 (Cth)
Social Security Legislation Amendment Act 2012 (Cth)

SIGNIFICANT CASES

R v Benny Lee (1974) NTSC 221
Mabo and Others v State of Queensland (No. 2) [1992] HCA 23
R v Fernando (1992) 76 A Crim R 58
Robertson v Flood [1992] 111 FLR 177
Wurridjal v Commonwealth of Australia [2009] HCA 2

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20.1 Background to the Northern Territory National Emergency Response

In 2007, the federal government launched a comprehensive program of measures aimed to assist the Indigenous people of the Northern Territory. The Northern Territory National Emergency Response (NTNER) is known by many as 'the intervention', because the government of the day intervened in the day-to-day lives of Indigenous people of the Northern Territory (unofficially abbreviated to IPNT for the purposes of this chapter). The fundamental motive for this legislation was the protection of Indigenous children from child sexual abuse.

However, the intervention dramatically changed the relationship between the federal government and the IPNT. It brought these two groups into a series of conflicts involving the protection of children, alcohol use, school attendance, employment and range of other issues relating to legislative changes.

The *Northern Territory National Emergency Response Act 2007* (Cth) seemed to overturn decades of law reform, and despite the best intentions of the government to improve the lives of IPNT, it has been widely criticised locally and globally. This criticism is based on a lack of consultation between the groups concerned on a strategy to improve the lives of IPNT, and the original motives of the federal government. The NTNER seemed to ignore the notion of self-determination for IPNT, and was felt to be carrying the message that 'you are no good, you can't sort out your problems and you need us to do it'.

The key to the conflict lies in the strategies employed by local Indigenous organisations versus a federal government's attempt to reduce child sexual abuse.

The Northern Territory

The Northern Territory (NT) covers an area of 1 347 525 km^2. Only Western Australia and Queensland cover a larger area, but the population is smaller than any other state or territory in Australia. Twenty-eight per cent of the population is Indigenous – significantly higher than in other states. Indigenous people of Queensland and New South Wales make up just 3 per cent and 2 per cent respectively of their state's population. Nationally, the proportion of Indigenous people in Australia is 2.5 per cent.

Figure 20.1 An aerial view of Alice Springs. The Northern Territory covers an area of 1 347 525 km^2, but has the smallest population of any state in Australia.

There are approximately 243 000 residents of the Northern Territory (2014 Census) of whom approximately 56 000 identify as Indigenous. Identifying as Indigenous does not imply uniformity, as Indigenous people differ in language, customs, beliefs and traditions. However, it is widely understood that most Indigenous people of Australia, past and present, have a strong spiritual connection to their land and Country. Approximately 30 per cent of the IPNT live in 500 **homelands**. These are small to medium-sized communities that were established in the late 1960s so that Indigenous groups could maintain their connections with their traditional and sacred land. The *Aboriginal Land Rights Act 1976* (Cth) provided for the return of large areas of land to IPNT. Amnesty International claims that homelands are not a rejection of modernity but an attempt to embrace traditional citizenship on a people's own terms. This aligns with the *UN Declaration of the Rights of Indigenous People*, which will be addressed later in this chapter.

homelands
small communities which were established so that Indigenous peoples can maintain their connection to their land and culture

Table 20.1 outlines a range of key quality of life indicators for Indigenous and non-Indigenous people from the Australian Institute of Health and Welfare (2015). The figures demonstrate many significant

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Table 20.1

Australian Institute of Health and Welfare (2015)

Indicator	Indigenous	Non-Indigenous
Life expectancy (years)	Males 69, Females 74	Males 79, Females 83
Life expectancy NT (years)	Males 61, Females 69	Males 78, Females 82
Infant mortality (deaths in children under 1 year)	8–9 per 1000 persons	4 per 1000 persons
Unemployment	21%	6%
Complete Year 12	55%	82%
Year 7 (reaching national minimum reading standard)	65%	88%
Juveniles (aged 10–17) detained	403 per 100 000	14 per 100 000

ranges or 'gaps' in education, employment, health and contact with the criminal justice system: Indigenous people die younger, and fewer Indigenous people can read to a minimum standard (and thus they have a lower secondary schooling completion rate). Indigenous people experience an unemployment rate at least three times higher than non-Indigenous people and come into contact with the criminal justice system about 36 times more frequently in the age range of 10–17 years. There is a strong correlation between detention as a juvenile and repeat offences, especially if educational and employment prospects are poor.

Brief history of federal laws regarding Aboriginal people

Since 1788, there have been numerous bloody conflicts between Indigenous and non-Indigenous Australians. Across most of Australia in the late 1700s and throughout the 1800s, martial law operated. The idea of *terra nullius* governed the early settlers' understanding of their new land. *Terra nullius* meant that the land was not occupied – no agriculture, herding or settlements were evident, and it was assumed that the Indigenous people had no legal or political organisation – so when the Europeans arrived the land was deemed to belong to no one. This meant the land was claimed as Crown land (land belonging to the King/government). The 'doctrine of reception' also came into play: it meant that British law would be the law of this new land. In these early days, no charges were laid when Europeans hurt or killed Indigenous people.

As a consequence of these beliefs and behaviours, there were many violent confrontations between Indigenous and non-Indigenous people. In New South Wales, there was the infamous Myall Creek Massacre of 1836, in which 27 women and children were slaughtered; in the Northern Territory in 1874, the Skull Creek Massacre saw the deaths of up to 90 men women and children, and in 1928, the Coniston Massacre resulted in the death of 70 Indigenous people.

From the 1910s through to the 1950s, the *Northern Territory Aboriginal Act 1910* (SA), the *Aboriginal*

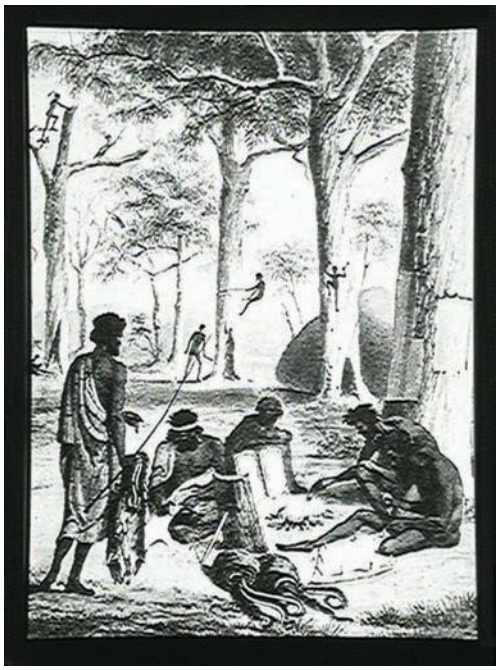

Figure 20.2 The colonial doctrine of *terra nullius* – that the land was not 'occupied' – is contradicted by evidence such as this artwork.

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Ordinance 1911 (Cth) and the *Aboriginal Ordinance 1918* (Cth) were the laws relating to Indigenous people in the Northern Territory. These laws allowed Indigenous people of the Northern Territory to be forcibly removed from their homelands and placed in reserves and government settlements. This legislation was underpinned by '**protectionism**', an approach that implied that governments had legal power to remove children from families, and families from reserves, and to exercise some control over marriages and employment. The laws can best be described as paternalistic – that is, 'father-like' – and clearly set up a climate of inequality, prejudice and discrimination.

protectionism
a government's power to control and limit the behaviour of a group of people in the name of protecting them

However, since the 1967 referendum, Indigenous communities throughout Australia have been granted equal recognition as citizens of Australia. Until this time, there were two references to Indigenous people in the Constitution: sections 51 and 127.

Section 127 excluded Indigenous Australians from the census and s 51 gave power to state governments to legislate for Indigenous people. Therefore the laws and policies differed from state to state. The 1967 referendum did not give Indigenous Australians the right to vote. That had been granted through changes to the *Commonwealth Electoral Act 1918* (Cth) in 1962. Indigenous people also had the right to vote in state elections by 1965. In reality, the 1967 referendum became a symbol of public recognition of the rights of Indigenous Australians. Section 127 was deleted from the Constitution, and s 51 was amended to allow the federal government to legislate for Indigenous people and to override any discriminatory state laws. From this point, Indigenous Affairs became a federal government matter.

In 1963, Yolngu people in the Northern Territory created and sent a petition on bark to the federal government protesting the loss of 300 hectares of land to a mining company without the permission of elders. This became the 1971 Gove Land Rights case, *Milirrpum v Nabalco Ltd.* It was heard in the NT Supreme Court with the final decision resting on the concept of *terra nullius*: Justice Blackburn ruled that the Yolngu people did not have any type of native title claim and common law prevailed.

Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), some Indigenous land became privately owned under a **permit system**, so it is neither Crown nor public land. All Australian landowners have the legal right to allow or refuse permission for people to enter or travel through their land. The permit system involves the traditional owners giving written permission for others to enter the land. The intention is to protect the privacy of Indigenous communities, preserve Indigenous culture and safeguard the natural environment.

permit system
a system that requires people to have permits to enter or remain on Indigenous land

The *Racial Discrimination Act 1975* (Cth) established important legal rights and protection for Indigenous people in the key areas of education, health and employment. The 1992 Mabo decision from the High Court of Australia – *Mabo and Others v State of Queensland* – ended the role of the *terra nullius* idea by determining that land did already belong to people when Europeans arrived in Australia. In addition, under the *Native Title Act 1993* (Cth), Indigenous citizens have the legal entitlement to access land to practise their traditional lifestyle and customs. Many observers of Indigenous rights may have believed that Indigenous Australians had finally achieved racial equality by the mid-1990s.

The *Little Children are Sacred* report

Despite the decades of law reform outlined above, in August 2007, Prime Minister John Howard and Indigenous Affairs Minister Mal Brough announced the most dramatic change in Indigenous affairs in Australia's history. Dubbed 'the NT Intervention', Howard claimed it was necessary and a direct response to a report entitled *Little Children are Sacred*.

