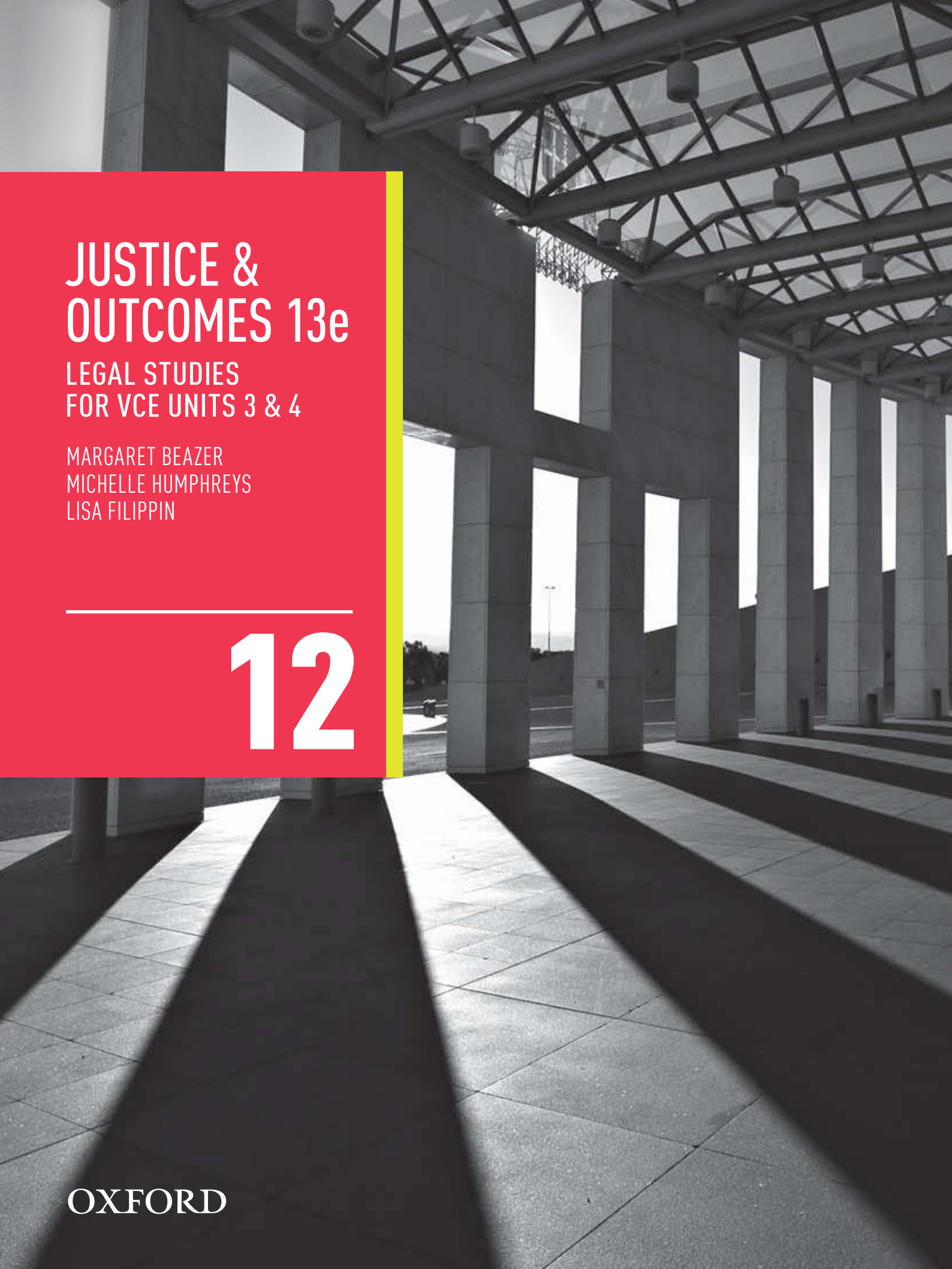


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LEGAL STUDIES FOR VCE UNITS 3 & 4

MARGARET BEAZER
MICHELLE HUMPHREYS
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ADVICE FOR TEACHERS

This Legal Studies book, *Justice & Outcomes, Legal Studies for Units 3 & 4*, is directed towards the requirements of the Victorian Curriculum and Assessment Authority (VCAA) for Units 3 and 4. It provides detailed information in an easy-to-read format, together with questions designed to help students understand the topics covered as well as challenge students.

DIGITAL SUPPORT

This student book includes free access to obook/assess. The obook is a cloud-based web-book available anywhere, anytime, on any device, navigated by topic or by 'page view'. Students can add notes, bookmark, highlight, save answers and export their work. As well as containing the student text, extra resources and study tools, the obook also includes assess, which is an indispensable online assessment tool.

assess helps students develop deep conceptual understanding with continual assessment of key knowledge closely aligned with the VCE Legal Studies Study Design. Using obook/assess, students can review their progress throughout the chapter with hundreds of auto-marking assessment questions.

As well as containing the student text and study tools, there is a teacher-only test bank containing many practice exam questions with marking guidance. Teachers are able to assign assessment to individual students, groups or classes to provide tailored learning experiences. Individual student results and class average results can be viewed, graphed or exported.

ASSESSMENT

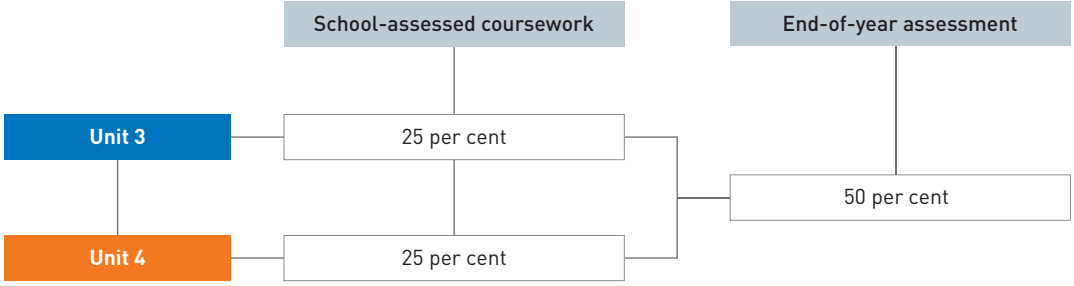
Assessment tasks as listed in the VCE Study Design for each learning outcome are included in the book where appropriate. Each assessment task is designed to assist students in achieving the learning outcomes and students' overall understanding of Legal Studies.

It is not necessary for students to complete all the assessment tasks. These are merely suggested activities to use in teaching the topics and to help students achieve their learning outcomes. Students will benefit greatly from completing as many as possible of these activities.

The information at the beginning of each chapter informs students of the requirements of each assessment task. To achieve an award of satisfactory completion for a unit, a student must have demonstrated the achievement of the set of outcomes specified for that unit. This decision will be based on the teacher's assessment of the student's overall performance on a selection of assessment tasks that are designed to cover the relevant key knowledge and skills listed for each outcome. It is important that the tasks selected are of comparable scope and demand.

ASSESSMENT OF LEVELS OF ACHIEVEMENT

The student's level of achievement for Units 3 and 4 will be determined by school-assessed coursework and an end-of-year examination.



UNIT 3 SCHOOL-ASSESSED COURSEWORK

Outcome 1 25 marks allocated

Explain the structure and role of parliament, including its processes and effectiveness as a law-making body, and describe why legal change is needed, and the means by which such change can be influenced.

Outcome 2 50 marks allocated

Explain the role of the Commonwealth Constitution in defining law-making powers within a federal structure, analyse the means by which law-making powers may change, and evaluate the effectiveness of the Commonwealth Constitution in protecting human rights.

Outcome 3 25 marks allocated

Describe the role and operation of courts in law-making, evaluate their effectiveness as law-making bodies and discuss their relationship with parliament.

The total for the outcomes is 100 marks, which contributes 25 per cent to the study score.

UNIT 4 SCHOOL-ASSESSED COURSEWORK

Outcome 1 40 marks allocated

Describe and evaluate the effectiveness of institutions and methods for the determination of criminal cases and the resolution of civil disputes.

Outcome 2 60 marks allocated

Explain the processes and procedures for the resolution of criminal cases and civil disputes, evaluate their operation and application, and evaluate the effectiveness of the legal system.

The total for the outcomes is 100 marks, which contributes 25 per cent to the study score.

TYPES OF ASSESSMENT TASKS

The types of assessment tasks shown in the Study Design for Units 3 and 4 are listed below with an explanation of each. These explanations are developed independently of VCAA, but are in line with the overall requirements of the study as a whole.

This text covers the key knowledge and skills listed for each outcome in the Study Design. Learning activities have been developed in accordance with these. Assessment tasks must be a part of the regular teaching and learning program.

PERFORMANCE DESCRIPTORS

The assessment tasks provided to the student for completion and assessment as part of the school-based coursework will be given a score based on the teacher's assessment of the level of performance of each student on achieving the outcomes specified in the Study Design.

Performance descriptors provide a guide to the levels of performance typically demonstrated within different scales of achievement. They are comprehensive statements that have been developed from the outcome statements contained in the Study Design for each Unit and based on the key knowledge and key skills specified as being necessary to achieve the outcomes.

Performance descriptors for each outcome can be found in the VCE Legal Studies Assessment Handbook 2011–2016, which is available on the VCAA website.

UNITS 3 AND 4 ASSESSMENT TASKS

Student performance on each outcome in Units 3 and 4 should be assessed using one or more of the following assessment tasks:

- case study
- structured questions
- test
- essay
- report in written format
- report in multimedia format
- folio of exercises.

Assessment tasks should be part of the teaching and learning program. For each assessment task, students should be provided with the:

- type of assessment task and approximate date for completion
- time allowed for the task
- allocation of marks
- nature of any materials they can use when completing the task
- opportunity to demonstrate the highest level of performance.

DESCRIPTION OF ASSESSMENT TASKS

CASE STUDY

A case study requires students to research a particular legal case or an element of the legal system, such as the ability to achieve a fair and unbiased hearing, and a report on their findings. The report may be a general report that links students' findings with the relevant key knowledge and key skills for the particular outcome. Alternatively, the report may be in response to a set of questions relating to the case study.

STRUCTURED QUESTIONS

Structured questions are a set of questions requiring extended responses that cover the relevant key knowledge and key skills for the particular outcome.

TEST

A test is a set of questions that are relevant to the key knowledge and key skills of the particular outcome, usually given under test conditions.

ESSAY

An essay is a sustained passage of writing that covers a particular topic and analyses the relevant issues. See the guide to writing an essay below.

GUIDE TO WRITING AN ESSAY

1. Read the topic carefully.
2. Work out all the separate parts to the question and decide on a logical order for answering them.
3. Research your topic using:
   - this Legal Studies textbook
   - other books or texts from the local library or school library

- newspapers, journals and magazine articles
- reports of investigations from law reform bodies or parliamentary committees
- the Internet.

4 Draw up a basic plan of your essay.
5 Write your essay paying attention to:
- the topic of the essay (ensuring not to miss any parts of the topic)
- your constructed plan
- the qualities required in your essay such as analysis and assessment
- the word limits that may have been set for the essay.

6 If discussion or analysis is required for each paragraph you should:
- make a point
- refer the point to the question
- explain the point
- discuss the positive and negative aspects of the point made
- use an example if appropriate.

7 Write a conclusion to the essay.
8 Make sure any quotes or statistics are footnoted.
9 If required, write a bibliography of all references used in researching and writing the essay.

REPORT IN WRITTEN FORMAT

This task requires students to produce a written report of research undertaken. The report will focus on particular aspects of the course.

REPORT IN MULTIMEDIA FORMAT

This task requires students to undertake research and collect information from electronic and printed sources such as the Internet, television, radio programs and newspapers. The report should be presented in multimedia format. This can include a set of overhead transparencies, a computer presentation using electronic software or a PowerPoint presentation. Each presentation should be supported by a set of explanatory notes.

FOLIO OF EXERCISES

This task requires students to compile a folio of pieces of work. The exercises can involve a range of activities such as working with texts, problem-solving exercises, short-answer questions, critical appraisal of a presentation by a guest speaker, role play, videotape or court visit.

THE EXAMINATION

Students' level of achievement in Units 3 and 4 will also be determined by an end-of-year examination, which will contribute 50 per cent to their VCE study score.

Students will be required to respond to a series of questions set by a panel of examiners. All the key knowledge and skills that underpin the outcomes in Units 3 and 4 are examinable. The examination consists of a question-and-answer booklet.

The total writing time of the examination will be two hours, with an additional 15 minutes' reading time at the beginning, during which time students will not be allowed to pick up their pen or mark the question paper.

PRACTICE EXAM QUESTIONS

Practice exam questions are provided throughout the book, with extra questions in the obook. These are a very useful means of preparing students for their final examination.

TIME ALLOCATION

	AREA OF STUDY	SUGGESTED TIME ALLOCATION
UNIT 3 Law-making	1 Parliament and the citizen	13 hours
	2 The Constitution and the protection of rights	5 hours
	3 Role of the courts in law-making	12 hours
UNIT 4 Resolution and justice	1 Dispute resolution methods	15 hours
	2 Court processes and procedures, and engaging in justice	35 hours

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UNIT 3

LAW-MAKING

INTRODUCTION TO UNIT 3

AIM

The aim of this introduction is to give those of you who have not previously studied Units 1 and 2 an introduction to the basic concepts covered early in the course. These are concepts that will be developed in Units 3 and 4. This introduction also provides an easy way to revise the essential concepts and ideas at the commencement of Unit 3.

KEY AREAS OF KNOWLEDGE

The following key areas of knowledge are summarised in this introduction:

- the nature of legal and non-legal rules
- why laws are needed
- the classification of laws
- the nature of criminal and civil law
- the essential features of parliament, the courts and subordinate authorities and their roles as law-makers
- the nature and role of the Constitution.



THE NATURE OF LEGAL AND NON-LEGAL RULES

Laws are rules by which those in society live. Rules can be either:

- non-legal rules
- legal rules – these are called laws.

Non-legal rules provide us with guidelines of what is acceptable behaviour at home, at school, on the sporting field, such as rules in a game of football or netball, and in other situations. Non-legal rules are made by private individuals, groups or private clubs in society.

Legal rules, or laws, are applicable to the community as a whole. They are made by law-making bodies and are enforceable through the courts.

WHY LAWS ARE NEEDED

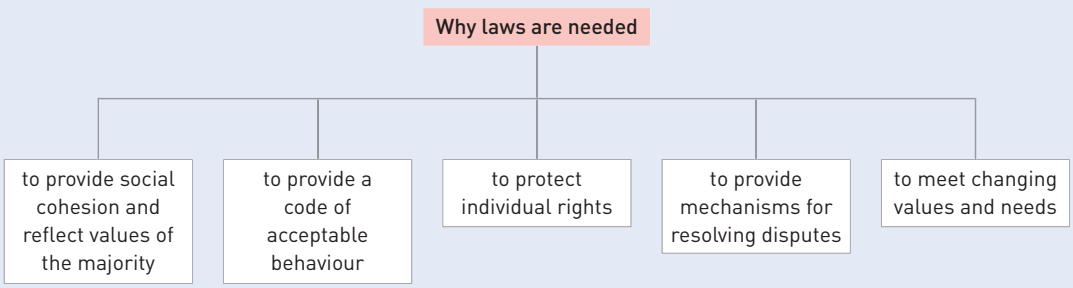
Laws provide the framework in which society functions so individuals can cooperate and live in harmony. This is known as social cohesion. Without laws there would be no guidelines on what is acceptable behaviour. The main aim of laws is to protect individuals from harm and to ensure that the rights of individuals are preserved. Without laws, people would not feel safe to walk down the street. The existence of these laws deters most people from committing crimes.

When people live together, laws will be broken and disputes will arise as each person competes for a share of the same space and resources. To survive, society must develop a mechanism of dispute resolution so disputes that arise can be settled peacefully.

Laws need to reflect the values and attitudes of the majority in the community, and need to change as values and attitudes change.



Breaking a rule in sport



CLASSIFICATION OF LAW

The legal system consists of a whole body of law that regulates the activities of society. The law can be classified in different ways. The main classifications relevant to Legal Studies are:

- **statute law** and **common law** (also called case law or judge-made law)
- **criminal law** and **civil law**.

The classifications of statute law and common law refer to the source of the law.

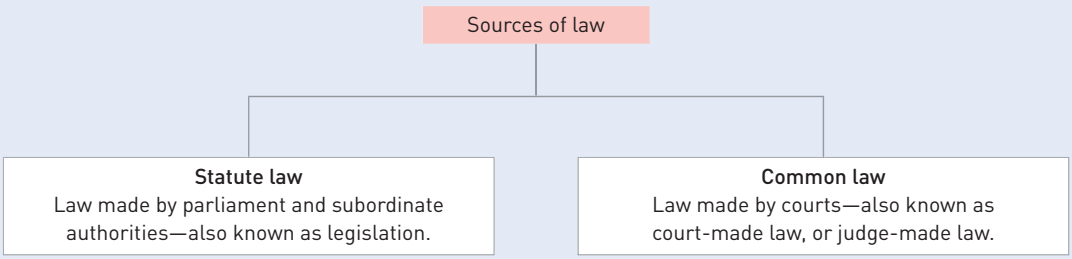
Statute law

A **statute** is an **Act of parliament** (passed by either a state parliament or the Commonwealth Parliament). Another term for this is **legislation**. Parliament's main role is to pass legislation to regulate the community. This involves drawing up a **Bill** (a proposed law). It is then necessary for each Bill to be passed by both houses of parliament. It must receive **royal assent** before finally becoming an Act of parliament. Royal assent is given by the Queen's representative at the state level (governor) or federal level (governor-general).

Common law

Common law, by contrast, is the law made by judges when deciding a particular case before the court. The reasoning adopted by the judge in a superior court becomes a **precedent** (a principle of law) to be followed by other courts that are lower in ranking and where the circumstances of the case are similar. This is the basis of the **doctrine of precedent** (the common law principle by which the reasons for the decisions of courts higher in the hierarchy are binding upon courts lower in the same hierarchy).

The courts are arranged in a **hierarchy** or ranking that allows this process to occur. This type of law is also referred to as case law or judge-made law.



Criminal law

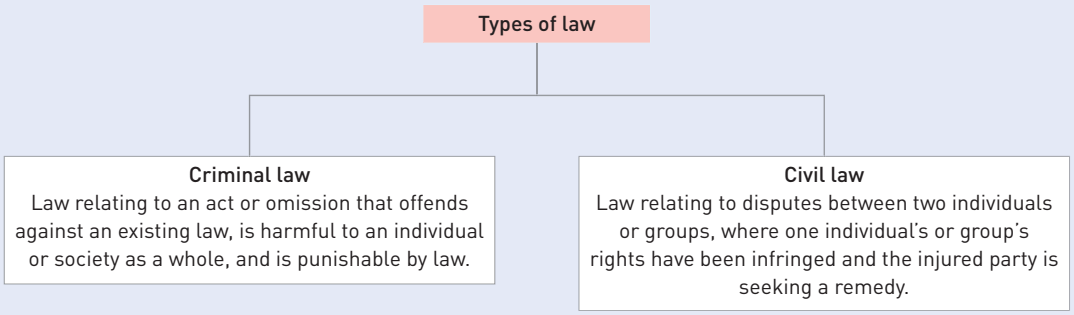
Criminal law deals with **acts or omissions** that offend against existing laws, are harmful to individuals and society as a whole and are punishable by law. For example, you would be breaking a criminal law if you stole something from a shop.

The result of a successful criminal prosecution is a finding of guilty and the imposition of an appropriate punishment (**sanction**). There is a wide range of sentencing options or sanctions, including fines, community correction orders and imprisonment.

Civil law

Civil law is an area of law that regulates disputes between individuals and seeks to enforce rights where some harm has been done, or is anticipated to be done, to an individual or a company. The purpose of a civil action is to, as far as possible, return the wronged person (the **plaintiff**) to the position he or she was in before the wrong occurred. This is usually done by awarding a remedy, such as compensation.

Rather than punishment, civil law is about finding which party was **liable** and awarding a remedy. There is a range of remedies that can be awarded in a successful civil claim, the most usual of which is compensation or **damages**.



LAW-MAKING BODIES

Parliament

Parliament is made up of the Queen's representative and all democratically elected members of parliament, who have been elected by the people to represent the people. The Queen's representative is the governor-general at a federal level and the governor at a state level.

Parliament is the structure within which the **government** (the party winning the most votes at election), the **opposition** (the main political party other than the government) and other political parties and independent members, debate and pass laws 'for the peace, order and good government' of the community.

The Victorian Parliament and the Commonwealth Parliament are **bicameral** (two houses or chambers) structures. There is an upper house (a **house of review**) and a lower house. Legislation is usually initiated by the government in the lower house.

Law-making is parliament's main function, although parliament can delegate part of this function to subordinate authorities.

Subordinate authorities

These authorities are part of the law-making process. The state and Commonwealth parliaments can delegate their law-making power to subordinate authorities to pass laws in their particular areas of expertise. One example of these bodies is local councils. Parliament maintains a general supervisory role over these bodies.

Courts

The role of judges in courts is to interpret and apply the laws made by parliament and, where necessary, to set a precedent which is a principle of law that is to be followed in the future. It can therefore be said that judges are also law-makers. Although they are not elected, judges are appointed by elected governments. The courts operate independently of governments.

CONSTITUTION

The document we refer to as the Constitution is properly entitled the ***Commonwealth of Australia Constitution Act 1900*** **(UK)**. It came into operation on 1 January 1901, the date of **federation**. There are also state constitutions. The Commonwealth Constitution is an Act of the British Parliament which sets out the framework for our parliamentary system and, in particular, the structure of the upper and lower houses, the powers of the Commonwealth Parliament to enact laws and, by implication, the powers of the states. Limitations on federal and state powers are also set out, as well as the mechanism by which the wording of the Constitution may be altered (the **referendum** procedure).

The High Court is the **guardian of the Constitution** and one of its roles is to settle disputes regarding the interpretation of the Constitution.

Constitutional monarchy

Australia is a constitutional monarchy in which the Queen (the monarch) is our head of state but our parliamentary system is governed by the terms of the Constitution. Australia is a **democracy** because we are governed by members of parliament who are voted into office and who represent the wishes of the people. Members of parliament usually belong to a political party. The party with a majority of members in the lower house forms the **government**.

If Australia were to become a republic, an Australian person (possibly known as a president) would be appointed and would replace the Queen as our head of state. A republic is different from a monarchy in that the head of state would be elected or chosen rather than inherit the position.

Summary

Nature of legal and non-legal rules
Why laws are needed
Classification of law
Law-making bodies
Constitution



CHAPTER 1

THE AUSTRALIAN PARLIAMENTARY SYSTEM

OUTCOME

This chapter is relevant to learning outcome 1 in Unit 3. You should be able to explain the structure and role of parliament, including its processes and effectiveness as a law-making body, describe why legal change is needed, and the means by which such change can be influenced.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- the principles of the Australian parliamentary system: representative government, responsible government and the separation of powers
- the structure of the Victorian Parliament and the Commonwealth Parliament and the roles played by the Crown and the houses of parliament in law-making.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information and data
- explain the principles and structures of the Australian parliamentary system.

KEY LEGAL TERMINOLOGY

bicameral Means 'two houses of parliament'. All parliaments in Australia except that of Queensland and the territories have two houses.

cabinet Cabinet consists of the prime minister and senior government ministers who have been placed in charge of a government department. It is a policy-making body; that is, it decides which laws should be introduced into parliament.

Crown The authority of the Queen is represented in Australia by the governor-general (federal) and the governor of each state.

federation A union of sovereign states that relinquish some powers to a central authority to form one nation. Australia is a federation of six independent states with a federal body known as the Commonwealth Parliament. Each state parliament and the Commonwealth Parliament have their own powers. Some powers are shared between the Commonwealth Parliament and the states. The territories come under the jurisdiction of the Commonwealth Parliament.

government Government is formed by the political party that governs the country (or state). This is the party that achieves the largest number of members voted into the lower house (the House of Representatives at a federal level and the Legislative Assembly at a state level). All members of parliament who belong to this political party form the government. Government does not make laws – this is the role of parliament. Government decides which laws should be introduced to parliament.

legislation Laws made by parliament, known as Acts of parliament or statutes.

minister A government minister is a member of parliament who is also a member of the political party that has formed government, and has some particular responsibility such as being in charge of a government department. For example, in 2014 the Hon Peter Dutton is the federal Minister for Health and Minister for Sport, and has responsibility for financing and providing medical services through entities such as Medicare.

parliament Parliament is the supreme law-making body consisting of all elected members of both houses from all political parties and the Crown's representative. The main role of parliament is to make laws.

prime minister The member of parliament who leads the political party that has formed government.

representative government Representative government refers to a government that represents the view of the majority of the people.

responsible government The executive government (prime minister, senior ministers and government departments) is accountable to parliament, and can only continue to govern as long as it has the support of the lower house of parliament. If the government loses the support of the lower house then it must resign.

royal assent Royal assent is the signing of a proposed law by the Crown's representative before it becomes law.

separation of powers The principle of separation of powers refers to the fact that there are three separate types of powers in our parliamentary system. These are legislative power, executive power and judicial power. Judicial power is separate from legislative power and executive power.

statute Also known as an Act of parliament, this is another term for legislation.

supremacy of parliament Also referred to as sovereignty of parliament. This refers to the concept that the final law-making power rests with parliament. Parliament can repeal and amend its own previous legislation and can pass legislation to override common law.

Westminster principles The set of principles that underpin our parliamentary system, inherited from the United Kingdom, known as the Westminster system. These are the principles of representative government, responsible government, the separation of powers, the structure of state and Commonwealth parliaments, and the roles played by the Crown and the houses of parliament.

BACKGROUND INFORMATION

The historical development of parliament

Early in the fourteenth century, in England, debates were conducted between the barons and clergy in one house of parliament, which became the House of Lords (the upper house), and the elected knights and burgesses in the other house, which became the House of Commons (the lower house).

The Tudor monarchs (kings and queens), who reigned between 1485 and 1603, had the power to make law by royal proclamation – the king or queen alone could decide on a new law – but as this was unpopular, laws were usually made by Acts of parliament.

During the seventeenth century, the Stuart kings tried to override the authority of parliament. Conflict between the monarchs and the parliament grew through the reign of James I (1603–25) and his son Charles I (1625–49). The power of the people over the divine right of kings manifested itself when Charles I was brought to trial for treason against the people. Charles I was beheaded, and Oliver Cromwell led the country without a monarch for a short period, but the Crown was restored in 1660 when Charles II came to the throne. Both Charles II and James II, who followed, were unpopular because they believed in the divine right of kings. In 1688 the throne was offered to William and Mary, Prince and Princess of Orange (Orange consisted of principalities in the south of France and the Netherlands), on condition they would govern with due deference to the rights of their subjects.

After this time the law-making power rested with the parliament, with the monarch having very few powers. The Queen of England is the Queen of Australia. The Australian parliamentary system is based on the British parliamentary system, known as the **Westminster system**, which is named after the British Parliament situated at **Westminster** in London. Under the Westminster system there are two houses of parliament (a **bicameral system**) and the monarch is the head of state.

THE AUSTRALIAN PARLIAMENTARY SYSTEM

Australia is a **constitutional monarchy**, with a monarch (the Queen of the United Kingdom and Australia) and a constitution that establishes the parliamentary system and provides a legal framework for making laws. It is also a **representative democracy** and a **federation of states**. A representative democracy is political government carried out by elected representatives of the people.

Under the Australian **federal system of government**, the country is divided into states and territories. Each state and territory has its own parliament, making a total of nine parliaments in Australia:

- the Commonwealth Parliament (the central parliament or federal parliament)
- six state parliaments
- two territory parliaments.

The members of parliament are elected by the people and must therefore represent the needs of the people if they wish to keep their seat in parliament. The elected members of parliament are also responsible to the parliament and the people for their actions.

The Australian parliamentary system is mainly based on the British Westminster system, which was adopted in the *Commonwealth of Australia Constitution Act 1900* (UK), known as the **Commonwealth Constitution**. This Act was passed in the United Kingdom because Australia and its states were originally British colonies.

The Commonwealth Constitution established the Commonwealth Parliament and outlined its law-making powers. This Act came into operation on 1 January 1901.

The Queen of England (also the Queen of Australia) is the head of state and is therefore part of the parliamentary system in Australia. The Queen's representative at a federal level is the **governor-general** and at a state level is the **governor**.

The bicameral system

The Commonwealth and state parliaments operate on a **bicameral system**, which means two houses: an upper house and a lower house. Queensland and the territories are exceptions to this rule and only have one house each. At a federal level the two houses are the Senate (upper house) and the House of Representatives (lower house). In Victoria the two houses are the Legislative Council (upper house) and the Legislative Assembly (lower house).

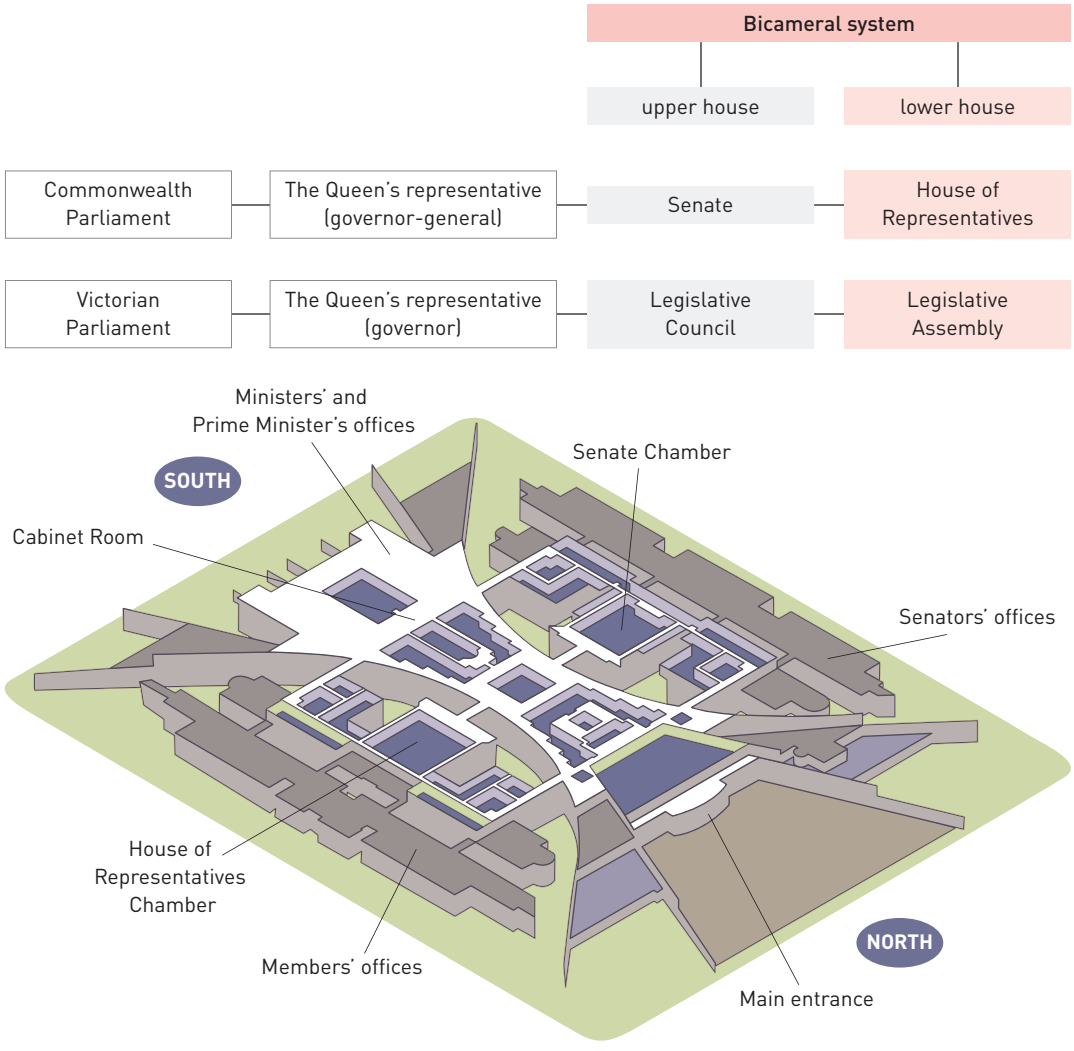


Figure 1.1 The Senate and the House of Representatives are situated at opposite sides of Parliament House in Canberra.

LEARNING ACTIVITY 1.1

The Australian parliamentary system

1 What is the Westminster system?

2 In what way is the Australian parliamentary system a constitutional monarchy?

3 What does the term 'bicameral system' refer to?
4 Give an example of a parliament in Australia that does not have a bicameral system.
5 In the Constitution, the executive power is vested in the Queen. Does this mean that the Queen makes decisions about what laws should be passed? Explain.
6 What title is given to the Queen's representative at a:
   - federal level?
   - state level?

THE STRUCTURE OF THE COMMONWEALTH PARLIAMENT

The **structure of the Commonwealth Parliament** consists of:

- the Queen (represented by the governor-general)
- the Senate (upper house)
- the House of Representatives (lower house).

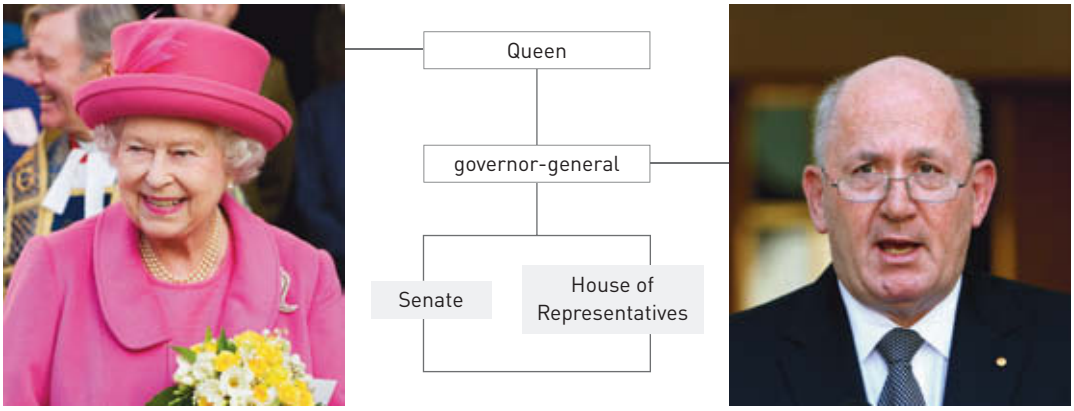


Figure 1.2 The Commonwealth Parliament consists of the Queen's representative (the governor-general), the House of Representatives and the Senate.

The House of Representatives

The House of Representatives (the lower house) is sometimes referred to as '**the people's house**'. This house reflects the current opinion of the people at an election, because it determines which party or coalition of parties should form government. It is therefore also known as '**the house of government**'.

The political party (or coalition of parties) that achieves the highest number of elected members to the House of Representatives becomes the **government** of the day. The leader of that political party becomes the **prime minister** who appoints the **government ministers**.

The party with the next highest number of elected members becomes the opposition. The leader of the opposition appoints **shadow ministers**. A shadow minister is usually appointed for every government minister. Their role is to keep a check on the activities and responsibilities of the corresponding government minister.

There are 150 members of the House of Representatives and each member represents an electoral division. The term of office for members of the House of Representatives is three years. In Australia, voting in an election is compulsory, and failure to vote can result in a fine being imposed. To be eligible to vote, a person must be 18 years old and registered to vote.



Figure 1.3 Seating in the House of Representatives of the 44th Parliament (June 2014)

The following diagram shows the composition of the Commonwealth Parliament in June 2014.

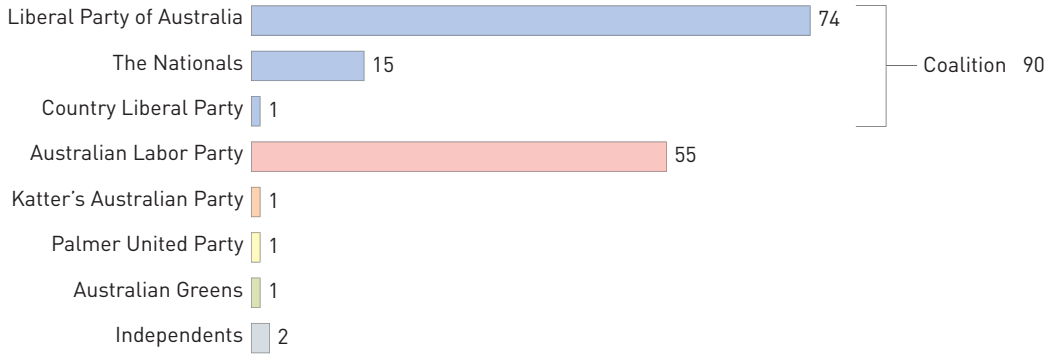


Figure 1.4 Composition of the House of Representatives in June 2014

Following the October 2013 general federal election, the coalition of the Liberal Party, the Nationals and Country Liberals (NT) won a total of 90 votes. This gave them a clear majority and they were able to form government because they held a majority of seats in the House of Representatives. The Australian Labor Party, with 55 votes, formed the opposition.

A HUNG PARLIAMENT IN 2010

The August 2010 federal election resulted in a **hung parliament**, with neither major party (the Australian Labor Party and the Liberal Coalition) holding enough of the 150 seats to ensure the successful passage of important Bills or the defeat of votes of no confidence in the government. The Labor Party and the Liberal/Nationals Coalition held 72 seats each in the House of Representatives. The remaining seats were held by one WA Nationals member (Tony Crook), one Australian Greens member (Adam Bandt) and four non-aligned independent members (Bob Katter, Rob Oakeshott, Andrew Wilkie and Tony Windsor).