Nannette Rogers, the Crown Prosecutor of the Northern Territory for 12 years, had raised serious concerns over the welfare of many young Indigenous children in the course of her work. Rogers urged the NT Government to commission a report into child sexual abuse. In June 2007, the *Little Children are Sacred* report was published. It declared child sexual

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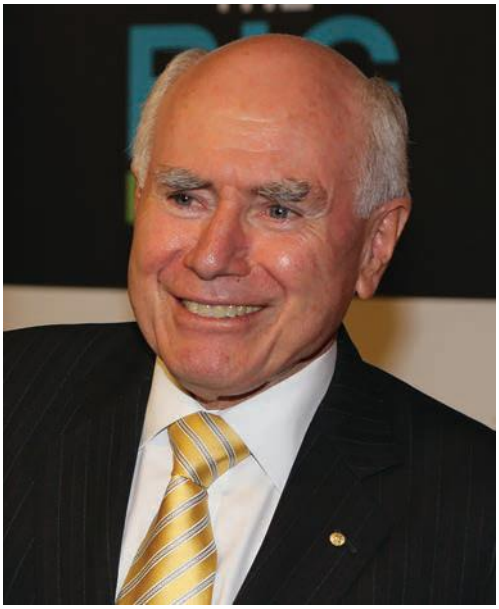

Figure 20.3 Former Prime Minister John Howard

abuse a 'crisis and an issue of national significance' and made 97 recommendations on how to reduce child sexual abuse in the Northern Territory. The fundamental theme was the urgency and critical importance of the protection of Indigenous children from predatory behaviour. Such behaviour often involved over-consumption of alcohol and a lack of parental supervision of children.

Review 20.1

1. Outline three quality of life indicators from Table 20.1 and rank them in order of importance. Describe how each indicator demonstrates socioeconomic disadvantage.
2. Describe your understanding of the term 'protectionist'. Use two or three pieces of legislation to illustrate your answer.
3. Use legislation to outline any improvements in legal rights for IPNT from 1967 to 1993.
4. Explain the importance of the *Little Children are Sacred* report.

20.2 Legal responses

Northern Territory National Emergency Response Act 2007 (Cth)

Mr Howard labelled the situation a 'national emergency' and announced a $587 million package that had nine key strategies. In August 2007, the nine measures were legislated under the NTNER. They were:

1. Additional police to be deployed to a range of areas/communities.
2. The Community Development Employment Program (CDEP) to be abolished.
3. All welfare recipients in the designated communities to have a portion of their benefits quarantined (income management), and those who neglect their children to have all benefits quarantined using the School Education Attendance Measure (SEAM).
4. Alcohol consumption and possession to have new restrictions.
5. Publicly funded computers to have pornography filters.
6. Townships held under the title provisions of the *Native Title Act* to be compulsorily acquired through five-year leases. (These were extended to 10-year leases from 2012.)
7. Customary law and cultural practice considerations to be removed from bail applications and sentencing within criminal proceedings.
8. The *Racial Discrimination Act* to be suspended (Indigenous Affairs Minister Jenny Macklin ended this suspension in 2010).
9. The permit system to be removed.

Deployment of military personnel to a range of areas/communities

The NTNER required the involvement of the Australian Defence Force (ADF). 'Outreach' involved 600 military personnel, who delivered trade services, such as engineering, construction and transport, to set up 18 new police stations and safe houses in five remote communities. The military personnel also provided support through the wet season as child health check teams examined all IPNT under the age

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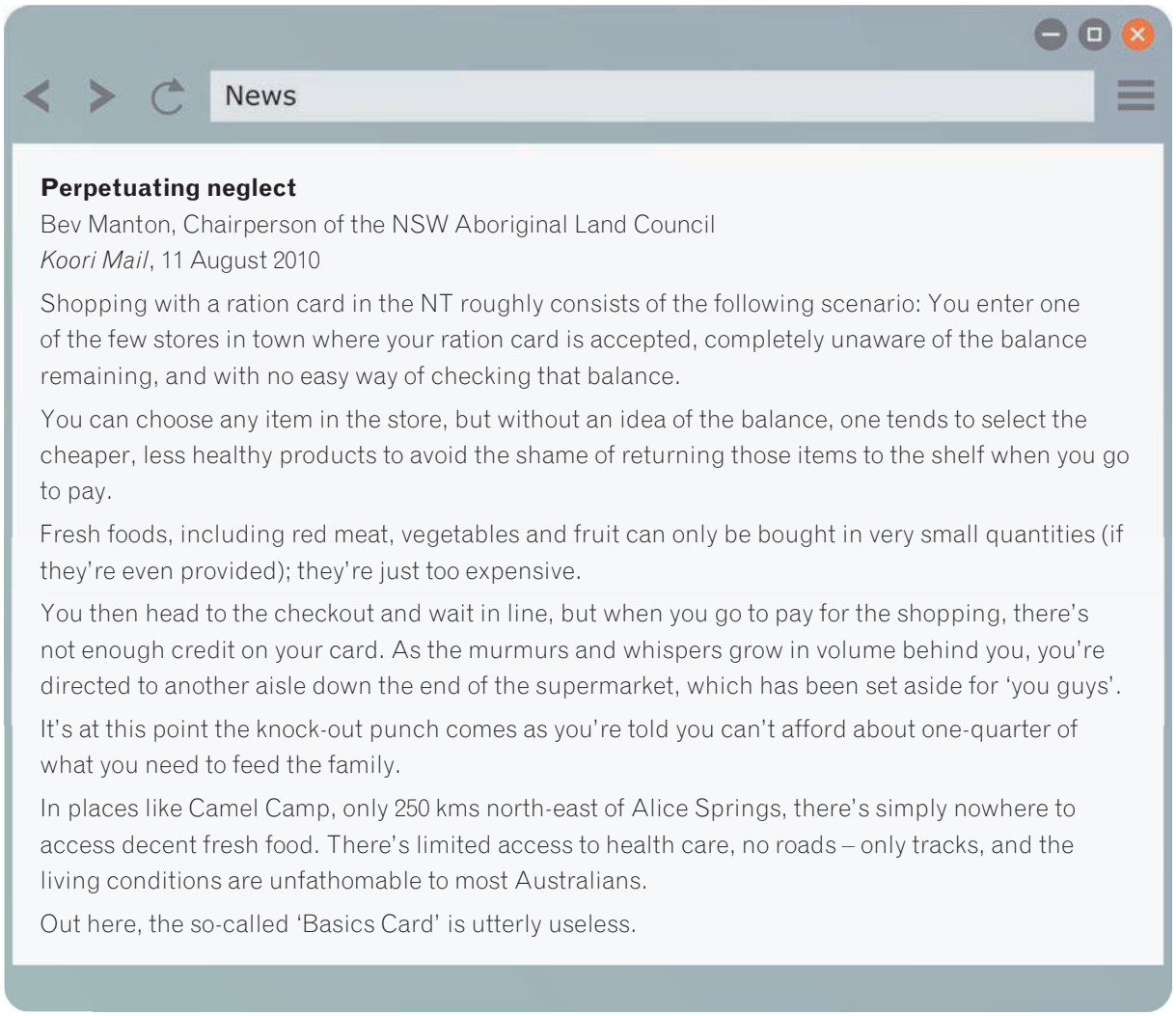
of 16. The child health checks were another direct response to the *Little Children are Sacred* report: the federal government was attempting to establish the level of child sexual abuse by examining all children 15 years and under.

According to ADF sources, the Army has been working in outback Indigenous communities for decades. The majority of Northern Australia was mapped by Army surveyors between the 1920s and the 1980s. The Army's various regional forces have included many Indigenous Australians since the late 1970s. Indigenous communities have received assistance from medical units conducting yearly camps since the early 1950s, and from Army engineers building houses and running training in trades for over a decade. Since the early 1990s, the Department of Defence has sponsored cross-cultural awareness courses in the Northern Territory, attended by members of the ADF. Therefore, from a government perspective, the involvement of the military was not seen as unusual or overzealous.

The abolition of CDEP and the partial quarantining of welfare benefits

CDEP was first introduced to remote Indigenous communities as an employment creation and income support scheme in the late 1970s. Nationally, in June 2008 CDEP had 18 800 active participants spread across 152 employers, at an annual cost of $223 million. One example of a CDEP project was the Kalano Community Patrol, which aimed to reduce the harmful effects of chronic alcohol abuse. The project monitored those struggling with chronic alcohol addiction who were stranded, homeless, or at risk of self-harm or falling into police custody, and picked them up and took them to respite areas and other safer places.



Perpetuating neglect

Bev Manton, Chairperson of the NSW Aboriginal Land Council
Koori Mail, 11 August 2010

Shopping with a ration card in the NT roughly consists of the following scenario: You enter one of the few stores in town where your ration card is accepted, completely unaware of the balance remaining, and with no easy way of checking that balance.

You can choose any item in the store, but without an idea of the balance, one tends to select the cheaper, less healthy products to avoid the shame of returning those items to the shelf when you go to pay.

Fresh foods, including red meat, vegetables and fruit can only be bought in very small quantities (if they're even provided); they're just too expensive.

You then head to the checkout and wait in line, but when you go to pay for the shopping, there's not enough credit on your card. As the murmurs and whispers grow in volume behind you, you're directed to another aisle down the end of the supermarket, which has been set aside for 'you guys'.

It's at this point the knock-out punch comes as you're told you can't afford about one-quarter of what you need to feed the family.

In places like Camel Camp, only 250 kms north-east of Alice Springs, there's simply nowhere to access decent fresh food. There's limited access to health care, no roads – only tracks, and the living conditions are unfathomable to most Australians.

Out here, the so-called 'Basics Card' is utterly useless.

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However, when the NTNER scrapped the CDEP component of the Kalano Patrol, many employees were retrenched without notice or severance pay. These employees were forced from a full-time salary to welfare benefits, which were approximately 50 per cent of their previous income. The federal government saved an estimated $232 million by abolishing CDEP.

The NTNER then issued 'BasicsCards', in a process known as **quarantining**. The cards contained an amount of credit that could be spent on food and clothing, but not alcohol, home brew kits or gambling products, or a range of other goods and services that non-Indigenous people are able to purchase with income.

quarantining
a system under which the government can allocate a portion of welfare income for specific uses such as food and clothing

The process of income management or quarantining has caused significant angst amongst the IPNT. The process segregates IPNT in shopping situations and makes public a notion that somehow IPNT are not capable of spending their weekly budget in appropriate ways.

At the end of June 2012 there were more than 17 000 people on income management: this cost the Commonwealth Government between $6600 and $7900 dollars per person, per year.

The news story on page 522 illustrates the issues with using a BasicsCard.