The Commonwealth Constitution does not provide a mechanism for resolving a hung parliament, although there are unwritten conventions to deal with this situation. If, after an election, no party emerges with an absolute majority in the House of Representatives, the incumbent prime minister (being the leader of the party holding government before the election) is seen as the last person to hold the confidence of the House. He or she therefore has the right to remain in office and test his or her support on the floor of the House.

The Labor Party was able to secure the promise of three of the independents (Oakeshott, Windsor and Wilkie) and the one member of the Australian Greens, to vote with them and was therefore able to form government (with a promise of 76 votes – more than half of the 150 seats).

The number of seats held by either major party changed slightly during the course of the Labor Government, but not enough to change the party holding government. The changes occurred by a member of the House of Representatives, Craig Thompson, leaving the Labor Party to become an independent and Peter Slipper temporarily stepping aside from the position of Speaker of the House. Bob Katter chose to form his own party.

>>GOING FURTHER

Electoral divisions

The voting for the House of Representatives is conducted on a preferential system of voting, which means the most preferred candidate wins the seat. If no candidate receives more than half

of the votes cast, the candidates with the fewest votes are progressively eliminated and the votes received by them distributed (that is, allotted to other candidates according to the preferences of the voters). This continues until one candidate holds a majority of votes.

Australia is divided into 150 areas called divisions. Each division contains approximately 90 000 voters. Because of Australia's uneven distribution of population, electoral divisions differ greatly in area, ranging from 30 square kilometres (Wentworth, NSW) to over 1.5 million square kilometres (Durack, WA).

Voters in each division elect one person (a member of parliament) to represent them in the House of Representatives. The physical size of each electorate varies according to the population of the state. Factors such as communication and travel, population trends, physical features and existing boundaries are taken into consideration when deciding the exact number of electors in a particular division.

Victoria and New South Wales have the most representatives in the House of Representatives. The less populated states, such as Western Australia, have fewer representatives. Under the *Commonwealth of Australia Constitution Act 1900* (UK), no state shall have fewer than five representatives. Therefore, regardless of population size, Tasmania has five representatives. This requirement does not apply to the territories.

The Electoral Commission, an independent body, checks on the size of the population in each division at least every seven years. When there is sufficient change in the number of electors in a division, the boundaries of the division may be changed.

The role of the House of Representatives

The role of the House of Representatives is summarised below.

- **initiate and make laws** – The main function of the House of Representatives is to initiate and make new laws. New laws are usually introduced to the House by the government, although any member may introduce a proposed law (Bill). Bills must be passed by both the House of Representatives and the Senate for a law to be made. Bills may also be initiated in the Senate.
- **determine the government** – After an election, the political party (or coalition of parties) that has the most members in the House of Representatives forms government, or in the case of a hung parliament has the promise of enough votes to defeat a no-confidence motion and to pass important legislation, such as supply Bills.
- **provide responsible government** – Ministers are responsible to parliament and therefore to the people. They may present petitions from citizens and raise citizens' concerns and grievances in debate. If the government loses the support of the lower house it must resign.
- **represent the people** – The House of Representatives plays a role in forming a representative government. Members are elected to represent the people and are given authority to act on behalf of the people. The House of Representatives should represent the interests of the majority of people. The proposed laws introduced to the House of Representatives should reflect the views and values of the majority of the community.
- **publicise and scrutinise government administration** – It is the role of the House of Representatives to publicise the policies of government, to make sure that legislation is debated, matters of public importance are discussed, and members of parliament are able to ask the government and ministers questions relating to their work and responsibilities. Committees also investigate proposed laws.
- **control government expenditure** – A Bill must be passed through both houses of parliament before a government is able to collect taxes or spend money. Expenditure is also examined by parliamentary committees.

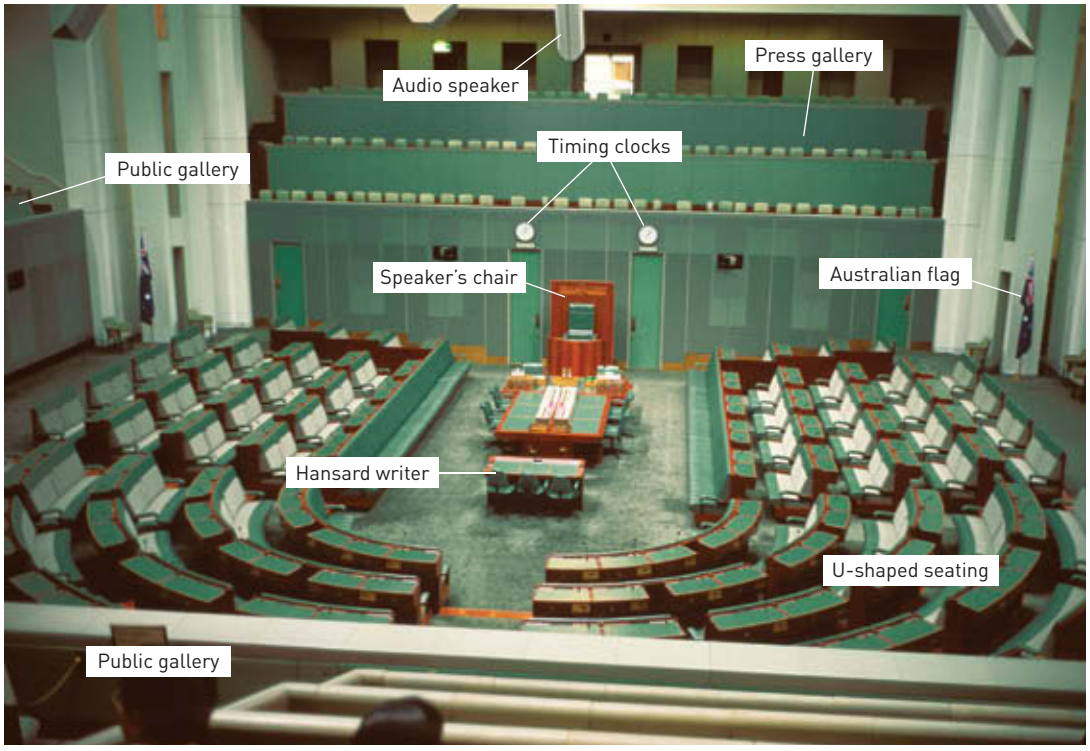


Figure 1.5 Inside the House of Representatives, sometimes referred to as the green chamber

The effectiveness of the House of Representatives

The House of Representatives is the house of government, and if the government holds a majority of seats, as it did after the 2013 election, the governing party should be able to get its legislative program passed by the House and fulfil its program of changes in the law, which it has been elected to do. However, this could mean there may be less debate of major issues before proposed Bills are passed.

The hung parliament – which was the outcome of the 2010 federal election – led to the Labor Party constantly having to engage in complex negotiations with the Australian Greens and the independents to achieve the passage of many Bills through both houses. For example, in October 2011 the 18 pieces of carbon tax legislation were passed by a vote of 74 to 72 in favour, after considerable discussion and compromises.

HOW EFFECTIVE IS A HUNG PARLIAMENT?

The Gillard Government, operating within a hung parliament, without a majority of seats, did prove successful in passing important reforms. These included carbon taxes and mining taxes, plain packaging laws for cigarettes, paid parental leave and the Murray–Darling Basin Plan. In fact, between 2010 and 2012, the Gillard Government managed to get 432 Bills passed by the Commonwealth Parliament. This compares favourably with the 549 Bills passed by the Commonwealth Parliament during the Howard Government between 2004 and 2007, when the Howard Government held a majority in both houses.

The Senate

The Senate has virtually equal power with the House of Representatives for making laws. The Senate consists of 76 senators, around half the number of members in the House of Representatives. Each state elects 12 representatives, regardless of the population of that state. There are two representatives elected from each territory. The Senate is elected by proportional representation,

so that its composition closely reflects the voting pattern of the electors. Candidates are elected by obtaining a predetermined proportion, or quota, of the total votes. Once a candidate has obtained the required quota, any excess votes he or she receives are transferred to another candidate in the voters' order of preference.

Each senator is elected for a period of six years. Half of the senators are elected every three years, with the changeover of seats occurring on 1 July of the relevant year.

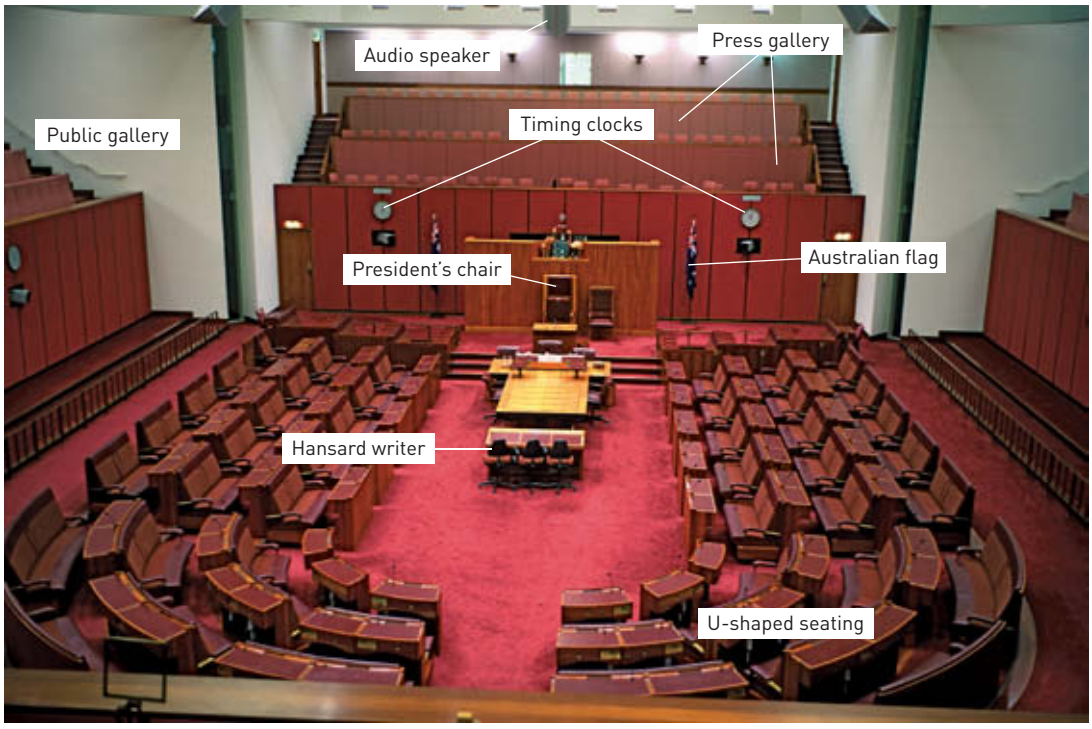


Figure 1.6 Inside the Senate chamber, sometimes referred to as the red chamber

The role of the Senate

The Senate's main role is to make laws. Its law-making powers are seen as being equal to those of the House of Representatives in that it can initiate proposed laws (Bills), although money Bills cannot be initiated in the upper house. Money Bills impose taxes and collect revenue. They must be introduced in the lower house at both federal and state levels. The Senate is not able to amend money Bills, but it can request that the House of Representatives make amendments.

A minister of the government will generally introduce a Bill because it will reflect government policy. As most ministers are members of the House of Representatives, more Bills go through the House of Representatives first. A Bill goes through specific stages in the first house before it is passed on to the other house, where it goes through the same processes before it receives royal assent (the signing of the proposed law by the Crown's representative) before it becomes law.

The Senate debates the proposed laws and has a large and active committee system that enables senators to inquire into policy issues in depth and to scrutinise Bills before they become law.

The main roles of the Senate are summarised below.

- **initiate and pass Bills** – The Senate is able to initiate Bills (other than money Bills) or pass Bills that have previously been passed through the House of Representatives.
- **act as a states' house** – At the time of the creation of the Commonwealth Parliament, under the *Commonwealth of Australia Constitution Act 1900* (UK), the states (which were separate colonies before federation) were afraid of giving up too much of their power. This was especially important to the smaller colonies, which did not want the more populated colonies to hold all the power in

the Commonwealth Parliament. To overcome this, S7 of the Constitution provides that the Senate should have equal representation from each state, regardless of its size or population. In this way the Senate represents the interests of the states (**representative government**).

- **act as a house of review** – The majority of Bills are initiated in the lower house, and the Senate (the upper house) has the task of reviewing the Bills already passed through the lower house. The Senate can, therefore, ensure that Bills which could be seen as too radical are not rushed through the parliament. Half-senate elections assist in this process. Since half the senators are put up for election every three years, the senators that remain are likely to have considerable experience in law-making.

The Senate fulfils its role of **scrutinising legislation** by checking all Bills and delegated legislation (regulations made by subordinate bodies) to ensure that they are in the public interest. The Senate also operates as a **check on government**, including government administration, and government policy in general (**responsible government**). The Senate committee system assists the Senate in this scrutinising and checking process.

The Senate may pass a Bill without amendment, pass it with amendments (or, in the case of money Bills, request amendments before passing it) or reject it. The Senate is able to insist on changes to proposed laws before they are passed into law.

>>GOING FURTHER

Double dissolution

Generally, at the time of an election, only half the senators are up for election. The governor-general has the power to dissolve the House of Representatives and the Senate at the same time – a double dissolution. This may occur in situations where the Senate and the House of Representatives are unable to agree over one or more pieces of legislation.

When the government does not have a majority in the upper house, there may be a disagreement about proposed legislation. In most cases a compromise is reached, amendments are made and the legislation is passed.

If a compromise cannot be reached, the governor-general can dissolve both houses (double dissolution) and a full election of all members of the Senate and the House of Representatives can take place. This rarely happens.

The possibility of a double dissolution occurs if the Senate rejects a Bill passed by the House of Representatives and, after an interval of three months, the House of Representatives passes the Bill again and sends it to the Senate. If the Senate again rejects the Bill, or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the prime minister can ask the governor-general to dissolve both houses.

Effectiveness of the Senate

In practice the senators tend to vote according to the dictates of their party. This means that the upper house largely does not fulfil its role as a states' house or a house of review. If the government controls the upper house (has a majority), it tends to be a '**rubber stamp**', merely confirming the decisions made in the lower house.

If, however, there is a **hostile Senate** (controlled by the opposition), then the upper house is likely to review the Bills passed through the lower house more carefully. If the balance of power in the Senate is held by a minority party or an independent member of parliament (one not aligned to any political party), the government will endeavour to win the support of that minority party in order to pass Bills through the Senate.

The following table shows the composition of the Senate after 1 July 2011 (as at January 2012) and the composition of the Senate after 1 July 2014.

Table 1.1 Composition of the Senate, from 1 July 2011 and after 1 July 2014

PARTY/AFFILIATION	NUMBER OF SENATORS FROM 1 JULY 2011	NUMBER OF SENATORS FROM 1 JULY 2014
Coalition	34	33
Australian Labor Party	31	25
Australian Greens	9	10
Democratic Labour Party	1	1
Palmer United Party	–	3
Others	1	4
TOTAL	**76**	**76**

Note: The four 'Others' (after July 2014) consist of one independent and one each from the Liberal Democratic Party, the Family First Party and the Australian Motoring Enthusiast Party.

Source: compiled from AEC 2010 election result data and senators' terms data

After July 2011, the Australian Labor Party (ALP) secured the support of the Australian Greens senators to enable many pieces of legislation to be passed in the Senate. The ALP had 31 seats, and together with the support of the nine Australian Greens senators (40 votes in total) it was more likely that government legislation could be passed in the Senate. Considerable negotiations were required with the Australian Greens senators to secure continued support.

The Senators elected in October 2013 took their place in the Senate on 1 July 2014. The Coalition has 33 senators. The ALP has 25 senators. With the support of the Greens and the Democratic Labour Party, the ALP has a possible 36 votes. The Coalition needs the support of six senators from the Palmer United Party and others in order to pass legislation. If this occurred, the Coalition would have the support of 39 senators and the ALP 36 (plus the possible support of one of the others). The Coalition will need to engage in careful negotiation with the Palmer United Party and the others to pass legislation through the Senate.

LEARNING ACTIVITY 1.2

The structure of the Commonwealth Parliament

1. Which is the house of government? Explain.
2. If you were elected to a seat in the House of Representatives, how many years would you serve before the next election?
3. Explain three roles of the House of Representatives.
4. What type of Bills cannot be introduced in the Senate?
5. How many members sit in the:
   - House of Representatives?
   - Senate?
6. Explain the significance of a hung parliament. How does this affect the effectiveness of the House of Representatives? How did the Gillard Government overcome some of these problems?
7. When might the Senate be a 'rubber stamp' for the House of Representatives?

8 Explain the terms 'house of review' and 'states' house'. Do you think these terms apply to the Senate today? Explain.

9 After 1 July 2014, the Coalition Government has a majority in the Senate. Will this mean an easy passage of Bills through the Senate or may some difficulties be experienced? Explain.

THE STRUCTURE OF THE VICTORIAN PARLIAMENT

The Victorian Parliament operates in the same way as the Commonwealth Parliament, with an upper and lower house. The **structure of the Victorian Parliament** is:

- the Queen (represented by the governor)
- the Legislative Council (upper house)
- the Legislative Assembly (lower house).

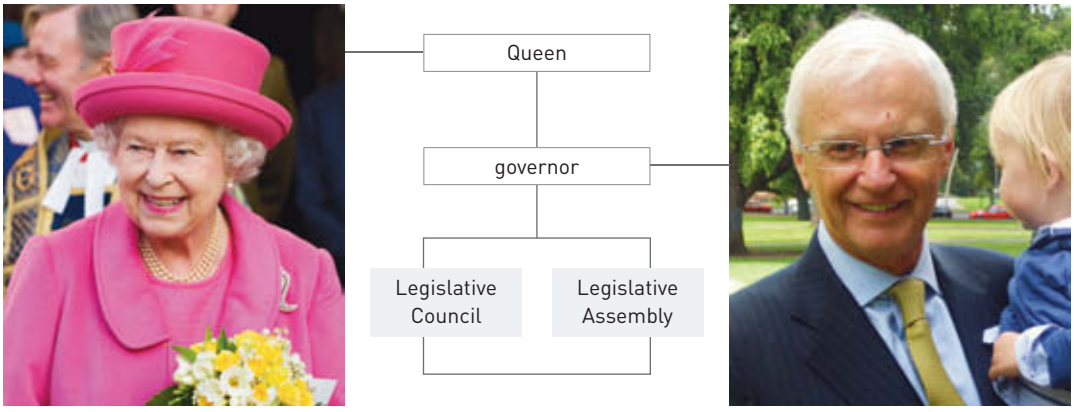


Figure 1.7 The Victorian Parliament consists of the Queen's representative (the governor), the Legislative Assembly and the Legislative Council. The current Governor of Victoria is Alex Chernov.

Legislative Assembly

For elections, Victoria is divided into 88 districts. One member of the Legislative Assembly (MLA) is elected to represent each of these districts. A member of the Legislative Assembly is elected for four years.

After the passing of the *Constitution (Parliamentary Reform) Act 2003* (Vic.), the parliament sits for **fixed four-year terms**. Elections are held on the last Saturday in November every four years.

The following diagram shows the composition of the Legislative Assembly after the 2010 elections.

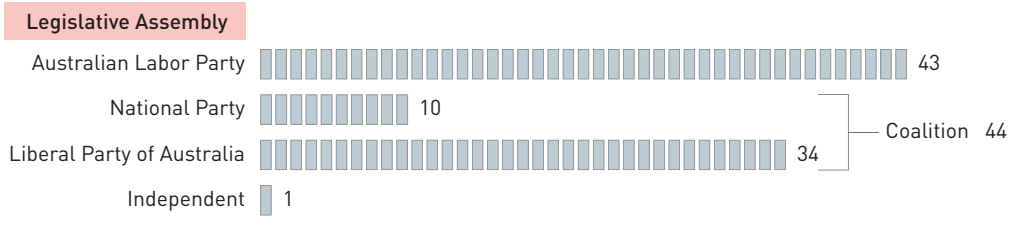


Figure 1.8 After the 2010 elections in Victoria, the Coalition (of Liberal Party 34 and National Party 10) formed government with 44 combined seats in the Legislative Assembly. This gave them a narrow majority, which eases the passing of proposed legislation through parliament.

The role of the Legislative Assembly

The Legislative Assembly is the house of government. The party with the majority of members in the Legislative Assembly forms the government. The main role of the Legislative Assembly is to make laws. Most Bills are initiated in the Legislative Assembly.



Figure 1.9 The Victorian Parliament

Members of the Legislative Assembly are elected to represent the interests of the people (**representative government**). Their actions must reflect the views and values of the people. If they cease to do this it is likely they will be voted out of office at the next election.

Legislative Council

Following the passage of the *Constitution (Parliamentary Reform) Act 2003* (Vic.), the Legislative Council in Victoria is divided into **eight regions**, each consisting of 11 districts. **Five members** of the Legislative Council (MLCs) are elected for each region, making a total of 40 MLCs to be elected. Members for each region are elected to serve a **fixed four-year term**.

The election for the Legislative Council uses a proportional representation system. Candidates are elected by obtaining a predetermined proportion, or quota, of the total votes. Once a candidate has obtained the required quota, any excess votes he or she receives are transferred to another candidate in the voters' order of preference.



The role of the Legislative Council

The role of the Legislative Council is similar to that of the Senate. It acts as a house of review for legislation that has been passed in the Legislative Assembly. It does this by scrutinising, debating and, on occasion, amending or rejecting legislation that has been initiated by the government.

By performing these functions, the upper house can apply many of the important checks and balances that uphold the system of **responsible government**.

The Legislative Council has a number of committees that debate the proposed laws at length.

Bills can also be initiated in the Legislative Council but it is less common than in the Legislative Assembly. Money Bills can only be initiated in the Legislative Assembly.

If the government holds a majority in both the lower house and the upper house, this increases the government's ability to get the parliament to pass its legislative program. However, this could lead to less scrutiny of government programs and less debate in parliament.

Table 1.2 Electorates in the Commonwealth Parliament and Victorian Parliament

COMMONWEALTH	STATE (VICTORIA)
House of Representatives	**Legislative Assembly**
150 seats	88 districts
150 electorates across Australia	One member for each district
Term of office is usually three years	Term of office is fixed four years
Number of members is decided on the population of each state (except Tasmania) because each original state must have at least five members according to S24 of the Constitution. There must be, as near as possible, twice as many members of the House of Representatives as the Senate (S48).	
The Senate	**Legislative Council**
Each state is an electorate	Eight regions with five members representing each region
12 senators elected from each state two senators elected from each of the Australian Capital Territory and the Northern Territory	Five members elected for each region
76 senators	40 members
Term of office is usually six years (half elected every three years)	Term of office is fixed four years

LEARNING ACTIVITY 1.3

The structure of the Victorian Parliament

1. What is the structure of the Victorian Parliament?
2. If you were elected to the Legislative Council, how long would you serve? How does this compare with the term of office of the Senate?
3. Explain the role of both houses of the Victorian Parliament.
4. The Coalition has a majority in the Legislative Council and the Legislative Assembly in Victoria. To what extent does this lead to effective law-making? Discuss.

THE ROLE OF THE CROWN

The Crown is represented in Australia by the Queen's representatives: the governor-general at a federal level and the governors of the six states. Under the Constitution the **executive power** of the Commonwealth is vested in the Queen and exercisable by the governor-general as the Queen's representative. The governor-general has the responsibility of appointing a federal **executive council**, made up of the prime minister and senior ministers, to give advice about the government of the Commonwealth, to establish departments of the government, to appoint ministers to administer

them and to approve delegated legislation (rules and regulations made by subordinate authorities). In practice, however, the governor-general acts on the advice of the prime minister and senior ministers, and the executive power is carried out by the government. The governor-general is appointed by the Queen on the advice of the prime minister.

The governor-general is required to sign Bills giving **royal assent** to them before they can become law. The governor-general's main responsibility is to ensure that the democratic system operates effectively. This requires an effective electoral system, parliament, government and courts. It is also essential that the majority of people are confident that their community functions as a democracy.

The governor of Victoria is responsible for acting as part of the state executive council with similar duties to the governor-general. The governor also has reserve powers; for example, the power to dismiss a premier if he or she refuses to leave office after a defeat in an election. Since the *Australia Act 1986* (Cth), the governors of each state are appointed by the monarch on the advice of the premier of that state, rather than on the advice of the Commonwealth and Foreign Office of the United Kingdom.



Figure 1.10 The Governor-General of Australia, His Excellency General the Honourable Sir Peter Cosgrove, AK, MC (Retd), and her Excellency Lady Cosgrove

THE ROLE OF THE GOVERNOR-GENERAL OF AUSTRALIA

- performing duties of the executive council, including giving assent to laws when they have been passed by the two Houses of Parliament – the Senate and the House of Representatives – and making regulations under Acts of parliament
- acting as head of state
- designating the times for parliamentary sessions
- bringing a session of parliament to an end and dissolving the House of Representatives to bring about an election
- appointing judges to the courts
- exercising reserve powers

Reserve powers

The governor-general and the governors of each state hold reserve powers that can be exercised without the advice of ministers and are not listed in the Constitution. These reserve powers date back to the time when the monarch was not a mere figurehead; the governors in the British colonies around the world represented the monarch and could exercise discretion in order to protect Britain's interests.

One of the functions of the governor-general as the formal head of state is to ensure that the country continues to be governed; if a government that had been voted out refused to step down, the governor-general could be expected to step in.

The reserve powers include the power to appoint a new government after an election, the power to appoint a prime minister if an election has resulted in a hung parliament, the power to dismiss a

prime minister who has lost the confidence of the parliament or who is acting unlawfully, the power to dissolve or refuse to dissolve the House of Representatives despite a request from the prime minister, and the power to appoint or dismiss ministers.

Exactly what the reserve powers are, and whether they should be acted on, is debatable. In 1975 when Sir John Kerr, the then governor-general, dismissed the Whitlam Government, there was much disagreement between constitutional experts and within the general public as to whether he had acted legally in exercising the reserve powers of his office.

Following the 2010 Tasmanian election in which both Labor and Liberal parties won 10 seats, the Tasmanian governor refused to accept the Labor leader's resignation and ordered the Labor leader to form a government with the help of the Greens.

Executive council

The governor-general (or governor of each state) is responsible for making delegated legislation, while acting in council with relevant ministers as the executive council. **Delegated legislation** (also known as subordinate legislation) is the rules and regulations made by government bodies such as government departments, the executive council or statutory authorities; for example, the Australian Broadcasting Authority and VicRoads. Some Acts, such as the *Road Safety Act 1986* (Vic.), give the executive council the power to make rules and regulations relating to their relevant area, such as road safety.

Royal assent

Royal assent is the signing of a proposed law by the governor-general. It is necessary before an Act of parliament can become law. Royal assent is normally given as a matter of course on the advice of the prime minister or ministers.

Withholding royal assent

At a federal level, the governor-general has the power under the Constitution to withhold royal assent in certain circumstances.

At a state level, the governor of each state does not have the power to withhold royal assent. This power was removed at a state level when the *Australia Act 1986* (Cth) was passed.

>>GOING FURTHER

Withholding royal assent

At a federal level, the Commonwealth Constitution states that the governor-general may:

- withhold or reserve royal assent for the monarch's pleasure (S58 and S60). The Bill will not come into force unless it receives the monarch's assent within two years
- make recommendations to the house in which a Bill originated for amendments to the Bill (S58)
- disallow any law within one year of the royal assent having been given (S59). This disallowance would make the law void.

At a state level, S8 of the *Australia Act* states that no Act that has been given royal assent by the monarch's representative can be subject to disallowance. Section 9 of the *Australia Act* provides that royal assent to state laws cannot be withheld or reserved.

LEARNING ACTIVITY 1.4

Role of the Crown

1 Explain the role of the Crown in the Australian parliamentary system.
2 What is the Executive Council and what is its role?
3 To what extent do you think royal assent is an automatic process?
4 How important is royal assent in the process of law-making?
5 Do the governor-general and the governors of each state have the right to withhold royal assent? Explain.
6 Explain the reserve powers of the governor-general and the governors of each state. Do you think these reserve powers are important to the running of our democratic system? Explain.

THE FUNCTIONS OF PARLIAMENT

Parliament is the law-making body. It consists of all members of both houses, from all political parties, plus the Crown's representative. The Commonwealth Parliament is made up of the governor-general, the Senate and the House of Representatives.

The main functions of parliament are to:

- make laws on behalf of the people for the good government of our society – the laws should reflect the views and values of the majority of the community
- provide for the formation of government
- provide a forum for popular representation and debate
- scrutinise the actions of government
- delegate some of its law-making power to subordinate bodies and check any delegated legislation
- balance the books – that is, decide what revenue is required and how it is to be spent.

Committees

Parliament is able to set up committees for the purpose of investigating the needs of the community and the activities of government instrumentalities. These committees can be joint committees (consisting of members from both houses), select committees (set up to investigate one particular issue) or standing committees (long-term committees that do not change with a change of government).

The Family and Human Development Commitee, in their report into child abuse, recommended a new offence of grooming a child for sexual abuse. The *Crimes Amendment (Grooming) Act 2014* (Vic.) created this new offence.

Government

The government consists of all members of parliament who are members of the political party that holds the majority of seats in the lower house, whether they are members of the upper or lower house.

Opposition

The opposition is the political party holding the second largest number of seats in the lower house. It is an alternative government and if the party wins the next election it will form a new government.

It is the role of the opposition to examine policies of the government, check decisions made by the government and scrutinise all Bills that are presented to parliament. An effective opposition will hold the government accountable for its actions. It can do this by asking questions at question time.

Prime minister, premiers and ministers

The **prime minister** is the leader of the government at a federal level. The government is the party with the majority of members in the lower house of parliament. The leader of the government in each of the states is called the **premier**. The prime minister's role is not stated in the Constitution but is based on conventions established under the Westminster system. The prime minister and premiers appoint **ministers** to be responsible for various departments, such as the Education Department. Ministers are responsible for running their departments and are responsible to parliament for the activities of their departments. A minister's area of responsibility is often referred to as a portfolio.

Cabinet

Cabinet consists of the prime minister and senior ministers. The cabinet's main role is to decide on general government policy and to formulate proposed laws (known as **Bills**) to be introduced to parliament.

The cabinet is not mentioned in the Constitution but operates under a set of conventions which include the following.

- The governor-general acts on the advice of the cabinet.
- Members of cabinet (the ministers) come from the party that holds the majority in the lower house.
- Members of cabinet have the support of the members of the party with the majority in the lower house.
- If members of cabinet lose the support of the party, they will resign from cabinet.

Parliament	Government	Cabinet
Parliament is a law-making body that consists of all members of both houses, from all parties, plus the Crown's representative. The Commonwealth Parliament's structure is the governor-general, the Senate and the House of Representatives.	The government is formed by the political party that holds a majority in the lower house of parliament. All members of parliament who belong to this political party form the government. The other major party that did not win the election forms the opposition and is not part of the government.	The cabinet is the policy-making body made up of the prime minister and senior government ministers who have been placed in charge of a government department. It decides which laws should be introduced into parliament.

LEARNING ACTIVITY 1.5

The functions of parliament

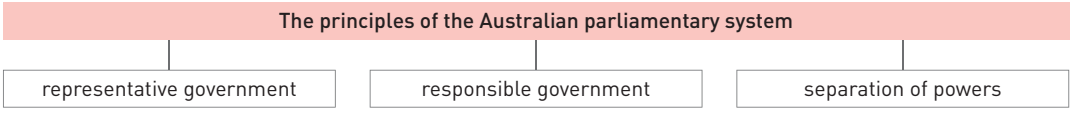
1. Explain the main functions of the houses of parliament.
2. What role do committees play in the law-making process?
3. What is the role of the opposition?
4. Describe the role of cabinet.
5. Explain the difference between government and parliament.
6. Using the Internet, investigate the role of parliament and the role of the Crown, and write a short report on each.



Figure 1.11
Parliament House, Canberra

THE PRINCIPLES OF THE AUSTRALIAN PARLIAMENTARY SYSTEM

The three main principles of the Australian parliamentary system are representative government, responsible government and the principle of separation of powers.



Representative government

Representative government refers to a government which represents the views of the majority of the people. The government consists of representatives of the people who are chosen by the people. This is essential for a democracy. To achieve representative government there must be regular elections so the people can vote for politicians to represent them in parliament. If the government does not represent the needs of the majority of the people, it is likely to be voted out of office at the next election.

The principle of representative government is established in the Constitution, which requires the members of the Senate and the House of Representatives to be chosen directly by the people (S7 and S24).

For a government to be representative, it must be answerable to the people. When people have a real concern about a need for a change in the law they may form a demonstration to indicate to government that there is an injustice in the law. For example, many people are lobbying for a change in the law to allow same-sex marriage. However, there are also people who do not agree with same-sex marriage. The government needs to initiate laws that are supported by the majority of people.

Many people have been calling for tougher sentences. *The Sentencing Amendment (Baseline Sentences) Bill 2014* (Vic.) would increase the sentences for six serious offences. The baseline sentences are the sentences parliament expects will become the median sentence. This Bill has not been passed.

The **bicameral system** contributes towards a more **representative government** because the lower house reflects the will of the people. Each state is equally represented in the upper house, regardless of the size of the population of the state. This allows for the election of more representatives acting on behalf of minority groups. One house can also act as a review of the operations of the other.

Responsible government

Responsible government refers to the government's responsibility to the voters. A **democratically elected government** must be answerable and accountable to the people for its actions. Ministers are drawn from within the government and they must maintain the confidence of the government. The Senate is able to scrutinise Bills before they are passed and become law. This helps to ensure the government is being accountable to the people.

The principles of a responsible government are listed below.

- Ministers are responsible to parliament and therefore to the people – a minister can be called upon to explain in parliament his or her actions and those of the department and agencies under his or her control (this is referred to as **ministerial accountability**).
- Members of parliament have the opportunity to question ministers about their activities and the activities of their departments.
- Ministers must carry out their duties with integrity and propriety or resign.
- There are opportunities for public scrutiny of the law-making process so the public can hold the government accountable for its actions; the government must respond to concerns of the parliament and the people and must answer questions where appropriate – a record of parliamentary proceedings is kept in Hansard, which is available to the public, and the public can view parliament in operation.
- If the government loses the support of the lower house it must resign, hence the government is responsible to parliament. The parliament in return is responsible to the people.

Separation of powers

The principle of the separation of powers is a basic principle underpinning our parliamentary system. This principle refers to the three **separate types of powers** in our parliamentary system, and that these powers should be held by separate bodies so that no one body has absolute power or control over the functions of the political and legal systems.

The Constitution makes provision for each of these separate powers to operate at a federal level. These powers are:

- **executive power** – the power to administer the laws and manage the business of government, which is vested in the governor-general as the Queen's representative, although in practice it is carried out by the prime minister and senior ministers
- **legislative power** – the power to make laws, which resides with the parliament
- **judicial power** – the power given to courts and tribunals to enforce the law and settle disputes, which is vested in the High Court and other federal courts. **This power is independent and separate from the legislative and executive powers** (at a federal level).

In Australia the legislative power and the executive power are combined. Although the legislative power and the executive power are described in the Constitution as separate powers, the duties of the legislature (the law-making bodies) and the executive (the governing body) are combined.

In practice the power to administer the law and carry out the business of government (the executive power) is placed in the hands of the cabinet, rather than the executive. The head of the executive, in practice, is the prime minister, not the monarch or the monarch's representative.

The governor-general, as the Queen's representative, is part of the executive power, as well as being part of the structure of parliament or legislative power. Likewise the prime minister and the cabinet are part of the governing body (the executive power) and are also part of parliament (the legislative power). This reflects the principle of **responsible government** under which government

ministers must be members of the parliament and must be accountable to the parliament, and hence to the people through the vote.

The executive power and the legislative power are closely linked by the fact that laws passed by parliament must receive **royal assent** from the governor-general in order to become law. There are also many Acts of parliament that give the **executive council** (the governor-general and senior ministers) the right to make regulations, but parliament retains the right to disallow or reject these regulations.

Despite the overlap between the executive and the legislature, there are still checks and balances between these two areas of power. Ministers are subject to the scrutiny of other members of parliament during question time. It is the role of the opposition to examine the policies and Bills of the government and to expose any flaws that may be apparent in proposed laws. At times, the upper house (the Senate) is controlled by the opposition, which provides for greater scrutiny of the government and its legislation.

The legislative power and the judicial power must be kept separate. Only a court or tribunal has the power to decide if a law (made by parliament) has been contravened. It is the sole province of the High Court to decide disputes on issues involving the Constitution although, as a secondary role, the courts have the power to make law through the application of precedent and the interpretation of statutes (see chapter 5 for information on law-making through courts). At a state level these lines of separation are less clearly defined.

Although the state and federal governments appoint judges, the courts are independent of political influence. In this way, citizens are safeguarded from the misuse of political power or corruption in the resolution of disputes. The impartiality of judges is protected by the fact that federal judges, for example, are appointed until the age of 70 and cannot be removed unless there is proven impropriety and parliament approves their removal.

BACKGROUND INFORMATION

Separation of powers

The idea of the separation of powers was adopted by the British Government in the mid-eighteenth century, influenced by the writings of the French philosopher Baron de Montesquieu (published in his book *The Spirit of the Laws*, 1748). Montesquieu felt that this separation was essential to protect the stability of the government and the freedom of the people. Montesquieu argued that the executive, legislative and judicial functions of government should be held by different bodies, so that attempts by one branch of government to impose their will on another could be restrained by the other branches. Accordingly, if one body held the power to make laws as well as the power to enforce the laws, it could lead to an abuse of power, because there would be no way to ensure that this body did not exceed its power. Without the courts checking to ensure that parliaments do not exceed their jurisdiction, a parliament could assume too much power and consequently have unreasonable control over people's lives.

The Constitution

The principle of the separation of powers is established in the *Commonwealth of Australia Constitution Act 1900* (UK).

- Chapter one establishes the Commonwealth Parliament to make laws according to the powers set out in the Constitution. This chapter also refers to the powers of the governor-general and the structure of parliament.
- Chapter two sets out the powers of the executive government and the role of ministers.

- Chapter three establishes the High Court to exercise the judicial power. The independence of the judiciary is referred to in S71 of the Constitution.

Section 64 of the Commonwealth Constitution provides that the monarch's ministers of state shall be members of the executive council. The **executive council** is set up under S62 of the Constitution to 'advise the governor-general in the government of the Commonwealth'. It is made up of the governor-general and any relevant ministers (being those ministers concerned with the matter under discussion). Section 64 of the Constitution provides that the ministers must be members of parliament.

Commonwealth Constitution

executive power	legislative power	judicial power
Vested in the governor-general Exercised by the prime minister and ministers	Parliament	Courts
The power to administer the law is given under Chapter II of the Constitution to the governing body of the country. In theory, the power is given to the executive (governor-general). In practice, it is the prime minister and ministers who exercise this power (the cabinet).	Law-making power vested in parliament by Chapter I of the Constitution.	
combined		separate
		independent of the legislative and executive powers





executive power – the cabinet in operation	legislative power – parliament in operation	judicial power – the High Court of Australia in operation



Reasons for the separation of powers

In Australia, the separation of powers is based on the notion of checks and balances. Each power is separate and independent and creates a check upon the other. The separation of power therefore:

- protects the stability of government and the freedom of the people
- provides independence between the bodies that make the law (the legislature, that is parliament) and the bodies that enforce the law (the judiciary, that is the courts)
- provides a check on the power of parliament to ensure that it does not go outside its area of power.

The government and the parliament must work together to pass laws, and the independence of the judiciary must be preserved. For example, a person who feels a parliament has passed a law that contravenes the Constitution or basic human rights can take the matter to court. Such challenges would be fruitless if courts were not independent of the government and parliament.

The power to judge criminal guilt, and to punish those who have broken the law, resides with the judiciary. It would be a conflict of interest if parliament, which makes the laws, were also given the power to prosecute and adjudicate on issues relating to those same laws. Similarly, in order to maintain the independence of the judiciary, judges cannot take a seat in parliament where laws are made.

LEARNING ACTIVITY 1.6

The principles of the Australian parliamentary system

1. Explain the principle of representative government.
2. Distinguish between the terms 'representative government' and 'responsible government'.
3. Explain how our Commonwealth Government is a responsible government under the requirements of our Australian parliamentary system.
4. List the three types of powers under the principle of separation of powers. Explain each power.
5. Explain how the legislative power and the executive power are combined in Australia.
6. Describe the separate nature of the judicial power.
7. 'The principle of separation of powers is an essential element of democracy in Australia.' Explain this statement and give reasons for the separation of powers.

>>GOING FURTHER

United States

In the United States, the separation of powers is much more clearly defined, as the executive power and the legislative power are quite separate in practice as well as in theory. The US president, who is not part of the law-making body, holds the executive power. In fact, no member of the legislative, executive or judicial bodies may be a member of any other body.

Victoria

In Victoria, and in other states, there is a blurring of the principle of separation of powers. This principle is not enshrined in state constitutions and is mainly followed as a matter of convention. The principle is, however, seen as important and should be followed, although there are some state bodies that are required to make decisions on disputes (the judicial role) and also make regulations (the legislative role).

EFFECTIVENESS OF THE PARLIAMENTARY SYSTEM

The main function of a parliament is to make laws for and on behalf of the people. Parliament is referred to as a **supreme law-making body** because its main role is law-making and it can change or repeal its own laws. It can also override law made by courts.

The party with the majority in the lower house will form government. The government of the day is given a mandate by the electors at the time of its election to make laws for the good government of the country. The prime minister (and premier of each state) forms a cabinet to make policy decisions on what laws are required.

Is parliament a rubber stamp?

Members of parliament from the government ranks are expected to support all government Bills, and because the government has the majority in the lower house (or in the case of a hung parliament can usually gain sufficient support from independent members of the parliament), once cabinet has decided to introduce a Bill into parliament, it will generally be passed by the lower house. This is referred to as **voting on party lines**, because the government members of parliament vote according to the wishes of the government.

Parliament provides a forum for discussion and evaluation of government proposals. The opposition parties are able to scrutinise proposed legislation to ensure that it reflects the needs of the people. This situation is made more difficult for the government if it does not hold an absolute majority in the lower house because they have to negotiate with independent members of parliament, and sometimes compromises must be reached in order to gain their support. The actions of the government are therefore under greater scrutiny.

If the governing party does not have a majority in the upper house, there is further scrutiny. If the Greens support the Australian Labor Party in the Senate, the Coalition Government will require the support of six of the other members of the Senate.

Even when the government has a majority in both houses, the parliament plays an active role in ensuring, as much as possible, that the proposed laws are discussed fully and amended to suit the needs of most people. The government should govern for all the people, regardless of whether they voted for them.

On some issues, usually those relating to moral values, the members of parliament are allowed to vote according to their conscience. The Gillard Government allowed the Labor members of the House of Representatives to vote according to their conscience on same-sex marriage. The then Coalition Opposition required their members to vote on party lines and the Bill was defeated. A conscience vote may be allowed on this issue in the future.

Time for public debate

A Bill may be presented to parliament, but the passing of the Bill delayed to allow time for debate in the community. This is a way of gauging the popularity of the proposal, and finding out any problems that the proposal may cause if it becomes law. For example, the *Juries Act 2000* (Vic.) was first introduced in 1999. Under the original proposal the use of majority verdicts was to be extended to include murder cases. There was considerable community concern about this proposal, and it was omitted from the final Act, which came into full operation in August 2001.

Restrictions on parliament

Parliament is the supreme law-making body because it can override other types of law-making bodies such as courts and subordinate bodies. However, this supremacy is restricted by the Constitution. Each parliament can only pass laws within its **jurisdiction** (area of power).

Parliament as a whole is restricted in the law-making process, because it can only pass laws which are presented to it, usually by the government of the day. The government must ensure that the laws presented to parliament are, as far as possible, responding to the needs of the people. Parliament may, however, be restricted by the cost of implementing any new laws, the long-term effects on the economy, and their acceptability or otherwise to the public in general.

If a highly vocal group of people is against a particular change in the law, the government may be reluctant to initiate the change. For example, there are outspoken and vocal conflicting opinions about proposals to change the law to allow voluntary euthanasia or allow same-sex marriages. There has been considerable debate about these issues in the community, and the parliament has been reluctant to change the law without a clear majority view.

Laws should reflect values

For laws to be effective they must reflect the values of the community. The government, when deciding on proposals for changes in the law, has to establish which changes would be most generally acceptable. For example, values have changed about the right to smoke in a public place. Some people believe they should be able to shop in a smoke-free area, while others believe they should be allowed to smoke when they are shopping.

Smoking is now banned in Victoria in most enclosed workplaces including restaurants, shopping centres and licensed premises. In August 2009, the Victorian Parliament passed laws banning smoking in motor vehicles if a person under the age of 18 years is present.

In some instances the law-makers can influence values in the community. For example, the *Equal Opportunity Act 2010* (Vic.) promotes a tolerant attitude in the community. Under this Act it is unlawful to discriminate against parents or carers in employment or employment-related areas.

The Victorian *Charter of Human Rights and Responsibilities*, which was passed in 2006, reflects the values of society such as the right to life and equality before the law. A compatibility statement must be provided to parliament prior to the second reading of any proposed laws to ensure that the provisions of the Bill are compatible with the *Charter of Human Rights and Responsibilities*. This Charter also seeks to generate values by stating those rights that are considered important to our society, and putting in place measures to protect these rights. At a federal level, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires that Bills be checked for their compatibility with human rights.

Participation by the individual

The Australian parliamentary system is based on democratic principles which allow the people to participate in the law-making process by being able to **vote** their representatives into office and keep a check on the operations of parliament through the ballot box.

People can also vote a member of parliament out of office, if it is thought that the member no longer represents the people's needs. In 2013, political commentators observed that the Labor Government was no longer providing the government that the majority of people required. It was voted out of office in the 2013 election.

Every member of the community who is 18 or older and has registered to vote has the right to vote, although there are exceptions such as prisoners serving more than three years in prison. Voting in Australia is compulsory. Not everyone agrees with this system as it may mean that people with little knowledge of political parties and the candidates are forced into voting for a member of parliament. On the other hand, the compulsory nature of our voting system makes people participate in the parliamentary system. Voting in some countries, such as the United States and the United Kingdom, is not compulsory and political parties spend a lot of resources encouraging people to vote.

Individuals in the community can **influence changes** in the law by letting the members of parliament know the needs and attitudes of the people by contacting members of parliament, being on talkback shows, taking part in protests and contacting the media.

LEARNING ACTIVITY 1.7

Effectiveness of the parliamentary system

1 Why is parliament referred to as the supreme law-making body?
2 Explain how conflicting opinions about a proposed change in the law can restrict the law-making process.
3 Why must laws reflect the values of the people?
4 How can laws encourage values within the community to change? Give an example.
5 How can individuals participate in the law-making process?
6 Discuss the advantages and disadvantages of compulsory voting.

LEARNING ACTIVITY 1.8

Mind map

Construct a mind map using 'parliament' as the central word. In your mind map, mention the words listed below and make the connections. Other words can be added to extend your mind map. Think about how your mind map can spread out as branches of a tree.

- government
- voters
- representative government
- responsible government
- Crown
- House of Representatives
- Senate
- bicameral
- cabinet
- governor-general
- ministers
- executive
- laws

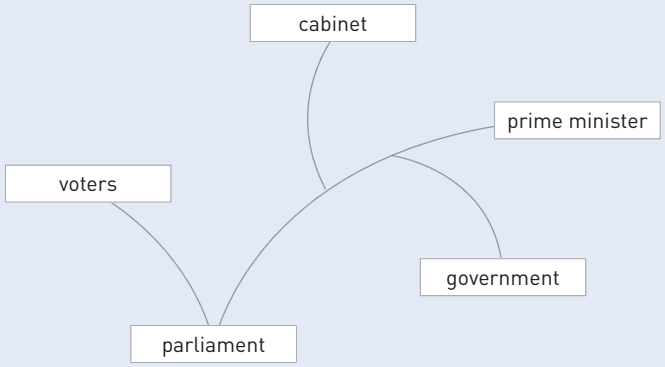


Figure 1.12
An example of the beginning of a mind map to be completed by students – your mind map does not need to follow this pattern

PRACTICE EXAM QUESTIONS

1 Describe the principle of and reasons for the separation of powers. *(6 marks)*

2 What is meant by the term 'responsible government'? Analyse the extent to which the Commonwealth Government is a representative government and a responsible government. *(6 marks)*

3 Explain the roles played by the House of Representatives, the Senate and the Crown in the law-making process and discuss the effectiveness of the parliamentary system. *(8 marks)*

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK FOLIO EXERCISE

Australian parliamentary system

One type of assessment is a folio of exercises. Each folio exercise is designed to test your knowledge and understanding of areas that will be covered in your examination at the end of the year, and as such is a useful tool in your revision process.

1 Describe cabinet and explain its role. *(2 marks)*

2 Fill in the following table. *(2 marks)*

The name of the Victorian upper house	
The name of the Victorian lower house	
The name of the upper house of the Commonwealth Parliament	
The name of the lower house of the Commonwealth Parliament	
How long are members of the lower house in Victoria elected for?	
How long are members of the upper house in Victoria elected for?	
How long are members of the upper house of the Commonwealth Parliament elected for?	
How long are members of the lower house of the Commonwealth Parliament elected for?	

3 Describe the principle of the separation of powers and explain the main reasons for this principle. *(6 marks)*

4 Explain the roles of the House of Representatives and the Senate. *(4 marks)*

5 Assess the effectiveness of the Senate as a states' house and a house of review. *(6 marks)*

(Total 20 marks)

ASSESSMENT TASK CASE STUDY

Functions of the House

Read the information 'Functions of the House' and answer the questions.

1 Why is it important that the House of Representatives is the House where the government is formed? *(2 marks)*

2 Under what circumstances might the power to unmake the government be exercised? Explain. Why is it an important power? *(4 marks)*

3 Under what circumstances might a government be required to resign? *(2 marks)*

4 Investigate one of the 1929, 1931 or 1941 examples of the government resigning or the House being dissolved and explain the reason for the resignation or dissolution of government in the particular example. *(4 marks)*

5 Investigate the 1987 double dissolution and explain the circumstances that led to the double dissolution and the outcome. *(4 marks)*

6 Why are the majority of Bills introduced in the House of Representatives? How can the opposition influence the make-up of Bills introduced to the House? *(2 marks)*

7 How might the House of Representatives act as an essential safeguard over excessive use of power? *(2 marks)*

(Total 20 marks)

Functions of the House

It is accepted that the House of Representatives, which reflects the current opinion of the people at an election, is the appropriate House in which to determine which party or coalition of parties should form government. Thus the party or coalition of parties which commands a majority in the House assumes the Government and the largest minority party (or coalition of parties) the Opposition.

Within this framework resides the power to 'unmake' a Government should it not retain the confidence and support of a majority of the Members of the House. To enable a Government to stay in office and have its legislative program supported (at least in the House), it is necessary that Members of the government party or parties support the Government, perhaps not uncritically, but support it on the floor of the House on major issues. Party discipline is therefore an important factor in this aspect of the House's functions.

A principal role of the House is to examine and criticise, where necessary, government action, with the knowledge that the Government must ultimately answer to the people for its decisions. It has been a Westminster convention and a necessary principle of responsible government that a Government defeated on the floor of the House on a major issue should resign or seek a dissolution of the House. Such a defeat would indicate prima facie [at first sight] that a Government had lost the confidence of the House, but there is no fixed definition of what is a matter of confidence. If a defeat took place on a major matter, modern thinking is that the Government would be entitled to seek to obtain a vote on a motion of confidence in order to test whether in fact it still had the confidence of the House. Defeat on a minor or procedural matter may be acknowledged, but not lead to further action, the Government believing that it still possessed the confidence of the House.

The Government has been defeated on the floor of the House of Representatives on a major issue on eight occasions since Federation following which either the Government resigned or the House was dissolved. The most recent cases were in 1929 (the Bruce–Page Government), 1931 (the Scullin Government), and 1941 (the Fadden Government). On 11 November 1975 immediately following the dismissal of the Whitlam Government, the newly appointed caretaker Government was defeated on a motion which expressed a want of confidence in Prime Minister Fraser and requested the Speaker to advise the Governor-General to call the majority leader (Mr Whitlam) to form a government. However, within the next hour and a half both Houses were dissolved and the resolution of the House could not be acted on.

The fact that the power of the House to 'unmake' a Government is rarely exercised does not lessen the significance of that power. Defeat of the Government in the House has always been and

still is possible. It is the ultimate sanction of the House in response to unacceptable policies and performance. In modern times, given the strength of party discipline, defeat of a Government on a major issue in the House would most likely indicate a split within a party or a coalition, or in a very finely balanced House the withdrawal of key support.

The initiation and consideration of legislation

Section 51 of the Constitution provides that the Parliament has the power to make laws for the peace, order, and good government of the Commonwealth with respect to specified matters. The law-making function of Parliament is one of its most basic functions. The Senate and the House have substantially similar powers in respect of legislation, and the consideration of proposed laws occupies a great deal of the time of each House. Because of the provisions of the Constitution with respect to the initiation of certain financial legislation and the fact that the majority of Ministers are Members of the House of Representatives, the vast majority of Bills introduced into the Parliament originate in the House of Representatives.

The right to govern carries with it the right to propose legislation. Private Members of the Government may be consulted on legislative proposals either in the party room or through the system of party committees. The result of these consultations may determine the extent to which the Government is willing to proceed on a policy issue or a course of executive action. In addition, the Opposition plays its role in suggesting changes to existing and proposed legislation. Some suggestions may be accepted by the Government immediately or taken up either in the Senate or at a later date.

Seeking information on and clarification of government policy

The accountability of the Government to Parliament is pursued principally through questions, on and without notice, directed to Ministers concerning the administration of their departments, during debates of a general nature – for example, the Budget and Address in Reply debates – during debates on specific legislation, or by way of parliamentary committee inquiry.

The aim of parliamentary questioning and inquiry is to seek information, to bring the Government to account for its actions, and to bring into public view possible errors or failings or areas of incompetence or maladministration.

Surveillance, appraisal and criticism of government administration

Debate takes place on propositions on particular subjects, on matters of public importance, and on motions to take note of documents including those moved in relation to ministerial statements dealing with government policy or matters of ministerial responsibility. Some of the major policy debates, such as on defence, foreign affairs and the economy, take place on motions of this kind. Historically, opportunities for private Members to raise matters and initiate motions which may seek to express an opinion of the House on questions of administration were limited, but these increased significantly in 1988.

It is not possible for the House to oversee every area of government policy and executive action. However, the House may be seen as an essential safeguard and a corrective means over excessive, corrupt or extravagant use of executive power. From time to time the Opposition may move a specific motion expressing censure of or no confidence in the Government. If a motion of no confidence were carried, the Government would be expected to resign. A specific motion of censure of or no confidence in a particular Minister or Ministers may also be moved. The effect of carrying such a motion against a Minister may be inconclusive as far as the House is concerned as any further action would be in the hands of the Prime Minister. However, a vote against the Prime Minister, depending on circumstances, would be expected to have serious consequences for the Government.

Source: Department of the House of Representatives 2005, *House of Representatives Practice*, 5th edn, Chapter 1, Canberra

Summary

The structure of parliament is based on the British Westminster system

Australia is a constitutional monarchy, a federation of states and a representative democracy

Australian parliamentary system

Bicameral system

Structure of Commonwealth Parliament

- governor-general (the Queen's representative)
- Senate (upper house)
- House of Representatives (lower house)

The role of the House of Representatives

- initiating laws
- determining the government
- providing responsible government
- representing the people
- publicising and scrutinising government administration
- controlling government expenditure

The effectiveness of the House of Representatives

The role of the Senate

- house of review/scrutinising Bills from lower house
- states' house
- initiating laws except money Bills

The effectiveness of the Senate

Structure of Parliament of Victoria

- governor (the Queen's representative)
- Legislative Council (upper house)
- Legislative Assembly (lower house)

The role of the Legislative Assembly

The role of the Legislative Council

The role of the Crown

The functions of parliament

- making new laws and amending existing laws
- providing for the formation of government
- providing a forum for popular representation and debate
- scrutinising the actions of government
- delegating some of its law-making power
- checking any delegated legislation
- balancing the books

Roles of the government, cabinet, prime minister/premier and committees

The principles of the Australian parliamentary system

Representative government

- represents the views of the people
- regular elections
- if government does not represent the people it is likely to be voted out of office

Responsible government

- government answerable to the people
- if government loses the confidence of the people it must resign
- ministers are responsible to parliament and therefore the people
- members of parliament can question ministers
- ministers are responsible for the actions of their departments
- ministers must carry out their duties with integrity and propriety or resign

Principle of separation of powers

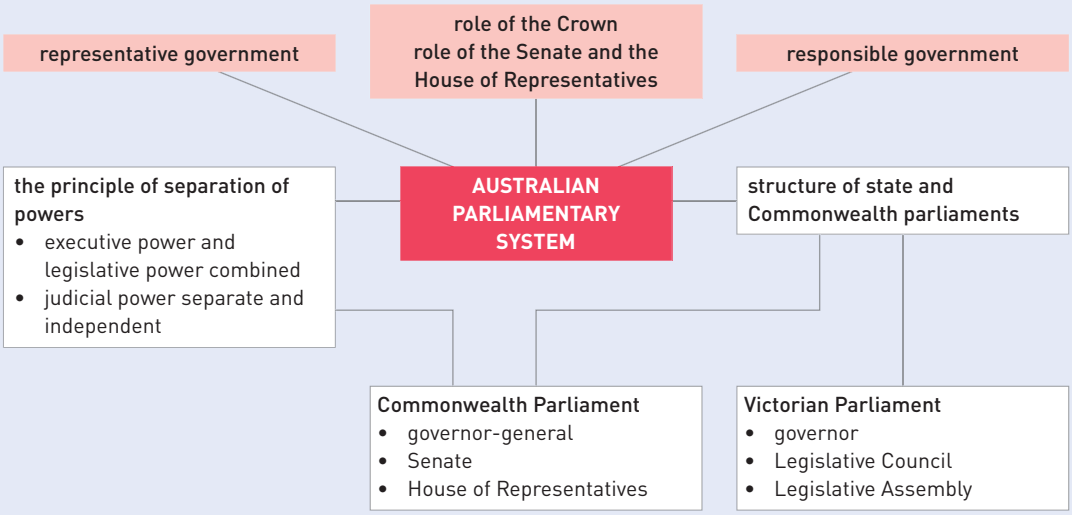
- legislative power
- executive power
- judicial power
- legislative and executive power combined
- judicial power separate

Reasons for separation of powers

- protects the stability of government
- provides independence between the bodies that hold these powers
- provides a check on the power of parliament and the government

Effectiveness of the parliamentary system

- is parliament a rubber stamp?
- time for public debate
- restrictions on parliament
- laws should reflect values
- participation by the individual


representative government
role of the Crown
role of the Senate and the House of Representatives
responsible government
the principle of separation of powers
• executive power and legislative power combined
• judicial power separate and independent
AUSTRALIAN PARLIAMENTARY SYSTEM
structure of state and Commonwealth parliaments
Commonwealth Parliament
• governor-general
• Senate
• House of Representatives
Victorian Parliament
• governor
• Legislative Council
• Legislative Assembly



CHAPTER 2

LAW-MAKING THROUGH PARLIAMENT

OUTCOME

This chapter is relevant to learning outcome 1 in Unit 3. You should be able to explain the structure and role of parliament, including its processes and effectiveness as a law-making body, describe why legal change is needed, and the means by which such change can be influenced.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- the reasons why laws may need to change
- the role of the Victorian Law Reform Commission
- the means by which individuals and groups influence legislative change, including petitions, demonstrations and use of the media
- the legislative process for the progress of a Bill through parliament
- strengths and weaknesses of parliament as a law-making body.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information and data
- use contemporary examples to explain the influences on legislative change
- evaluate the effectiveness of methods used by individuals and groups to influence change in the law
- critically evaluate the law-making processes of parliament.

KEY LEGAL TERMINOLOGY

abrogate Abolish; law made through the courts can be cancelled by an Act of parliament if the Act specifically states that it abolishes the law made by the courts.

Bill Proposed law.

cabinet The policy-making body of the government, made up of senior ministers and the prime minister (federal) or premier (state).

delegated legislation Rules and regulations made by subordinate authorities.

legislation An Act of parliament or set of Acts.

lobbying Making requests to politicians or groups for their assistance in trying to influence a change in the law.

office of parliamentary counsel The office of parliamentary counsel is responsible for drafting legislation; the drafters are given instructions from cabinet about the purpose and extent of proposed laws.

pressure group A group of people who have a common interest in trying to influence changes in the law.

Scrutiny of Acts and Regulations Committee A Victorian joint investigatory committee that looks at new Bills as they make their passage through the Victorian Parliament.

Senate Scrutiny of Bills Committee A Senate committee that is responsible for examining all Bills that come before the Commonwealth Parliament.

statute law Law made by parliament, also known as legislation.

subordinate authorities Bodies to whom parliament delegates law-making powers.

terms of reference Instructions given to an organisation (for example, a law reform body) setting out the parameters within which an investigation will operate.

REASONS LAWS MAY NEED TO CHANGE

The main aim of the law is to protect our society and keep it functioning. The law also aims to protect individual rights and stop behaviour that will ultimately affect the peace and good order of society. Laws are therefore needed to outline acceptable behaviour and prevent conflict within society.

To be effective, laws need to be known by the community, easily understood and able to be changed. Laws also need to be acceptable to the individual members of society and society as a whole, and enforceable. Laws must therefore keep up with changing values and other changes in society.

There is a large body of law that covers all aspects of the legal system and our lives. Each time a new law is passed this is a change in the existing body of the law.

Reasons for changes in the law include:

- changing values in society
- changes in society
- advances in technology
- greater need for protection of the community
- greater awareness of the need to protect rights
- greater demand for access to the law
- encouraging changes in values in society.

Changing values and attitudes

In our society, values and attitudes have changed over the years. The majority of people in our community are law-abiding citizens. However, if a law is not accepted by the community it could lead to more and more people being willing to disobey the law. In order for the law to remain acceptable it must change to keep up with these changing values.

Oscar's law

In general, people abhor cruelty to animals. This is a change in attitudes from times gone by when people tended to be less concerned with the welfare of animals. Debra Tranter is a campaigner who called for a change in the law in relation to puppy farming. In 2010 she rescued a dog called Oscar from a puppy farm. He had been very badly treated. In December 2011 the *Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Act 2011* (Vic.) was passed into legislation. This Act provides more regulation over puppy farm activities. This Act also amended the *Prevention of Cruelty to Animals Act 1986* (Vic.) to increase penalties for cruelty to animals.



Figure 2.1
When rescued, Oscar weighed only 1.6 kilograms. He was subsequently treated by a vet.

De facto relationships and same-sex couples

With greater understanding, our views on **de facto relationships and same-sex couples** have changed. Society appreciates that de facto relationships and same-sex couples have endured injustices, and the law has changed to recognise this change in attitude.

The *Relationships Act 2008* (Vic.) establishes a register for the registration of domestic relationships in Victoria. This covers two people living together on a genuine domestic basis, irrespective of gender.

In February 2012, two private member's Bills to legalise same-sex marriage were introduced to the Commonwealth Parliament. The Labor Party allowed a conscience vote on these Bills but the Coalition did not. Both Bills were defeated.

Changes in society

Our society is constantly changing. Over the last hundred years our society has changed considerably. Buying habits, for example, have changed. Many items purchased a hundred years ago were purchased from local markets and inspected before buying. Packaging has made thorough inspection impossible. The law has changed over time to protect the consumer and make sellers and manufacturers ensure their products are safe. The *Competition and Consumer Act 2010* (Cth) states that goods that are purchased must be of acceptable quality and reasonably fit for any disclosed purpose.

Drunk and disorderly

People have become intolerant towards drunk and disorderly conduct in public. The *Justice Legislation Amendment Act 2011* (Vic.) enables a licensee, responsible person or member of the police force to bar a person from entering or remaining on licensed premises.

To try to curb the problem of excessive drinking, the *Liquor Control Reform Amendment Act 2010* (Vic.) requires licensees to make free drinking water available to patrons on licensed premises when liquor is being consumed, although exemptions can be applied for.



Figure 2.2 Free drinking water to be provided in licensed premises

Bullying

Society is changing in relation to bullying. It is no longer seen as 'just having fun' or 'part of growing up'. It is an increasing problem and is recognised as harmful to children and youths. Cyberbullying is a new and equally harmful problem. Studies in various parts of the world show that bullying behaviour in youth is associated with depression, suicidal contemplation and suicide attempts. The *Crimes (Amendment (Bullying) Act 2011* (Vic.) was passed in an attempt to tackle this rising incidence of bullying. This Act increases the offence of stalking to include acts of bullying such as making threats, using abusive or offensive words and performing abusive or offensive acts in the presence of the victim or towards the victim. The Act also expands the definition of mental harm to include psychological harm and suicidal thoughts.

FACEBOOK BULLYING LED TO SUICIDE

Following the inquest into the death of a 19-year-old man from Port Talbot in the United Kingdom, who committed suicide after being bullied on Facebook, two young women have been cautioned for malicious communication. Police said the comments were completely unfounded and malicious.

Protection of the community

The community needs to be protected so that it can continue functioning in a harmonious way. One of the major roles of the law is to protect individuals from harm, whether it is physical harm or unfair or unscrupulous practices. Laws are therefore needed to make unlawful those actions that may harm the community or individual members of the community. As new situations arise, new laws are required.

The *Crimes Amendment (Grooming) Act 2014* (Vic.) was passed to protect children from individuals seeking to groom children for sexual purposes. This change in the law was recommended by the Victorian Family and Human Development Committee.

The law is sometimes required to be **paternalistic** – protect those who are not prepared to or able to protect themselves – and **educative** – teach the community what is safe. For example, people driving their boats in a dangerous manner can have their boat impounded; people can be punished for spiking food and drinks with the intention to render others incapable.

A major concern in our society is the protection of road users. Many people are killed or injured every year. The law is constantly changing in an effort to bring the road toll down.

EXTRACT

Mobile phones while driving

VicRoads News room, 'D-Day looms for mobile phone crackdown', 28 October 2013

Sweeping new changes to mobile phone rules for P-platers and penalties for illegally using a phone while driving will come into effect in a month, Minister for Roads Terry Mulder announced today.

Mr Mulder said changes to the current laws would be submitted to the Governor this week for approval but that the Victorian Coalition Government's intention is to warn Victorians they would face higher fines and more demerit points if they reach for their phone while driving.

Mr Mulder said from 25 November this year drivers caught using a mobile phone will face a $433 fine (up from $289) and 4 demerit points, up from 3 points.

In addition, the total ban on mobile phone use is being extended from P1 drivers on red P-plates, the first year of the probationary licence, to P2 drivers on green P-plates. This includes years two, three and four of holding a probationary licence.

'These are some of the most significant changes to our road rules in years and reflect the growing problem of distraction, which has the potential to result in deaths and injuries on our roads,' Mr Mulder said.

'The Coalition Government is getting even tougher on mobile phone use because we know that taking your eyes off the road for just two seconds to answer a call or read a text message can kill. We want to see using mobiles while driving become as unacceptable as drink driving now is.'



Figure 2.3 Using mobile phones while driving increases the risk of being in an accident.

Restrictions on parole

Following the murder of Jill Meagher and other murders committed by offenders who were on parole at the time of the murders, the *Corrections Amendment (Parole Reform) Act 2013* (Vic.) has been passed. The purpose of this Act includes amending the *Corrections Act 1986* (Vic.) to ensure that safety and protection of the community are the paramount considerations in decisions to release a prisoner on parole.

Corruption in betting

In order to fight the problem of corrupt practices in gambling situations, the *Crimes Amendment (Integrity in Sports) Act 2013* (Vic.) has created offences in relation to corrupting the betting outcomes of events or event contingencies on which it is lawful to place bets. In January 2014, Victoria Police charged a man over alleged courtside betting at the Australian Open under this legislation. The 22-year-old man from the United Kingdom was arrested and charged with one count of engaging in conduct that would corrupt a betting outcome.

Gross violence

There have been a number of horrific attacks that have resulted in a person being severely injured or killed. Society has responded to the reports of these attacks by demanding a change in the law, which led to the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic.). According to Attorney-General Robert Clark, the Act is designed to send a clear message that adult offenders who inflict gross violence will go to jail.

Protection of rights

The protection of individuals' rights is seen as important in the community. When these rights are infringed, and injustices are unable to be resolved through the law, the law needs to change to deal with these injustices.

The *Equal Opportunity Act 2010* (Vic.) has been passed to replace existing legislation. This area of law has been changed a number of times to accommodate changes in values relating to discrimination and definitions of what is unacceptable discrimination, such as discrimination on the grounds of age, impairment, pregnancy or race.

Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

Part 2 of this Act establishes the Parliamentary Joint Committee on Human Rights. This committee examines Bills and legislative instruments for compatibility with Australia's human rights obligations and reports to both houses of the Commonwealth Parliament. The committee will also investigate issues relating to human rights referred to it by the attorney-general.

Advances in technology

Technology is constantly improving and opening up new frontiers. As it improves, new situations need to be covered by the law to reduce the opportunity for individuals and groups being exploited or harmed.

Computers

Computers have brought us new problems that the law needs to address. For example, stalking on the Internet is a recent type of crime that has been made possible by the increased availability of computers. It is unlawful to stalk another person using the Internet, email or any electronic communication.

Computers have made it easier to steal a person's identity. The *Crimes Amendment (Identity Crime) Act 2009* (Vic.) has been passed to try to overcome this problem.

Gene technology

The explosion in genetic knowledge has created an area of uncertainty in the law. Who owns our genes? Gene patenting has a bearing on the detection and treatment of a vast range of illnesses and medical conditions. Governments here and overseas have failed to frame laws that protect our common genetic interests. According to a decision in the highest US court, human genes will no longer be controlled by private companies in the United States because they are naturally occurring substances that are not patentable. Consumer advocacy group Cancer Voices Australia has called on the government to amend the *Patent Act 1990* (Cth) to reflect the wishes of the people.

Access to the law

As people become better educated about the law and their rights, they are more likely to want to seek justice if they believe their rights have been infringed. To take a matter to court is expensive and intimidating. To assist people in their efforts to seek a just resolution to disputes that arise, the law has been changed to provide alternative avenues of dispute resolution such as the Victorian Civil and Administrative Tribunal. This tribunal was established under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic.).

More recently, there have been changes in the law to provide more effective access to the law. The Assessment and Referral Court List of the Magistrates' Court has been established under the *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010* (Vic.) to assist people who have mental health problems and have been accused of a crime.

The Drug Court was established in 2002 to assist people with drug problems with the aim of helping them to rehabilitate and reduce recidivism.

In civil cases the courts have shown a commitment to greater use of mediation to try to resolve civil actions faster and with less expense. Judicial resolution conferences are conducted before a matter goes to trial to see if an early settlement can be reached.

The Neighbourhood Justice Centre at Collingwood is a multi-jurisdictional centre that has created one-stop justice to help people access the court system more easily and provide an array of services to help people involved in court cases.

The Moorabbin Justice Centre and regional courts in some major towns in Victoria provide a number of courts under one roof.

The Department of Justice has established mobile justice centres that attend large events with people on hand to give information and advice.

Generating changing values in society

In some instances it appears that the law-makers have changed the law in order to encourage a change in society's values. The Victorian *Charter of Human Rights and Responsibilities* seeks to educate the community on rights and tolerance, generate a respect for diversity, and promote an understanding of the balance between rights and responsibilities. This is achieved through providing legislative protection for an extensive number of human rights for Victorians, and setting out the responsibilities of governments, organisations and citizens in the general community.

The law-makers have helped to change values in relation to discrimination under the *Equal Opportunity Amendment Act 2010* (Vic.) by making many types of discrimination unlawful.

Shop trading legislation has gradually changed the way we shop. The *Shop Trading Reform Amendment (Easter Sunday) Act 2011* (Vic.) removes the restrictions on shopping on Easter Sunday.

Table 2.1 Changes in the law

REASON FOR CHANGE	EXAMPLE OF CHANGE IN THE LAW
Changing values and attitudes	*Relationships Act 2008* (Vic.) Proposal for same-sex marriages *Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Act 2011* (Vic.)
Changes in society	*Competition and Consumer Act 2010* (Cth) *Liquor Control Reform Amendment Act 2010* (Vic.) *Crimes (Amendment (Bullying) Act 2011* (Vic.) *Justice Legislation Amendment Act 2011* (Vic.)
Protection of the community	*Corrections Amendment (Parole Reform) Act 2013* (Vic.) *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic.) *Crimes Amendment (Integrity in Sports) Act 2013* (Vic.) *Crimes Amendment (Grooming) Act 2014* (Vic.) Regulations relating to mobile phone use *Transport Legislation Amendment (Hoon Boating and Other Amendments) Act 2009* (Vic.) *Crimes Legislation Amendment (Food and Drink Spiking) Act 2009* (Vic.)
Protection of rights	*Equal Opportunity Act 2010* (Vic.) *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)
Advances in technology	*Crimes Amendment (Identity Crime) Act 2009* (Vic.) *Assisted Reproductive Treatment Act 2008* (Vic.) Suggestions to change patent laws in relation to genes
Access to the law	*Victorian Civil and Administrative Tribunal Act 1998* (Vic.) *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010* (Vic.) Neighbourhood Justice Centre
Generating changing values in society	*Shop Trading Reform Amendment (Easter Sunday) Act 2011* (Vic.) *Equal Opportunity Act 2010* (Vic.)

CASE STUDY

Making our streets safer

In the media, we see reports of situations of public drunkness and violent attacks. One of the aims of law-making is to make the community safer. The *Justice Legislation Amendment Act 2011* (Vic.) enables a licensee, responsible person or member of the police force to bar a person from entering or remaining on licensed premises.

To try to curb the problem of excessive drinking, the *Liquor Control Reform Amendment Act 2010* (Vic.) requires licenses to make free drinking water available to patrons on licensed premises when liquor is being consumed.

The *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic.) creates two new offences. A person must not, without lawful excuse, **intentionally cause serious injury** to another person in **circumstances of gross violence** or **recklessly cause serious injury** in such circumstances. The Act also provides for sentences with a minimum non-parole period for those offences.

LEARNING ACTIVITY 2.1

Reasons for changes in the law

1 Discuss how laws help to promote harmony in the community.
2 Look back at the extract 'Mobile phones while driving' and explain how laws have changed for the protection of the community in relation to road users.
3 Read the case study 'Making our streets safer' and answer the questions.
   a Referring to the laws mentioned in the case study, how do you think these laws affect young revellers attending licensed premises?
   b Do you think society will be safer because of these laws? Explain.
   c What other laws mentioned earlier can help to protect members of society and make society safer?
   d Do you think other countries have similar laws to Victoria to help to curb the incidence of public drunkenness? Investigate this issue in two other countries and comment on similar laws. In New Zealand public drunkenness is not an offence. Do you think this is better for society or worse for society? Discuss.
   e Why is it necessary for laws to be accepted in society? Do you think the laws you have discussed will be accepted? Explain.
   f Why is it necessary for a society's legal system to reflect the values of that society?
4 Why have advances in technology brought about the need to change the law? Give an example of a law that has changed to accommodate changes in technology.
5 How has the law changed to provide better access to the law?
6 Explain two other reasons why laws need to change and give an example of a recent change in the law that has taken place for each of the reasons explained.
7 Find a newspaper article discussing a proposed change in the law and suggest reasons for the proposed change in the law.