Removal of customary law and cultural practice considerations from bail applications and sentencing

Since the 1990s customary law and cultural considerations had been playing greater roles in sentencing Indigenous people of Australia. For example, in the case *R v Fernando* (1992) 76 A Crim R 58, Justice Wood (NSW) stated that there were times when it was relevant to consider the circumstances to ensure the equal treatment of Indigenous offenders: 'where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor'.

He accepted that in some Indigenous communities, 'problems of alcohol abuse and violence go hand in hand', and recognised that 'more subtle remedies' than imprisonment could be needed.

Some Northern Territory court decisions concentrated on the sense of hopelessness spawned by the cultural breakdown that leads to alcohol abuse. In the cases of *R v Benny Lee* (1974) NTSC 221 and *Robertson v Flood* [1992] 111 FLR 177, it was understood that imprisonment was unlikely to be an effective deterrent. However, these principles and approaches were removed by the NTNER.

Compulsory acquisition of townships/ removal of the permit system

The NNTER legislation made 69 regions of the Northern Territory subject to the compulsory acquisition by the Commonwealth as five-year leases. These areas consisted of Indigenous townships and town camps which Indigenous communities owned under Aboriginal title. The acquisitions were made under s 51 (xxxi) of the Constitution, so the Commonwealth was required to compensate the Indigenous communities on 'just terms'. The basis of this legislative measure was to speed up the provision of necessary government services and infrastructure in affected communities. In 2012, these leases were extended to 10 years under the 'Stronger Futures' legislation (discussed later in this chapter).

The permit system set up under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was also scrapped so that access to remote communities and homelands to apply the strategies outlined above could not be refused.

Alcohol restrictions

The NTNER legislation also included bans on alcohol in many areas of the Territory. The *NT Liquor Act* was modified so that it applied in a particular way to 'alcohol protected areas'. For example, under s 8 various offences were inserted into the Acts such as the offence of consuming liquor in an 'alcohol protected area'.

As Sara Hudson (2012) explains:

> … in all the states and territories where alcohol restrictions have been introduced, government

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Figure 20.4 The government banned the sale and consumption of alcohol without providing any adequate recovery programs or support.

has failed or been slow to deliver on promised rehabilitation programs for alcoholics and on real and substantive reforms to education, employment and housing. As a result some residents have transferred their addiction to other drugs and others have found ways to avoid the law by bringing alcohol in illegally. The gradual erosion of the benefits of alcohol restrictions highlights how useless the introduction of restrictions can be without addressing the aimlessness and boredom of lives lived on welfare.

The Prohibition movement of the 1930s in the United States is often referred to as an example of the outcomes of banning alcohol. Drinkers either find illegal methods of obtaining alcohol or find cheaper alternative substances that may have even more harmful effects.

Court challenge

Mr Reggie Wurridjal, a senior member of the Dhukurrdji clan, challenged the NTNER in October 2007 (see *Wurridjal v Commonwealth of Australia* [2009] HCA 2). He claimed that the seizing of his people's land, 10 km^2 in area, was a property acquisition that was not consistent with the 'just terms' in s 51(xxxi) of the Constitution. Mr Wurridjal's challenge was unsuccessful on the basis that s 122 of the Constitution 'gives Parliament the power to make laws for the governing of any territory'.

Research 20.1

Read the High Court judgement in the Wurridjal case, which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6597.

Outline the arguments of both parties.

International implications

The UN Special Rapporteur on Indigenous Rights, James Anaya, visited Australia in 2009 and found that Australia was failing in its compliance with the *UN Convention on the Elimination of all Forms of*

Figure 20.5 The intervention failed to recognise Indigenous cultures.

Review 20.2

1. Discuss the value of a BasicsCards or the quarantining of income/welfare payments. Use the news story on page 522 to illustrate your response.
2. Outline the significance of the removal of customary law and cultural practice considerations from bail applications and sentencing in criminal proceedings. Describe the impact the removal may have on IPNT.
3. Outline the significance of the permit system for IPNT. Describe the impact the removal of the permit system may have on IPNT.

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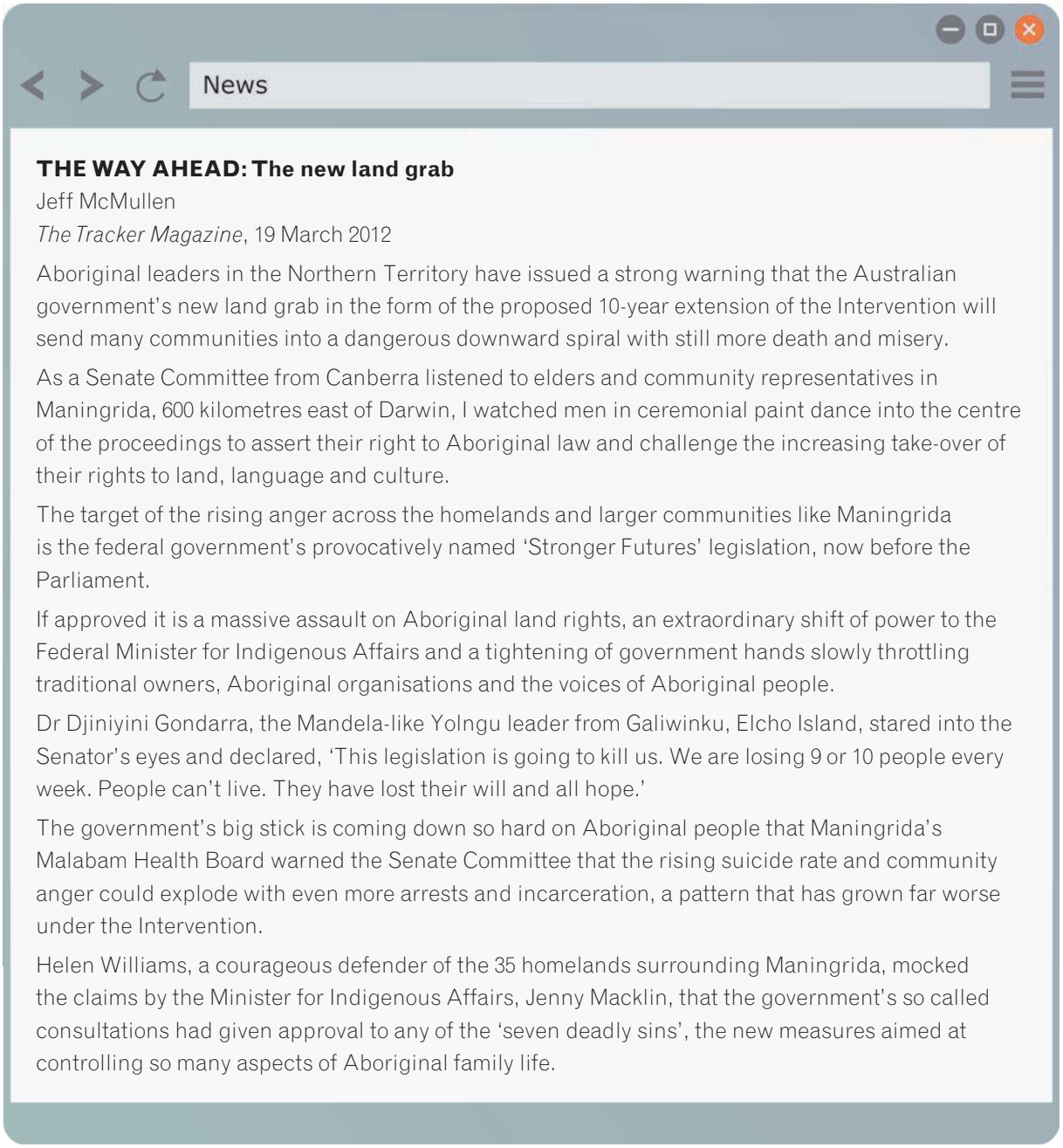
Racial Discrimination (UNCERD). Australia fulfilled its commitments to the UNCERD in 1975 by enacting and implementing the *Racial Discrimination Act*. However, the NTNER suspended this Act in 2007 in order to pursue its nine strategies. Mr Anaya noted that the NTNER also impacted on the Native Title Act, and that Articles 1 and 2 of the International Covenant of Economic, Social and Cultural Rights (ICESCR) had been contravened, because the NTNER failed to recognise culture as a central pillar of Indigenous Australian identity.

Stronger Futures in the Northern Territory Act 2012 (Cth)

The NTNER expired in 2012, and was succeeded by the *Stronger Futures in the Northern Territory Act 2012* (Cth), which extended many of the intervention measures for a further 10 years, as well as providing a $3.4 billion funding package for the period.

It is clear that the government went to great lengths to talk about the legislation with Indigenous communities throughout the Northern Territory. Government sources report that in mid-2011 there were over 450 meetings with 100 communities as the



THE WAY AHEAD: The new land grab

Jeff McMullen

The Tracker Magazine, 19 March 2012

Aboriginal leaders in the Northern Territory have issued a strong warning that the Australian government's new land grab in the form of the proposed 10-year extension of the Intervention will send many communities into a dangerous downward spiral with still more death and misery.

As a Senate Committee from Canberra listened to elders and community representatives in Maningrida, 600 kilometres east of Darwin, I watched men in ceremonial paint dance into the centre of the proceedings to assert their right to Aboriginal law and challenge the increasing take-over of their rights to land, language and culture.

The target of the rising anger across the homelands and larger communities like Maningrida is the federal government's provocatively named 'Stronger Futures' legislation, now before the Parliament.

If approved it is a massive assault on Aboriginal land rights, an extraordinary shift of power to the Federal Minister for Indigenous Affairs and a tightening of government hands slowly throttling traditional owners, Aboriginal organisations and the voices of Aboriginal people.

Dr Djiniyini Gondarra, the Mandela-like Yolngu leader from Galiwinku, Elcho Island, stared into the Senator's eyes and declared, 'This legislation is going to kill us. We are losing 9 or 10 people every week. People can't live. They have lost their will and all hope.'

The government's big stick is coming down so hard on Aboriginal people that Maningrida's Malabam Health Board warned the Senate Committee that the rising suicide rate and community anger could explode with even more arrests and incarceration, a pattern that has grown far worse under the Intervention.

Helen Williams, a courageous defender of the 35 homelands surrounding Maningrida, mocked the claims by the Minister for Indigenous Affairs, Jenny Macklin, that the government's so called consultations had given approval to any of the 'seven deadly sins', the new measures aimed at controlling so many aspects of Aboriginal family life.