HINT

In your Legal Studies examination you will be required to refer to examples of recent changes in the law. You should start a folder of changes in the law. Collect newspaper articles discussing proposed changes in the law and make a note of reasons for the proposed changes.

Keep a list of recent proposed changes in the law and changes that have taken place to use as examples. Refer back to these examples throughout your study.

As you collect examples of changes or proposed changes in the law, you could file them under headings relevant to the Year 12 course.

INDIVIDUALS AND GROUPS INFLUENCING CHANGES IN THE LAW

The law is constantly changing. Most law reform is initiated through parliamentary ministers, who take advice from their departments and law reform bodies about required changes in the law. However, individuals and groups have a voice and can, through their own efforts, influence changes in the law, although they need support, particularly from the media, if they wish to make their voices heard.

Each political party has a set of policies relating to how the country or state should be run. At the time of an election, the parties put these policies forward in the hope that the majority of people will vote for them. These policies take into account submissions made by individuals and groups about

changes in the law that would benefit the community. When a party is elected, the new government (or existing government if the governing party has been re-elected) will usually try to implement promises made during the election.

>>GOING FURTHER

Informal and formal pressure

Pressure on law-makers for changes in the law can be formal or informal. **Informal pressures** come from individuals or groups who are not connected with the law-making process and cannot be instrumental in changing the law, but who can try to influence the law-makers to change the law. Informal pressure can increase public awareness of a problem and encourage parliament to investigate an issue. Informal pressure may come from such sources as individuals, political parties, pressure groups and trade unions.

Formal pressures for changes in the law come from within the formal structures of the law-making process and include:

- cabinet, which is responsible for deciding what changes in the law should take place
- government departments, which decide what changes in the law are required in their area
- parliamentary committees, which are asked by parliament to investigate an issue
- law reform bodies, which are responsible for investigating the need for changes in the law as needs arise.

Pressure groups

Many individuals seeking a change in the law choose to form pressure groups. Pressure groups are groups of people who join together because they have a particular common interest in trying to influence the government to change the law. Often the sheer weight of numbers can lead to their demands being listened to.

Pressure groups may be formed specifically because of some dissatisfaction with the law, or there may be a group with other functions, such as a trade union, that also takes an interest in changes in the law. **Dying With Dignity Victoria** (DWDV) is an example of a special interest pressure group. It was formed to lobby the government to initiate laws to legalise voluntary euthanasia in Victoria.

EXTRACT

Dying With Dignity Victoria

DWDV is an active law reform and 'self-help' organisation pursuing public policies and laws in the state of Victoria that enhance self-determination and dignity at the end of life. DWDV is not for profit and we rely on membership, donations and bequests to continue our work. DWDV does its work by:

- **lobbying** politicians and writing submissions with the aim of achieving law reform to allow medically assisted dying at the request of rational, informed, profoundly suffering adults
- **working** to improve both the legislation and the practical impact of the *Medical Treatment Act 1988* (Vic.)
- **informing** the general public, professionals and students through media interaction, talking to community groups and sponsoring public lectures and workshops
- **providing** members with information and other member services including counselling and forms to facilitate protection of their end-of-life rights.

Source: Dying With Dignity Victoria



Figure 2.4
According to Dying with Dignity Victoria, an overwhelming majority of Australians (85 per cent) agree: dying with dignity is vital. Current law lags significantly behind the views of the people.

Animals Australia

Animals Australia is a pressure group. It is Australia's second largest national animal protection organisation, representing thousands of individual supporters and some 40 member societies, such as Animal Active. They are committed to investigating and exposing animal cruelty.

The Animals Australia Action Network gets people involved in writing letters to keep animal issues in the press and in the minds of decision-makers. It assists in public awareness initiatives, collects petition signatures, raises funds and organises campaigns and national days of action.

One issue that came to their attention was puppy farms. Some people raise dogs for sale. It was found that sometimes these dogs are kept in terrible conditions. According to the RSPCA a responsible puppy farm will assess the suitability of a prospective buyer before selling a puppy. Other puppy farms have been found to be in remote places, unlicensed and unethical. Some were overcrowded, with insufficient food and lack of veterinary care.

Debra Tranter, an animal welfare activist, rescued a dog called Oscar, along with a number of other dogs, from a puppy farm in central Victoria, where they had been neglected to the point of needing urgent veterinary care. She was responsible for setting up Oscar's Law, which is a pressure group that campaigns for changes in the law in relation to puppy farms.

I want
OSCAR'S
LAW

Figure 2.5 Pressure group Oscar's Law

GetUp!

GetUp! is an online politically motivated action group that uses the Internet to enlist like-minded people who want to bring participation back into democracy. The group launches campaigns to try to influence changes in the law through the Internet. It provides an opportunity for everyone to have their say and support a campaign by adding their names to an online petition asking for a change in the law. It also provides links to politicians to make it easier for people to have their say directly to the relevant members of parliament. People can also donate to advertising campaigns.

Some of the campaigns that GetUp! is currently involved in are:

- marriage equality for same-sex couples
- action on climate change
- protection of the Great Barrier Reef
- the threat of unregulated coal seam gas mining
- a fairer asylum seekers policy.

Out of Sight is a GetUp! and ChilOut collaboration to raise awareness about the plight of asylum seekers on Manus Island, Papua New Guinea. There are over 200 adults and 34 children detained on Manus Island. They feel isolated and unsure of their future. GetUp! is working on bringing their stories to light and putting pressure on our politicians to do the right thing by these people who have fled their homes, often in fear for their lives.

EXTRACT

Facts

- Australia is today locking up at least 1144 children.
- 126 children are detained on Nauru. They will never be resettled in Australia, even if found to be refugees.
- Australia is the only Refugee Convention signatory to have a policy of mandatory, indefinite detention for asylum seekers.

Source: ChilOut

Note: ChilOut is a not-for-profit community group which seeks to increase public awareness by providing accurate information showing what is happening to children inside Australia's immigration detention facilities.

METHODS USED BY INDIVIDUALS AND GROUPS TO INFLUENCE CHANGE IN THE LAW

Methods used by individuals and groups to influence change in the law include:

- petitions
- demonstrations
- media.

Some methods of trying to influence the government to change the law are more likely to be used by a pressure group, such as demonstrations. Other methods, such as writing letters to the editor of a newspaper, are more likely to be used by an individual.

Petitions

A petition is a formal, written request to the government for action in relation to a particular law that is considered outdated or unjust. It usually has a collection of signatures on it, which have been gathered from supporters. A petition is forwarded to a local member of parliament to present at the next sitting of parliament. A petition can also be conducted on the Internet, using email addresses rather than signatures.

Although a petition only needs to have one signature to be accepted, it will appear more representative of public feeling if it is signed by as many people as possible, as this will show a high level of support for the suggested change in the law. A petition can be on an issue of general interest, or may be on an issue relevant to a small group of people. Often there are a number of petitions presented to parliament on the same subject. Parliament receives many petitions every year.

Parliament imposes certain rules on the form and content of petitions. A petition must:

- be addressed to only one house of parliament
- refer to a matter that is within the power of the parliament to address

- state the facts
- contain a request for the parliament to take action.

A petition can only be presented to the parliament by a member of parliament. This can be any member and does not have to be the petitioner's local member.

A standing committee on petitions has been established to ensure all petitions presented to the House of Representatives are considered. The person making the petition (either an individual or someone on behalf of a group) will be contacted by the committee to inform him or her of the response made on behalf of the House.



Figure 2.6 Collecting names and addresses on a petition

Asylum seekers

There has been continued debate in the community about the plight of asylum seekers. Some people think that there should be tighter restrictions on who should be allowed to settle in Australia. Others would like to see a more generous treatment of asylum seekers. In the petition below, the petitioners are asking the Commonwealth Government to consider removing all asylum seekers from offshore detention centres and providing them with greater assistance.

EXTRACT

Petition – House of Representatives

Asylum seekers

To the Honourable Members of the House of Representatives in the Parliament assembled:
This petition of certain concerned citizens of Australia draws to the attention of the House the dire and unjust – and very costly – situation of asylum seekers detained by the Australian Government in off-shore and on-shore Detention Centres.

We therefore ask the House to:

(1) adopt a compassionate, just and bi-partisan approach to this issue, as befits our Australian values (as happened with the 'boat people' of the 70s and 80s)

(2) withdraw all asylum seekers ASAP from off-shore centres to mainland Australia

(3) choose locations and arrange on-shore accommodation and facilities (as has been done in Leonora, WA) to provide a quality of life which meets Australian community standards – and benefits the local community

(4) process their claims ASAP (Canada is able to process in three months)

(5) provide on-going assistance to those released into the community, as offered in the 80s and 90s

(6) cease indefinite detention immediately, and review the cases of current detainees, providing them with reasons for their incarceration and options, conditions for rehabilitation and release

(7) admit that on-shore, rapid processing would prove far less costly, and be much more just and humane, than the current totally un-Australian approach.

From 240 citizens

Tabled on 12 December 2013

Source: Parliamentary Debates (Hansard), House of Representatives, 12 December 2013, p. 2511

Cruelty to animals

Many thousands of people have been protesting against the treatment of cruelty to animals. Some of those people who were trying to influence a change in the law to abolish puppy factories signed a petition and tabled it in the Legislative Assembly. A second petition was tabled in 2013 asking for tougher penalties for people found treating animals cruelly.

EXTRACT

Petition – Legislative Assembly

Wednesday, 26 October 2011

Puppy farms: abolition

Member Wakeling

To the Legislative Assembly of Victoria:

The petition of the residents of Victoria brings to the attention of the house the hidden industry behind the pet shop window.

Puppy factories farm puppies and sell them to pet shops and trade them online. The dogs are often kept in cramped, filthy conditions for their entire lives and their behavioural needs are never met. The dogs not only suffer physically but are psychologically traumatised due to confinement and constant breeding; when they are no longer able to breed they are killed and replaced.

The petitioners therefore request that the Legislative Assembly of Victoria support Oscar's Law and abolish puppy factories and ban the sale of factory-farmed companion animals from pet shops and online.

By Mr WAKELING (Ferntree Gully) (47 signatures)

Source: Parliamentary Debates (Hansard), Legislative Assembly, 26 October 2011, p. 4870



Figure 2.7 Puppies who were maltreated at a puppy farm

EXTRACT

Petition – Legislative Assembly

Animal cruelty and negligence

Requesting that the Legislative Assembly urges the Government to implement tougher penalties for animal cruelty, including heavy fines, criminal convictions and jail sentences.

Tabled 17 October 2013

388 signatures

By Mrs Wreford (Mordialloc)

Source: Parliamentary Debates (Hansard), Legislative Assembly, 17 October 2013, p. 3479

Marriage definition

Sometimes petitions ask the parliament not to change the law. People have written petitions to the Commonwealth Parliament requesting changes in the law to allow same-sex marriage. Others have petitioned the Commonwealth Parliament to keep the definition of marriage as between 'a man and a woman'.

EXTRACT

Petition – House of Representatives

Marriage

To the Honourable Members of the House of Representatives in the Parliament assembled:

This petition of certain citizens of Australia draws the attention of the House to the proposal to amend the *Marriage Act 1961* (Cth).

We therefore ask the House NOT to approve the *Marriage Amendment Bill 2012* as presented by Mr Stephen Jones and specifically not to change the definition: ('marriage' means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life).

From 26 citizens

Petition received

Source: Parliamentary Debates (Hansard), House of Representatives, 12 December 2013, p. 2513

E-petitions

An e-petition is a petition that is signed online. The Queensland Government and the Senate accept electronic petitions. In the Senate, the rules governing electronic petitions are much the same as those outlined for petitions tabled in parliament. The Senate will accept a printout of a petition that has been posted on an Internet page and that people have 'signed' by submitting their names and email addresses. The petition must be certified as an electronic petition by the senator presenting the petition.

E-petitions have the ability to gather far more signatures than a petition that has to be taken around by hand. This could lead to a groundswell of support for a particular change in the law. They are also less time-consuming and require less effort to conduct.

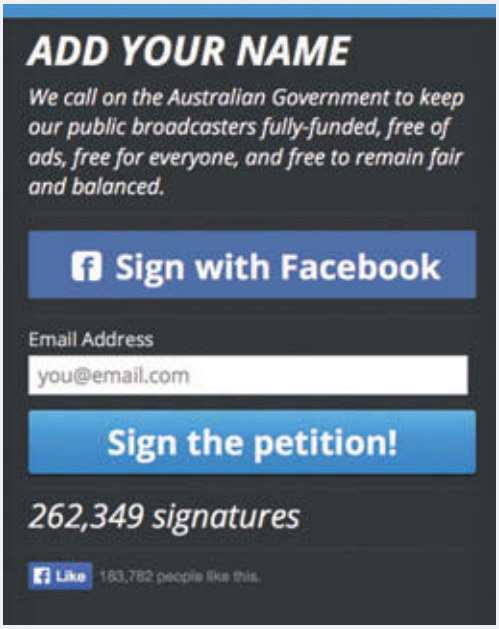
GetUp! and a number of other online pressure groups currently host petitions to gauge the feelings of the community on particular issues. GetUp! has held online forums on issues such as climate change, asylum seekers and same-sex marriage. The petition below was in response to the Abbott Government threatening to commercialise the ABC and withdraw funding from it. Nearly 215 000 people signed up to this petition within 72 hours.

EXTRACT

Save the ABC!

Before the 2013 Federal Election, Tony Abbott said that there would be *'no cuts to the ABC or SBS'*.

But this week the debate has fired up again. First, Prime Minister Abbott went on the attack, blasting the ABC for taking 'everyone's side but our own'. Today the Government announced an 'efficiency study' into the costs of the ABC and the SBS. This follows months of members of the Liberal Party and the IPA [Institute of Public Affairs] agitating for the Government to defund and commercialise Australia's favourite public broadcaster.



We know what this is, they've pulled this move before. They're seeing how much they can get away with and the answer is clear; GetUp! members have rallied together time and time again to demonstrate we won't allow defunding or the privatisation of our ABC. Let's do it again.

Stand up for the ABC and sign the petition.

Right-wing think tanks like the IPA, who have the ear of Tony Abbott, made it clear that the ABC is firmly in their line of fire. But we'd like to keep our ABC free of ads, free for everyone, free to remain fair and balanced.

Sign the petition to show your support for Australia's public broadcasters.

LEARNING ACTIVITY 2.2

Petitions

1 How can you as an individual influence a change in the law?
2 What are pressure groups? Give an example of a pressure group.
3 Investigate the lobby group Dying With Dignity Victoria or Animals Australia. Explain their aim and the types of actions they take to try to influence a change in the law.
4 What is GetUp!? What has this group done to try to influence changes in the law? Investigate a current campaign of GetUp! and write a short report.
5 How can individuals initiate a petition? What must be done to present a petition to parliament?
6 To what extent do you think a petition is likely to be a successful method of influencing changes in the law? Discuss.
7 Investigate a petition on the Internet. You could go to the Parliament of Australia website. Click on Hansard. Select House of Representatives or Senate. Type in 'petition'. To search for a particular petition add the keyword in relation to that search, e.g. 'petition marriage'. Choose a petition and explain what you think the government response to that petition should be.
8 What is an e-petition? How do you think that e-petitions may make a difference with respect to the likely success of a petition in influencing a change in the law? Explain.

Demonstrations

Demonstrations (also referred to as protests or rallies) are held to alert the government to the need for a change in the law. For these to be successful, a large group of people must show their support for the change in the law and attend the demonstration. Demonstrations and protests can take different forms, but they all aim to bring an issue to the attention of the community and the law-makers with the objective of influencing a change in the law.

Action on climate change

On 17 November 2013, tens of thousands of Australians demonstrated across Australia, demanding that the federal Coalition change its policy on climate change and take action on global warming by keeping the carbon tax brought in by the previous Gillard Government. The Abbott Government vowed to keep its election promise and abolish the carbon tax.



Figure 2.8 Up to 30 000 Melburnians gathered in Treasury Gardens on 17 November 2013 to call for stronger action on climate change. The rally was one of 130 gatherings nationally, which organiser GetUp! estimates were attended by about 60 000 people.

The National Day of Climate Action was organised by activist groups including GetUp!, the Australian Youth Climate Coalition and the Australian Conservation Foundation. The Climate Council's Tim Flannery told 30 000 people in Melbourne that Australians must make their voices heard. He said, 'We must stand up and be counted [and take] every effort to speed the uptake of renewable energy.' In Sydney, Deputy Leader of the Opposition Tanya Plibersek said, '[While] Australia is going backwards, the rest of the world is going forwards accepting that climate change is real and accepting that we must act.'

Cruelty to dogs in puppy farms

There was considerable publicity about the plight of a dog called Oscar and other dogs. They were housed in a puppy farm in terrible conditions. Pressure groups actively influenced a change in the law in this area through petitions and demonstrations. Following wide media coverage, thousands of animal lovers participated in rallies against puppy 'factories' in Melbourne, Sydney and Adelaide in September 2011. The massive turnout gave a powerful voice to all the dogs suffering in terrible conditions in industrial breeding facilities where they lack care and affection.

Following this massive community call for a change in the law, the Victorian Parliament passed the *Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Act* (Vic.) in December 2011. This Act provides more regulation over puppy farm activities and amends the *Prevention of Cruelty to Animals Act 1986* (Vic.) to increase penalties for cruelty to animals.

In August 2013, the Victorian Government received 21 000 submissions calling for an end to puppy factories. When the Victorian Government opened the public consultation on puppy factories, it was overwhelmed with the volume of submissions. The Department of Environment and Primary Industries has, among other promised commitments, announced that there will be a specific ban on using 'blunt force trauma' as a method of euthanasia.



Figure 2.9
Australians rally to end puppy farms.

Marriage equality

Many people have been calling for the definition of marriage to be changed in the *Marriage Act 1961* (Cth) to include same-sex couples. There are regular demonstrations around the country in favour of same-sex marriage. Many people also try to influence the Commonwealth Parliament to keep the marriage laws as they are. Equal Love groups and Community Action Against Homophobia have promised to fight the Coalition and win equal marriage rights, despite the High Court finding that the *Marriage Equality Same Sex Act 2013* (ACT) was inconsistent with Commonwealth laws.



Figure 2.10 Crowds convey messages supporting marriage equality.

LEARNING ACTIVITY 2.3

Demonstrations

1 Why do you think people or groups use demonstrations as a way of trying to influence a change in the law?

2 Comment on two demonstrations that have taken place and discuss the changes they were seeking. To what extent do you think this method of influencing a change in the law is likely to achieve success? Discuss. Consider opposing views in the community.

3 Investigate, using the web or newspapers, a demonstration that has taken place recently.
- Describe the approximate size of the demonstration, its location and any other relevant information.
- What type of change in the law is the demonstration trying to influence?
- To what extent do you think this demonstration will be successful in influencing a change in the law? Discuss.

Media

The media have an important role to play in influencing changes in the law. Without media coverage the law-makers would not be able to gauge public opinion, and individuals would not be able to inform the law-makers of changes in attitudes and needs in society. If demonstrations and petitions are to have any impact, media coverage is required in order to gain community awareness and perhaps support to assist in alerting the law-makers to the need for a change in the law.

Newspapers

Newspapers are a forum to inform the public of both sides of an issue. A journalist may report on an event that has taken place or report opinions that have been expressed on an issue. For example, state political editor Farrah Tomazin, and senior writer John Elder wrote an article about the issue of same-sex marriage for *The Sunday Age* on 18 August 2013. Their article pointed out that there are an estimated 33 700 same-sex couples in Australia.

Newspapers also report about laws that have been enacted. For example, Ben Rumsby, a sports writer for the British *Daily Telegraph*, reported about courtsiding at the Australian Open in January 2014. Courtsiding involves a spectator at a sporting event passing on information for bets to be placed before the bookmakers get the information. Betters are able to defraud bookmakers because of the seconds-long delay between the on-court action and the 'live' television broadcast. The *Crimes Amendment (Integrity in Sports) Act 2013* (Vic.) was passed quickly to try to overcome this problem.

Letters and emails to the editor

It is possible for an individual to send letters or emails to the editor of a newspaper with comments about how the law needs to be changed. Publication of such letters or emails can alert the public and the law-makers to a need for a change in the law, or the inappropriateness of a suggested change in the law.

EXTRACT

The vast majority are genuine refugees

According to the Australian Parliamentary Library's research service, between 70 per cent and 97 per cent of asylum seekers arriving by boat at different times have been found to be genuine refugees (*The Age*, 9/1).

This is distressingly contrary to the beliefs of 59 per cent of Australians, according to a poll by UMR Research. This mis-fit with tragic reality suggests several causes: selfish chauvinism, a diet of distorted information, or both.

Our government should help by correcting the falsehoods and promoting fellow feeling towards the wrongly disliked asylum seekers. But I would bet fourpence at long odds that it will not do either.

David Muschamp, Castlemaine

Source: Letters to the Editor, *The Age*, 10 January 2014

EXTRACT

We need to act now on climate change

Given his ignorance on climate science and electricity economics, Maurice Newman ('Heat is on Abbott adviser for his warming denial', *The Age*, 1/1), has no place on committees advising government.

Rising sea levels, melting arctic ice, rising global temperatures and increasingly frequent severe weather demonstrate that the climate is already changing. A drastic reduction in emissions is required to contain warming to a tolerable level. This requires the pricing of emission-intensive activities such as coal-fired electricity and the encouragement of clean energy through a renewable energy target (RET), plus other measures.

The average electricity price of around 30c per kilowatt hour is largely driven by transmission and distribution charges, accounting for 50 per cent. The RET and carbon price account for less than 10 per cent.

The competitive pressures on Australian industry have more to do with the high dollar and low labour costs in Asian countries. To assert that power prices are a major factor shows Newman is ignorant or being deliberately deceptive. Tony Abbott should get rid of him.

Michael Hassett, Blackburn

Source: Letters to the Editor, *The Age*, 2 January 2014

Social media

People can make their opinions known to the wider community on **Facebook**, **blogs** or **Twitter**. Many newspapers have their own blog site. People can post articles on these blog sites. According to *The Age*, their blog 'charts the big issues around the world – where nations and people align and collide – and how these issues act to shape Australia'.

The use of smart phones has led to increased ease of communication between people. Facebook and Twitter are part of this communication explosion. In 2008, Facebook had 100 million users and by March 2013, it had 1.11 billion. In 2013, there were over 645 million active users of Twitter.

Social media is connecting people around the world. It can be used to inform a huge number of people, including the state and federal governments, about injustices and to rouse people to action, such as the need for action on climate. It has proved an important tool in the fight for justice in various hot spots around the world, such as in Syria and Egypt. People can let the world know what is happening in their country.

Facebook users can go directly to a politician's Facebook page for the most up-to-date information. They can interact directly with members of parliament. This immediate access gives individuals more power in holding law-makers accountable for their actions.

Twitter has emerged as a significant channel for breaking news, announcements and discussions on political, social, environmental and commercial topics. Many politicians at both federal and state levels now use Twitter, including the prime minister and the leader of the opposition. Social media can achieve outstanding outcomes for mass communication, which can lead to changes in the law.

The Bully Project is a Facebook page aimed at helping young people who suffer from bullying. It features a documentary following five children for one school year in the United States, to see how students, schools and parents deal with bullying. This site shares emotional stories and pictures about children who have experienced bullying.

Al Gore, climate change activist, is using social media to try to change the conversation on climate change. Using a live online broadcast, he shows the local effects of extreme weather and carbon pollution across six continents over a 24-hour-period.

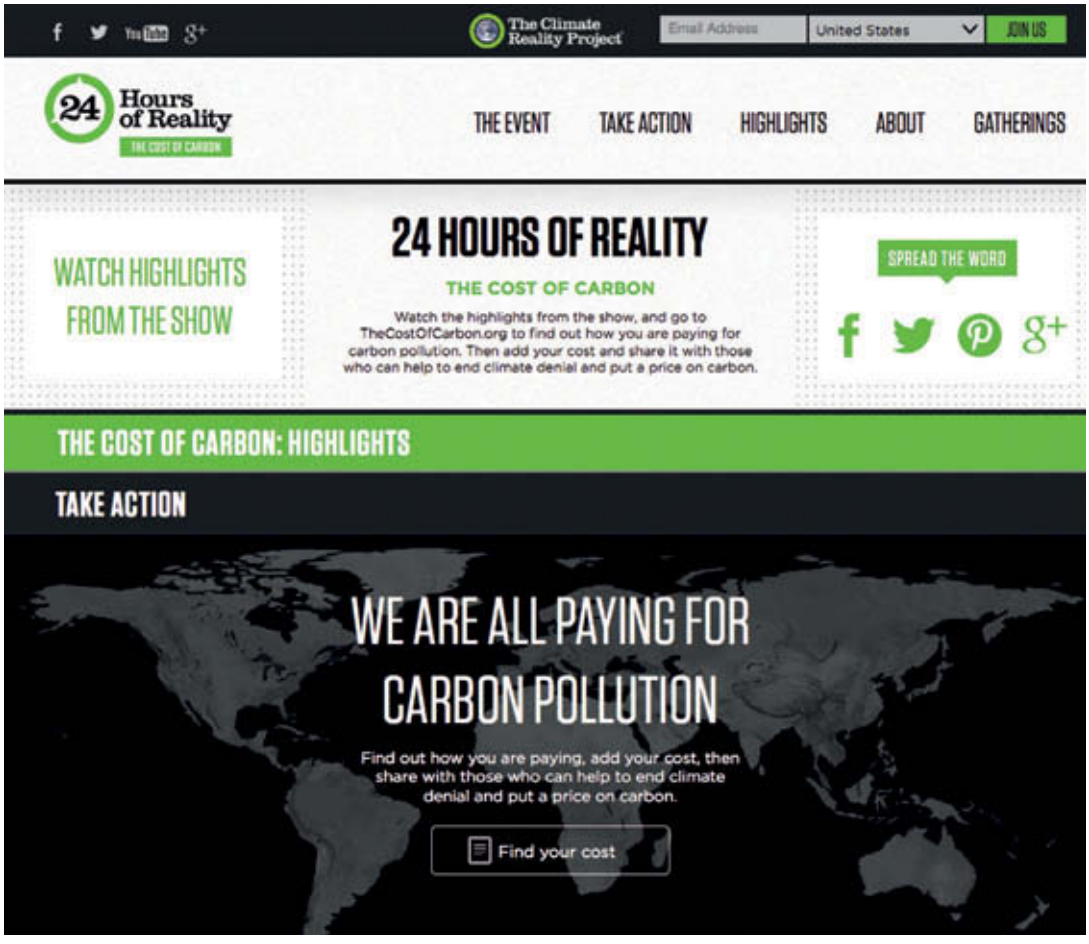


Figure 2.11 Al Gore promotes serious communication about climate change on his *24 Hours of Reality* online broadcast.

EXTRACT

justine@nerdyjewishgirl

Re: global warming and the cold weather

'Liberals keep telling me the Titanic is sinking but my side of the ship is 500 feet in the air.'

3:02 AM – 4 Jan 2014

Twitter comment about global warming

Radio

There are many talkback shows on television and radio that allow individuals to communicate their opinions about defects in the law and the need for change. Raising issues on talkback radio can be more influential than articles in a newspaper, as it is likely to bring the matter to the attention of more people, which can lead to other people demanding a change in the law.

Neil Mitchell of 3AW was instrumental in bringing the issue of the need for **mandatory reporting of child abuse** into the open. He pursued the matter until parliament changed the law.

Issues such as **global warming**, **same-sex marriage** and **voluntary euthanasia** are regular topics on talkback radio. Discussion also occurs on more local issues such as the need for changes in the public transport system.

Radio discussion can help the law-makers to gauge the feeling of the people and influence changes in the law.

EXTRACT

High Court rules against ACT's same-sex marriage law

ABC Radio, *The World Today*

Lexi Metherell reported this story on Thursday, 12 December 2013

SCOTT BEVAN: The High Court has handed down its decision in the Commonwealth's fight against the ACT's same-sex marriage laws.

The Federal Government has argued the ACT Act should be void because it's inconsistent with the *Federal Marriage Act*.

Our reporter, Lexi Metherell joins us now from the High Court in Canberra.

Lexi, what has the court ruled?

LEXI METHERELL: Scott, the court has ruled unanimously that the ACT's same-sex law is inconsistent with the Commonwealth *Marriage Act*. Effectively it's found that the Commonwealth *Marriage Act* provides for marriage between a man and a woman and the ACT Act was inconsistent with that.

So it has thrown out that entire law and it's ordered the ACT to pay costs.

Now today, the judgment actually went up online before the judgment was handed down in the court. So I have to say, it was a bit heartbreaking to see couples coming in as journalists were writing their stories and knew the answer and couples sort of coming in still full of hope – some that had just been married in the last six or so days since the ACT laws came into effect on Friday.

So let's hear now from Rodney Croome, the head of Australian Marriage Equality and get his reaction to this decision.

RODNEY CROOME: The High Court today has given us a clear path forward. It has said that the ACT *Marriage Equality Same Sex Act* is unconstitutional, but at the same time, it has affirmed for

the first time ever that the Federal Parliament definitely has the power to enact laws for same-sex marriage. Many people have assumed that until now, but it has never been declared by the court.

Note: S28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) deals with inconsistencies between laws of the Australian Capital Territory (ACT) and other laws. In December 2013, the High Court, using the inconsistency provision in S28, held that the *Marriage Equality (Same Sex) Act 2013* (ACT), which legalised same-sex marriage in the ACT, was inconsistent with the federal *Marriage Act 1961*.

Television

Many television programs investigate problems in the community to inform the community of injustices and the need for changes in the law. These programs, such as the ABC's *Four Corners*, can influence governments in deciding if there is sufficient community support for a change in the law.

EXTRACT

Four Corners – Trading misery

Reported by Sarah Ferguson and presented by Kerry O'Brien on Monday, 18 November 2013, ABC1

In September a boat carrying 72 asylum seekers sank in stormy waters off the coast of Indonesia. Most of the people onboard drowned, many of them children.

The majority of passengers came from Lebanon. They'd been persuaded to part with hundreds of thousands of dollars to go on a vessel they had been told was seaworthy and well equipped with food and safety equipment. They had been deceived.

Four Corners reporter Sarah Ferguson goes on the trail of the people smugglers who organised the boat. Travelling to the Middle East she meets the survivors and relatives of those who drowned in the waters off Java. She hears the promises made to them by the smugglers and sees the devastating impact on the communities in Lebanon. But that is not all she finds out.

She tracks down the smugglers responsible for the doomed vessel and discovers that Australia's hardline policy on asylum seekers has spawned a new generation of criminals who will use any avenue to keep the trade in human beings going. Their new methods of sending people to Australia are a direct challenge to the authority of the Federal Government.

Australian Story tells us of achievements and injustices. On 4 November 2013, the story about Johnson Maker-Adeng gives us an insight into what some refugees have gone through in their journey to Australia.

EXTRACT

Australian Story – Think Big

Monday, 4 November 2013, ABC1

CAROLINE JONES, PRESENTER: Hello, I'm Caroline Jones. Tonight's story is about Johnson Maker-Adeng. As a fatherless child, he fled from war-ravaged Southern Sudan with the remnants of his family. For the next four years, they trekked through the African wilderness, then spent another 12 years at Kakuma, one of the world's biggest camps for displaced people. Finally they were accepted as refugees and gained legal entry into Australia. We started filming with Johnson Maker seven years ago when he was a schoolboy with big dreams.

Live talkback shows, such as the ABC's *Q&A*, are also a method of bringing concerns of the community to members of the government. Often there are politicians on the discussion panel of *Q&A*, and individuals in the audience, or on Twitter, can put questions directly to the politicians. On Monday 23 September 2013, the program consisted of an audience with David Suzuki, the well-known Canadian environmentalist. During the program, viewers' tweets are published on the screen.

EXTRACT

Q&A – An audience with David Suzuki

Monday, 23 September 2013, ABC1

SUSTAINABLE ADVICE

Nina Hardy asked: The doom and gloom around environmental and social issues tends to demotivate people and make them feel the problem is beyond their control. What lessons from around the world can you share with us here in Australia to help achieve positive change for a more compassionate and sustainable future, despite our government leading us in the opposite direction?

Tweet

Author Ellie

Date/Time 23 Sep 2013 10:45:08 pm

Subject >>Re: 23.09.13 Q15 – SUSTAINABLE ADVICE

I thought it was a great question that clearly shows young people are not apathetic – that they do care about the environment and the world they live in.

>>GOING FURTHER

Other methods of influencing changes in the law

Other methods of influencing changes in the law are shown below.

- **defiance of the law** – Defiance of the law occurs when someone feels strongly enough to break the law, despite the risk of being punished, in an attempt to show the general public and the law-makers that injustices are occurring because of an outdated law. This method of trying to influence the law-makers is often not successful as the law-makers do not want to be seen as giving in to people who defy the law. However, if the suggested change in the law has sufficient community support, this can lead to changes occurring. For example, shopkeepers opening their stores during restricted hours has led to almost unrestricted shopping hours.
- **lobbying** – Lobbying is putting a point of view to a politician in person. Professional lobbyists in Canberra are employed by individuals or groups to lobby members of parliament, particularly cabinet ministers. The lobbyists charge a fee for their services. They operate mainly at a federal level and are often former politicians who have made many important contacts in parliament. It is also possible for individuals or groups to lobby members of parliament personally to try to influence a change in the law. For example, GetUp! and its members have lobbied members of parliament on many issues, including demands for same-sex marriage laws.

- **submissions to law reform bodies** – Individuals and groups can influence changes in the law by making suggestions to formal law reform bodies during their investigative processes. People are encouraged to make submissions to current inquiries being undertaken by law reform bodies, such as the Victorian Law Reform Commission (VLRC).
- **courts** – Courts can play a role in influencing changes in the law. Higher courts are able to change the law, although they are limited in this role as they can only do so when a case comes before them and only in relation to the issues in the case. Individuals can be instrumental in bringing about a change in the law by taking a matter to court and pursuing it so that a point of law is clarified or established. Judges in court cases can make suggestions that a law needs to be changed. Public outrage following the findings of a court case can lead to a change in the law. For example, the *Child Amendment (Child Homicide) Act 2008* (Vic.) was prompted by public outrage about the light sentences given in two high-profile cases of child killing.
- **private member's Bills** – Most legislation is introduced into parliament by a representative of the government and has the backing of the government. Any member of parliament can, however, introduce a Bill into parliament. It usually has little chance of success because it does not have government support and therefore lacks the voting numbers for it to pass through the house. If the Bill arouses public concern, it may be taken up by the government and passed through parliament. An example is the private member's *Marriage Equality Amendment Bill 2013* (Cth). This Bill was introduced into the Senate on 25 February 2013 by Senator Sarah Hanson-Young. The Bill has not been passed by either house of parliament.

LEARNING ACTIVITY 2.4

Media

1 Why is it vital to get the support of the media if you are seeking a change in the law?
2 Explain three ways the media can be used to influence the government to initiate a change in the law. Describe an example of each.
3 Read the case study 'A huge protest created through social media about Trayvon Martin' and answer the questions.
   a Why do you think there was a public outcry about this case?
   b What types of action were taken to inform the law-makers about the public dissatisfaction over the sentence in this case?
   c Do you think these types of actions will result in a change in the law? Discuss. In your discussion, comment on similar situations in Australia.
4 Use contemporary examples to explain three methods of influencing a legislative change.

CASE STUDY

A huge protest created through social media about Trayvon Martin

In July 2013, when the jury found George Zimmerman (26) not guilty of fatally shooting Trayvon Martin, there was a groundswell of protests through social media. The fatal shooting took place on 26 February 2012 in Florida, United States. Martin was a 17-year-old African American. George Zimmerman was found standing over Martin's body. Martin was unarmed, holding only a bottle of iced tea and a bag of Skittles.

The stand-your-ground law in Florida gives individuals the right to use deadly force to defend themselves. The law does not require a person in danger to retreat or use evasive action.

Zimmerman said he shot in self-defence. Following the 'not guilty' verdict, there was an online petition, which netted over two million signatures and a surge of tweets protesting the decision.

5 You have been employed as a publicity officer for a pressure group that is trying to influence the Commonwealth Government to initiate a change in the law to allow voluntary euthanasia. List the actions you would take to try to influence changes in the law. Give reasons for your choice of actions.

6 **Case study – puppy farms or same-sex marriages**

Follow the progress of pressure groups, petitions, demonstrations, media and changes in the law in relation to puppy farms or same-sex marriages. Write the story of people and groups trying to influence a change in the law in relation to puppy farms or same-sex marriages. What did they do to try to influence a change in the law? What was the outcome of this pressure for change?

7 Collect newspaper reports regarding changes or proposed changes in the law. Write a report on two articles about a change or proposed change in the law. In your report:

- give the source and date of the newspaper articles
- describe the change or proposed change in the law
- explain the problem that this proposal is attempting to overcome.

Keep a file of your newspaper reports to use for recent examples when answering essay questions.

8 Read the newspaper article 'King-hit deaths prompt law push' and answer the questions.

a Explain the problem in the law that is being discussed in this article.

b What particular situation further incensed the public and led to the call for action with respect to dealing with gross violence offenders?

c Explain actions taken to try to influence a change in the law.

d Investigate and explain what actions have been taken by the NSW Government in relation to one-punch deaths.

e Investigate if any actions have been taken by the Victorian Government and the Parliament of Victoria in response to these calls for action relating to one-punch deaths?