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government organised to amend the 2007 legislation. The news story on page 525 describes one of the meetings.

However, by June 2013, despite fierce resistance and a 43 000-signature petition, the *Stronger Futures* legislation extended the Northern Territory intervention for another 10 years. Under this legislation, the penalties for alcohol offences were increased, with up to six months' imprisonment for possession of a single can of beer, and three times that for a six-pack.

Courts were still not allowed to take customary law or cultural practice into consideration when making decisions.

In addition, the School Education Attendance Measure (SEAM) was introduced. This meant that some income quarantining continued, with welfare payments being withheld under SEAM. Under the *Social Security Legislation Amendment Act 2012* (Cth), parents and caregivers of both Indigenous and non-Indigenous children (in SEAM locations) must maintain a minimum standard of school attendance for their children. If they failed to meet these standards their welfare payments could be cut until the parent could demonstrate adequate attendance rates.

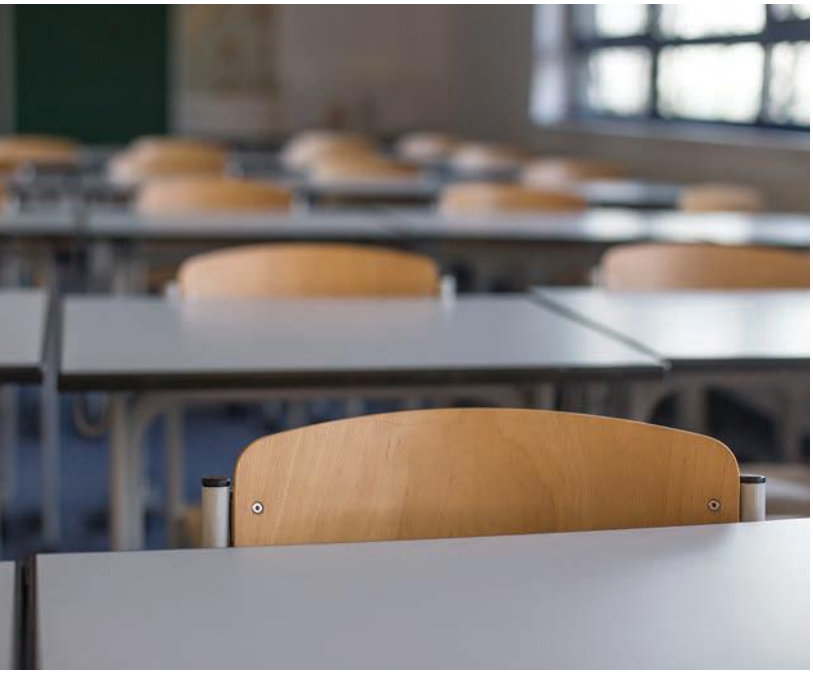

Figure 20.6 Some payments were withheld if children failed to meet minimal attendance expectations at school.

Review 20.3

1 What international agreements have been contravened by the NTNER?
2 Explain the ways in which the *Stronger Futures in the Northern Territory Act 2012* (Cth) is even more stringent than the *Northern Territory National Emergency Response Act 2007* (Cth).

20.3 Non-legal responses

Public discussion and criticism

In general terms, the Indigenous people of the Northern Territory were outraged by the intervention and protested on the grounds that it constituted racial discrimination. Many argued that the strategies employed were not in response to child protection but rather a simple return to the protectionist and paternalistic days.Mr Howard was facing an election in 2007 and some commentators argued that he was simply trying to win votes. Prominent Indigenous leaders made the following statements in the first few months of the NTNER:

> People are living in third world conditions here and yet the government made the delivery of basic services and rights conditional on the rolling back of land rights. No other group in Australian society would be treated in this way. (Barbara Shaw)

> Aboriginal people whose communities were subject to the intervention were not consulted; their expertise, trust and partnership were unimportant to the federal government. And it was not lost on many that the rhetoric being used from Canberra was the same that earlier governments had used to justify the removal of Aboriginal children from their families. (Larissa Behrendt)

The North Australian Aboriginal Justice Agency stated in 2009 that people felt that their self-worth had deteriorated, and that income management is both insulting and humiliating. The Law Council of Australia has also argued that the affected communities would have been highly unlikely to

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reject the medical and infrastructure services if their free and informed consent had been sought.

Legal Links

In 2007 an article titled 'Australian government imposes military-police regime on Aborigines' was published. The article is anti-government and criticises the government's strategies. It can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6598.

Demonstrations

Stop the Intervention Collective Sydney is a group based in Sydney that organises rallies and meetings on a monthly basis with a goal of reversing the legislation associated with the NTNER. The group meets twice per month in Sydney and invites guest speakers.

Review 20.4

1 What views did the North Australian Aboriginal Justice Agency express about the NTNER?
2 What is the goal of the Stop the Intervention Collective Sydney group?

20.4 Effectiveness of responses

Overall, the NTNER has been perceived by many as racist, protectionist and regressive. It seemed to ignore decades of negotiation and collaboration as well as many international conventions set down by the United Nations. But did it achieve its objectives?

Positive outcomes

In 2011, the federal government claimed that:

> Aboriginal people living in remote communities in the Northern Territory feel safer and receive better levels of government services than they did four years ago.

By June 2011, government targets of 310 new houses and 1182 refurbishments has both been exceeded, with 324 houses and 1592 refurbishments. In socioeconomic terms there had been some improvements. In 2006, in the Northern Territory 23 per cent of Indigenous children aged 3–5 were going to preschool, compared with 36 per cent of non-Indigenous children. By 2011, this had risen to 30 per cent of the Indigenous population, and 37 per cent of the non-Indigenous population. Preschool education figures are not a true indicator of literacy gains, but an increase in preschool enrolments should be seen as a positive educational outcome.

Up until 2011, there had also been gains in Indigenous education outcomes since 2006 for those aged 15–24. The number of Indigenous Australians in the Northern Territory participating in education at some level rose from 16.6 per cent in 2006 to 22.4 per cent in 2011. The figures for the non-Indigenous NT population were about 38 per cent. School attendance rates had risen to about 62 per cent by 2011; they had been 59 per cent in 2007. However, they were recorded at 64 per cent in 2009, which seems to indicate that they have fluctuated slightly throughout the time of the intervention.

In another positive measure, household incomes were on the rise for Indigenous people in the Northern Territory, growing by about 12.7 per cent

Figure 20.7 Though Indigenous Australian household incomes improved, non-Indigenous household incomes improved significantly better.

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between 2006 and 2011. However, the incomes of non-Indigenous households grew even faster, so the gap actually widened during the period. Therefore, it is difficult to say whether or not the increases are a result of the legislative changes by both sides of politics.

Negative outcomes

Despite a change of government in 2007 and an end to the five-year program of nine strategies in 2012, the *Stronger Futures in the Northern Territory Act 2012* (Cth) provided little relief for IPNT.

Despair such as that referred to in the McMullen article on page 525 often leads to anger and rebellion against authorities. This can lead to more arrests, incarcerations and a breakdown in the relationship between the groups in conflict.

According to an Aboriginal and Torres Strait Legal Services Issues Paper of 2010, there is little evidence of an improvement in the statistics of child sexual assault. By 2015, many important aspects relating to the lives of IPNT, such as suicide, incarceration, school attendance and unemployment, have worsened under the intervention. Suicide rates have increased by 500 per cent and incarceration rates by 40 per cent while school attendance has decreased by 5 per cent. It has been suggested that:

> Aboriginal people are one of the most incarcerated on the planet. If the NT was a country, it would have the second highest rate of incarceration after the USA.

Conclusion

It is difficult to know whether the small gains described in education and incomes up until 2011 would have been achieved without the NTNER. The nine strategies have not been applied to non-Indigenous people, so it is difficult to make an accurate comparison. While the rationale of the NTNER was to speed up the delivery of services to the IPNT and reduce the incidence of child sexual assault, the program has been met with widespread condemnation by organisations such as the United Nations and Amnesty International.

The 2015, NTNER appears not to have improved the lives of IPNT in terms of education, income and health. The suspending of the *Racial Discrimination Act* for a number of years, the cutting of CDEP and the forcible movement towards welfare, plus the BasicsCard, which has to be redeemed publicly, have all been seen as negatives.

Figure 20.8 The response to the Northern Territory National Emergency Response has been mostly negative.

Review 20.5

1. List two positive outcomes that have been attributed to the NTNER.
2. To what extent have IPNT suicide, incarceration and school attendance rates worsened under the intervention?
3. Did the Aboriginal and Torres Strait Legal Services Issues Paper of 2010 find evidence of an improvement in the statistics of child sexual assault?

Research 20.2

1. Have there been any recent incidents involving IPNT and state or federal governments around Australia? Describe briefly the nature of the conflict.
2. Read the news article on page 525 and view the website Stop the Intervention. Evaluate the impact of the NTNER from 2007 to 2015.

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Chapter summary

- In 2007, the federal government launched a program of measures aimed to assist the Indigenous people of the Northern Territory: the Northern Territory National Emergency Response (NTNER), otherwise known as 'the intervention'.
- The main motive for the NTNER was the protection of Indigenous children from sexual abuse.
- The NTNER dramatically changed the relationship between the federal government and the Indigenous people of the Northern Territory in relation to land, customary law and human rights.
- The $587 million package included the seizure of Indigenous land, the placing of Indigenous people under a compulsory income management system, blanket alcohol and pornography bans and eliminating customary considerations in sentencing and bail applications.
- The Australian Defence Force provided engineering, construction, transport and health measures.
- The Racial Discrimination Act was suspended; Indigenous people of the Northern Territory, and many others, protested strongly.
- Indigenous people also argued that the strategies were not a response to child sexual protection, but rather a return to the protectionist and paternalistic days.
- There have been small gains in education and income outcomes, but it is difficult to know whether or not these would have been achieved without the intervention.
- By 2015, many statistics show a decline in quality of life for Indigenous people of the Northern Territory. Suicide, incarceration and school attendance rates demonstrate a decline in welfare.

Chapter summary questions

Multiple-choice questions

1 The legislation that enabled the intervention was formally known as the:
- **A** *Northern Territory National Emergency Response Act 2012*
- **B** *Northern Territory National Emergency Response Act 2007*
- **C** Northern Territory Emergency Response Bill 2007
- **D** *Stronger Futures Act 2007*

2 In the Northern Territory Indigenous people make up:
- **A** 2 per cent of the total population
- **B** 72 per cent of the total population
- **C** 28 per cent of the total population
- **D** 3 per cent of the total population

3 The Northern Territory National Emergency Response suspended parts or all of the:
- **A** *Racial Discrimination Act 1975*
- **B** *Native Title Act 1993*
- **C** CDEP
- **D** all of the above

4 Under the *Stronger Futures in the Northern Territory Act 2012*:
- **A** penalties for alcohol offences have been relaxed
- **B** customary law and practice can be considered in sentencing in criminal cases
- **C** welfare payments to parents can be cut until their children have adequate school attendance
- **D** sale of alcohol is banned

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5 What was the main reason for enacting the Northern Territory National Emergency Response?
- **A** to reduce unacceptable levels of child sexual assault
- **B** to promote welfare payments over Community Development Employment Programs
- **C** to reduce deaths from alcohol abuse
- **D** to reduce police deaths in custody

Short-answer questions

1 Outline some of the key quality of life indicators for Indigenous Australians.
2 Describe some of the key legislative changes for Indigenous Australians since 1967.
3 Justify the federal government decision to intervene in the Northern Territory in 2007.
4 Describe one of the legislative responses to the Northern Territory National Emergency Response legislation.
5 Discuss the views of the federal government and the Indigenous people of the Northern Territory about continuing the *Stronger Futures* legislation until 2022. Suggest possible amendments to the current legislation.

Extended-response question

Evaluate the effectiveness of the law in resolving conflict between groups and the state. Use the Northern Territory Intervention 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.

GO

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Additional resources

Issue 4:
Criminal or civil cases that raise issues of interest to students

Chapter 23
Facebook privacy issues

Chapter objectives

In this chapter, students will:

- explore 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.

Key terms/vocabulary

caveat emptor
civil action
commercialise
content community
database
e-communication
Electronic Frontier Foundation
electronic monitoring
extraterritorial application
infringe
invasion of privacy
jurisdiction
privacy legislation
privacy rights
social media
trans-border

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Relevant law

IMPORTANT LEGISLATION

Crimes Act 1914 (Cth)
National Health Act 1953 (Cth)
Freedom of Information Act 1982 (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)

SIGNIFICANT CASES

Damien O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys [2011] FWA 5311

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23.1 Social media and the law

What is social media?

The term '**social media**' is heard a lot these days, but what does it mean? A simple definition is the interactions between people in which they create, share, exchange and comment on content among themselves. 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'.

Types of social media include blogs, collaborative projects such as Wikipedia, **content communities** such as YouTube and social networking sites such as Facebook and Twitter. The use of social media is a growing. According to the Australian Bureau of Statistics, there are about 9.3 million Facebook users and 1.2 million Twitter users in Australia.

social media
a web-based form of social interaction where users can share, comment on and discuss topics

content community
a group of people who upload, share, comment on and discuss content online; for example, YouTube and Tumblr

Social networking has become a powerful source of news updates, and a way to influence decision-making, in the past few years. Businesses and politicians use such forums as Facebook, Twitter, Instagram, LinkedIn, Blogger and Tumblr to sell products and ideas, and musicians, actors and sportspeople use them to keep a high profile in the public eye.

However, social media users are not all corporate. It began – and continues to be – a tool for individuals. Snapchat, a popular video and photo-messaging app, is used among friends to share ordinary events that occur throughout the day and also allows users to view different clips from around the world. The messages are intended to be private and are deleted after a set time-limit, although external apps have found ways to allow recipients to save messages without the sender knowing. Instagram also allows you 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 your profile.

Table 23.1 Top 10 most popular social networking sites (January 2016)

Social media platform	Estimated unique monthly visitors
1. Facebook	1 100 000 000
2. Twitter	310 000 000
3. LinkedIn	255 000 000
4. Pinterest	250 000 000
5. Google Plus+	120 000 000
6. Tumblr	110 000 000
7. Instagram	100 000 000
8. VK	80 000 000
9. Flickr	65 000 000
10. Vine	42 000 000

Source: http://www.ebizmba.com/articles/social-networking-websites

Followers can like photos and videos, comment and direct-message anyone on their feed. Users with a large amount of followers can be extremely influential and possess a large group of supporters. Brands have caught on to the power these influences have and many Instagram users have made careers out of promoting brands and product through their photos. For example, digital influencer Nicole Warne built a business posting her outfits and promoting her personal blog on Instragram. Her page, Gary Pepper Girl, now has over 1.5 million followers and she reportedly is paid up to $8000 for featuring a product or brand on her Instagram account.

Despite the explosion of different types of social media, Facebook continues to be the dominant platform. 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 the size of the next placed site.

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

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Figure 23.1 The Facebook logo is one of the most recognisable logos in social media.

13 years of age. In September 2012, Facebook had over one billion members and over 800 million active users.

As it grew, Facebook became increasingly **commercialised**. In 2007, Microsoft paid $240 million to acquire a 1.6% share, including the rights to place ads on Facebook. In 2012, Facebook listed on the stock exchange and became a public company. In the last decade more and more businesses have been using Facebook to advertise and sell their products.

commercialise
to make/give an organisation or an activity more public awareness for financial gain

Social media law

As with many things to do with technology, changes to social media occur at a faster rate than laws can develop to protect people using these technologies. It is very hard for law-makers to be proactive in many areas of society, but is especially difficult in terms of anything that involves using the internet.

In addition, some of these sites, such as Facebook, are not physically located in Australia, or owned by Australians, so making laws to govern their behaviour is almost impossible; so is enforcing such laws and the outcomes of court cases.

Privacy issues

One of the biggest areas of concern about social media, and especially Facebook, is how to protect the privacy of users.

Social media networks are generally not run by governments, and are rarely run by benevolent people or organisations. Most sites (for example, Facebook, Google and LinkedIn) are operated by profit-making companies, and so have shareholders who expect a return on their investment.

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. Also, the ability of an individual to take **civil action** against an **infringement** of their **privacy rights** is extremely limited in the international arena.

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

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

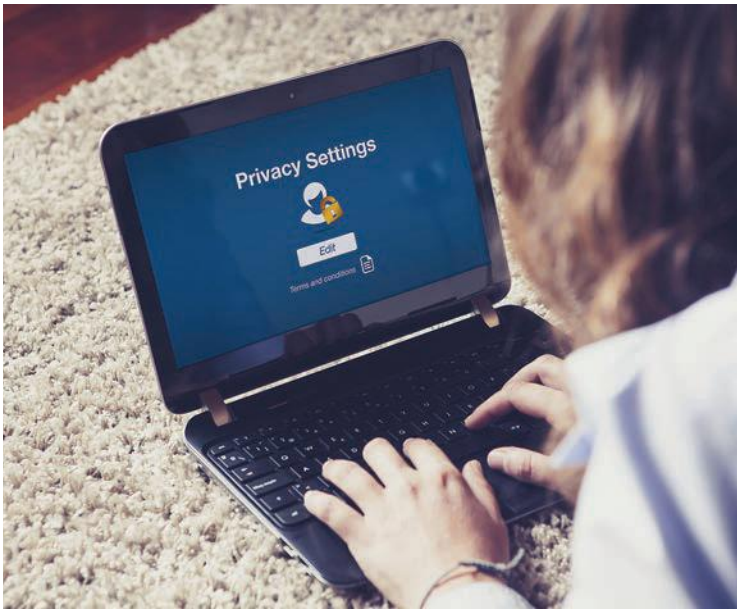

Figure 23.2 Privacy is a common concern for social media users.

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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 when an intangible thing such as the internet is involved.

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 work day. Just as in the past workers would use the office phone to make a call to family or friends, they will now use the office computer, or their own phone or tablet to make or get a social media update.

In the same way that workers love social media, businesses are finding that it is a very good vehicle to promote their products. These new areas of **e-communication** have provided terrific channels for information to flow both inside and outside the workplace. But while there are benefits to having an increasingly connected workforce, there are also potentially negative consequences. As the barriers between workplace and personal activities become increasingly blurred, there are concerns that an employer's ability to monitor staff can border on the invasive.

e-communication
(electronic communication) any transmission of communication using computers or other digital products

Figure 23.3 The use of social media in the workplace can result in breaches of workplace privacy policies.

Problems arise when businesses are seen to invade their workers' rights by accessing the information and messages sent by them through electronic media, and when workers are seen to use social media to bring their employer's reputation into disrepute. 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. Supervisors may become 'friends' with employees on Facebook and then take exception to comments made or make inappropriate comments themselves. A worker may post a derogatory comment after a bad day at work. This can damage workplace relationships and affect future employment opportunities. Sometimes these actions can constitute an **invasion of privacy**.

invasion of privacy
to violate an individual's privacy by intruding into their private affairs

Review 23.1

1 Define the term 'social media'. Identify four different types of social media.
2 How popular is social media in Australia? Which site is the most popular?
3 Discuss the issues involved in social media use.
4 Why is it difficult for the law to protect social media users?

Research 23.1

Investigate one social media site, and then answer the following questions.

1 Who owns it?
2 How many users does it have?
3 How easy is it to join?
4 What rules cover its members?
5 How is privacy protected?
6 Would you join this social media site? Why or why not?

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23.2 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, privacy is covered by the following laws:

Commonwealth

- *Privacy Act 1988* (Cth)
- *Telecommunications Act 1997* (Cth)
- *National Health Act 1953* (Cth)
- *Data-matching Program (Assistance and Tax) Act 1990* (Cth)
- *Crimes Act 1914* (Cth)
- *Anti-Money Laundering and Counter- Terrorism Financing Act 2006* (Cth)
- *Healthcare Identifiers Act 2010* (Cth)

NSW

- *Privacy and Personal Information Protection Act 1998* (NSW)
- *Health Records and Information Privacy Act 2002* (NSW)
- *Health Records and Information Privacy Regulation 2012* (NSW) (HRIP Regulation)
- *Government Information (Public Access) Act 2009* (NSW)
- *State Records Act 1998* (NSW)
- *Criminal Records Act 1991* (NSW)
- *Surveillance Devices Act 2007* (NSW)
- *Workplace Surveillance Act 2005* (NSW)
- *Telecommunications (Interception and Access) (New South Wales) Act 1987* (NSW)
- *Access to Neighbouring Land Act 2000* (NSW)
- *Crimes (Forensic Procedures) Act 2000* (NSW)

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 application
the ability of a government to exercise authority outside its borders

trans-border
beyond the border

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 s 2 of the *Australia Act 1986* (Cth).