EXTRACT

King-hit deaths prompt law push

Aisha Dow, *The Age*, 2 December 2013

'One-punch' assaults have claimed 90 Australian lives since 2000, mostly in booze-fuelled bashings, a new study has found.

The victims were killed either by a single blow to the head or when falling and smashing their heads against the hard ground after being knocked unconscious. The findings have intensified calls for Victoria to adopt tough king-hit laws, despite resistance from the state government.

Jennifer Pilgrim, a researcher at Monash University's Department of Forensic Medicine, said alcohol was involved in almost three-quarters of deaths recorded between 2000 and 2012. Dr Pilgrim said most of the victims were knocked unconscious when they were at a licensed venue, outside the venue or on their way home from the venue.

In more than a third of killings, the deceased and the attacker did not know each other.

'There was a brief altercation with someone they just met five minutes ago,' Dr Pilgrim said.

'One person throws a punch. A person goes down, hits their head and never again regains consciousness.'

NSW had the highest number of king-hits (28), followed by Victoria and Queensland (24 cases each).

Recently, the NSW government joined Western Australia and the Northern Territory in pursuing one-punch laws.

The move came after widespread public disgust at the four-year minimum sentence given to the killer of 18-year-old Thomas Kelly, who was king-hit by a young man on a Kings Cross bashing spree.

But Victoria's Attorney-General Robert Clark said the government had no plans for change because existing dangerous-act manslaughter laws already carried a penalty of up to 20 years in jail.

Despite the government's opposition, Victorian families of king-hit victims are calling for immediate law reform to ensure hefty prison sentences for offenders.

They will rally at Manningham City Square on December 15 to demand that judges be allowed to hand down the maximum 20-year sentence for manslaughter in king-hit cases.

'STOP. One Punch Can Kill' rally organiser Michelle Kleinert is close friends with a family devastated by an alleged king-hit.

Ms Kleinert said two years spent in prison did not equate to a life taken, yet some young people seemed to have an attitude that 'if you do something and someone dies, you'll get a couple of years and we'll get a tattoo in jail'.

'We need to start educating people that are coming up because I think the culture of king-hits is strengthening,' she said.

Last weekend, three people in Queensland were charged with murder over the alleged king-hit and bashing of a man, 45, outside a Maroochydore kebab shop.

Missing from the 90 deaths listed in the coroner's study are recent suspected one-punch deaths yet to be finalised in the courts.

Among the incidents not listed is the alleged manslaughter of David Cassai, 22, while he was on his way home from the Portsea Hotel last New Year's Eve.

More than 40 per cent of fatal punches happened between midnight and 6 am, according to the latest data.

Victoria Police Superintendent Rod Wilson said he had observed problems when patrons 'hit the air' outside after leaving bars.

Superintendent Wilson said it was the responsibility of venue operators to make sure partygoers were consuming alcohol responsibly and screening patrons before they were let in. 'You've got to talk to people. It's not good enough to look at them and say "come in",' he said.

NSW Police Superintendent Pat Paroz said perpetrators had only themselves to blame.

'It is not normal to get intoxicated and then beat someone up, and we shouldn't accept that because a person was intoxicated it somehow reduces their level of accountability for their actions,' Superintendent Paroz said.

St Vincent Hospital's emergency department director Gordian Fulde said he treated four or five 'absolutely obvious' king-hits while working at the Sydney hospital each Friday and Saturday night.

Professor Fulde is a supporter of a move to force pubs and clubs to close earlier, with experts pointing to evidence that bringing forward closing times to 3 am reduces assaults by more than 30 per cent.

FORMAL LAW REFORM BODIES

Formal law reform bodies are organisations that are employed by the state and Commonwealth governments to inform them of changes in society that may require a change in the law. They aim to give impartial advice and make recommendations that are practical and able to be implemented.

Parliament is not bound to follow the recommendations from formal law reform bodies, although the government is often influenced by the reports of these committees when considering changes in the law.

Parliaments and politicians often lack the time and resources to undertake a thorough investigation of an issue and it is sometimes necessary to pass the investigation on to a formal law reform body. Their research is usually conducted as a result of a request from the government. After their initial research they draw up discussion papers, which include clear arguments and suggestions so that the community can be informed of problems and likely changes and can provide comment.

Victorian Law Reform Commission

The Victorian Law Reform Commission (VLRC) came into operation on 6 April 2001. It is an independent, government-funded organisation. It was established to investigate areas of law in which the government feels there is a need for reform and to monitor and coordinate law reform activity in Victoria.

USEFUL WEBSITE

Victorian Law Reform Commission www.lawreform.vic.gov.au

>>GOING FURTHER

The VLRC personnel

The VLRC has a chairperson, a full-time commissioner and seven part-time commissioners. The chairperson can establish divisions of the VLRC to take responsibility for working on a particular reference. The VLRC has an advisory council that assists in coordinating law reform in Victoria and provides directions and priorities for community law reform. It is made up of members of various organisations such as the Equal Opportunity and Human Rights Commission and Victoria Legal Aid.

The role of the Victorian Law Reform Commission

The main role of the Victorian Law Reform Commission (VLRC) is to undertake research and make recommendations for changes in the law on issues that are referred to the VLRC by the state attorney-general. This is called a reference. The VLRC also has the power to recommend minor changes to the law without a reference from the attorney-general.

The VLRC engages in community-wide consultation and debate, and advises the attorney-general on ways to improve and update Victorian law. The VLRC's main aim is to ensure that the legal system meets the needs and aspirations of the Victorian community. It is responsive to issues raised by lobby groups and individuals, and considers newly emerging rights and responsibilities.

The VLRC encourages all Victorians to participate in consultations. The VLRC is independent of the political process and is committed to being transparent. It consults with marginalised groups such as people from non-English speaking backgrounds, people with disabilities, Indigenous people and people living in remote communities.

The VLRC can do the following things.

- It can make recommendations for law reform on matters referred to it by the attorney-general. This includes conducting research, consulting with the community and reporting on law reform projects.
- The VLRC can make recommendations on minor legal issues of general community concern. It can recommend changes in the law relating to minor issues that have not been referred by the attorney-general, but have been brought to the VLRC's notice by members of the public.
- It can suggest to the attorney-general that he or she refer a law in need of investigation to the VLRC. After consultation with various groups, the VLRC may suggest new references relating to areas where change in the law would be desirable.
- It can educate the community on areas of law relevant to the VLRC's work. The VLRC works with groups in the community to ensure that changes in the law are effective. It also provides relevant information on what the law is.
- The VLRC can monitor and coordinate law reform activity in Victoria. It works with other law reform bodies to ensure effective law reform in Victoria.

After receiving a report from the VLRC, parliament decides whether to implement the recommendations, either in whole or in part, which will then be incorporated into a Bill.

Processes used by the VLRC

In assessing the need for change in the law, the VLRC consults with expert bodies in the area under review, and also with the general community. After receiving a reference, the general process is to:

- undertake initial research and consultation with experts in the area under review
- publish an issues or discussion paper, which explains the key issues and asks the community questions
- invite and consider written submissions from members of the public, organisations, legal bodies and interested individuals or groups
- undertake consultation with interested and relevant individuals and groups – this could include public forums or roundtable discussions
- ask experts to research areas requiring further information – findings are sometimes published as an occasional paper
- publish a report with recommendations for changes in the law – either a final report or an interim report if further comment from the community is desired
- table the final report in the Victorian Parliament.

New technologies are used to facilitate debate about law reform issues, including electronic mail bulletins and online discussion groups.

Current VLRC inquiries

Current inquiries include:

- jury empanelment
- crimes (mental impairment).

JURY EMPANELMENT

In March 2013, the VLRC was asked to review the jury empanelment process to ensure it operates justly, effectively and efficiently. Jury empanelment is the selection of people in the jury pool for a particular case. The VLRC review includes consideration of:

- peremptory challenges in civil and criminal trials and the right of the Crown to stand aside jurors in criminal trials

- the calling of the panel as outlined in S31 of the *Juries Act 2000* (Vic.) by names or numbers and whether using numbers only would improve procedural fairness and better protect jurors
- the operation of S48 of the *Juries Act*, which applies when there are additional jurors on the jury and should additional jurors be used during deliberations
- whether the jury should be reduced to 12 (in criminal trials) or 6 (in civil cases) before the jury retires to consider its verdict.

Submissions closed on 15 November 2013. The report is expected to be tabled at the end of May 2014. A consultation paper was published in October 2013. Submissions closed on 15 November 2013.

CRIMES (MENTAL IMPAIRMENT)

The attorney-general asked the VLRC to investigate the operation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic.) to ascertain how well this Act is working and whether changes are needed. This Act governs what happens when a person is charged with a crime and had a mental impairment at the time the offence was committed or was mentally impaired at the time of the trial.

Any suggestions by the VLRC will balance the interests of the safety of the community, including victims and families, and the interests and rights of people who are unfit to stand trial or are mentally impaired.

Issues that will be reviewed by the VLRC include:

- the definition of mental impairment
- unfitness to stand trial
- whether a Magistrates' Court should be able to decide that a person is unfit to stand trial (currently this decision can only be made in a higher court with a jury)
- how the system works for people who receive custodial and non-custodial supervision orders, including supervision and review.

The VLRC has called for submissions in relation to this review and a consultation paper was released on 21 November 2013. The final report is expected to be tabled by June 2014.

Completed VLRC inquiries

Some of the topics of inquiries carried out by the VLRC include:

- abortion
- birth registration and birth certificates
- jury directions
- sex offenders registration.

ABORTION

In August 2007, the VLRC was asked for legislative advice in relation to the decriminalisation of abortion.

Processes used for this review

The VLRC's research included:

- receiving more than 500 submissions from individuals, groups and organisations

- holding more than 30 meetings with interested parties – some of these parties went on to make submissions
- using a panel of medical experts to assist the VLRC
- conducting national surveys and market research to ascertain community attitudes on abortion.

Recommendations

The VLRC handed down its report to the attorney-general in March 2008. Recommendations included:

- Repeal the relevant section of the *Crimes Act* and decriminalise abortion.
- Choose from three options to decriminalise abortion.
- Require that health providers inform patients of their conscientious objections and provide the patients with referrals to another provider.
- There should be mandatory counselling.
- There should be a cooling-off period.
- An abortion should be unlawful, unless performed by, or supervised by, a registered medical practitioner.

Legislative response

The *Abortion Law Reform Act 2008* (Vic.) reformed the law relating to abortion, put in place regulations in relation to health practitioners performing abortions, and amended the *Crimes Act 1958*.

Victorian Government considers winding back abortion law

The Liberal state council has called on the Victorian Government to overhaul Victoria's abortion laws. They have asked that the section of the Act that makes it mandatory for doctors with a conscientious objection to abortion to refer women to medical practitioners who do not hold similar objections be removed.

BIRTH REGISTRATION AND BIRTH CERTIFICATES

This enquiry was implemented to look at ways of improving the process of registering births of children. Legally, all births of children should be registered. There are about 75000 births in Victoria per year. However, it is estimated that more than 2000 births are not registered within six months of the birth. It is unknown how many births are not registered.

If a birth is not registered it is not possible for the child to obtain a birth certificate or access their full civil citizenship rights such as being covered by Medicare or enrolling at school. People from disadvantaged backgrounds have sometimes been found to not register births.

Processes used for this review

The VLRC asked the general public about their experiences and suggestions and received 13 submissions. They conducted 33 consultations around Victoria. A consultation paper was drawn up. Research was carried out. The report on this issue was tabled in the Victorian Parliament on 12 November 2013. A case study was published in January 2014. It provided a step-by-step description of the process, including background to the report, research and reporting stages.

Recommendations

The report contained 26 recommendations to make the process of registering a birth easier and reduce the cost of getting a birth certificate for disadvantaged people.

JURY DIRECTIONS

The VLRC was asked in January 2008 to identify how directions to juries could be improved and simplified while maintaining the overall aims of the criminal justice system. Retired Supreme Court judge Geoff Eames QC was appointed as a consultant on the review.

Processes used for this review

The VLRC's research included:

- creating a consultative committee consisting of retired judges and criminal lawyers
- consulting with judges, lawyers, legal aid and the director of public prosecutions
- conducting symposiums with representatives of law reform commissions in other countries such as New Zealand
- receiving submissions from judges, barristers, solicitors, statutory authorities, professional associations, academics and members of the public.

A Consultation Paper was released in September 2008. A further background paper, *Jury Directions: a closer look*, was released in December 2008. Under its terms of reference the VLRC was asked to:

- identify directions or warnings which may no longer be required or could be simplified
- consider whether judges should be required to warn or direct the jury in relation to matters that are not raised by counsel in the trial
- clarify the extent to which the judge needs to summarise the evidence for the jury.

The VLRC handed its final report on jury directions to the attorney-general on 1 June 2009.

Recommendations

The VLRC made 52 recommendations to reduce the complexity of judges' directions to juries in criminal trials. Some of the recommendations are shown below:

- The law containing jury directions should be contained in a single Act of parliament.
- The law should clearly indicate which directions are mandatory and which are discretionary.
- The trial judge should have an obligation to give the jury any direction that is necessary to ensure a fair trial.
- It should not be possible to argue on appeal, without the leave of the Court of Appeal, that the trial judge made an error of law when giving or in failing to give a particular direction to the jury, unless the alleged error of law was drawn to the attention of the trial judge before the verdict.

Legislative response

The *Jury Directions Act 2013* (Vic.) was given royal assent in March 2013. This Act is in response to the recommendations of the VLRC in relation to jury directions. The purpose of this Act includes reducing the complexity of jury directions in criminal trials, simplifying and clarifying the issues that juries must determine, and the duties of the trial judge giving jury directions and assisting the trial judge in giving jury directions.

SEX OFFENDERS' REGISTRATION

In April 2011, the attorney-general asked the VLRC to review laws governing the registration of sex offenders and the use of information about registered sex offenders by law enforcement and child protection agencies.

The Victorian Ombudsman recommended this review in his report to parliament about problems with the management of the sex offenders' registration scheme.

The purpose of the review is to ensure that the legislative arrangements for the collection and use of information about registered sex offenders enable law enforcement and child protection agencies to assess the risk of reoffending, prevent further offences and protect children from harm.

Processes used for this review

In June 2011, the VLRC released an information paper that described the operation of Victoria's sex offenders' registration system and asked questions about ways in which it could be improved. The VLRC received 32 submissions, 26 of which were made available on its website for public review. In August 2011, the VLRC published an article about the problems of sexting.

The Commission conducted meetings with key government agencies with responsibility for managing sex offenders and protecting children, including Victoria Police, the Department of Justice and the Department of Human Services. The Commission also widely consulted academics, forensic psychologists, psychiatrists and lawyers.

The VLRC delivered the *Sex Offenders Registration: Final Report* to the attorney-general in April 2012.

Recommendations

The VLRC recommended that an individual approach should be adopted for registering sex offenders, rather than treat them all the same. Seventy-nine recommendations were made to make the registration of sex offenders more effective in protecting children from child abuse. It was recommended that the sharing of information between Victoria Police, the Department of Human Services and Corrections Victoria should be improved. It was also suggested that courts should be able to impose special conditions on registered sex offenders, and Victoria Police should be able to inform parents that a person having contact with their child is a registered sex offender.

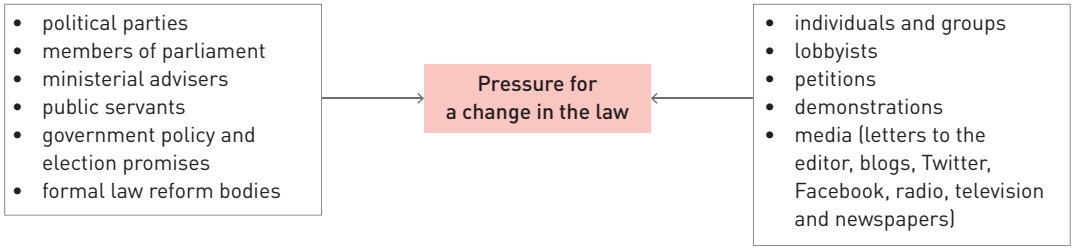


Table 2.2 Strengths and weaknesses of methods of influencing changes in the law

	STRENGTHS	WEAKNESSES
Victorian Law Reform Commission	• the government has asked the VLRC to investigate an area and therefore the government is more likely to act on its report on the need for change • can gauge public opinion by receiving public submissions and holding seminars in which people can have their say • is able to investigate an area comprehensively so the government can initiate a new law that covers a whole issue, such as the *Abortion Law Reform Act 2008*, which was the outcome from the VLRC abortion report	• can only investigate issues referred to it by the government or minor issues that it can look into without a reference • there is no obligation on the part of the government to follow any of the recommendations made • investigations can be time-consuming and costly

	STRENGTHS	WEAKNESSES
Petitions	• can make direct contact with the government when the petition is tabled in parliament • can show a high degree of support when a lot of signatures obtained • can arouse public awareness of an issue when collecting signatures • e-petitions can gather large support over the Internet	• many petitions are presented to parliament and parliament cannot respond to them all • are not as visual as other methods such as demonstrations so less likely to gain media support • it may be difficult to obtain large numbers of signatures • the minister tabling the petition may have little influence on government policy for new laws
Demonstrations	• if numbers are large, the media is likely to report on the demonstration • with media support, they are likely to gain wide support in the community and nationally for a cause • can arouse public awareness of the issue	• they have to be publicised well to get the numbers to attend to make an impression • unless there is ongoing support and media attention, they are likely to have little effect • they are time-consuming to organise
Media	• can gain a groundswell of support for an issue if the issue is widely reported, such as through radio, television, newspapers, blogs, Facebook and Twitter • the government is fully aware of the issues that the media is covering and can gauge public support about an issue through the media • without the support of the media, other methods of influencing changes in the law will have little effect	• can show that there are very strong conflicting views on an issue, such as same-sex marriages, which will deter the government from changing laws in this area • the government will only take on board an issue if it fits in with their legislative program and there is a high level of community support • letters to the editor, newspaper reports, radio, television, blogs, Facebook and Twitter will only be influential if the public gets behind an issue and demands a change in the law • change in the law usually requires bipartisan support, or at least support of the minor parties and independents

LEARNING ACTIVITY 2.5

Victorian Law Reform Commission

1 What are formal reform bodies?
2 How successful is the VLRC likely to be in influencing parliament to change the law? Discuss giving examples to illustrate your answer.
3 Describe the role of the VLRC.
4 Discuss an area of law that has been investigated by the VLRC. Explain the methods used by the VLRC to assess the need for change in the law. Comment on what, if any, changes in the law have taken place as a result of the VLRC investigation.
5 Evaluate the effectiveness of methods used by individuals and groups to influence change in the law. In your evaluation look at the strengths and weaknesses of the methods used.

LEGISLATIVE PROCESS – INITIATING LEGISLATION

The legislative process (law-making by parliament) begins with a problem that has been identified in the community and which the government thinks should be addressed by a change in the law. Law-making is the main role of parliament.

USEFUL WEBSITES

Parliament of Australia www.aph.gov.au
Parliament of Victoria www.parliament.vic.gov.au

Government departments

Government departments constantly review the laws in operation and the need for changes in the law. For example, the Department of the Environment is responsible for investigating changes in the law to protect the environment.

The role of cabinet and ministers

Cabinet is made up of the prime minister (or premier) and senior ministers, such as the treasurer and the minister for defence. Cabinet ministers decide on which laws need to be changed. They have extensive resources to help them find out what laws need to be changed or what new laws need to be developed. Cabinet decides what Bills need to be introduced to parliament and is therefore very influential on Bills that are passed through parliament. This is particularly the case when the government holds a majority in both houses, as Bills that are proposed by cabinet will receive the support of the majority of members in both houses.

If a minister who wants to propose a change in the law is not a member of cabinet (for example, the minister for human services), he or she will contact a member of cabinet to have the proposal brought to the notice of cabinet. The relevant minister will usually introduce the Bill (proposed law) to parliament (that is, the minister whose department was responsible for initiating the Bill).

Parliamentary committees

Parliamentary committees have been set up to investigate a variety of matters and report back to parliament. They are a way of achieving greater public input into issues being investigated. They consist of members of parliament and are established because parliament does not have the time to carry out its own enquiries into particular aspects of society and the possible needs for changes to the law. Committees may be asked to investigate the need for change in the law and make recommendations to parliament.

>>GOING FURTHER

Joint committees

Joint committees are made up of members from both houses. In Victoria there are a number of joint investigatory committees appointed under the *Parliamentary Committees Act 1968*. Joint committees are usually longstanding committees that investigate issues on behalf of parliament (standing committees). They can also be select committees to investigate a particular issue. The Scrutiny of Acts and Regulations Committee is a joint investigatory committee of the Victorian Parliament.

Standing committees

Standing committees are appointed for the life of a parliament and are usually re-established in successive parliaments. Standing committees provide an ongoing check on government activities. For example, the Victorian Standing Committee on Legal and Social Issues will inquire

into and report on any proposal, matter or thing concerned with community services, education, gaming, health, and law and justice. The committee comprises a Legislation Committee and a References Committee.

Select committees

Select committees are appointed for specific purposes as the need arises. Once an investigation is completed, and the committee has reported to parliament, the committee ceases to exist. For example, a select committee was established in March 2009 to investigate and report on train services. This committee was disbanded when it finished its investigation. Currently no select committees have been established in the 57th Parliament of Victoria.

Drafting legislation

The office of parliamentary counsel (OPC) is responsible for drafting legislation. Its principal function is drafting Bills for introduction into either house of the parliament and drafting amendments of Bills. In Victoria, the office responsible for drafting Bills is called the Office of the Chief Parliamentary Counsel (OCPC).

Before each parliamentary sitting the government formulates a program of Bills that it requires to be drafted. Based on this program, agencies instruct the parliamentary counsel (relevant drafter of the Bill) on the policy required to be incorporated into the proposed Bills. The parliamentary counsel also assists in formulating private member's Bills.

The role of the parliamentary counsel is to:

- examine and analyse the instructions given by cabinet
- examine the constitutional, legal and other implications of the policy
- discuss the proposals with the relevant government department to ascertain the intention of the department and cabinet and to clarify any matters
- decide how the policies can be implemented and put into a comprehensive, clear and easily understood Bill
- prepare a draft Bill
- check the draft Bill for compatibility with the Victorian *Charter of Human Rights and Responsibilities* (at a federal level the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth))
- send the draft Bill to the relevant government department for consideration and other departments if appropriate
- ensure that legislation is legally effective; that is, it does what it is intended to do.

If the government decides to amend a Bill during its passage through the parliament, the parliamentary counsel prepares the necessary amendments and provides sufficient copies to the parliament.

The government keeps its legislative program under continuous review during the sittings and makes adjustments as necessary.

When the draft Bill has been considered by the relevant department and has been agreed to, it is then submitted to the **relevant minister for approval**. After approval, copies are sent to the **Department of Prime Minister and Cabinet**, together with a brief from the OPC. (At a state level, draft Bills are sent to the Department of Premier and Cabinet.)

The Bill is then ready to be considered by the relevant legislation committee. In a Labor Government, after consideration by that committee, the draft Bill is returned to the relevant caucus committee for further consultation. Caucus is a closed political meeting aimed at exchanging opinions and reaching an agreement.

To ease the burden on cabinet, Bills that do not involve a policy change and are purely of an uncontroversial, technical nature do not need to be submitted to cabinet. With these types of Bills, the drafting of the legislation may be approved by the minister responsible.

Problems of drafting legislation

The OPC (or OCPC in Victoria) has special knowledge and expertise in the drafting of proposed legislation. However, problems arise from time to time because of poorly drafted legislation. The difficulties faced by the OPC include the following.

- It is not always possible to foresee future circumstances.
- The meaning of words changes over time.
- Poor communication between the departments and the OPC could result in loopholes or omissions.
- It is difficult to cover all situations that might arise.
- Mistakes can be made with technical terms, even though the OPC seeks advice in technical areas.
- The proposed legislation might be in conflict with existing legislation.
- The draftsperson is under time constraints to draft the Bill.
- There could be inconsistencies in the way words or terms are used within the Bill.

LEARNING ACTIVITY 2.6

Legislative process – initiation of legislation

1 What is the main role of parliament?
2 How do committees participate in the legislative process?
3 What is the role of the cabinet in the process of initiating legislation?
4 Explain the responsibility of ministers in the law-making process.
5 Why are proposed changes in the law sent to the OPC?
6 Explain three problems that might arise from the drafting process.
7 Read the article 'Big tobacco uses *The Castle* in legal blue' and answer the questions.
   a Why does British American Tobacco Australia think the legislation in relation to plain packaging of cigarettes is poorly drafted? What part of the legislation is being referred to as a problem?
   b Present the argument in favour of the legislation.
   c How is the situation referred to, compared to the film *The Castle*? Explain whether you agree or disagree with the comparison.

EXTRACT

Big tobacco uses *The Castle* in legal blue

Julian Drape, *The Australian*, 14 September 2011

Big tobacco says the federal government's plan to ban company branding on cigarette packs is as unjust as the Commonwealth's attempt to acquire Darryl Kerrigan's home in the Australian film *The Castle*.

British American Tobacco Australia has told a Senate inquiry that Labor's plain-packaging legislation is badly drafted and unfair.

Top silk Allan Myers QC said the draft laws would 'extinguish the most valuable uses of trademarks' without compensation. 'If the parliament wants to enact plain-packaging legislation, it's pretty simple – they face up to the fact that they're taking people's property away and pay for it,' Mr Myers told the committee hearing in Canberra.

'The trademark in a broad sense is being appropriated for the benefit of the Commonwealth. The acquisition of property simply doesn't refer to marching in and taking someone's house like in *The Castle* or some film.'

But other legal experts, including officials from the attorney-general's and health departments, disagree.

Melbourne University law professor Simon Evans essentially told Mr Myers he was dreaming.

Prof Evans agreed trademarks were considered property under section 51(xxxi) of the Constitution and they could not be acquired without just compensation. But he argued the Commonwealth was not acquiring the brands but rather restricting their use.

Prof Evans also drew on Darryl Kerrigan's fictional battle to make his point. 'It's not like *The Castle* where the Commonwealth gets the benefit of the house in order to operate the airport,' the academic said.

'On current authority there is very little prospect that the High Court would conclude that the plain-packaging legislation effects an acquisition of those property rights.'

Prof Evans said there was 'very little risk' big tobacco would win a High Court challenge because there was no transfer of property and the government would not use the trademark.

LEGISLATIVE PROCESS – SCRUTINY OF BILLS

At both federal and state levels, Bills are scrutinised by parliamentary committees. This scrutiny can occur before or during the progress of a Bill. The main advantages of the process of referring proposed legislation to committees are that committees:

- provide further scrutiny of proposed legislation
- are able to undertake thorough examination of proposed legislation – such examination by a small committee specially selected for its particular expertise is quicker than examination by the whole house
- are able to hear submissions from interest groups and individuals in the community interested in the proposed legislation
- provide the public a chance to contribute to the legislative process.

The scrutiny of Bills at a federal level

Senate

The **Senate Standing Committee for Selection of Bills** considers all Bills that come before the Senate (other than just appropriation Bills), decides whether a Bill should be referred to a legislative and general purpose standing committee and which committee is appropriate.

The **Senate Standing Committee for the Scrutiny of Bills** is responsible for examining all Bills that come before the Senate. The role of the committee is to assess legislative proposals against

a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations. The committee reports to the Senate on whether Bills:

- trespass unduly on personal rights and liberties
- make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers
- make rights, liberties or obligations unduly dependent on decisions that are not reviewable
- inappropriately delegate legislative powers
- give legislative power that has insufficient parliamentary scrutiny.

The **Senate Standing Committee on Legal and Constitutional Affairs** is divided into two committees: a **Legislation Committee** that deals with Bills referred by the Senate and oversees the performance of departments, and a **References Committee** that deals with all other matters referred by the Senate.

There are also seven joint standing committees administered by the Senate, such as the Joint Standing Committee on the National Disability Insurance Scheme.



Figure 2.12 Senate Estimates Committee

House of Representatives

The House of Representatives has a **Selection Committee** that determines the program of business for committee and delegation business and private members' business. There are a range of house standing committees, such as the **Standing Committee on Health**, which looks into proposed legislation, petitions, financial matters and reports relating to health.

There are also a range of joint standing committees, such as the Joint Standing Committee on Migration.

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

The Joint Parliamentary Committee on Human Rights was established under *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The role of this committee is to:

- examine Bills and legislative instruments that come before either the Senate or the House of Representatives for compatibility with human rights as defined in seven human rights treaties, and to report to both houses of parliament

- report their findings to both houses
- inquire into any matter relating to human rights which is referred to it by the attorney-general, and to report to both houses of parliament on that matter.

This Act also introduces a requirement that each new Bill introduced to the Commonwealth Parliament be accompanied by a **statement of compatibility**, which provides an assessment of whether the Bill is compatible with human rights.

According to the previous attorney-general, Nicola Roxon, this Act does away with the need for a Bill of rights because each new Bill is examined by the joint committee to ensure that it is compatible with human rights.

The scrutiny of Bills in Victoria

In Victoria, the **Scrutiny of Acts and Regulations Committee** considers all Bills introduced into the Legislative Council or the Legislative Assembly and reports to the Victorian Parliament on whether the Bill directly or indirectly:

- trespasses unduly on rights or freedoms
- makes rights, freedoms or obligations dependent on insufficiently defined administrative powers
- makes rights, freedoms or obligations dependent on non-reviewable administrative decisions
- unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*
- unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*
- inappropriately delegates legislative power
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- is incompatible with the human rights set out in the *Charter of Human Rights and Responsibilities*
- does not raise any issues in relation to the jurisdiction of the Supreme Court.

Once the second reading speech for a Bill is completed, administrative staff from the Scrutiny of Acts and Regulations Committee collect copies of the Bill and second reading speech from the Procedures Office of the Legislative Assembly or the Legislative Council. The senior legal adviser of the committee then begins careful examination of all the clauses and schedules of each Bill.

STATEMENT OF COMPATIBILITY

In Victoria, the minister introducing the Bill to parliament will also prepare a **statement of compatibility** that sets out whether the Bill complies with the *Charter of Human Rights and Responsibilities* (the Charter). The statement goes through sections of the Bill that are relevant to human rights and gives reasons for decisions about compatibility. The Victorian Scrutiny of Acts and Regulations Committee is responsible for examining compatibility statements in Victoria.

Parliament can override any statement of incompatibility, but it is the intention of parliament to only do so in exceptional circumstances.

LEARNING ACTIVITY 2.7

Legislative process – scrutiny of Bills

1 Why are Bills referred to committees?
2 What is the role of the Senate Standing Committee for the Scrutiny of Bills?

3 How does this role differ from the Senate Standing Committee for the Selection of Bills?
4 Explain the purpose of the Parliamentary Joint Committee on Human Rights. How does this committee overlap with the role of the Senate Standing Committee for the Scrutiny of Bills?
5 Explain the role of the Victorian Scrutiny of Acts and Regulations Committee. Explain the similarities and differences between this committee and the Senate Standing Committee for the Scrutiny of Bills.

Progress of a Bill through parliament

A Bill may be introduced in either the upper or the lower house, except those Bills that give the government the authority to raise taxes or spend money (money Bills). These Bills must be introduced in the lower house.

>>GOING FURTHER

Types of Bills

There are different types of Bills, which include the following:

- **government Bills** – The majority of Bills are introduced in parliament by the relevant minister on behalf of the government. For example, the minister for health will introduce a Bill concerning health issues. Government Bills have been formulated by cabinet as part of its program to implement government policy.
- **appropriation Bills** (also known as money Bills or supply Bills) – These Bills are also government Bills. They relate to the gathering of revenue by the government and authorise the government to spend the money it has collected through taxation and other means. These Bills can only be introduced in the lower house.
- **private Bills** – A private Bill is very rare. It is introduced by the government and only applies to one person or one group. The *Community Protection Act 1990* (Vic.) was a private Bill that only applied to a prisoner named Garry David (also known as Garry Webb). Garry David was a prisoner who made wild and dangerous threats such as threatening to blow up the MCG on grand final day. This Act was necessary to hold him in prison. Since this time the law has been amended to deal with such violent prisoners in general by introducing indefinite sentencing. The Victorian Parliament has passed a private Bill to keep mass-murderer Julian Knight in prison indefinitely. He was convicted of killing seven people in the Hoddle Street massacre. The Act is the *Corrections Amendment (Parole) Act 2014* (Vic.).
- **private member's Bills** – On some occasions an individual member of parliament (not acting on behalf of the government) may wish to introduce a Bill that the cabinet has chosen not to include in its legislative program. This is known as a private member's Bill. These Bills are often on controversial issues such as abortion, same-sex marriages or euthanasia. Private member's Bills are generally unsuccessful because they do not have the backing of cabinet and, as members of parliament mostly vote according to the dictates of their political party, such Bills may not get sufficient support. Sometimes a private member's Bill is adopted by the government and may then be passed.

The opposition will sometimes use a private member's Bill to put pressure on the government and bring a particular issue to the notice of the public.

The progress of a Bill introduced into the Victorian Legislative Assembly is shown in table 2.3. Note that Bills can be introduced into the lower house or the upper house (except money Bills).

Table 2.3 The progress of a Bill introduced into the Victorian Legislative Assembly

BEFORE THE INTRODUCTION INTO PARLIAMENT	
• Policy development • Preparation of draft Bill	
ORIGINAL HOUSE – LEGISLATIVE ASSEMBLY	
Introduction and first reading	The minister who wishes to introduce a Bill gives notice of his or her intention to bring the Bill into the house. The member in charge of the Bill reads the title of the Bill and moves 'that the Bill be now read a first time'. There is no debate. Copies of the Bill and explanatory notes are circulated to all members of the house. The introduction and first reading are separate stages in the Commonwealth Parliament.
Second reading	**Statement of compatibility is considered** – The member of parliament introducing the Bill must lay before the house a statement of compatibility, which states whether the Bill is compatible with the *Charter of Human Rights and Responsibilities*, giving reasons. If, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of this incompatibility must be explained during the second reading speech. A Bill can still be passed if it is in some way not compatible with the Charter, but there would have to be exceptional circumstances.
	Purpose of the Bill – In the second reading speech the relevant minister (or private member) outlines the purpose of the Bill. At the end of the minister's second reading speech he or she presents an explanatory memorandum to the house, explaining the reasons for the Bill and outlining its provisions. Debate is usually adjourned and set down as an item of business for a future sitting. The purpose of this pause in proceedings is to provide the members of parliament with the opportunity to study the Bill and its effects before speaking and voting on it, and to provide time for public discussion and reaction. The second reading debate usually begins with the relevant opposition minister delivering the main opposition speech in response to the Bill. Government and opposition members then usually speak in turn. The second reading debate is normally the most thorough debate that takes place relating to the general principles of the Bill. A vote is taken at the end of the debate.
	Scrutiny – Once the second reading speech is complete the senior legal adviser of the Scrutiny of Acts and Regulations Committee examines all the clauses and schedules of each Bill.
Committee stage – consideration in detail	This stage may be eliminated if the house unanimously agrees. The process of the committee of the whole house is: • The Speaker (lower house) or the President (upper house) leaves the house and the house is then said to be in committee. • Each clause of the Bill is discussed in detail, clause by clause. • Amendments are most likely to be made at this stage. This stage is referred to as the **Committee of the Whole** in the Legislative Council. In the **House of Representatives** the committee stage includes the House Committee followed by consideration in detail. In the **Senate** the committee stage includes the Senate Committee followed by consideration in detail. **Adoption of the committee report** – The speaker or president returns to their chair and asks the parliament to accept the committee's report.
Third reading	The long title is read. There is further debate on the Bill if necessary. The Bill is voted on in its final form.

The Bill passes the original house.	
SECOND HOUSE – LEGISLATIVE COUNCIL	
Same procedure	The Bill goes through the same procedure again in the second house. Any amendments must be communicated to the original house. Messages flow between both houses. Any amendments must be approved by both houses in identical form before a Bill can become law.
The Bill passes the second house.	
Certification	The clerk of parliaments certifies the Bill.
Royal assent	The governor (governor-general at federal level) signs the Bill and gives royal assent.

An Act comes into operation on a day stated in the Act or on a day proclaimed by the governor or governor-general in the government gazette (the **proclamation**). If not otherwise stated, an Act comes into operation 28 days after royal assent. The fact that the Bill has been passed is published in Hansard.

The *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic.) has been passed to try to overcome the problem of acts of gross violence on the streets. It brings in two new offences and provides for a minimum non-parole period of four years, unless there are special reasons for the offences.

EXTRACT

Crimes Amendment (Gross Violence Offences) Bill 2012

Introduction and first reading

Mr CLARK (Attorney-General) introduced a bill for an act to amend the *Crimes Act 1958* and the *Sentencing Act 1991* to insert new offences of causing serious injury intentionally or recklessly in circumstances of gross violence, to provide for a minimum non-parole period in certain circumstances for those offences, to amend certain definitions of injury and serious injury and for other purposes.

Read first time.

Source: Victorian Parliamentary Debates (Hansard), Legislative Assembly, 12 December 2012, p. 5421

EXTRACT

Crimes Amendment (Gross Violence Offences) Bill 2012

Statement of compatibility

Mr CLARK (Attorney-General) tabled following statement in accordance with *Charter of Human Rights and Responsibilities Act 2006*:

In accordance with section 28 of the *Charter of Human Rights and Responsibilities Act 2006* (charter act), I make this statement of compatibility with respect to the *Crimes Amendment (Gross Violence Offences) Bill 2012*.