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

The extraterritorial operation of the *Privacy Act 1988* (Cth) (section 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. At the moment, this Act only serves as a watchdog, reminding businesses to behave in an ethical way – it is yet to be tested in an international court of law.

Figure 23.4 *The Privacy Act 1988* (Cth) is yet to be tested in an international court of law.

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Trans-border data flows

Embodied within the Privacy Act 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 collection of personal data, it can be argued that they are all applicable, because these days most people share huge amount of personal details on their social media sites. This has allowed businesses to access a huge amount of information about individuals and market products to them.

Legal Links

The Office of the Australian Information Commissioner website has a Privacy Law section, which contains details of the Privacy Act and other legislation. It can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6599.

However, once again, these principles only serve as a deterrent, and only apply to businesses that operate in Australia. It has not yet been tested in an Australian or international court.

Review 23.2

1. Privacy laws cover many areas. Identify the laws that would be relevant to social media.
2. Which areas of privacy are covered by laws in all states and territories? Would it be more relevant to have just federal laws? Justify your answer.
3. Describe how the Australian Government has tried to make the Privacy Act relevant to social media use. Assess the practicalities of this.

Research 23.2

1. View the Office of the Australian Information Commissioner (OAIC) website. Outline the responsibilities of the OAIC. How easy is it to make a privacy complaint?
2. Investigate two of the privacy laws, and then complete the following tasks:
   - **a** Outline the actions covered by these laws.
   - **b** What penalties are incurred for disobeying these laws?
   - **c** Are there any reported prosecutions under these laws? If there are, write a brief summary of a case.

Workplace social media policies

Business owners and managers can ban their staff from using social media at work, but while the business is using Facebook to promote products, this would seem hypocritical. 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 are telling businesses 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 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' was not allowed.

Of the businesses surveyed, 44 per cent stated that they felt allowing access to social media created 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 also 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.

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In Court

***Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 (2011)**

In this case, a disgruntled employee had gone home and vented his anger at supervisors on his Facebook page. Unfortunately, some colleagues who were his Facebook friends were not happy with these comments and reported him. His employers 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 and was successful in his complaint of unfair dismissal. The Commissioner upheld the employee's complaint, as, among other reasons, the company did not have a social media policy. Thus, the workers at the business had no guidelines to follow in regard to their use of social media, especially when discussing issues with the business using this platform.

A two-part article about *Stutsel v Linfox Australia Pty Ltd* [2011] can be accessed via the following two links:

- http://cambridge.edu.au/redirect/?id=6600
- http://cambridge.edu.au/redirect/?id=6601

This article also makes reference to another case: *Damien O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311. You can access the full case via the following link: http://cambridge.edu.au/redirect/?id=6602.

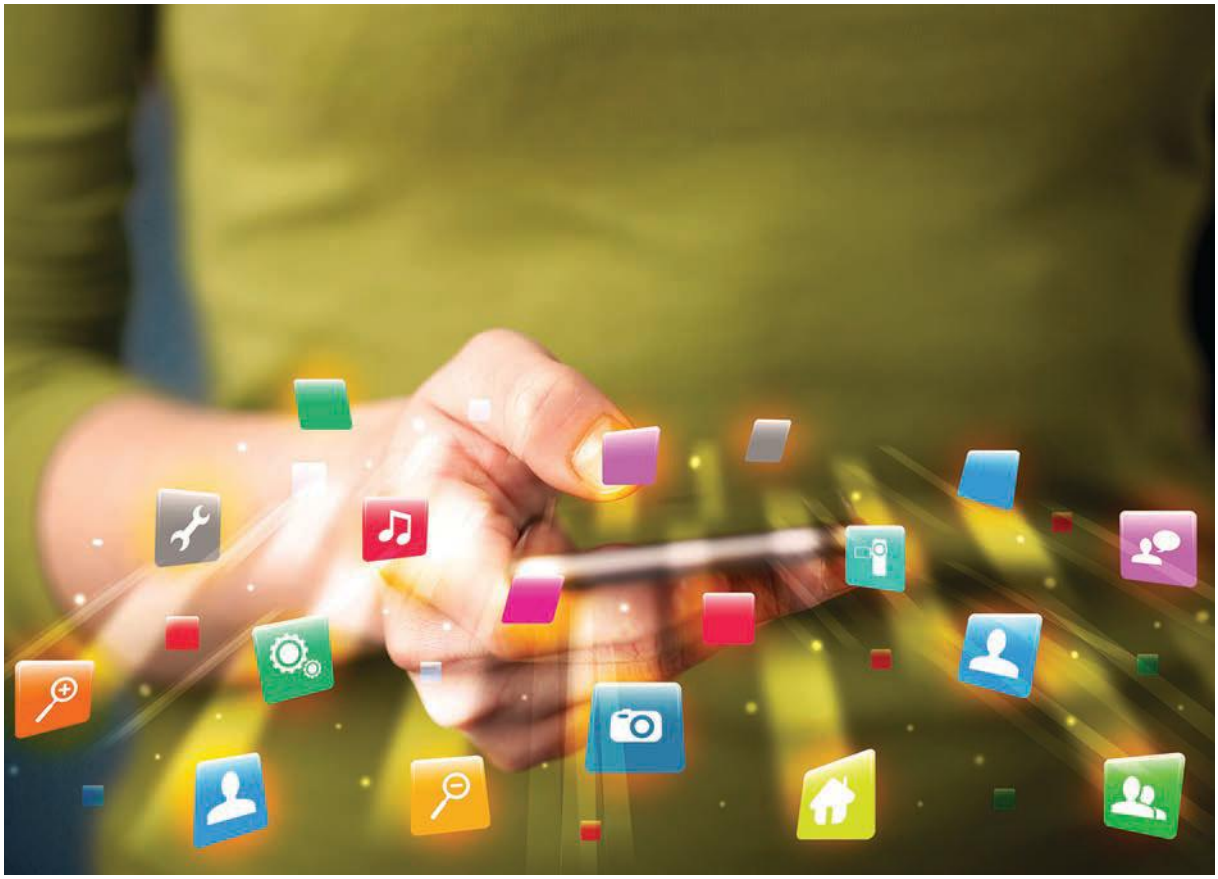

Figure 23.5 Despite issues with social media privacy, many businesses are using social media as a way to expand and promote their business.

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Case Study

Commonwealth Bank policy causes problems

The importance of management understanding social media can be seen in the case of the Commonwealth Bank. Its social media policy required workers to inform the bank if they saw any negative commentary about it on social media. This included employees' own Facebook pages. Failure to do so would lead to termination of employment. Employees were upset by this as they felt that they would always be on duty. The Financial Services Union (FSU) negotiated with the bank to change the wording of the policy as it made employees responsible for comments made by others and blurred the distinction between being on duty and off duty. The bank softened its stance: negative comments should still be reported, but failure to do so would not lead to dismissal. The FSU representative Mr Carter urged members to take care with their own online postings, since employers or potential employers could be watching.

Figure 23.6 The Commonwealth Bank has adjusted its social media policy.

Case Study

NSW Police Force policy

The NSW Police Force has taken a strong approach to the use of social media by its employees. This is stated in its 'Personal Use of Social Media Policy and Guidelines' and 'Official Use of Social Media Policy' documents, which are available in hard copy and on the internet. It does not ban employees from social media use but instead sets 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.

The two NSW Police Force documents are available online as downloadable PDFs:

- 'Personal Use of Social Media Policy and Guidelines', which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6603
- 'Official Use of Social Media Policy', which can be accessed via the following link: http://cambridge.edu.au/redirect/?id=6604

Employers are not only concerned about what their employees may say about them on social media. An individual's social media profile may include the name of their employer, and thus their online behaviour, and the personal values this demonstrates, may reflect back on the employer.

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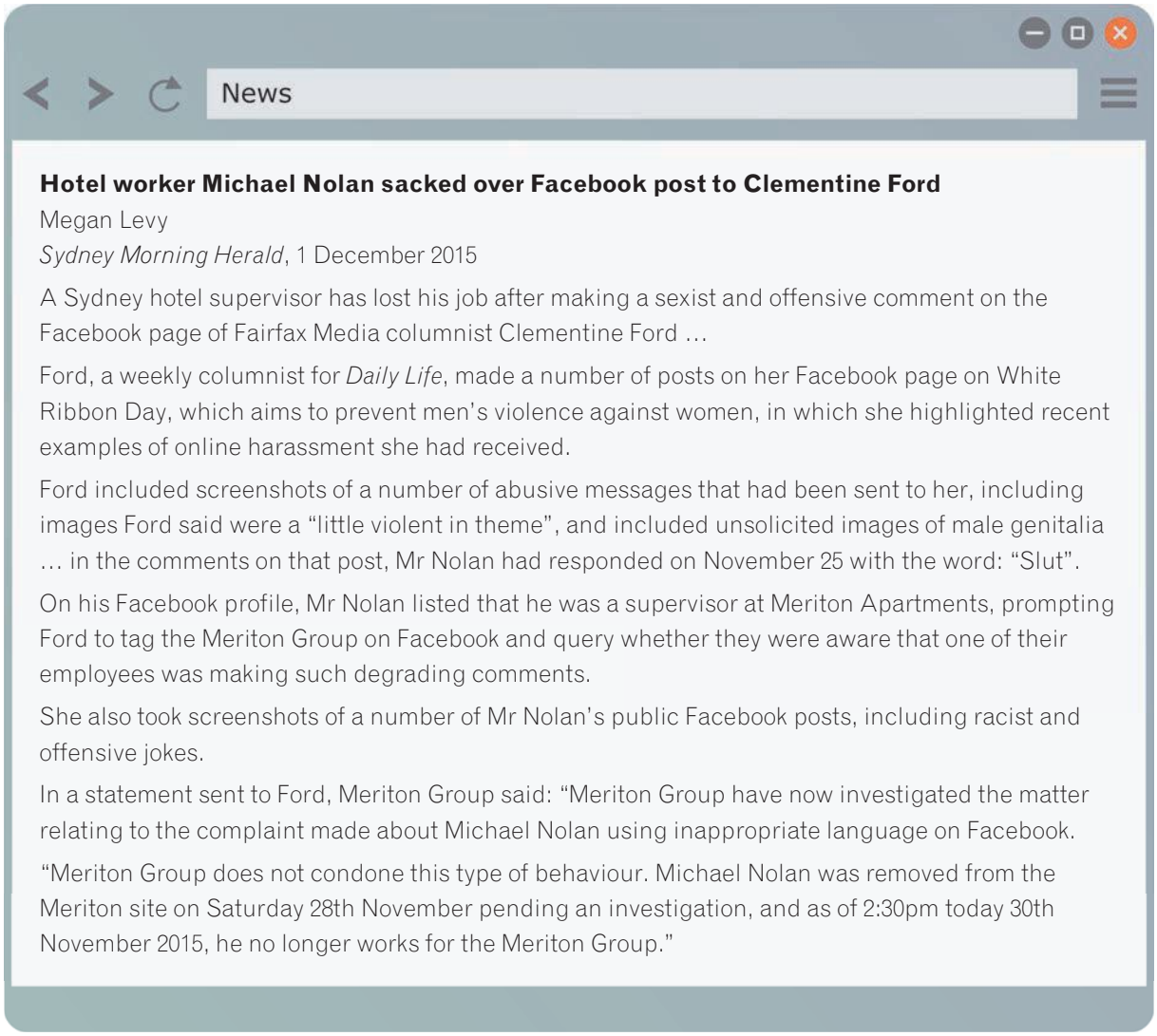

Hotel worker Michael Nolan sacked over Facebook post to Clementine Ford

Megan Levy

Sydney Morning Herald, 1 December 2015

A Sydney hotel supervisor has lost his job after making a sexist and offensive comment on the Facebook page of Fairfax Media columnist Clementine Ford …

Ford, a weekly columnist for *Daily Life*, made a number of posts on her Facebook page on White Ribbon Day, which aims to prevent men's violence against women, in which she highlighted recent examples of online harassment she had received.

Ford included screenshots of a number of abusive messages that had been sent to her, including images Ford said were a "little violent in theme", and included unsolicited images of male genitalia … in the comments on that post, Mr Nolan had responded on November 25 with the word: "Slut".

On his Facebook profile, Mr Nolan listed that he was a supervisor at Meriton Apartments, prompting Ford to tag the Meriton Group on Facebook and query whether they were aware that one of their employees was making such degrading comments.

She also took screenshots of a number of Mr Nolan's public Facebook posts, including racist and offensive jokes.

In a statement sent to Ford, Meriton Group said: "Meriton Group have now investigated the matter relating to the complaint made about Michael Nolan using inappropriate language on Facebook.

"Meriton Group does not condone this type of behaviour. Michael Nolan was removed from the Meriton site on Saturday 28th November pending an investigation, and as of 2:30pm today 30th November 2015, he no longer works for the Meriton Group."

Review 23.3

1. Discuss the issues associated with employees using social media in their workplace.
2. Outline why employees were unhappy with the Commonwealth Bank's social media policy.
3. Explain why it is important that management have a social media policy in the workplace. Identify some key components you believe should be in this policy.
4. Read the news item above, and explain why the Meriton Group terminated Michael Nolan's employment.

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23.3 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.

Electronic Frontier Foundation
(EFF) an organisation that seeks to protect the privacy of individuals online by running campaigns to educate users

Figure 23.7 Logo of the Electronic Frontier Foundation

Research 23.3

View the Electronic Frontier Foundation's website and complete the following tasks.

1. Outline the activities carried out by the Electronic Frontier Foundation.
2. Go to the 'Takedown Hall of Shame' link. Choose a business that has been shamed and describe why it has been nominated.

23.4 Effectiveness of responses

As can be seen, 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 been 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 problem being complained about.

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.

Employer/employee privacy

Evidence suggests that many workers are a bit too relaxed in their attitude to using social media in the workplace. In 2012, Monash University and the University of Tasmania published research into employees' attitudes to **electronic monitoring** and surveillance by employers across Australia. The report *The Electronic Workplace* was concerned by a number of employee attitudes towards privacy, personal data and social media:

electronic monitoring
any form of surveillance using electronic devices such as cameras, microphones and computers

- 31 per cent of those surveyed admitted to using social networking sites during work hours. Facebook was the most used site at work (94 per cent) and only 14 per cent acknowledged using social media solely for work-related activities, with 42 per cent using it just for personal (non-work related) activities, a 3 to 1 ratio.
- Of those surveyed, 45 per cent used social media for both work and personal activities, highlighting the issue of blurring the workplace/private space boundaries and the work and private life boundaries. Only 35 per cent of respondents reported the presence of a policy or statement concerning the use of social media at work and less than one-third indicated they had received training around the use and intent of such a policy.
- An underlying theme associated with this research is the issue of employee privacy. Along with the development of technology within the digital workplace, the amount of information an employer holds on an employee continues to increase. With this in mind, we asked employees

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during our study about their views on the information their employer holds on them.
- In terms of an employee's rights to access their own personal information held by the employer, 72 per cent reported they understood their access rights on this important issue. Yet only 51 per cent understood what this personal information was used for, and only 53 per cent knew who within the organisation had access to it.
- 62 per cent of respondents indicated they were not at all concerned about how their employer used this personal information; a further 20 per cent were only a 'little' concerned.
- Only 57 per cent of organisations were reported to have a privacy policy or statement for employees and, in these organisations, only around 6 out of 10 respondents had read the policy or statement.

These results indicate that use of social media and workplace privacy is likely to be a growing area for conflict between employees and their employers. The amount of information that employers obtain on employees is increasing, and employers want to exercise greater control over the manner and purposes for which their employees use electronic media. The desire by individuals to discuss their personal and professional lives on social networking sites can increasingly lead to clashes with their employers.

Personal privacy

Users of Facebook must remember the Latin expression ***caveat emptor*** when using Facebook, and be aware that online, every conversation, every photo uploaded, every item shared and even every web search goes into a **database**.

caveat emptor
a Latin term which loosely translates to 'buyer beware', meaning that buyers are responsible for their actions

database
the place/program where collected data is organised and stored

Businesses will pay for this data, so sites such as Google and Facebook make their money by giving advertisers access to their enormous databases. With this information, advertisers can target people making specific searches or discussing specific topics.

Facebook has been globally criticised for the fact that its settings allow access to personal information and thus invasion of privacy. Young people, especially, seem to have a nonchalant attitude to posting information about their everyday activities on Facebook. This makes them especially vulnerable to being targeted by businesses, stalkers, cyberbullies and identity thieves.

Consumers must use common sense if they don't want to be pestered by businesses and other groups who have used the same websites to find their target

Figure 23.8 Social media challenges the distinction between personal and public.

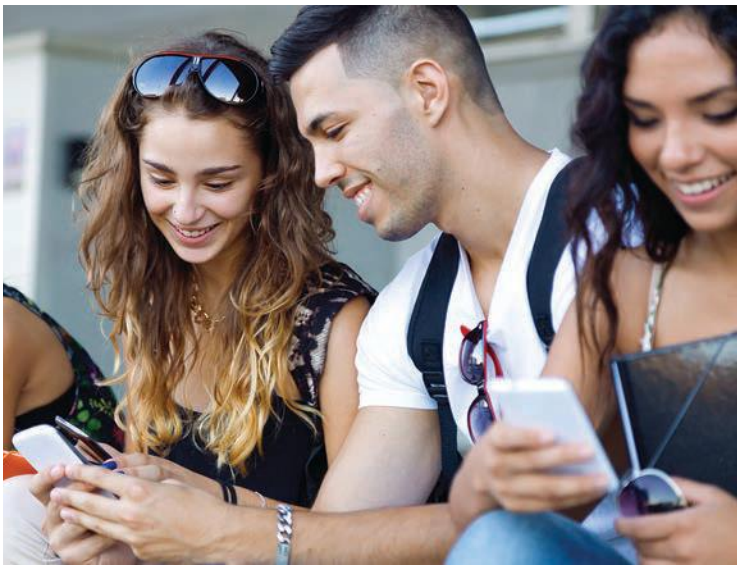

Figure 23.9 Young people are some of the biggest users of social media.

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markets. Part of this involves users of social media setting their privacy settings high, so that only those they want to see the information can access it. Or they could take a deep breath and not post the information at all, because if it's not on Facebook, no one can use Facebook to find it.

Conclusion

Social media will not go away, and as more and more people use it, legal issues will be highlighted. In terms of privacy, Australian privacy laws can offer some protection, but due to the intangible nature of the internet and the international ownership of social media sites, it is difficult to make and enforce laws. The only true protection is education and awareness, and users taking responsibility for their own actions.

Review 23.4

1. Describe the ways in which Australian workers can be considered to be too carefree in their use of social media.
2. Define *caveat emptor*. Discuss why this term is important for users of social media.
3. Describe all the ways that an individual can place him or herself at risk using social media sites such as Facebook.
4. Provide a list of five important personal rules for someone using Facebook.

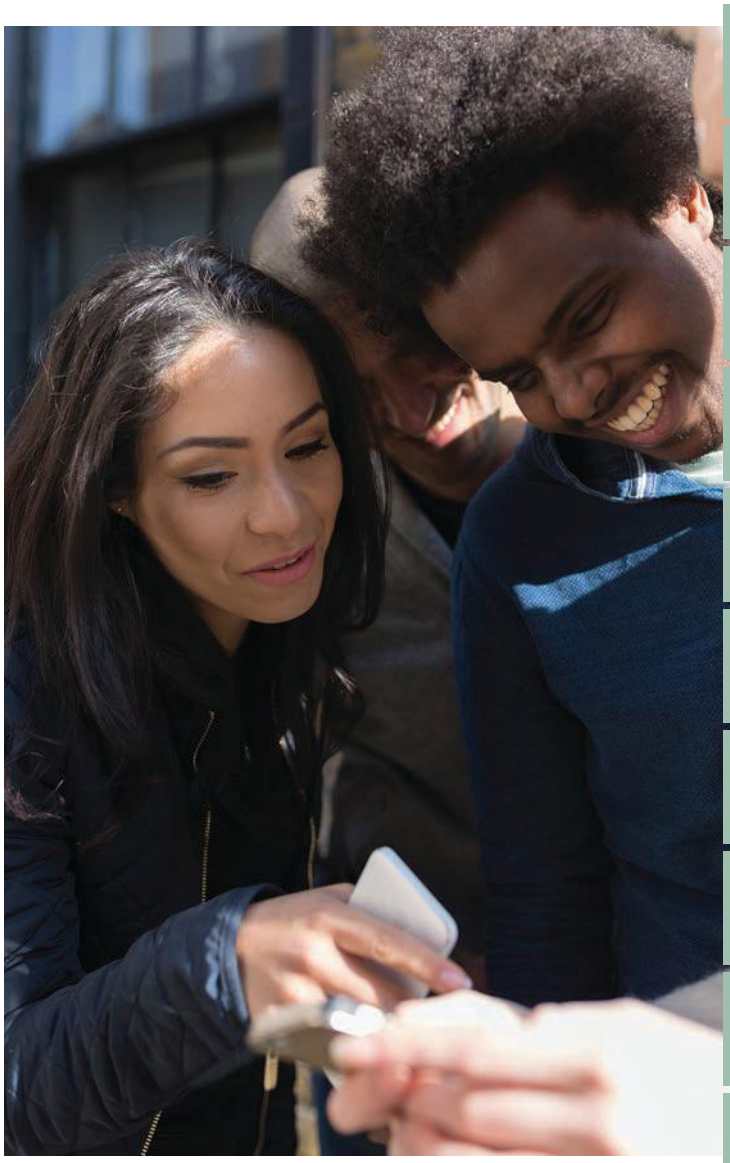

Figure 23.10 Social media use is only increasing.