In my opinion, the *Crimes Amendment (Gross Violence Offences) Bill 2012*, as introduced to the Legislative Assembly, is compatible with the human rights protected by the Charter Act. I base my opinion on the reasons outlined in this statement.

Overview of Bill

The main purposes of the Bill are to amend the *Crimes Act 1958* (Crimes Act) and *Sentencing Act 1991* (Sentencing Act) to introduce statutory minimum sentences of imprisonment for gross violence offences, and to revise the definitions of injury and serious injury under the Crimes Act.

...

Conclusion

For the reasons given in this statement, I consider that the Bill is compatible with the *Charter of Human Rights and Responsibilities Act 2006*.

Robert Clark, MP

Attorney-General

Source: Victorian Parliamentary Debates (Hansard), Legislative Assembly, 13 December 2012, pp. 5548–9

EXTRACT

Crimes Amendment (Gross Violence Offences) Bill 2012

Second reading

Mr CLARK (Attorney-General) – I move:

That this bill be now read a second time.

The government committed prior to the election to introduce statutory minimum sentences for offenders who intentionally or recklessly cause serious injury in circumstances of gross violence, and this bill delivers that commitment.

For too long, the law has not done enough to protect innocent Victorians from being victims of horrific, unprovoked attacks that leave terrible lifelong injuries. A young man leaving a football game is king-hit from behind without warning and then kicked in the head repeatedly, suffering permanent brain damage. A student innocently walking home through a railway underpass is bashed by a gang until unconscious, and then left for dead. A promising footballer is choked unconscious in a fast food restaurant before being flung face first to the ground.

Vicious kicking or stomping on the heads of victims has become commonplace, as has the deliberate carrying and use of knives to inflict terrible wounds. These attacks go way beyond spontaneous street brawls. They are part of a culture of extreme violence that threatens to shatter the generally law-abiding and peaceful way of life we have been fortunate to enjoy in Victoria.

This bill sends a clear message that violent attacks such as these will not be tolerated. It will ensure that adult offenders who inflict gross violence will go to jail and will stay in jail for at least four years, unless the court decides that a genuinely special reason applies.

In undertaking this reform, the government sought advice from the Sentencing Advisory Council as to how the reform should best be implemented. The council provided this advice in its report *Statutory Minimum Sentences for Gross Violence Offences*. The government has carefully considered the council's advice and has adopted many of the council's recommendations. On behalf of the government, I thank the council for its thorough and carefully considered work.

The bill creates two new indictable offences in the *Crimes Act 1958*, of intentionally or recklessly causing serious injury in circumstances of gross violence. In doing so, the bill also gives effect to reforms to the definitions of injury and serious injury, not only for the new gross violence offences, but also for all other relevant offences in the Crimes Act.

...

Source: Victorian Parliamentary Debates (Hansard), Legislative Assembly, 13 December 2012, pp. 5549–50

Second reading debate resumed on 5 February 2013

Ms HENNESSY (Altona, ALP) – I welcome the opportunity to make a contribution to the debate on the *Crimes Amendment (Gross Violence Offences) Bill 2012* and to put forward the position of the Labor opposition on the bill. I am very pleased to have the opportunity to talk about an issue that pertains to the commission of violence in our community. Having said that, I note the bill applies to only a reasonably small category of offences.

From the outset, and before I address the details contained in the bill, it needs to be acknowledged that the level of reported violence in our community ought be a cause for alarm, and not just for those who sit in this house. As a community we need to reflect seriously upon what we think are the best mechanisms to start addressing the levels of violence in our community. Our crime statistics certainly indicate there is a growing level of reported violence in our state. We often read stories in the media about horrific acts of sheer violence committed upon innocent people. However, it is the stories behind the statistics we get every quarter from Victoria Police, particularly those stories that do not always receive attention from sources such as the media, as well as the violent incidents that occur every day behind closed doors, especially in a familial environment, that are of particular concern to me. I am very passionately interested in exploring a wide variety of public policy responses to them.

...

It is interesting to note that the government has sought to separate this new subset of offences from all others. I suppose inevitably the question gets asked: why gross violence and why not other particularly serious and grave offences? I suspect the government's answer to that is, 'Well, this was our election commitment', but I am sincerely interested from a public policy perspective whether this is the frame the government intends to apply to a whole host of serious offences.

Whilst we all agree that community expectations around sentencing of serious violent offenders or any serious offenders are something that judges ought to have at the front and centre of their minds when they are making decisions about an appropriate punishment, when performing their very important work it is important that judges are not completely hamstrung. They need the legislative tools to be able to both reflect the intention of the Parliament and at the same time ensure that a miscarriage of justice does not occur. In my view this bill does both of those, and it is on that basis that we will not be opposing it.

...

Source: Victorian Parliamentary Debates (Hansard), Legislative Assembly, 5 February 2013, pp. 38, 41

EXTRACT

Crimes Amendment (Gross Violence Offences) Bill 2012

Second reading

Debate resumed from earlier this day; motion of Mr CLARK (Attorney-General).

Motion agreed to.

Read second time.

Third reading

Motion agreed to.

Read third time.

Source: Victorian Parliamentary Debates (Hansard), Legislative Assembly, 7 February 2013, p. 257

EXTRACT

Crimes Amendment (Gross Violence Offences) Bill 2012

Royal assent

Message read advising royal assent on 26 February 2013 to:

Crimes Amendment (Gross Violence Offences) Bill 2012

Source: Victorian Parliamentary Debates (Hansard), Legislative Assembly, 5 March 2013, p. 613

EXTRACT

Crimes Amendment (Gross Violence Offences) Act 2013

Proclamation of commencement

I, Alex Chernov, Governor of Victoria, with the advice of the Executive Council and under section 2(1) of the *Crimes Amendment (Gross Violence Offences) Act 2013*, fix 1 July 2013 as the day on which that Act comes into operation.

Given under my hand and the seal of Victoria on 21 May 2013

(L.S.) ALEX CHERNOV Governor By His Excellency's Command

ROBERT CLARK Attorney-General

Source: *Victoria Government Gazette*, 21 May 2013

EXTRACT

crest of the Parliament of Victoria appears here



Victoria

title of the Act

Crimes Amendment (Gross Violence Offences) Act 2013

number and year of the Act

No. 6 of 2013

date of assent the date the Act is given royal assent

[Assented to 26 February 2013]

The Parliament of Victoria enacts:

PART 1—PRELIMINARY

purpose the purpose of the Act is clearly set out—this assists courts in the interpretation of the Act and in finding a relevant Act

1 Purposes

The purposes of this Act are –

(a) to amend the ***Crimes Act 1958*** –

(i) to substitute definitions of injury and serious injury; and

(ii) to insert offences of causing serious injury intentionally in circumstances of gross violence and causing serious injury recklessly in circumstances of gross violence; and

(b) to amend the ***Sentencing Act 1991*** to provide for sentences with a minimum non-parole period for those offences.

commencement the date the Act comes into operation, if known

2 Commencement

(1) Subject to subsection (2), this Act comes into operation on a day to be proclaimed.

...

PART 2—AMENDMENT OF THE CRIMES ACT 1958

...

4 New sections 15A and 15B inserted

new section to be inserted into the original *Crimes Act 1958*

After section 15 of the Crimes Act 1958 insert –

"15A Causing serious injury intentionally in circumstances of gross violence

(1) A person must not, without lawful excuse, intentionally cause serious injury to another person in circumstances of gross violence.

Penalty: Level 3 imprisonment (20 years maximum).

(2) For the purposes of subsection (1), any one of the following constitutes circumstances of gross violence –

(a) the offender planned in advance to engage in conduct and at the time of planning –

(i) the offender intended that the conduct would cause a serious injury; or

(ii) the offender was reckless as to whether the conduct would cause a serious injury; or

(iii) a reasonable person would have foreseen that the conduct would be likely to result in a serious injury;

(b) the offender in company with 2 or more other persons caused the serious injury;

(c) the offender participated in a joint criminal enterprise with 2 or more other persons in causing the serious injury;

(d) the offender planned in advance to have with him or her, and to use an offensive weapon, firearm or imitation firearm and in fact used the offensive weapon, firearm or imitation firearm to cause the serious injury;

(e) the offender continued to cause injury to the other person after the other person was incapacitated;

(f) the offender caused the serious injury to the other person while the other person was incapacitated.

LEARNING ACTIVITY 2.8

Passage of a Bill through parliament

1 At what stage is the statement of compatibility considered? Explain the purpose of a statement of compatibility.

2 When is the purpose of the Bill explained?

3 At what stage in the progress of a Bill through parliament does the major debate of the Bill take place?

4 At what stage are amendments most likely to be made?

5 Explain the different types of committee stage and in which house each is used.

6 What is the final stage before a Bill is passed and comes into operation?

7 Do you think royal assent is merely a tradition that should be dispensed with or an important part of the law-making process? Discuss.

8 Where can you find a proclamation relating to an Act that has just been passed? What is its purpose?

9 Look back and read the information relating to the *Crimes Amendment (Gross Violence Offences) Bill 2012* (Vic.).

a This Bill is an amending Bill. Identify one Act that this Bill is amending.

b What human rights do you think are likely to be relevant to the *Crimes Amendment (Gross Violence Offences) Bill 2012*? Explain.

c Explain the reasons for this Bill and any individuals or groups that may have influenced the drawing up of this Bill.

10 The *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) has been passed to overcome the problems of gross violence on the streets. Look back at the extract from the Act and discuss what constitutes circumstances of gross violence. Do you think this Act covers the situation of one punch causing serious injury or death (unplanned or unprovoked)? Give your reasons.

11 Read the case study 'New Victorian law to crack down on malicious sexting' and answer the questions.

a Explain the loophole in the law that has caused problems for your people.

b What has taken place to influence this change in the law?

c If you had been part of a group wishing to influence this change in the law, which methods might you have used to bring the need for this change in the law to the attention of the government? Give your reasons

d Briefly explain the process that would take place to draft this Bill.

e Investigate to see if this Bill has been presented to the Victorian Parliament and passed.

CASE STUDY

New Victorian law to crack down on malicious sexting

Farrah Tomazin, *The Sunday Age*, 15 December 2013

Sending explicit images without consent will soon be a crime in Victoria, as the Napthine government moves to create Australia's first specific sexting law.

But in a significant shift, young people who sext will not be prosecuted for child pornography, closing a loophole that has previously seen some children placed on the sex offenders register.

The anomaly was highlighted by *The Sunday Age* in 2011, when it was revealed that a number of teenagers caught with raunchy images of girls sent via the internet or mobile phone had been charged with child pornography and placed on the register, ruining their career options and branding them for years.

Last week, in response to a parliamentary inquiry prompted by *The Sunday Age*'s reports, Attorney-General Robert Clark announced new measures to tackle the issue.

Under the changes, sexting will not be illegal if it takes place between consenting minors with no more than two years' age difference between them.

However, it will be an offence to distribute, or threaten to distribute, explicit images of another person without their consent.

The government is yet to determine what type of penalties should apply, but insists they will be 'appropriate'.

'This will continue to make clear that such behaviour is unacceptable and illegal, while not treating young people who distribute such images as child pornographers or rendering them liable to consequences such as being placed on the sex offenders register,' Mr Clark said.

The government accepted 11 out of 14 of the committee's recommendations, either in full or in principle. Other changes include:

- an education program in schools to teach young people about the dangers of sexting.
- improved training for prospective teachers.
- ensuring that diversion is offered to some adults charged with the offence.

Previously under the law, sexts were classified as child pornography when the images involved people under 18, even when the person pictured took the photographs themselves and willingly sent them to others.

But the parliamentary committee found that the current system 'missed the mark' because consensual distribution came with hefty sanctions for young people, yet laws protecting people of all ages from non-consensual distribution were 'relatively weak'.

'The law does not adequately recognise that sexting by young people is different to the sharing of images by paedophiles, and the law does not adequately recognise that real and significant harm is done to people of all ages when explicit images are distributed to third parties without consent,' the committee found.

12 Research

Find two news articles that discuss a proposed change in the law or a change in the law that has just taken place. For each article:

- state the date and source of the article
- describe the proposed change or change in the law
- explain the reason for the proposed change or change in the law.

13 Investigation

Find three Acts that have been passed this year by the Victorian Parliament. Go to the Parliament of Victoria website. Click on 'Legislation & Bills'. Scroll down and go to 'All Acts by Year – Victorian Statute Book'. Click on the current year. Choose three Acts that refer to something that seems familiar to you or others you know. Find and briefly explain the purpose of each Act.

14 Role play

Imagine you are a minister in parliament and you are introducing a Bill into parliament at the second reading stage. Write brief notes for a Bill that you would like to pass through parliament, such as a Bill providing for voluntary euthanasia, and act out your role of explaining the need for the legislation to parliament. This can be followed by debate that may take place in class. Write a brief explanation of the process of passing a law through parliament. Use an example of a Bill that has been presented to the Victorian Parliament or Commonwealth Parliament to illustrate the process.

HINT

The study of law-making by subordinate authorities is not part of Unit 3 or 4, but knowledge of this type of law-making is helpful when looking at the effectiveness of parliament as a law-maker.

>>GOING FURTHER

Law-making by subordinate authorities

Parliament's limited sitting time makes it impossible to pass all laws necessary for the governing of the country. It therefore passes some of its law-making power to lesser authorities that can deal with a specific area of law-making and develop expertise in it. These are known as **subordinate authorities** or **delegated bodies** because they are subordinate to parliament.

Subordinate authorities are bodies that have been given the power to make rules and regulations by parliament. These rules and regulations are known as **delegated legislation** or **subordinate legislation**. These bodies include:

- the executive council, which is made up of the governor-general (federal), or governor (state), and relevant ministers – many Acts give the executive council the power to make regulations, such as the *Bail Act 1977* (Vic.)

- local councils, which make local laws – the members of local councils are generally elected to make laws on behalf of the local community; for example, the City of Melbourne
- government departments, which make regulations to provide further or more detailed rules in line with the general policies set out by parliament; for example, the Department of Education and Early Childhood Development
- statutory authorities, such as Australia Post and the Australian Broadcasting Corporation Board, which are bodies set up by an Act of parliament.

Delegated legislation is enforceable through the courts. Parliaments pass enabling Acts to give power to subordinate authorities to make laws in specialised areas such as local government. Subordinate authorities must not go outside the power granted to them under the enabling Act.

Subordinate authorities bring the law-making process closer to the people and are more accessible to the general public than parliament. They also place the law-making in the hands of experts – specialised bodies can make laws in their particular field.

However, subordinate authorities (other than local councils) are not elected and therefore parliament is giving up its role of legislating to bodies that have not been voted into office by the people. Subordinate legislation may be passed without the debate that is part of the parliamentary law-making.

Rules and regulations made by subordinate authorities are subject to the scrutiny of parliament.

EFFECTIVENESS OF PARLIAMENT

The state and Commonwealth parliaments are elected supreme law-making bodies within their own jurisdictions. Supremacy of parliament is also sometimes referred to as **sovereignty of parliament**. This means that they have overriding authority when exercising the law-making powers given to them. Parliaments are not bound by previous Acts of parliament and can change the law when the need arises. Courts can interpret the words in an Act of parliament, but parliaments can abrogate (cancel) a law made by courts, or can pass an Act to reinforce court-made law.

Parliament is able to investigate a whole area of law. There are many parliamentary committees that can hold public forums and request public submissions to determine the needs of the people. A whole area of law can be thoroughly investigated to gain the necessary expert advice. Committee findings are reported to parliament. As committees are often made up of members of the government and the opposition, their findings usually have bipartisan support (support of both parties).

There are, however, restrictions on parliaments' ability to make laws.

- **conflicting views within the community** – It is very difficult to make a law that suits everyone's needs within the community. For example, the law regulating abortion has many supporters and many people who disagree with it.
- **economic viability** – A change in the law may be needed but the implementation of that change may not be possible because of financial restraints. For example, the law needs to be changed to provide for more hospital beds to alleviate the long waiting lists of people wanting surgery. The lack of funds places a restriction on this change in the law taking place.
- **public debate** – Changes in the law may be delayed so public debate can take place. This can often take a long time and the change in the law may be delayed indefinitely. For example, the debate about abortion law has been taking place in the community for many years. In July 2007, a private member's Bill was introduced to decriminalise abortion, the Crimes *(Decriminalisation of*

Abortion) Bill 2007. This was not passed, but the Brumby Government referred the matter to the Victorian Law Reform Commission for investigation. The *Abortion Law Reform Bill* was introduced in August 2008 and passed and given royal assent in October 2008.

- **constitutional restrictions** – The law-makers can only change the law if it is within their jurisdiction to do so. For example, one of the states cannot pass an Act that allows them to raise an army. Under the Constitution, raising an army is the exclusive right of the Commonwealth Parliament. The Constitution can only be changed by holding a successful referendum.
- **a hostile upper house** – A government may not have a majority in the upper house. When the government does not hold a majority in the Senate, the latter is referred to as a hostile Senate. This is because the senators may be hostile to plans for changes in the law and may vote against them. The advantage of a hostile Senate is that there is likely to be more vigorous debate about proposed legislation.
- **a hung parliament** – Sometimes a government may not hold a majority in the lower house, because they have the same number of members as the opposition, and therefore have to negotiate with other members of the lower house to get their support for the passage of a Bill. This can lead to a government's legislative agenda being considerably watered down in order to reach compromises with independents and minor parties.
- **outdated legislation** – Times and values change rapidly and it is difficult for the government of the day to keep up with the need for changes in the law.
- **lack of time** – Parliaments do not have the time to pass laws relating to the minor details of a particular area of law. Parliament passes its power to make law to delegated bodies (also known as subordinate authorities), which are not elected by the people (other than local councils).

Some restrictions on law-making can also be seen as part of the process that creates an effective parliament. For example, it is the role of the opposition parties to ensure that the parliament does not make laws that would not be in the best interests of members of our community. It is therefore important that they are able to expose the flaws in legislation and prevent some legislation from being passed.

Strengths of parliament as a law-making body

The primary role of parliament is to make laws on behalf of the community, although this is hindered by the fact that parliament is not always sitting.

As a general rule, parliament makes laws **in futuro**. This means that laws are made for the future with the future in mind as far as possible. Members of society are then able to know what the law is and how it applies to them. Courts make laws **ex post facto** (after the action has taken place).

Parliament can **change the law as the need arises**, although this can be a slow process as any law made by parliament has to be passed by both houses of parliament. However, when a Bill receives the support of parliament, it is able to be passed quickly if needed. For example, the *Crimes Amendment (Integrity in Sports) Act 2013* was quickly passed through the Victorian Parliament in response to growing concerns about the number of incidents of match fixing in recent times, both in Australia and overseas. Technological advances in recent years have greatly increased the potential for Australian sports to attract betting interest and the potential for criminal involvement from around the world. This Act was introduced to parliament on 5 March 2013 and received royal assent on 7 May 2013.

Members of parliament are **elected by the people** to represent the needs of the people and are responsible to the people. Law-making by parliament should, therefore, reflect the needs of the people. However, there are often **conflicting views** within society that hinder parliament in the law-making process. For example, there are strong opposing views about Australia becoming a republic.

Parliament is able to **investigate a need for a change** in the law thoroughly, and gauge public feelings about a proposed change in the law, although this can be very time-consuming. Parliamentary committees can investigate matters fully and gain public input through public forums and submissions in response to discussion papers. Government departments provide ministers with the knowledge required to initiate necessary changes in the law. There was comprehensive community comment about abortion law reform during the Victorian Law Reform Commission (VLRC) investigation.

Parliament has **access to expert information**, can keep up with required changes and can pass **comprehensive laws** that bring about wide-ranging changes to a specific area. An example is the *Criminal Procedure Act 2009* (Vic.), which clarified, simplified and consolidated the laws relating to criminal procedure.

Parliament must look at a compatibility statement to ensure that a Bill that is being presented to parliament is **compatible with human rights**; however, parliament can pass a Bill even if it is found that a section is not compatible with human rights. This will only occur in exceptional circumstances.

A very important part of the law-making process through parliament is the **debate** that takes place in parliament. Members of parliament can point out the advantages of a particular change in the law, as well as the flaws in any proposed change in the law. In this way the views of more sections of the public can be considered. The process of passing a Bill through parliament can, however, be very **time-consuming**.

Parliament can **delegate some of its law-making powers** to subordinate authorities to make delegated legislation on its behalf. This saves parliamentary time and also passes the law-making task to bodies that are expert in their particular fields. Subordinate authorities may be more likely to be aware of the need for changes in the law because they are more accessible to the people. Local councils are more likely to know local requirements in their areas. On the other hand, other than local councils, subordinate authorities are not elected, but there are ways to check delegated legislation and ensure that subordinate authorities do not exceed their law-making powers.

Weaknesses of parliament as a law-making body

Parliament may **not be able to respond quickly** to a need for a change in the law, either because it is not sitting at the time, or it is not possible to gain the support needed to pass the Bill through the parliament (if there is a hung parliament or a hostile upper house). Also, the process of law-making through parliament is very **time-consuming** because it has to pass through three readings and debates in both houses.

Parliament may be restricted in its law-making by the fact that there are strong **conflicting views** in the community regarding a particular issue, such as same-sex marriage. If both sides of the discussion have strong support, it is likely that the law will not be changed. For example, there are strong and conflicting views about legalising voluntary euthanasia, and as a result the law remains unchanged.

Parliaments are also restricted to making laws only within their **own jurisdiction**. For example, the Victorian Parliament is not able to make laws with respect to customs and excise, even if they saw a need for a change in the law in this respect.

Investigations for the need for a change in the law can be very thorough but also lengthy and **time-consuming**. It may also be **difficult to keep up with changing attitudes** in the community and **changing technology**. The mobile phone has provided the ability of people to send sexually explicit images to many people without the consent of the person depicted in the image. This has led to the need for sexting laws.

Parliament may **not always be able to foresee future circumstances** when drafting a law. For example, when the *Commonwealth of Australia Constitution Act 1900* (UK) was passed, it did not refer to television as this type of communication did not exist at the time. The courts had to interpret the Constitution at a later date to include television.

Parliament can make **retrospective laws**. Retrospective law-making can result in injustices because laws can be made that make something unlawful after the action has taken place, although this is rare. However, they could resolve an injustice.

Parliament delegates some of its law-making powers to subordinate authorities, but these subordinate authorities (other than local councils) are **not elected**. Many of the laws that we follow are made by subordinate authorities, and therefore are not being made by our elected representatives and may not be representative of the needs of the people. Parliament does, however, have the means to scrutinise these subordinate authorities in their law-making activities.

Table 2.4 Strengths and weaknesses of parliament as a law-making body

STRENGTHS	WEAKNESSES
It is parliament's primary role to make laws.	Parliament is not always sitting and so cannot always change the law as the need arises.
Parliament is elected by the people and therefore responsible to the people.	There are often conflicting views within society that hinder parliament in the law-making process. For example, there are conflicting views in society about voluntary euthanasia.
Parliament can investigate the whole topic and make a comprehensive law; for example, the *Criminal Procedure Act 2009* (Vic.).	Investigation and implementation are very time-consuming and parliament may not be able to keep up with changes in society because there are many issues that require the attention of parliament.
Parliament has access to expert information and is therefore more able to keep up with changes in society than courts.	Investigations may be lengthy and expensive.
Parliament provides an arena for debate, which can lessen the chance of unjust laws being passed and allows different views to be heard.	The process of passing a law through parliament is time-consuming, and if the opposition to a Bill is strong it can result in the Bill not being passed or being considerably watered down.
Parliament ensures a Bill is compatible with human rights.	A Bill can still be passed even if it is found that a section is not compatible with human rights, but this is only in exceptional circumstances.
Parliament can delegate its power to make laws to expert bodies.	Subordinate authorities (other than local councils) are not elected by the people. Also, there may be too many bodies making laws, which can be confusing.
Parliament is able to involve the public in law-making and gauge the needs of the people.	It is not always possible to respond to changing values in the community because there may be conflicting values.
Parliament can change the law as the need arises.	Parliament may not be able to foresee all future circumstances and laws can become outdated.
Parliament makes the law in futuro.	Parliament can make retrospective laws, which can result in injustices.
Parliament is a supreme law-making body.	Parliaments are restricted to making law only within their jurisdictions.

HINT

In your Legal Studies exam and school-based assessment it is essential that you use legal terms correctly. It is a good idea to start your own glossary of legal terms. This will help you to remember the legal terms and how to use them.

LEARNING ACTIVITY 2.9

Effectiveness of parliament

1 Outline three reasons why parliament's ability to make laws may be restricted.
2 Discuss three ways in which parliament is an effective law-making body.
3 Explain the term 'supremacy of parliament', and explain why this is an advantage of law-making through parliament.
4 What is meant by the term 'in futuro'?
5 In what ways does parliament have access to expert information and public opinion? How can this assist in the law-making process?
6 Why might the fact that parliament can delegate its law-making power to subordinate authorities be both an advantage and a disadvantage?
7 Discuss the advantages and disadvantages of parliament as a law-making body in relation to a change, or proposed change, in the law.

PRACTICE EXAM QUESTIONS

1 Read the information in the extract from the *Crimes Amendment (Grooming) Bill 2013* (Vic.) and answer the questions.
   a Explain how individuals and a parliamentary committee may have influenced the Victorian Government to introduce this Bill to parliament. *(2 marks)*
   b Explain the role of the cabinet and the office of parliamentary counsel in the early stages of this Bill being formulated. *(6 marks)*
   c Describe the law-making processes that will occur after the first reading in the Legislative Assembly if this Bill is to become an Act. This Bill was initiated in the Legislative Assembly. *(4 marks)*
   d To what extent do you think that law-making through parliament is an effective method of law-making? Discuss. *(8 marks)*

Crimes Amendment (Grooming) Bill 2013

The Parliament of Victoria enacts:

1 Purpose

The purpose of this Act is to amend the ***Crimes Act 1958*** to insert a new offence of grooming for sexual conduct with a child under the age of 16 years and to make consequential amendments to other Acts.

Source: Victorian Parliament Bills 2013

2 a Using contemporary examples, explain influences on legislative change and evaluate the capacity of individuals and groups to influence a change in the law. In your evaluation discuss the strengths and weaknesses of methods of influencing changes in the law. *(10 marks)*
   b Discuss the strengths and weaknesses of law-making through parliament. *(10 marks)*

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK FOLIO EXERCISE

Same-sex marriage

1 Read the newspaper article 'Same-sex marriage debate closer to tipping point' and answer the questions.

- **a** Identify one pressure group that is trying to influence the Commonwealth Parliament to change the law. Investigate this group. What actions do you think this group would take to try to influence a change in the law? You can check out their website to get further information. *(2 marks)*
- **b** Why do you think the same-sex marriage debate is closer to tipping point? Explain. *(2 marks)*
- **c** If you agree with same-sex marriage, or not, what do you think you could do to help to influence the Commonwealth Parliament to change the law, or keep the law as it is, according to your point of view? Discuss. *(3 marks)*

Same-sex marriage debate closer to tipping point

Christine Forster, *The Age*, 3 December 2013

The national discussion on equality will help to persuade opponents to back reform.

About a month ago I met a student actor who was interested in portraying me in a play about the lives of gay and lesbian men and women in today's Australia. Without knowing any of the detail, I was intrigued by the concept and agreed to participate.

Over the course of our first meeting, this young artist and I talked about my life and coming out, my relationships with my family and partner Virginia, and my role as a councillor at the City of Sydney. We discussed at length how I feel about and relate to my brother, Prime Minister Tony Abbott, who would inevitably be central to some of the discourse of the other people featured in the play. I recounted honestly and in detail his empathetic, non-judgmental and supportive response to my revelation to him that I was gay.

At the last of what turned out to be several sessions, she and I talked about how she had been affected by our conversations and by the reactions of her fellow students to her having chosen me as her subject. She had grown up in a family committed to Green politics and lived in a world in which the Liberal Party was regarded as the great evil, and people like me as closed-minded, even dangerous, reactionaries.

This artistic project, however, had changed her view of politics and opened her eyes to how people so often blindly accept as absolute truth ideas and opinions we have never thoughtfully considered.

In some ways a similar thing is what has been and still needs to happen in Australia's debate about same-sex marriage.

Australia is a liberal democracy. It's a nation that values individual liberties, freedom of speech, majority rule and, for the most part, small government. In countries such as ours lasting social reforms come from the will of the people, reflected in the decisions of their elected representatives.

Those reforms start with personal changes of opinion that challenge the status quo, taking root as an idea or conversation shared between individuals, their families and associates. Liberal democracies like ours provide the freedom for appealing ideas or conflicts of rights to be acknowledged and more broadly discussed by the leaders of communities, scholars, commentators and politicians.

If the argument holds sway, those on the middle ground can be persuaded to support and opponents can be brought round, or at least to a point of acceptance. Eventually, a tipping point is reached and when an obvious majority is in favour, our parliamentarians inevitably feel compelled to implement reform.

Our national discussion on same-sex marriage has come a very long way in a relatively short period. According to opinion polls cited by Australian Marriage Equality, 62 per cent of us support and only 33 per cent of us oppose same-sex marriage. But clearly that is not yet an obvious majority, at least not to our legislators.

The Australian Capital Territory's Legislative Assembly recently became our first Parliament to pass legislation allowing same-sex couples to marry. Not long afterward, Tasmania's Legislative Council narrowly rejected a motion to reopen debate on the issue and, more recently, the NSW upper house failed to pass a same-sex marriage Bill by just a single vote.

Even if the High Court quashes the ACT legislation, recent events have moved the debate further into the mainstream of our political and social discourse on human aspirations and freedoms. The outcomes in Tasmania and NSW have also shifted the spotlight back to the federal arena, which is where the issue must be decided for us to achieve true equality under the Marriage Act.

In order for this reform to happen, we must convince our federal legislators in the political centre and at least some of their more conservative colleagues that it has merit, that it's supported by a clear majority of their constituents and that it deserves careful consideration. This is what occurred in Britain and New Zealand, where same-sex marriage was passed under governments from the right, not the left.

It is inevitable that a same-sex marriage Bill will be tabled in Parliament over the course of the Abbott Government's first term, and as a supporter of the reform I want it to have the best possible chance of passing.

My own party, the Liberals, went to the election for the first time without a binding position, but even with consciences being exercised on both sides of the House, clearly many of our decision-makers will still need respectful and private persuasion.

The timing of any new Bill will also require careful planning, with an eye on both the Abbott Government's priority to address its election agenda and the sensitive period when all parliamentarians are navigating through pre-selection processes.

It will not be an easy task, but the debate has shifted towards the centre and the cause is being taken up by Australians such as Governor-General Quentin Bryce, who command respect and admiration, and whose support will influence many.

As a middle-aged Liberal who managed to sway the view of a young, left-leaning actor, I am full of optimism that the tipping point is coming.

Christine Forster is a councillor with the City of Sydney.

2 Why do you think it is important for the Coalition and the Opposition to grant its members the right to vote according to their conscience rather than along party lines? Explain. *(2 marks)*

3 Evaluate three methods of influencing a change in the law looking at their strengths and weaknesses as a method of influencing changes in the law. *(6 marks)*

4 Investigate petitions on the Parliament of Victoria website. Look up 'Petitions Parliament of Victoria'. Try to find one petition asking for a change in the law in favour of same-sex marriages. Describe the petition. *(2 marks)*

5 Evaluate the strengths and weaknesses of parliament as a law-making body. *(8 marks)*

(Total 25 marks)

ASSESSMENT TASK CASE STUDY

Victorian Law Reform Commission

Investigate the Victorian Law Reform Commission and write a case study report. In your report, answer the following questions.

1 Outline the role of the Victorian Law Reform Commission in assessing the need for a change in the law. *(2 marks)*

2 How does the VLRC decide which area of law reform to investigate? *(1 mark)*

3 Explain a change, or proposed change, in the law that has been investigated by the VLRC. Why do you think the law needed to be reviewed? *(2 marks)*

4 To what extent did the law reform body consult with ordinary members of the community in assessing the need for change? Discuss. What other methods were used to investigate the area of law? *(5 marks)*

5 'The VLRC is the most appropriate method of influencing parliament to change the law.' Discuss. In your discussion, consider other methods used by individuals and groups to influence changes in the law and explain the advantages and disadvantages of the VLRC as a method of influencing a change in the law. *(6 marks)*

6 Evaluate the reasons law may need to change using examples to illustrate your answer. *(4 marks)*

(Total 20 marks)

ASSESSMENT TASK CASE STUDY

Bullying

Investigate the *Crimes Amendment (Bullying) Act 2011* on the Internet. Go to the Parliament of Victoria website. Click on 'Legislation & Bills'. Scroll down to 'All Acts by Year – Victorian Statute Book'. Go to 2011 and locate this Act. Look at the purpose of the Act and S3 'Stalking'. Then read the following two articles 'Brodie's Law means workplace and cyber bullies face 10 years in jail' and 'Federal action on workplace bullying' and answer the questions.

1 What are the problems that the *Crimes Amendment (Bullying) Act 2011* is trying to overcome? Discuss in relation to some of the difficulties experienced by Brodie Panlock. *(3 marks)*

2 What is one of the changes that this Act has brought into law? *(1 mark)*

3 How do you think Brodie's parents tried to influence this change in the law? *(1 mark)*

4 Which other groups do you think tried to influence this change in the law? *(2 marks)*

5 How are members of the Legislative Assembly informed of the purpose of a proposed law? *(2 marks)*

6 Explain the role of the Scrutiny of Acts and Regulations Committee. Refer to the *Crimes Amendment (Bullying) Act 2011* in your explanation. *(2 marks)*

7 Briefly explain the actions of the Commonwealth Parliament in relation to bullying. *(1 mark)*

8 Evaluate the need for the law to be able to be changed, referring to the example of bullying. *(5 marks)*

9 Analyse three ways in which individuals can be involved in influencing changes in the law. To what extent do you think these methods of influencing changes in the law are likely to be effective? In your analysis comment on how the law-makers may have been influenced in relation to workplace bullying. *(6 marks)*

10 Explain the role of cabinet and government departments in the law-making process. *(1 mark)*

11 Describe the passage of a Bill once it has been passed by the first house, before it becomes law. *(2 marks)*

12 In the Australian parliamentary system, the government is a representative government. Explain ways in which the law-making process reinforces the principle of representative government. *(4 marks)*

(Total 30 marks)

Brodie's Law means workplace and cyber bullies face 10 years in jail

Geoff Wilkinson, *Herald Sun*, 5 April 2011

Tougher laws for workplace bullies are welcome, but employers shouldn't think they can wash their hands of the problem, unions say.

Bullies will face up to 10 years' jail under changes to stalking laws to be introduced in Parliament this week, and an industry group wants the laws to be nationwide.

The parents of Brodie Panlock, the bullied waitress whose tragic death prompted the change, yesterday welcomed the news, while some called for the Federal Government to take a leaf from the State Government and implement nationwide bullying laws to stamp out harassment in the workplace.

But ACTU president Ged Kearney told heraldsun.com.au this morning while she hoped the increased penalties would deter people from bullying, she was concerned holding individual bullies responsible could absolve employers of their obligations.

'These laws will hopefully help deter people from conducting such undesired behaviours but it shouldn't suggest to employers that it's no longer their job to provide a safe workplace for all employees,' Ms Kearney said.

'Every workplace should have policies and procedures to deal with bullying and harassment, as it's essential for employers to provide a safe and harassment-free environment for all their workers.'

The new laws, nicknamed 'Brodie's Law', will add serious workplace and cyber bullying to *Crimes Act* provisions already governing stalking.

Children who use Facebook to threaten or harass could be caught up in the change, although those under 10 cannot be brought before a criminal court.

'If this law had existed then (when Brodie was victimised), the vultures who caused our daughter's death would be in jail,' said Brodie's father, Damian Panlock.

'That's the only way you can show anyone what this law is about – not just give them a fine and a slap on the wrist.'

Ms Panlock was 19 when she jumped to her death from a building in 2006 after being bullied at a Hawthorn cafe.

A court was told that co-workers abused her, spat on her, poured beer over her and held her down while she was doused in cooking oil.

When she first attempted suicide she was mocked for failing, then offered rat poison.

Attorney-General Robert Clark said the kind of behaviour inflicted on Brodie would not be tolerated.

'Victorian families are entitled to be confident that their children starting out in the workforce are protected from falling victim to serious bullying,' he said.

Cabinet yesterday approved the *Crimes Amendment (Bullying) Bill*, which is likely to be introduced to parliament this week.

And calls have been made for the legislation to be used as a federal model, ensuring nation-wide anti-bullying laws.

The Victorian Employers' Chamber of Commerce and Industry's Alexandra Marriot said the legislation to be put before State Parliament should be used to create a federal model.

'Much of this work is already underway,' she told heraldsun.com.au this morning.

'Our position is that this kind of thing would be dealt with through a federal model and a federally consistent approach would be adopted to this kind of issue.

'Bullying can be a serious problem in the workplace, the Panlock case is of course one of the more extreme examples of what happens when it's not managed in the workplace.

'Generally speaking employers are very aware of their obligations to provide a safe workplace for their employees and that means a workplace free from severe bullying.'

Police association boss Snr Sgt Greg Davies said he thought it was important bullying and what it referred to was accurately defined in the legislation.

'We need to be very careful the legislation differentiates between the top end of the scale and the bottom and doesn't condemn a teenager for not sharing their cricket bat with someone,' Snr Sgt Davies said.



Figure 2.13 Damian and Rae Panlock with a photo of their daughter, Brodie

Bullying behaviour that is part of a course of conduct and could reasonably be expected to cause physical or mental harm to the victim, including self-harm, will be treated as stalking.

Cyber bullying will be covered by the new law if it is part of a pattern of conduct likely to cause physical or mental harm, or fear of it.