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Chapter summary

- Social media use is a growing phenomenon, with Facebook being the most popular site.
- Because of the fast rate of change in the area of the internet, and the international nature of social media, it is difficult to create and enforce laws regarding its use.
- Privacy laws go some way to affording protection to 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 is the best form of protection in using social media.

Chapter summary questions

Multiple-choice questions

1 Which of the following is a meaning for 'social media'?

A a website to organise parties
B a website where people can create, share and exchange content and comments
C a newspaper where people can create, share and exchange content and comments
D a blog where people can create, share and exchange content and comments

2 Why is it difficult to make and enforce laws about social media use?

A the owners are outside Australia
B technology moves so fast
C technology changes rapidly and the owners often are not Australian-based
D the internet is intangible and technology moves so fast

3 How has the federal government tried to deal with the international dimension of privacy and social media?

A by giving the *Privacy Act 1988* (Cth) extraterritorial application and regulating trans-border data flow
B by signing an agreement with the United Nations and by giving the *Privacy Act 1988* (Cth) extraterritorial application
C by signing an agreement with the United Nations and by regulating trans-border data flow
D by having all international businesses sign an agreement that they will do the right thing

4 Which of the following is a role of the Fair Work Commission?

A to investigate allegations of wrong behaviour by employees when using social media in the workplace
B to investigate allegations of wrong behaviour by employers when using social media in the workplace
C to investigate the advantages and disadvantages of using social media in the workplace
D to investigate allegations and to make a decision about unfair dismissal in the workplace

5 What does *caveat emptor* mean for users of social media?

A It is difficult to apply the law to social media, so wise decision-making is needed.
B The government is not able to legislate for social media users so wise decision-making is needed.
C Consumers need to take responsibility for their social media use.
D Social media owners just want to make a profit from users.

Short-answer questions

1 Identify the domestic and international protection that is provided for Australians in relation to social media privacy.

2 Discuss with your class why there are issues with social media and the workplace. List other sectors where social media and privacy could be an issue.

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3 What does the term *caveat emptor* mean? Discuss the way this term can allow social media networks to deny or refuse any responsibility in regard to the distribution of their users' personal details.

Extended-response questions

1 '"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.

2 Evaluate the effectiveness of the legal system in achieving justice for social media users whose privacy has been compromised.

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

GO

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Additional resources

Cases, statutes and media reports (CSM)

In Legal Studies, it is important that written responses are backed up by cases, statute law and media reports. This means knowing the basic facts about certain important cases, learning some key pieces of legislation, and being able to cite recent events that relate to certain topics or areas of law (media reports).

Always remember the acronym CSM when writing extended responses. Ask yourself 'Have I included some cases, statutes and media reports?'

Cases

Citing cases

Legal cases refer to matters brought before the courts for decision. As discussed in the textbook (Chapter 2 – Sources of contemporary Australia law), cases in Australia can be heard by a number of different courts according to a jurisdiction's court hierarchy. More minor matters might be heard before lower courts, such as the Local Court in NSW, whereas appeals or more significant matters will generally be heard by higher state or federal courts, such as the Supreme Court of NSW or the High Court of Australia. Remember, most legal disputes decided in courts are a matter of applying the facts of the case to the law that exists. In some legal cases, there might be some uncertainty as to what the law is or should be. These may be important cases in Australian law – they may help to clarify how the law applies in an area that is otherwise vague or unclear. These cases may then be frequently cited in later cases and discussions about that area of the law.

Each case reported in a court will have a unique citation to identify it. This will identify the name of the case and its location in the law report in which it has been published. As with legislation, there are well-established rules and conventions for case citations. During your studies, you will need to research or refer to legal cases, and you will need to use the established citation rules as outlined below.

Case citations are made up of a number of components. There are:

- **name** – this includes the names of the principal parties in the case. The name is always written in italics.
- '**v**' – most cases will be cited with two parties, separated by a 'v' which means 'versus'. When reading aloud, the v is read as '**and**'.
- **year** – this follows the name and refers to the year the report is published (note this is not always the same year as the case). This is written in either **[square brackets]** or **(round brackets)**. Square brackets indicate that the report is compiled sequentially by year, and no volume number is needed. Round brackets indicate that the law report uses sequential volume numbers, and you will need to refer to the volume to find the particular case.
- **volume number** (where applicable) – as referred to above.
- **abbreviation** – each law report series has a specific abbreviation and you will need to refer to the specific series where the case is reported. The table below contains some of the most common abbreviations.

Abbreviation	Law report
A Crim R	Australian Criminal Reports
ALR	Australian Law Reports
All ER	All England Law Reports
CLR	Commonwealth Law Reports
FCR	Federal Court Reports
FLR	Federal Law Reports
KB	Law Reports, King's Bench Division
NSWLR	New South Wales Law Reports
QB	Law Reports, Queen's Bench Division

- **page number** – this is the first page in the report where the specific case appears.

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Statutes

Legislation, also known as statute, refers to laws that have been passed through state and federal parliaments, and includes acts and regulations. An example of this is the *Australia Act 1986* (Cth). When citing legislation, there are four main components to consider. These are:

- **short title** – this is the name of the act or regulation (usually specified in the legislation under section 1). This part is written in *italics*. The short title also includes the year of the legislation, discussed below.
- **year** – part of the short title; the citation must include the year that the act or regulation was passed (i.e. when it received Royal Assent). This part is also written in *italics*.
- **jurisdiction** – the citation must specify the jurisdiction that the legislation comes from – for example, an act from New South Wales will include ('NSW') after the short title. A federal, or Commonwealth act will include ('Cth'). Note that this part is **not** written in italics. Other state and territory jurisdictions are written as follows: (Vic), (Qld), (SA), (WA), (ACT), (Tas) and (NT).
- any **section number(s)** – if a specific section needs to be referred to, this is usually written after the legislation name. For a section this is shortened to 's' (e.g. 's 52'); for more than one section, 'ss' is used (e.g. 'ss 5, 14').

The rules also apply to bills that have not yet been passed by a parliament – the year cited will be the year the bill was introduced. The only difference is that the bill title does not appear in italics; for example Native Title Amendment Bill 2009 (Cth).

Note that when talking about a *specific* act, regulation or bill, once the title is cited you should always refer to the legislation using a capital letter: e.g. 'the Act' or 'the Bill'. This is different from referring to acts or bills in general, which will always use a small letter.

Media reports

A media report is anything that has appeared in the news. Media reports most commonly appear in newspapers, but can also include magazine articles, documentaries and articles/reports published online. The law is a dynamic thing and sparks much public comment. Luckily for students of Legal Studies, the media is always carrying an item or making a comment that is relevant to the law. It is important that you recognise this and remain aware of current events in the legal arena. This will not only help you gain a greater understanding of the concepts and content that you are covering in the course, but it will also give you relevant, up-to-date examples to use in your written responses. However, be aware that outrage sells, and sometimes the headline and the article have very little in common. Therefore, as you regularly peruse the media for reports, evaluate the information that is being provided and be alert for bias and the sales factor.

Try keeping a media file of relevant articles throughout the year. Set up a folder (either hard copy or electronically) with three subdivisions: 'The legal system', 'The individual and the law' and 'Law in practice'. Articles relevant to any of the topics, even if they have not yet been studied in class, can be placed into plastic sleeves or electronic folders under the relevant heading. Make some brief notes and include these with the article. You may wish to use the 'Media report pro forma' supplied on *Cambridge GO* to help you with this task. Make sure that you write down the source and date of each item.

You can regularly check newspaper websites, as they allow you to access their most recent articles (e.g. the *Sydney Morning Herald* allows you access to articles that have appeared in the previous eight days). When accessing newspaper articles electronically, it is important to do so as soon as possible, as it is difficult to get old articles without having to pay for them. Articles can be copied into Word for easier manipulation, then placed in the relevant folder. An even better method of storage is to use a commercially available database such as Procite or Endnote, or to make a database yourself. However, do not forget to evaluate each item and its source for reliability, validity, bias and usefulness.

When writing a research essay, correctly cite your media reports in a consistent way in footnotes or endnotes. For example: *Sydney Morning Herald*, 'New development in gang torture case', 9 December 2009.

When writing in an exam, however, it is not necessary to remember exact titles and dates of media reports – simply placing the event or issue that has been reported in the media in a timeframe is

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sufficient. For example, 'the recent debate on gang violence', 'in recent months', 'earlier this year' or 'in 2013'.

The internet is a valuable source of information for Legal Studies students. However, there is a lot of misinformation posted online. Some websites will not be updated for months at a time, so the information will be old and irrelevant; some sites are just venues for individuals or groups to promote their own agendas and views, or for businesses to sell items; and some have incorrect facts and figures. Therefore, any website accessed must be looked at for reliability, validity, bias and usefulness.

Sites provided by government departments are useful, as they are dynamic and the information provided is reliable. The websites of large newspapers, magazines and television networks are useful in the same way, although it must be remembered that most of these are commercial organisations. When you search the internet for information, it is important that you check the provider of the website and the last time it was updated.

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