The owner, manager, chef and a waiter at the restaurant where Ms Panlock worked were charged with workplace offences rather than assault or criminal offences. They were convicted under the *Occupational Health and Safety Act* and fined a total of $337000, but didn't face jail sentences.

Damian Panlock said he and his wife, Rae, had seen no justice since the death of their youngest child.

'They get a fine, a slap on the wrist, then they walk away and have a life,' Mr Panlock said.

'We haven't got a life. We don't sleep. We still take sleeping pills nearly five years later.'

Federal action on workplace bullying

Following the passing of the Victorian Brodie's Law, the federal ministers began working to introduce national laws to protect workers from being bullied. Victorian Attorney-General Robert Clark raised the matter of workplace bullying at the ministerial Standing Committee on Law and Justice. Under the *Fair Work Amendment Act 2013* (Cth), the federal Fair Work Commission will have new powers to hear allegations of bullying in the workplace by a worker. A worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer. The Commission will be able to order a person or group to stop bullying the applicant in the workplace.

A worker is bullied at work if, while the worker is at work, an individual or group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member, and this behaviour creates a risk to health and safety. This does not apply to management action carried out in a reasonable manner.

ASSESSMENT TASK ESSAY

Changing the law

'Change in the law is necessary for the law to keep up with changing needs in society.'

Discuss this proposition using an example or examples of changes in the law or proposed changes in the law to illustrate points made.

Your essay should include the following:

- discussion of reasons why laws may need to change using examples to illustrate points made *(4 marks)*
- explanation of the role of the Victorian Law Reform Commission in assessing the need for change *(2 marks)*
- analysis of methods used by individuals and groups to influence changes in the law *(6 marks)*
- evaluation of the strengths and weaknesses of law-making through parliament. *(8 marks)*

(Total 20 marks)

Summary

Reasons laws may need to change

Influencing changes in the law

Methods used by individuals and groups to influence change

- petitions and e-petitions
- demonstrations
- media
  - newspapers
  - letters to the editor
  - social media
  - radio
  - television

Victorian Law Reform Commission

- the role of the VLRC
- inquiries
  - jury empanelment
  - crimes (mental impairment)
  - abortion
  - birth registration and birth certificates
  - jury directions
  - sex offenders' registration

Legislative process – initiating legislation

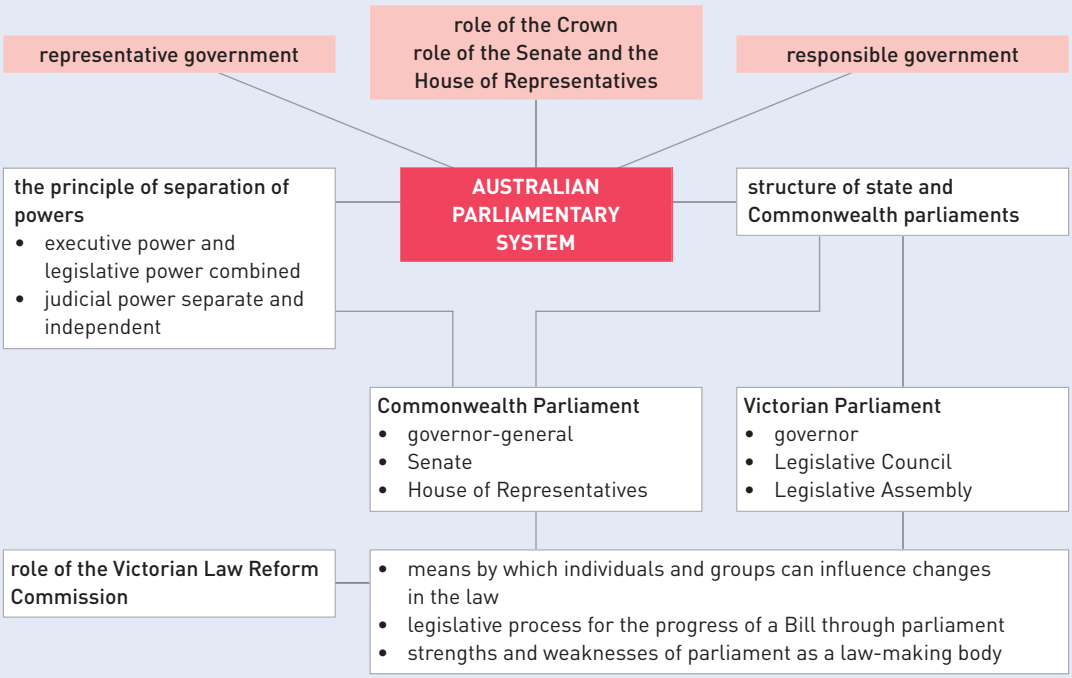
- government departments
- cabinet and ministers
- parliamentary committees
- drafting legislation

Legislative process – scrutiny of Bills

Progress of a Bill through parliament

Effectiveness of parliament

Strengths and weaknesses of parliament as a law-making body





CHAPTER 3

THE CONSTITUTION

OUTCOME

This chapter is relevant to learning outcome 2 in Unit 3. You should be able to explain the role of the Commonwealth Constitution in defining law-making powers within a federal structure, analyse the means by which law-making powers may change, and evaluate the effectiveness of the Commonwealth Constitution in protecting human rights.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- the division of law-making power between state and Commonwealth parliaments under the Commonwealth Constitution, including specific (concurrent and exclusive) and residual powers, and the impact of S109
- restrictions imposed by the Commonwealth Constitution on the law-making powers of state and Commonwealth parliaments
- the process of change by referendum under S128 of the Commonwealth Constitution and factors affecting its likely success
- the way in which one successful referendum changed the division of law-making powers
- the role of the High Court in interpreting the Commonwealth Constitution
- the significance of two High Court cases involving the interpretation of the Commonwealth Constitution in terms of their impact on the law-making power of the state and Commonwealth parliaments
- the capacity of the states to refer law-making power to the Commonwealth Parliament.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information and data
- apply legal principles to relevant cases and issues
- explain the role of the Commonwealth Constitution with respect to law-making powers and the protection of rights
- identify the types of law-making powers
- explain the methods and processes of changing constitutional power
- analyse the impact of referendums, High Court interpretation of the Constitution, and the referral of powers on the division of law-making powers.

KEY LEGAL TERMINOLOGY

bill of rights A document that sets out individual democratic and human rights.

concurrent powers Those powers in the Constitution that may be exercised concurrently (at the same time) by the Commonwealth Parliament and one or more state parliaments.

Constitution The *Commonwealth of Australia Constitution Act 1900* (UK), which came into force on 1 January 1901; a set of rules or principles guiding the way the nation is governed. States have their own separate constitutions.

division of powers The way in which law-making powers are divided between the Commonwealth and the states.

double majority The requirement in the process of changing the Constitution through a referendum – to achieve a yes vote by a majority of voters in the whole of Australia as well as a yes vote by a majority of voters in a majority of states (this means a majority in four out of the six states).

exclusive powers Those powers in the Constitution that belong solely to the Commonwealth.

federation A union of sovereign states that relinquish some powers to a central authority to form one nation. Australia is a federation of six independent states with a federal body known as the Commonwealth Parliament; each state and Commonwealth parliament has its own powers. Some powers are shared between the Commonwealth Parliament and the states.

heads of power The areas of law-making power listed in S51 of the Constitution.

referendum A vote of the people in which an entire electorate is asked to either accept or reject a particular proposal to change the wording in the Constitution. This may result in the adoption of a change to the Constitution. The process of changing the wording of the Constitution by referendum is set out in S128 of the Constitution.

referral of power The giving or returning of a law-making power from a state to the Commonwealth Parliament.

representative government Representative government refers to a government that represents the view of the majority of the people.

residual powers Those law-making powers that belong to the states; these powers were not given to the Commonwealth at federation but were left with the states.

responsible government The executive government (prime minister, senior ministers and government departments) is accountable to parliament, and can only continue to govern as long as it has the support of the lower house of parliament. If the government loses the support of the lower house then it must resign.

separation of powers The principle of separation of powers refers to the fact that there are three separate types of powers in our parliamentary system. These are legislative power, executive power and judicial power. Each type of power is exercised by a separate institution.

specific powers Those powers that are referred to in the Constitution specifically and are given to the Commonwealth Parliament; these mainly appear in S51 and are numbered, hence they are also referred to as enumerated powers. Specific powers are either concurrent powers or exclusive powers.

BACKGROUND INFORMATION

In order to understand the significance of the Constitution as a document and its role and significance in law-making, it is helpful to understand the nature of federation and the way in which it occurred in Australia.

Federation

A federation involves separate entities coming together to form one single body, often for political reasons. This was the case in Australia. In the nineteenth century, Australia was made up of different British colonies. Each of our present states was previously a separate colony, and each colony made laws on its own behalf. This meant that each colony had different laws on such matters as tariffs and defence.

During the 1870s and 1880s, there was a real fear of invasion and a realisation that there was a need for a central body to take charge of the defence of Australia and other matters that affected Australia as a whole.

In 1891, a convention of the Australian colonies was held and the framing of a federal Constitution was approved. The colonies were reluctant to give up all their law-making powers to a central body. Most of the law-making powers for the day-to-day running of the states were kept by the colonies. Law-making powers, relevant to Australia as a whole, such as defence and coining money, were given to the central body.

At the time of federation the separate colonies became states with their own parliaments and a central body, the Commonwealth Parliament, was formed. The Constitution is the formal document by which this process of federation was achieved. Its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK). It was an Act of the British Parliament and it came into force on 1 January 1901, the date we celebrate as the anniversary of federation.

Law-making powers on more local issues, such as criminal law, were not handed over to the central administration but remained with the states (residual powers).

Reasons for federation

- **defence** – A central body was needed for the defence of Australia, which was a particular concern because of the domination of European colonial powers in the Pacific and the closeness of New Guinea, where Germany possessed large areas of land.
- **immigration** – Laws were needed to regulate the entry of immigrants into Australia.
- **industrial disputes** – Industrial disputes had begun to spread across colonies and extend from one colony to another.
- **tariffs** – Uniform laws relating to importation of goods and tariffs were required to overcome the problem of some colonies allowing freer movement of goods than others.
- **uniform laws** – As the population grew it was becoming necessary to have uniform laws on issues such as banking, currency, marriage and divorce that would be administratively more convenient and provide equal treatment for all Australians.

THE COMMONWEALTH CONSTITUTION

Australia's political system is based on a constitution. A **constitution** is a set of rules declaring the nature, functions and limits of government. The role of a constitution is to determine the powers and duties of the government. Some constitutions guarantee certain rights to the people of the country.

The *Commonwealth of Australia Constitution Act 1900* (UK) (the Constitution) is the most important legal and political document affecting the lives of Australians. It is referred to as the **Commonwealth Constitution**.

Australia is a **constitutional monarchy**. Queen Elizabeth II of England is also the Queen of Australia.

The role of the Commonwealth Constitution

The role of the Commonwealth Constitution is to:

- **facilitate the division of law-making powers** by setting out what the Commonwealth Parliament can do with respect to law-making; that is, the types of laws that can be passed by the Commonwealth Parliament – the states can make laws in any area not mentioned in the Constitution or not specifically made exclusive to the Commonwealth Parliament
- **provide a legal framework for the creation of the Commonwealth Parliament and outline the structure of the Commonwealth Parliament**, including the composition of the House of Representatives and the Senate
- **provide for direct election** of the members of the House of Representatives and the Senate by the **people of the Commonwealth of Australia**
- **give the High Court the power to interpret the Constitution** if the need arises.

The Commonwealth Constitution does not contain a bill of rights. It does, however, provide protection for a limited number of rights, such as the right to freedom of religion.

The Constitution protects Australians in their dealings with the Commonwealth Parliament. It does this by placing restrictions on the law-making powers of the Commonwealth Parliament and making provision for the High Court of Australia to act as the final arbiter of the power of the Commonwealth. The Constitution also provides for representative government and responsible government. This means that if a government is not protecting the rights of its citizens, the citizens can vote the government out of office at the next election.

THE CONSTITUTION IS DIVIDED INTO EIGHT CHAPTERS

Chapter I	The Parliament
	Part I – General
	Part II – The Senate
	Part III – The House of Representatives
	Part IV – Both Houses of the Parliament
	Part V – Powers of the Parliament
Chapter II	The Executive Government
Chapter III	The Judicature
Chapter IV	Finance and Trade
Chapter V	The States
Chapter VI	New States
Chapter VII	Miscellaneous
Chapter VIII	Alteration of the Constitution
The Schedule	

Source: *Commonwealth of Australia Constitution Act 1900* (UK)



Figure 3.1 The *Commonwealth of Australia Constitution Act* signed by Queen Victoria on 9 July 1900



Figure 3.2 The cover page of the Constitution

LEARNING ACTIVITY 3.1

The Commonwealth Constitution

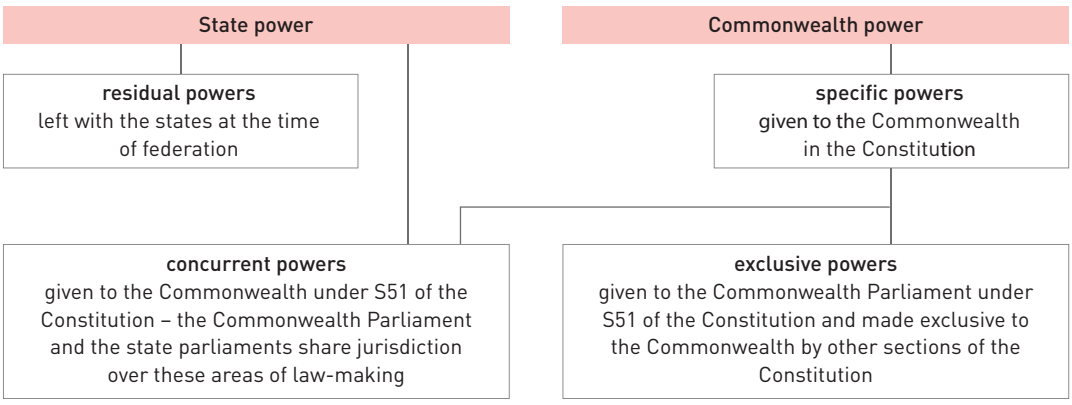
1 What is a constitution?
2 Why was a central government needed in Australia?
3 Why does Australia need a federation?
4 What concerns did the colonies of Australia have about forming a federation?
5 Bhutan, a country to the north of India, was an absolute monarchy until 2008 when the king gave his power to the people to run the country and it became a constitutional monarchy.
   a What is a constitutional monarchy?
   b What benefits do you think a constitution will have given to the people of Bhutan?
6 What is the name of the Act that forms the Constitution in Australia?
7 Explain the role of the Commonwealth Constitution with respect to law-making powers and the protection of rights.

THE DIVISION OF LAW-MAKING POWER UNDER THE COMMONWEALTH CONSTITUTION

The *Commonwealth of Australia Constitution Act 1900* (UK) came into force on 1 January 1901. Since that time, Australia has been a **federation**, governed by the Commonwealth Parliament (also referred to as the federal parliament) and six state parliaments. The Northern Territory and the Australian Capital Territory come under the jurisdiction of the Commonwealth Parliament, although both have now gained self-government in many areas of law-making.

The law-making powers of the state parliaments and the Commonwealth Parliament are divided into:

- **residual powers** – those law-making powers left with the states at the time of federation
- **specific powers** – those law-making powers given to the Commonwealth Parliament at the time of federation. These specific powers can be exclusive powers (only the Commonwealth Parliament can create laws in these areas) or concurrent powers (both the Commonwealth Parliament and state parliaments can create laws in these areas).



OTHER COMMONWEALTH TERRITORIES

Since Australia became a federation, the Commonwealth of Australia has gained other territories, such as Christmas Island, the Cocos (Keeling) Islands, Norfolk Island, Heard and McDonald Islands, the Coral Sea Islands, Ashmore and Cartier Islands, the Australian Antarctic Territory and the Jervis Bay Territory.

Residual powers

Residual powers are those law-making powers left with the states at the time of federation and not listed in the Constitution. Before federation and the forming of the Commonwealth Parliament, the states, as separate colonies, had power to make laws on all areas that affected their colony. At the time of federation, some powers were passed to the Commonwealth Parliament but many powers were left with the states.

STATES' RIGHTS

S106 The constitution of each state of the Commonwealth shall continue ... until altered.

S107 Every power of the states shall continue unless exclusively given to the Commonwealth or withdrawn from the state.

S108 Every law in force in the states shall remain in force.

S121 New states may be admitted or established – The parliament may admit to the Commonwealth or establish new states, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of Parliament, as it thinks fit.

Source: *Commonwealth of Australia Constitution Act 1900* (UK)

The Constitution protects the continuing power of the states. Each state has its own constitution setting out guidelines for its law-making powers. Areas of law-making such as criminal law, education and public transport are not mentioned in the Constitution and are therefore areas of residual power. The states retained the right to make laws in these areas (residual powers).

The Commonwealth Parliament has no right to make laws in areas of residual power, although some inroads have been made into these areas by the Commonwealth Parliament, through High Court interpretations, **tied grants** and changes to the Constitution. (Tied grants are grants of money by the Commonwealth to the states that specify what the states must do with the funds.)

The states have also referred or given some of their law-making power to the Commonwealth Parliament in areas such as children of de facto couples. In June 2009, the Victorian Parliament referred its law-making powers in relation to certain workplace relations to the Commonwealth Parliament.

AREAS OF RESIDUAL POWER

- law enforcement
- environment
- public transport
- education
- health

Specific powers

The powers that are set out specifically in the Constitution are called **specific powers**. These powers were given to the Commonwealth Parliament under the Constitution. The purpose of these powers is to 'make laws for the peace, order and good government of the Commonwealth'. Most of these powers are set out in S51 and are referred to as 'the 39 heads of power' (now 40, since S51(xxiiiA) was inserted in 1946). Section 51 is shown overleaf. The powers in this section are numbered and therefore are sometimes also referred to as **enumerated powers**.

Specific powers are either **exclusive powers** or **concurrent powers**.

EXTRACT

Section 51 of the *Commonwealth of Australia Constitution Act 1900*

Part V – Powers of the Parliament

Legislative powers of the Parliament

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

(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;
(iii) bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
(iv) borrowing money on the public credit of the Commonwealth;
(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;
(vii) lighthouses, lightships, beacons and buoys;
(viii) astronomical and meteorological observations;
(ix) quarantine;
(x) fisheries in Australian waters beyond territorial limits;
(xi) census and statistics;
(xii) currency, coinage, and legal tender;
(xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;
(xiv) insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;
(xv) weights and measures;
(xvi) bills of exchange and promissory notes;
(xvii) bankruptcy and insolvency;
(xviii) copyrights, patents of inventions and designs, and trade marks;
(xix) naturalization and aliens;
(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
(xxi) marriage;
(xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
(xxiii) invalid and old-age pensions;
(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; [Placitum (xxiiiA) inserted, Act No. 81, 1946 s2]
(xxiv) the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
(xxv) the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
(xxvi) the people of any race for whom it is deemed necessary to make special laws; [Placitum (xxvi) altered, Act No. 55, 1967 s2]

(xxvii) immigration and emigration;
(xxviii) the influx of criminals;
(xxix) external affairs;
(xxx) the relations of the Commonwealth with the islands of the Pacific;
(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;
(xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
(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;
(xxxviii) the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;
(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Source: Section 51 of the *Commonwealth of Australia Constitution Act 1900* (UK). All legislative material herein is reproduced by permission but does not purport to be the official or authorised version. This material is subject to Commonwealth of Australia copyright.

Exclusive powers

An exclusive power is a power which can only be exercised (that is, exclusively or solely) by the Commonwealth Parliament. Some of the specific powers listed in S51 of the Constitution are exclusive to the Commonwealth Parliament. This means that only the Commonwealth Parliament can make laws in these areas; for example, defence.

Some specific powers are made exclusive by other sections of the Constitution. For example, S51(xii) gives power to the Commonwealth Parliament to make laws relating to coining money and S115 states that a state shall not coin money, thereby making this an exclusive power of the Commonwealth.

Other specific powers are exclusive by their nature. For example, S51(xix) gives the power to the Commonwealth to make laws relating to naturalisation (becoming an Australian citizen).

Section 52 contains a small list of powers that are also exclusive powers of the Commonwealth Parliament.

AREAS OF EXCLUSIVE POWER

S51(iii) customs and excise
(vi) naval and military forces
(xii) coining money
(xix) naturalisation and aliens

Table 3.1 Specific powers made exclusive by other sections of the Constitution

SPECIFIC POWER GIVEN TO THE COMMONWEALTH	SECTION OF THE CONSTITUTION THAT MAKES THE POWER EXCLUSIVE
S51(iii) gives power to the Commonwealth Parliament to make laws regarding customs and excise.	**S90** states that this power is exclusive to the Commonwealth Parliament.
S51(vi) gives power to the Commonwealth Parliament to make laws relating to naval and military forces.	**S114** says that the states shall not raise naval or military forces, making this exclusive to the Commonwealth Parliament.
S51(xii) gives power to the Commonwealth Parliament over currency, coinage and legal tender.	**S115** says that the states shall not coin money. Coining money is therefore an exclusive power of the Commonwealth.

Exclusive powers in the Constitution

As shown in table 3.1, some specific powers are made exclusive by other sections of the Constitution.

Some of the powers given to the Commonwealth Parliament under S51 of the Constitution are, by their nature, exclusive to the Commonwealth. These are:

- **S51(iv)** – borrowing money on the public credit of the Commonwealth
- **S51(xix)** – naturalisation (becoming an Australian citizen)
- **S51(xxv)** – recognition throughout the Commonwealth of state laws and records
- **S51(xxxii)** – control of railways for defence purposes
- **S51(xxxiii)** – acquisition of state railways with the consent of the state concerned.

Exclusive powers contained in S52

Section 52 contains a small list of powers that are also exclusive powers of the Commonwealth Parliament.

EXTRACT

Section 52

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

(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 the control of which is by this Constitution transferred to the Executive Government of the Commonwealth

(iii) other matters declared by this Constitution to be within the exclusive power of the Parliament.

Source: Section 52, *Commonwealth of Australia Constitution Act 1900* (UK)

Commonwealth territories

Sections 111 and 122 give exclusive power to the Commonwealth with respect to Commonwealth territories.

The High Court – S71

The judicial power of the Commonwealth is vested in the High Court of Australia and in such other federal courts as the Commonwealth Parliament creates.

Concurrent powers

Concurrent powers are law-making powers over which both the Commonwealth Parliament and the state parliaments share jurisdiction (shared powers). Many of the specific powers given to the Commonwealth Parliament in S51 of the Constitution are concurrent powers. In fact, all those powers that are not made exclusive to the Commonwealth Parliament are concurrent powers.

- For example, the power to make laws in relation to **taxation** is given to the Commonwealth Parliament, but state parliaments can also levy taxes. Commonwealth taxes include income tax and GST (goods and services tax). State taxes include stamp duty and payroll tax.
- Another example is that both the Commonwealth Parliament and state parliaments have the right to make laws on marriage, although the Commonwealth law prevails over the state laws.

AREAS OF CONCURRENT POWER

S51 (i) trade
(ii) taxation
(xxi) marriage

The impact of S109

Section 109 of the Constitution provides a mechanism to resolve conflict and inconsistencies between state and Commonwealth laws that can sometimes arise in the area of concurrent powers.

If the Commonwealth Parliament and a state parliament make a law on the same area of law (under concurrent powers), and the state law is inconsistent with the Commonwealth law, then there is conflict between the state and Commonwealth legislation.

Under S109 of the Constitution, if there is a conflict between state and Commonwealth laws in an area of concurrent law-making power, the Commonwealth law will prevail, to the extent of the inconsistency between the two pieces of legislation. The provisions of the state law that are inconsistent with the Commonwealth law will be invalid. For example, if the Commonwealth law states that you must do X and the state law states that you must *not* do X then that section of the state law will become inoperable. It is impossible to obey both laws at the same time, so the inconsistent part of the state law is invalid.

Marriage is an area of concurrent power. The *Marriage Act 1958* (Vic.) provided laws for a valid marriage. When the Commonwealth Parliament passed the *Marriage Act 1961* (Cth), it rendered the pre-existing Victorian legislation largely redundant because it covered the same areas and the Commonwealth law prevails. Since this time the inconsistent areas of the Victorian Act have been repealed.

SECTION 109 NOT RELEVANT TO INCONSISTENCIES BETWEEN COMMONWEALTH AND TERRITORY LAWS

Section 109 applies only to inconsistencies between Commonwealth and state laws and does not apply to inconsistencies between laws of the Commonwealth and the territories. The parliaments of the self-governing territories derive their law-making power from the Commonwealth, rather than the Constitution.

A provision similar to S109 of the Constitution is contained in S28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), which deals with inconsistencies between laws of the Australian Capital Territory (ACT) and other laws. In December 2013, the High Court, using the

inconsistency provision in S28, held that the *Marriage Equality (Same Sex) Act 2013* (ACT), which legalised same-sex marriage in the ACT, was inconsistent with the federal *Marriage Act 1961*, which states that marriage is between a man and a woman. The High Court decided unanimously that the ACT Act was of no effect.

Marital status an area of inconsistency under S109

Another area of concurrent law-making where there was inconsistency is marital status. See the case study 'Inconsistency and *John McBain v. The State of Victoria & Ors*'.

CASE STUDY

Inconsistency and *John McBain v. The State of Victoria & Ors* [2000] FCA 1009

The Victorian *Infertility Treatment Act 1995* was passed to establish the Victorian Infertility Treatment Authority and the in-vitro fertilisation program. This program assists infertile couples to have children using their own or donor sperm or ova. Section 8 of the *Infertility Treatment Act* provided that, in order to receive treatment, a woman must be:

- married and living with her husband on a genuine domestic basis or
- living with a man in a de facto relationship.

In other words, access to the program could be denied if the marital status requirement was not satisfied.

On the other hand, S22 of the Commonwealth *Sex Discrimination Act 1984* makes it unlawful for a person to refuse to provide a service to another person on the grounds of the latter person's marital status. Marital status, under the *Sex Discrimination Act*, is defined to mean:

> the status or condition of being single, married, married but living separately and apart from one's spouse, divorced, widowed or the de facto spouse of another person.

The provision of IVF services is a service under the Commonwealth *Sex Discrimination Act*. Therefore under this Act it is unlawful to refuse to provide the IVF service on the grounds that the person is not married or living in a de facto relationship.

Under S109 of the *Commonwealth of Australia Constitution Act 1900* (UK), if there is a conflict between state and Commonwealth laws in an area of concurrent power, Commonwealth law will prevail.

Under the Victorian law, single or lesbian patients could not access IVF services. Under Commonwealth law, it was unlawful to deny IVF services to single or lesbian patients. This should have meant that single or lesbian patients could access IVF services because the Commonwealth law prevails.

This was tested through the courts. Dr John McBain, a specialist IVF doctor, was directly affected by the inconsistency in the legislation. By denying single or lesbian patients access to the IVF program, he was meeting the requirements of the Victorian *Infertility Treatment Act* but, at the same time, contravening the Commonwealth *Sex Discrimination Act*. He had previously been fined under the Commonwealth *Sex Discrimination Act*. Under the Victorian *Infertility Treatment Act* it was an offence for a doctor to treat a woman who is not married. The Commonwealth *Sex Discrimination Act* makes it an offence to discriminate against a person on the basis of, among other things, marital status.

In order to argue the inconsistency, McBain was required to show that a specific patient was being denied the service, in this case Leesa Meldrum. The Federal Court upheld McBain's argument that the Victorian marital status requirement was inconsistent with the Commonwealth provision

and that, on the basis of S109 of the Constitution, the Commonwealth provision should prevail. Therefore, the discriminatory section of the Victorian law was invalid.

The effect of this decision was that couples could not be denied IVF services on the basis of marital status and therefore single and lesbian patients should be allowed access to the services.

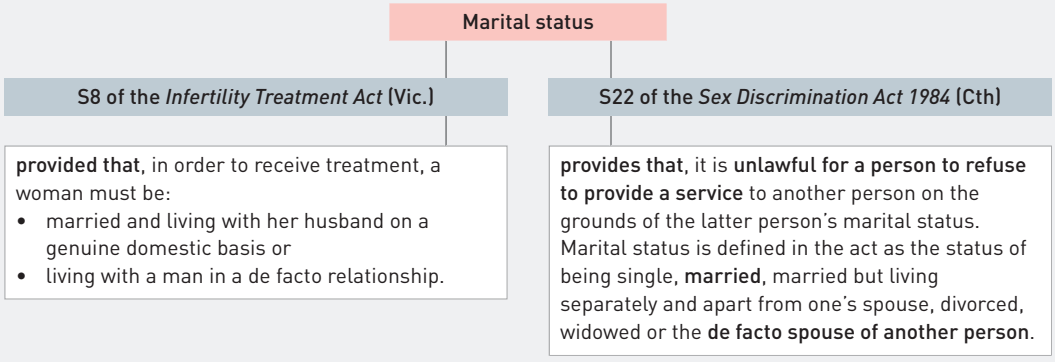
Following the decision in this court case, the Victorian Infertility Treatment Authority decided that even though providers could not discriminate on marital status, they could only provide treatment to infertile women. This means that single women and women in lesbian relationships can have access to IVF treatment, but only if they cannot conceive a baby naturally.

Under the *Assisted Reproductive Treatment Act 2008* (Vic.), a fertile woman can access IVF treatment if, in the woman's circumstances, she is unlikely to become pregnant in any other way. This Act incorporated the major provisions of the Victorian *Infertility Treatment Act*, which was repealed in 2010.





Figure 3.3 Dr John McBain campaigned strongly in the mid 1990s for single women and women in gay relationships to have access to IVF services. Leesa Meldrum took her fight to have access to IVF to court in Melbourne with the help of Dr John McBain.



ASSISTED REPRODUCTIVE TREATMENT ACT 2008 (VIC.)

Under this Act, one of the guiding principles is:

5e persons seeking to undergo treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.

This Act is therefore no longer in conflict with the Commonwealth legislation.

LEARNING ACTIVITY 3.2

Division of law-making power

1 Explain the different types of law-making powers.
2 Explain, using examples, the difference between exclusive powers and concurrent powers.
3 How are some of the law-making powers given to the Commonwealth Parliament in S51 made exclusive to the Commonwealth Parliament?
4 What is the significance of S52 of the *Commonwealth of Australia Constitution Act 1900*?
5 Why is the Constitution seen as the most important legal and political document affecting the lives of Australians?
6 Prepare a brochure explaining the division of law-making power under the Commonwealth Constitution.
7 Explain the relevance of S109 to the division of law-making power between the Commonwealth and state parliaments.
8 Look back at the case study 'Inconsistency and *John McBain v. The State of Victoria & Ors*' and answer the questions.
   a Why did Dr John McBain think it was necessary to take this case to court?
   b Why was Leesa Meldrum part of the case?
   c Find the areas of conflict between state and federal legislation in this case and explain how they are in conflict.
   d Why is it necessary for the provision of IVF services to be seen as fitting in with the definition of a service in the *Commonwealth Sex Discrimination Act*?
   e Explain the outcome of the Federal Court case.
   f Did this decision mean that any woman, regardless of marital status, could have access to IVF treatment in Victoria? Explain.

RESTRICTIONS ON LAW-MAKING BY PARLIAMENT

The Constitution outlines the division of law-making powers between the state parliaments and the Commonwealth Parliament. This division of powers places restrictions on the law-making powers of the Commonwealth and the states. State and Commonwealth parliaments are supreme law-making bodies within their own jurisdiction (area of power); that is, they are law-making bodies that prevail over all other sources of law. They can change previous laws, make new laws and change laws made through the courts. Their supremacy is limited by restrictions in the *Commonwealth of Australia Constitution Act 1900* (UK).

Parliaments may, however, be restricted in their law-making if there is a strong opposition and the government does not have a majority in the upper house, or if the government requires the support of independents or minor parties to get the numbers for a proposed law to pass through parliament.

Restrictions on state parliaments

Under the Constitution, the states are restricted from making law in areas of **exclusive power** held by the Commonwealth Parliament; for example, raising an army (S114) and coining money (S115). The

power of the states is also restricted by **S109**, which states that in areas of concurrent power, federal legislation will prevail over state law in all cases where the two laws are inconsistent.

Some sections of the Constitution place restrictions on state parliaments. The restrictions are set out below.

RESTRICTIONS ON STATE PARLIAMENTS

Exclusive powers of the Commonwealth Parliament The states cannot pass laws on areas that have been made exclusive to the Commonwealth Parliament or areas that are by their nature exclusive to the Commonwealth Parliament.

S114 **Raising military forces (exclusive power)** The states are prohibited from raising naval and military forces.

S115 **Coining money (exclusive power)** The states are prevented from coining money.

S90 **Customs (exclusive power)** The states are prevented from levying customs and excise duty.

S109 **Concurrent powers** State power is restricted by the fact that in areas of concurrent power, where there are inconsistencies between state and federal legislation, federal law prevails over state law, to the extent of the inconsistency, and the inconsistent state law is considered invalid or inoperable.

S92 **Trade within the Commonwealth must be free** This amounts to a prohibition on trade restrictions between states. This section of the Constitution has come to the attention of the High Court in many cases brought before it. A significant development in the interpretation of this section occurred in the case of *Cole v. Whitfield* (1988) 62 ALJR 303, which concerned the importation of undersized crayfish from South Australia to Tasmania. In this case the High Court decided that legislation that regulates or controls movement of goods between states can be valid. The Tasmanian regulations that imposed a minimum size for crayfish were acceptable under S92 because the regulations did not impose a burden on interstate trade. The reason for this decision was that the regulations applied to crayfish caught in Tasmania as well as those imported into Tasmania. As these regulations did not discriminate against interstate trade, or protect trade within a particular state, they were valid.

This means that although the states are restricted from making laws that interfere with free trade within the Commonwealth, some restrictions are acceptable as long as they do not impose a burden on interstate trade, or discriminate against interstate trade.

Restrictions on Commonwealth Parliament

The Commonwealth Parliament is restricted from legislating in areas of **residual powers**; it can only pass laws on areas of power given to it under the Constitution.

LAW-MAKING IN RELATION TO GUNS A RESIDUAL POWER

After the Port Arthur massacre in April 1996, the then prime minister, John Howard, wanted to have uniform gun laws throughout Australia. As laws governing gun control come under residual powers, the Commonwealth Parliament was unable to pass legislation to do this. John Howard therefore had to persuade the state parliaments to each pass uniform gun laws. If they had refused to do this, a referendum would have had to be put to the people to change the Constitution to allow the Commonwealth Parliament to pass laws relating to gun control. This issue arose again after a shooting at Monash University in 2002.

Certain sections of the Constitution impose restrictions on law-making by the Commonwealth Parliament. For example, S116 prevents the Commonwealth Parliament from legislating with respect to religion. Sections 106, 107 and 108 restrict the Commonwealth Parliament from interfering with the states' constitutions, powers and laws.

Section 128 restricts the Commonwealth from changing the wording of the Constitution without first taking the proposed change to the people in the form of a referendum.

The principle of the separation of powers, which is established by the form and structure of the Constitution, is a restriction on Commonwealth Parliament in that the Commonwealth cannot form a body that combines judicial powers, executive powers and legislative powers.

The High Court can place restrictions on the Commonwealth Parliament through its **interpretation of the Constitution**. For example, the High Court placed a restriction on the Commonwealth Parliament in the case *Australian Capital Television Pty Ltd v. The Commonwealth of Australia (No 2)* (1992) 104 ALR 389. In this case it was decided that the Commonwealth is not able to make laws that restrict freedom of political communication.

The Commonwealth Parliament is a supreme law-making power in that it can pass laws that change previous laws made by the Commonwealth Parliament or the courts. However, the Commonwealth Parliament is unable to override an interpretation of the Constitution and make a law that is in conflict with an interpretation of the Constitution by the High Court.

RESTRICTIONS ON COMMONWEALTH POWER

The Commonwealth Parliament is restricted from legislating in areas of residual power.

S106, S107, S108 **Guarantee of state powers** Guarantee that the states' constitutions, powers and laws remain in force. Therefore, the Commonwealth Parliament cannot pass any laws that interfere with the states' powers and laws. The Commonwealth cannot pass laws in areas of residual power.

S116 **Freedom of religion** Prevents the Commonwealth Parliament from legislating with respect to religion, thereby guaranteeing freedom of religion.

S117 **Rights of residents in states** Prevents the residents of a state being discriminated against.

S99 **Preference** The Commonwealth cannot give preference to one state over another.

S92 **Free trade** The Commonwealth cannot restrict free trade between states, although since the case of *Cole v. Whitfield* (1988) 62 ALJR 303, some restrictions on the movement of goods between states are allowed.

S51 (xxxi) **Acquiring property** The Commonwealth Parliament is prevented from acquiring property without paying just compensation.

S51 (ii) **No discrimination in taxation** Gives power to the Commonwealth to make laws with respect to taxation, but does not allow discrimination between states or parts of states.

S128 **Changing the Constitution** Section 128 provides the mechanism for changing the Constitution. This is a restriction because the requirements under S128 are onerous and the Commonwealth Parliament is not at liberty to change the Constitution as it might wish. For example, it is necessary for the wording of the *Commonwealth of Australia Constitution Act* to be changed before Australia can become a republic. The Commonwealth Parliament cannot do this without the consent of the people through a referendum.

Principle of the separation of powers Commonwealth Parliament cannot form a body that combines judicial and legislative powers.

High Court decisions

- **Freedom of political communication** The freedom of political communication was guaranteed under a High Court decision. The Commonwealth is therefore unable to make laws that restrict this freedom. The *Political Broadcasts and Political Disclosures Act 1991* (Cth) sought to ban political advertising on radio and television during federal and state election campaigns. This ban was challenged in the High Court in the case of *Australian Capital Television Pty Ltd v. The Commonwealth of Australia (No. 2)* (1992) 104 ALR 389 (HC). The High Court found that there was an implied right to freedom of political communication in the Constitution and therefore the Commonwealth Act was found to be invalid. (See chapter 4 for a detailed discussion of this right.)
- **Voting for representative government** The High Court, in *Roach v. Electoral Commissioner* (2007) 233 CLR 162, found that the Commonwealth Constitution provides for representative government, chosen directly by the people. The Commonwealth Parliament can decide how elections are to take place and who is allowed to vote (such as people over the age of 18) but, according to the High Court, there are restrictions placed on the Commonwealth Parliament on how this is done because the people's right to vote is critical to representative government. For example, prisoners who are serving a sentence of three years or longer can be denied the right to vote, but not all prisoners.



Figure 3.4 Various symbols of religions – **Section 116** of the Constitution prevents the Commonwealth Parliament from legislating with respect to religion. Australia does not have an official or state religion. The law does not enforce any religious doctrine; however, religious practices must conform to the law. We are free to follow any religion we choose. We are also free not to have a religion, thereby guaranteeing freedom of religion for all Australians.

LEARNING ACTIVITY 3.3

Restrictions on state and Commonwealth power

1 What section (or sections) of the Commonwealth Constitution is (are) relevant to the states being prevented from coining their own money? Explain.
2 Why do you think state parliaments are restricted from coining money?
3 Why do you think the Commonwealth Parliament is prevented from legislating with respect to religion?

4 How is the principle of separation of powers a restriction on Commonwealth powers?
5 Explain two other restrictions on Commonwealth powers that have not been referred to in these questions.
6 To what extent are state parliaments supreme law-making bodies? Discuss in relation to the restrictions on state parliaments.
7 In groups, prepare a brochure showing the restrictions imposed on the law-making powers of the state and Commonwealth parliaments by the Commonwealth Constitution.

CHANGING THE DIVISION OF LAW-MAKING POWERS UNDER THE CONSTITUTION

There are three ways in which the division of law-making powers in the Constitution can be changed:

- a successful referendum, which changes the words in the Constitution
- High Court interpretation of the Constitution, which changes the meaning of words in the Constitution
- referral of powers from the states to the Commonwealth Parliament, where law-making powers are given to the Commonwealth by the states.

Changing the words in the Constitution

When the *Commonwealth of Australia Constitution Act 1900* (UK) was drafted, it was recognised that times would change and the Constitution would need to alter to keep up with changing attitudes. Section 128 of the Constitution gives the mechanism for change, but it has proved to be a difficult process.

The Commonwealth Parliament can ask the people to agree to a change in the wording of the Commonwealth Constitution. This may result in greater power to the Commonwealth Parliament. Under S128 of the Constitution, for a change to be made to the words in the Constitution, the people must be asked to vote on the change in a **referendum**. A referendum is a compulsory vote on a proposed change to the wording of the Commonwealth Constitution.

When the Constitution has been changed through a referendum, the actual words in the Constitution are amended and the new words appear in the updated printed copies of the Constitution. The new law is then in place.

The **impact of a successful referendum** is that the law-making power of the states and Commonwealth parliaments may be altered. Not all successful referendums have altered the division of powers; for example, the referendum in 1977 that provided for the compulsory retirement age of 70 years for judges had no impact on law-making powers.

There have been **four** referendums that have altered the division of law-making powers between the states and the Commonwealth (state debts 1910, state debts 1928, social services 1946 and Indigenous people 1967).

In all these instances, the Commonwealth Parliament has gained more power to legislate in an area that had been previously left with the states. For example, the Commonwealth Parliament was originally given the power under the Constitution to make laws with respect to invalid and age pensions (social services). Following a successful referendum in 1946, under the *Constitution Alteration (Social Services) Act 1946* (Cth), this power was extended to include other social services; for example, maternity allowances, unemployment benefits and child endowment.

Table 3.2 Constitutional referendums accepted and rejected

YEAR	PROPOSAL	GOVERNMENT SUBMITTING	STATES APPROVING	YES VOTES (PER CENT)	RESULT
1906	Senate elections	Protectionist	6	82.65	Accepted
1910	Finance	Fusion	3 (Qld, WA, Tas)	49.04	Rejected
	State debts	Fusion	5 (all except NSW)	54.95	Accepted
1911	Legislative powers	ALP	1 (WA)	39.42	Rejected
	Monopolies	ALP	1 (WA)	39.89	Rejected
1913	Trade and commerce	ALP	3 (Qld, WA, SA)	49.38	Rejected
	Corporations	ALP	3 (Qld, WA, SA)	49.33	Rejected
	Industrial matters	ALP	3 (Qld, WA, SA)	49.33	Rejected
	Railway disputes	ALP	3 (Qld, WA, SA)	49.13	Rejected
	Trusts	ALP	3 (Qld, WA, SA)	49.78	Rejected
	Monopolies	ALP	3 (Qld, WA, SA)	49.33	Rejected
1919	Legislative powers	Nationalist	3 (Vic, Qld, WA)	49.65	Rejected
	Monopolies	Nationalist	3 (Vic, Qld, WA)	48.64	Rejected
1926	Industry and commerce	Nat-CP	2 (NSW, Qld)	43.50	Rejected
	Essential services	Nat-CP	2 (NSW, Qld)	42.80	Rejected
1928	State debts	Nat-CP	6	74.30	Accepted
1937	Aviation	UAP	2 (Vic, Qld)	53.56	Rejected
	Marketing	UAP	0	36.26	Rejected
1944	Post-war reconstruction and democratic rights	ALP	2 (WA, SA)	45.99	Rejected
1946	Social services	ALP	6	54.39	Accepted
	Marketing of primary products	ALP	3 (NSW, Vic, WA)	50.57	Rejected
	Industrial employment	ALP	3 (NSW, Vic, WA)	50.30	Rejected
1948	Rents and prices	ALP	0	40.66	Rejected
1951	Communists	Lib-CP	3 (Qld, WA, Tas)	9.44	Rejected
1967	Nexus	Lib-CP	1 (NSW)	40.25	Rejected
	Indigenous people	Lib-CP	6	90.77	Accepted
1973	Prices	ALP	0	43.81	Rejected
	Incomes	ALP	0	34.42	Rejected
1974	Simultaneous elections	ALP	1 (NSW)	48.30	Rejected
	Amendment	ALP	1 (NSW)	47.99	Rejected
	Democratic elections	ALP	1 (NSW)	47.20	Rejected
	Local government	ALP	1 (NSW)	46.85	Rejected
1977	Simultaneous elections	Lib-NP	3 (NSW, Vic, SA)	62.22	Rejected

YEAR	PROPOSAL	GOVERNMENT SUBMITTING	STATES APPROVING	YES VOTES (PER CENT)	RESULT
1977	Casual vacancies	Lib-NP	6	73.32	Accepted
	Territorial votes	Lib-NP	6	77.72	Accepted
	Retirement of judges	Lib-NP	6	80.10	Accepted
1984	Simultaneous elections	ALP	2 (NSW, Vic)	50.64	Rejected
	Interchange of powers	ALP	0	47.06	Rejected
1988	Parliamentary terms	ALP	0	32.91	Rejected
	Fair elections	ALP	0	37.59	Rejected
	Local government	ALP	0	33.61	Rejected
	Rights and freedoms	ALP	0	30.79	Rejected
1999	Establishment of a republic	Lib-NP	0	45.13	Rejected
	Alteration of Constitution preamble	Lib-NP	0	39.34	Rejected

Note: Successful referendums that led to amendments to the Constitution are highlighted.

Three stages of changing the Commonwealth Constitution under S128

The procedure for changing the Commonwealth Constitution, as laid down in S128, has three stages, involving the parliament, the people and the governor-general.

Parliament

Any proposed change to the Constitution must first be passed by the Commonwealth Parliament. A Bill is prepared, which sets out the proposed alteration to the Constitution. It is written as a constitutional alteration Bill; for example, the *Constitution Alteration (Establishment of Republic) Bill 1999* (Cth). It is introduced into the Commonwealth Parliament.

The Bill can be passed by both houses, or one house twice. It must be passed by an absolute majority (over 50 per cent of the house). If either house passes the proposed change and the other house rejects it, or requires amendments that are not acceptable to the first house, after a period of three months it can be passed through the first house again. If it is rejected a second time by the second house, the governor-general may still submit the proposed change to the people.



Figure 3.5 You cannot vote in a referendum if you are not enrolled to vote in elections for the House of Representatives.

The people

The Constitution can only be changed after a successful referendum, which is a compulsory vote on a proposed change to the wording of the Commonwealth Constitution.

The referendum outlining the proposed change is put to the people not less than two months, and not more than six months, after it has been passed by both houses of the Commonwealth Parliament, or one house twice.

All of those **electors** who are required to vote for the election of members of the House of Representatives in each state and territory must vote on the referendum.

Before the referendum being put to the people, the Australian Electoral Commission sends information to every household that explains the proposed change, and provides arguments for and against the proposed change.

EMAIL TO HOUSEHOLDS

The *Referendum (Machinery Provisions) Amendment Act 2013* (Cth) relates to the submission to the electors of proposed laws for the alteration of the Constitution. Under this Act the Australian Electoral Commission will be able to post or email a Yes/No referendum pamphlet to each household on the electoral roll, rather than to each elector. The Act also temporarily suspends the limit on Commonwealth spending on referendum proposals.

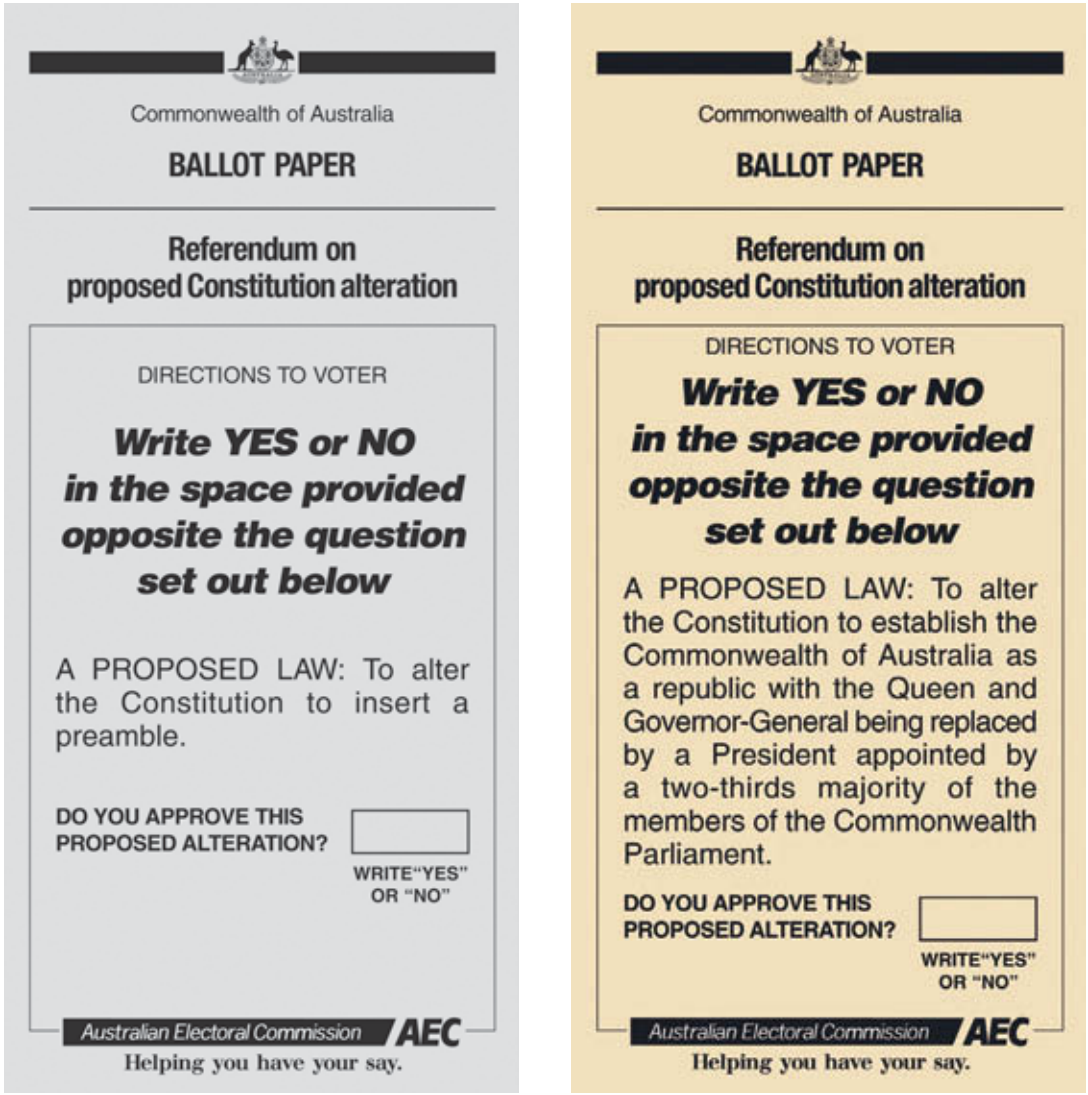


Figure 3.6
Ballot papers from the 1999 referendum to see if the people wanted to change the words in the preamble to the Constitution and/or whether Australia should become a republic.

Double majority provision

In the referendum, the voters are required to answer 'yes' or 'no' to the question asked; for example, 'Should Australia become a republic?' For the referendum to be successful, each referendum question must satisfy the **double majority provision**.

- **A majority of voters in the whole of Australia (including the territories) must vote 'yes'**.

AND

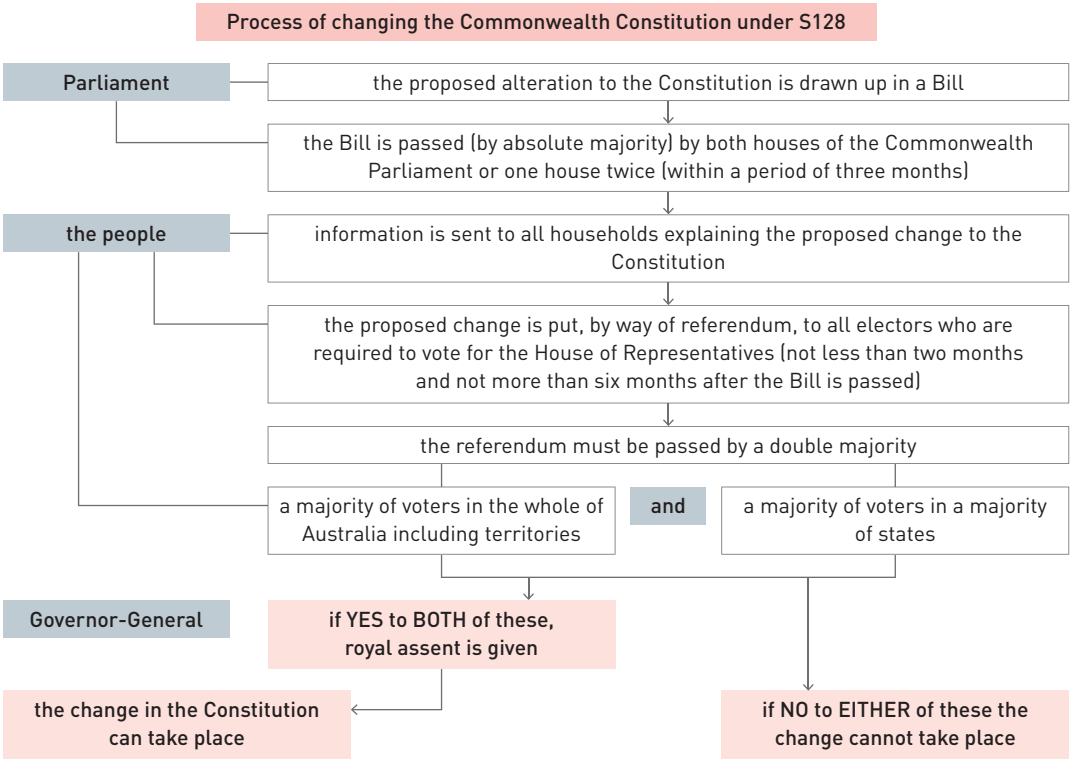
- **A majority of voters in a majority of states must vote 'yes' to the proposed change** – that is, the referendum must be approved by a majority of voters in at least four out of the six states before it is accepted. The territories are not counted under this provision. This provision protects the smaller states from being dominated by the larger, more populated states.

A successful referendum in 1977 changed S128 to include electors in the territories as qualified to vote on a referendum, but their votes only apply to the majority of voters in the whole of Australia provision.

If a proposed change affects the proportionate representation of any state in either house of the Commonwealth Parliament, a majority of voters in that state must agree to the change before the change can take place. As proposals usually affect Australia as a whole, this provision is rarely relevant.

The governor-general

If the proposed change receives a 'yes' vote from a majority of voters in a majority of the states as well as a majority of all electors, it is then presented to the governor-general for **royal assent**.



LEARNING ACTIVITY 3.4

Changing the words of the Constitution

1 What is a referendum?
2 Explain the double majority provision.
3 Why do you think, at the time of federation, it was thought necessary for referendums to be agreed to by a majority of all Australian voters as well as a majority of voters in a majority of states?
4 Examine table 3.2 and answer the following questions.
   a Which of the two double majority provisions has been the most difficult to satisfy?
   b Identify two successful referendums and suggest why you think they succeeded.
   c Discuss the impact that these two successful referendums have had on the operation of the state and federal legal systems.
   d Provide three examples of unsuccessful referendums.

5 Explain the process for bringing about a change in the Constitution, using the 1999 referendum to illustrate the points made.

Referendums changing the division of power

Actual changes to the Constitution under S128 have been few and not all referendums change the division of powers. Those changes that do alter the division of powers between the states and the Commonwealth have generally given more law-making power to the Commonwealth Parliament.

This usually results in the law-making power of the states becoming more restricted because, under S109 of the Constitution, if there is an inconsistency between a section of a Commonwealth law and a section of a state law, the section of the Commonwealth law prevails.

Increasing the division of law-making power of the Commonwealth

Examples of successful referendums that have increased the division of law-making power in favour of the Commonwealth Parliament include:

- **State debts 1910** – amended S105 to extend the power of the Commonwealth Parliament to take over state debts incurred at any time, not just those in existence at the time of federation.
- **State debts 1928** – inserted S105A to give the Commonwealth Parliament power to set up a Loan Council responsible for allocating monies borrowed by state and Commonwealth governments.
- **Social services 1946** – inserted S51(xxiiiA) to extend the Commonwealth Parliament's powers in relation to social services, to include maternity allowances, widow's pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services, benefits to students and family allowances.
- **Indigenous people 1967** – amended S51(xxvi) to enable the Commonwealth to enact laws for Indigenous people; deleted S127 and thereby removed the prohibition against counting Indigenous people in population counts used to allocate the number of seats per state for the House of Representatives and per capita Commonwealth grants.

LEARNING ACTIVITY 3.5

Referendums changing the division of power

1 Why do referendums usually give more power to the Commonwealth?
2 Explain how the social services referendum in 1946 gave more power to the Commonwealth.
3 Read the case study 'Power to make laws for Indigenous people' and answer the questions.
   a What questions were put to the Australian people in the 1967 referendum relating to Indigenous people?
   b What percentage of people accepted the referendum about Indigenous people? Why do you think this was the case?
   c How did this referendum change the division of law-making powers between the states and the Commonwealth?
   d What rights did Indigenous people have with respect to voting before the 1967 referendum? Explain.
   e When did Indigenous people become Australian citizens? Explain. In your explanation refer to the 1967 referendum.
4 Explain the impact of successful constitutional referendums. Give an example.

CASE STUDY

Power to make laws for Indigenous people

One referendum that changed the division of law-making power from the states to the Commonwealth was in relation to Indigenous people. In 1967, the then prime minister Harold Holt's Liberal Government staged a referendum on whether the Commonwealth Parliament should have powers in respect to Indigenous people. Before this change to the Constitution all Indigenous issues had been left with the states because they were deemed to have more specialised knowledge.

All six states voted in favour of the referendum. Across the whole of Australia, 90.77 per cent of voters voted in favour and 9.23 per cent against.

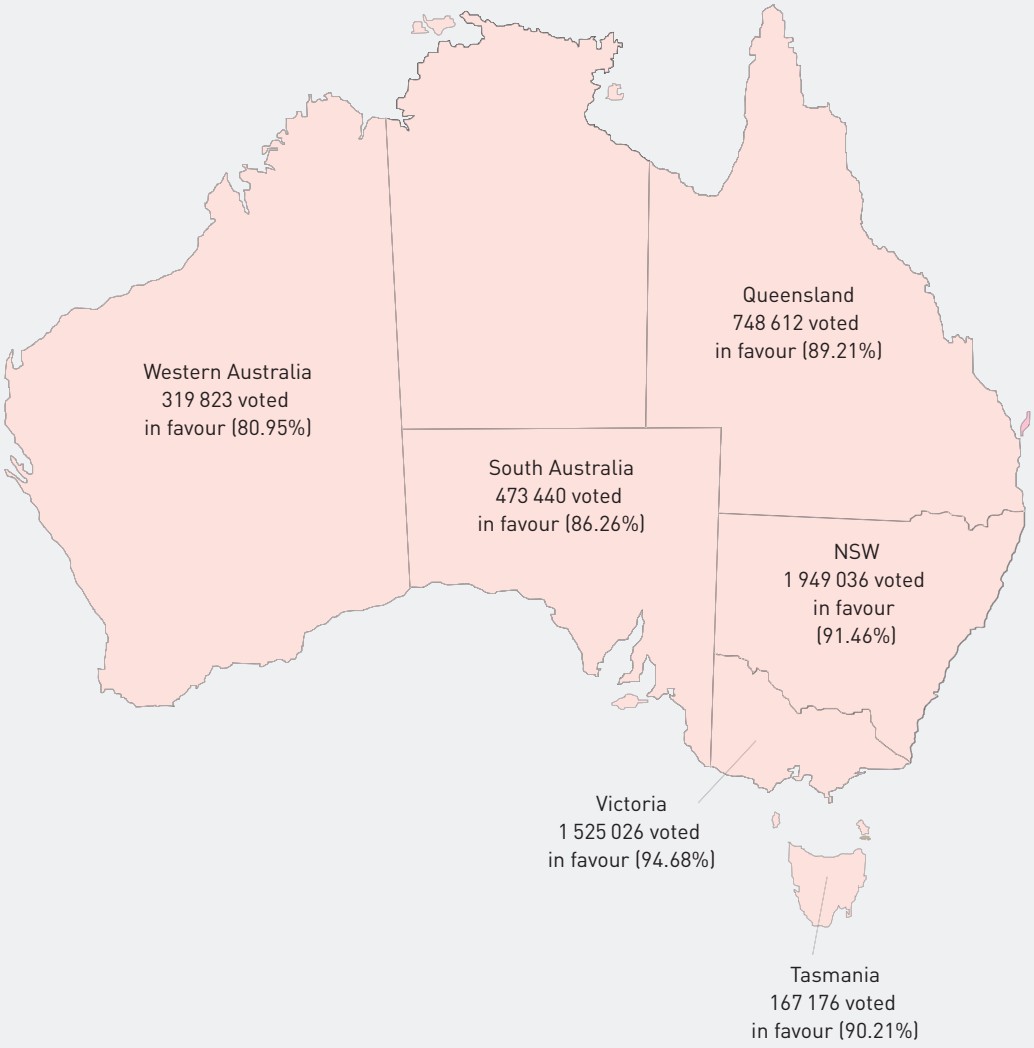


Figure 3.7
Results in the 1967 referendum

27 MAY 1967 – REFERENDUM

Parliament

Submission to the electors of a proposed law for the alteration of the Constitution entitled *Constitution Alteration (Parliament) Bill 1967*.

This proposal sought to alter the Constitution so that the number of Members of the House of Representatives could be increased without necessarily increasing the number of Senators.

The proposal was not carried.

Indigenous people

Submission to the electors of a proposed law for the alteration of the Constitution entitled *Constitution Alteration (Aboriginals) Bill 1967*.

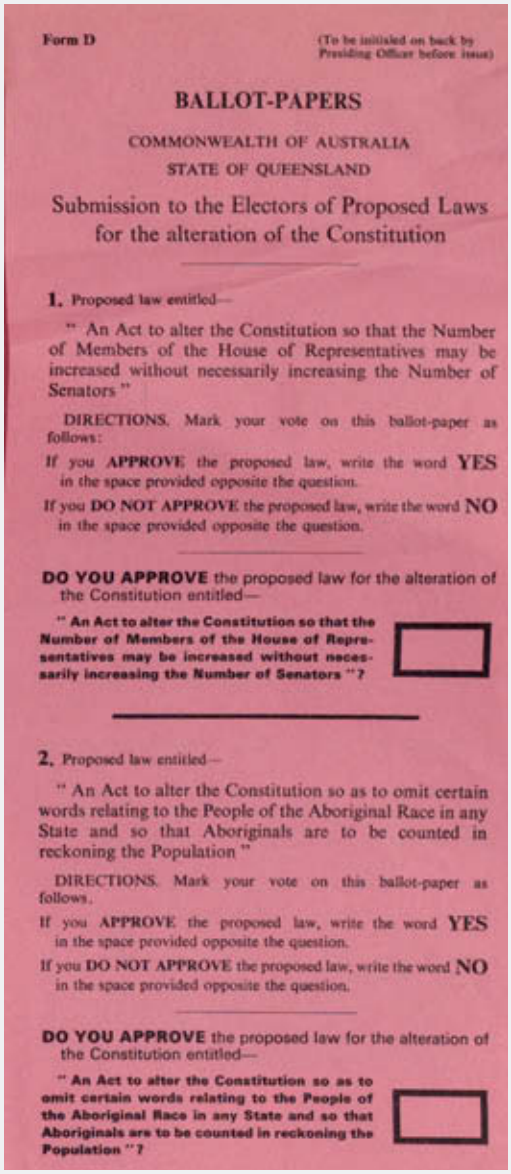
This proposal sought to remove any ground for the belief that the Constitution discriminated against people of the Aboriginal race, and, at the same time, to make it possible for the Commonwealth Parliament to enact special laws for these people.

The questions put to the people were:

- whether Indigenous people should be included in the federal census and
- whether the federal government should be allowed to make policies in respect of them.

The proposal was carried.

This referendum gave the Commonwealth Parliament the power to legislate for Indigenous people in the states and to include them in national censuses. This amendment altered S51(xxvi) of the Constitution and deleted S127.



Form D

(To be initialed on back by Presiding Officer before issue)

BALLOT-PAPERS

COMMONWEALTH OF AUSTRALIA

STATE OF QUEENSLAND

Submission to the Electors of Proposed Laws for the alteration of the Constitution

1. Proposed law entitled—

" An Act to alter the Constitution so that the Number of Members of the House of Representatives may be increased without necessarily increasing the Number of Senators "

DIRECTIONS. Mark your vote on this ballot-paper as follows:

If you **APPROVE** the proposed law, write the word **YES** in the space provided opposite the question.

If you **DO NOT APPROVE** the proposed law, write the word **NO** in the space provided opposite the question.

DO YOU APPROVE the proposed law for the alteration of the Constitution entitled—

" An Act to alter the Constitution so that the Number of Members of the House of Representatives may be increased without necessarily increasing the Number of Senators "?

2. Proposed law entitled—

" An Act to alter the Constitution so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in reckoning the Population "

DIRECTIONS. Mark your vote on this ballot-paper as follows.

If you **APPROVE** the proposed law, write the word **YES** in the space provided opposite the question.

If you **DO NOT APPROVE** the proposed law, write the word **NO** in the space provided opposite the question.

DO YOU APPROVE the proposed law for the alteration of the Constitution entitled—

" An Act to alter the Constitution so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in reckoning the Population "?

Figure 3.8 1967 ballot paper



Figure 3.9 Poster relating to the 1967 referendum



Figure 3.10
Voting in the 1967 referendum

CHANGES AFTER THE SUCCESSFUL 1967 REFERENDUM

Before the 1967 change to include Indigenous people

S51(xxvi) 'The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.'

S127 Aborigines not to be counted in reckoning population

In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

After the 1967 change to include Indigenous people

S51(xxvi) The people of any race, ~~other than the aboriginal race in any State~~, for whom it is deemed necessary to make special laws;

~~S127~~ ~~Aborigines not to be counted in reckoning population~~

~~In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.~~

Section 127 repealed by the *Constitution Alteration (Aboriginals) Act 1967* (Cth)

Reasons for the 1967 change to the Constitution

Until 1967, the Constitution specifically denied the Commonwealth the power to legislate for Indigenous people in the states or to include them in national censuses. Many people regarded these provisions as unjust for Indigenous people and a barrier to effective policy-making for the Commonwealth Parliament. An attempt to alter this situation had failed in 1944.

The 1967 alteration sought to remove these barriers from the Constitution. Despite the fact that this referendum was held at the same time as an unsuccessful referendum, it was accepted with the highest 'yes' vote to date, 90.8 per cent. This vote was said to have reflected a general community view that it was time to make amends to the Indigenous people, although the state with the largest Indigenous population (Western Australia) as a percentage of the population, recorded the largest 'no' vote (19.05 per cent).

Movement of law-making power to the Commonwealth Parliament

The amendment allowed the Commonwealth Parliament to move into an area that was previously denied it under the Constitution. An area of residual power became a concurrent power. Although the Commonwealth did little in this policy area for the first five years, it was seen as extremely important for Indigenous people. It gave the Commonwealth the opportunity to become more involved in dealing with Indigenous people and their needs. The Commonwealth was also able to direct government spending towards Indigenous affairs.

The referendum gave the Whitlam Government and subsequent governments the authority to expand the Commonwealth's role in Indigenous affairs and implement major reforms. This eventually led to the passing of the *Native Title Act 1993* (Cth).

The effect of this referendum

This referendum led the way for changes in the way Indigenous people were treated and the financial assistance they received. However, at the time, the Indigenous people had more rights than was commonly understood.

- Voting – A common myth at the time was that the referendum allowed Indigenous people to vote for the first time. Although Indigenous people had been excluded from the vote in federal elections in 1901, under S41 of the Constitution, any person who was eligible to vote in state elections could also vote in federal elections. This included Indigenous people who had already enrolled to vote in state elections, although it excluded Indigenous people who had not already enrolled to vote in state elections. The Menzies Liberal Government formally gave Indigenous people the right to vote in federal elections in 1962.
- Citizenship – Another myth was that Indigenous people were not Australian citizens before the referendum. In fact, Indigenous people became British citizens when Australia was annexed by Britain in 1772. At the time, however, there were very few advantages to being a citizen. It merely meant that citizens were bound to obey British laws. The status of Australian citizenship was created by the *Nationality and Citizenship Act 1948* (Cth). Indigenous people officially attained their citizenship at the same time as every other Australian. Following the passing of this 1948 Act, the federal government had the power to make race-specific policies for all races except Indigenous people. This power was left with the states until the referendum in 1967.

The terms **Indigenous people** and **Aboriginal and Torres Strait Islander Peoples** are now generally used in preference to 'Aboriginal people'. 'Indigenous people' refers to a group of people with the earliest known connection to a land.

Factors affecting the likely success of referendum proposals

At the time of federation, Labor politicians were unsure whether a federal system and a constitution were right for Australia. They saw it as possibly making social change more difficult. From the first years of federation, Labor politicians have seen constitutional amendment as an important priority. Liberal governments have been less likely to introduce change. The Liberal Party has projected itself as the protector of the Constitution. Former Senator Rod Kemp said the Constitution 'has maintained our liberties, national unity in war and depression, the federation and our national independence'.

Since 1901 there have been **44 proposals** for a change to the Constitution put to the people. Only **eight** have been accepted. Factors affecting the likely success of referendum proposals include the following.

- **timing** – The timing of referendums (the plural of referendum can also be referenda) could contribute to their lack of success. Because of the expense of holding a referendum, they are often held at the same time as an election. Voters are likely to be concerned about which party to vote into office, rather than considering the referendum being put to them at the same time. This can take the focus away from the referendum.
- **double majority** – The strict requirement of a double majority means it is not an easy task to amend the Constitution in order to reflect the will of the voters. In particular, the requirement for the approval by a majority of electors in a majority of states is difficult to satisfy. While 13 of the 44 referendum proposals have received the support of a majority of Australian voters overall, five of these did not satisfy the majority of voters in a majority of states provision. The 1937 referendum to change the Constitution to empower the Commonwealth Parliament to make laws with respect to air navigation and aircraft and remove the restraints imposed on the Commonwealth Parliament by S92 was defeated. The majority of Australians voted in favour of this proposal (53.6 per cent) but there was a majority of voters who voted 'yes' in only two states (Victoria and Queensland) so the proposal was defeated.
- **lack of bipartisan support** – The proposed changes most likely to succeed are those that are supported by both major parties (bipartisan support) and which cover issues the voting public can relate to. If the opposition political party is against the proposed changes, the information from both parties can become confusing. A referendum is democracy at work where the people have their say. Both major political parties have been unable to resist the temptation of trying to take political advantage in relation to any proposed changes, without proper consideration of the best outcome for the Constitution and the Australian system of government.
- **confusing information** – Information is sent to all households outlining the reasons for and against the proposed change to the Constitution. Members of political parties discuss the reasons for and against the change in the media. This can lead to the information being very confusing. When there is confusion in this way, voters usually decide to vote against the proposal. Further confusion is caused when more than one issue is raised in the same proposal. Sometimes voters agree with some parts of the proposal but not others. In this instance they have no choice but to vote against the proposal.
- **voter conservatism** – Voters tend to be conservative and prefer to accept the Constitution as it is rather than make a change to it that could have unknown adverse effects. A referendum was held in 1999 to see if the Australian people wanted to change the words in the preamble to the Constitution, and whether Australia should become a republic. Both proposals were rejected. People were unsure about what model of a republic was the best for Australia and how this change would affect their lives. It may well be that there has been a growing acceptance of the Constitution over the years, and a suspicion of efforts to alter it.

- **opposition in the community** – Sometimes there may be general support for a referendum across both major political parties, but there is strong opposition in the community. In 1926, the industry and commerce proposal had strong support in parliament from both political parties but was defeated. There was strong and very vocal community opposition to this proposal. In 1988, the referendum relating to rights and freedoms was defeated. The extension of religious freedom contained in this proposal was strongly opposed by many church representatives and by independent schools, both fearful of the future of state aid to church and independent schools.
- **erosion of states' rights** – The Constitution is the basis of the federal system and voters in the states may see any changes as not in their interests. Premiers have warned voters of the need to protect states' rights from the movement of law-making power to the Commonwealth. All 17 attempts to increase Commonwealth economic power have been rejected by the voters.
- **high cost of holding a referendum** – The cost of holding a referendum is high and an alternative way of achieving the same result may be used instead of holding a referendum. The proposal in 1996 to put a referendum to the people to give power to the Commonwealth Parliament to make laws on the ownership of guns had support from both major parties and therefore it had a very good chance of success. However, the expense of holding a referendum was avoided by the states agreeing to implement uniform restrictions on gun ownership.

THE 1988 REFERENDUM AND VOTER CONFUSION

In 1988, four proposals were put to the people in a referendum. These were:

- parliamentary terms – fewer elections with a four-year maximum term for both houses of parliament
- fair elections – to provide for fair and democratic parliamentary elections throughout Australia
- recognition of local government – local government is not mentioned in the Commonwealth Constitution; it comes under the jurisdiction of state parliaments
- rights and freedoms – this included an extension of the right to freedom of religion, the right to trial by jury for offences against state and territory laws, and fair terms for a person whose property is acquired by any government.



Figure 3.11 A poster campaigning for 'yes' votes in the 1988 referendum

None of these changes were agreed to by the electors. A booklet setting out the arguments for and against the proposals was sent to every household in which eligible voters lived. The booklet was 31 pages long, and although it set out the 'yes' and 'no' arguments, it was difficult to follow. Some people have argued that giving equal treatment to the 'yes' and 'no' vote in information sent to households does not indicate the amount of support a proposal has. It has been suggested that the total of the votes in the two houses of parliament ought to be included in the information sent to voters, to make clear the strength of parliamentary support for any change.

The 'parliamentary terms' proposal effectively dealt with five separate issues. These were a longer term for the House of Representatives, a shorter term for the Senate, ending the continuous nature of Senate terms, Senate terms to be no longer fixed, and compulsory simultaneous elections for both houses. Whether voters agreed with some of these or not, they had no choice but to vote for or against the entire group.

SUMMARY OF FACTORS AFFECTING THE SUCCESS OF REFERENDUMS

- timing
- double majority requirement is difficult to satisfy
- lack of bipartisan support
- confusion and suspicion of the voters
- voter conservatism
- strong community support against change
- state governments may discourage voters from voting in favour of movement of power to the Commonwealth
- high cost of holding a referendum

Suggested future referendums

Constitutional recognition of Indigenous Australians

The Commonwealth Government is currently considering proposing an amendment to the Constitution to provide recognition of Aboriginal and Torres Strait Islander Peoples. In December 2010 the former Labor Government established the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, which consulted widely on constitutional change during 2011, and reported to parliament in early 2012. The panel recommended that the Constitution be changed to recognise the continuing cultures, language and heritage of Aboriginal and Torres Strait Islander Peoples, to remove racist elements from the Constitution and prohibit discrimination on the grounds of race, colour or ethnic or national origin. Specifically, their recommendations for change included:

- repealing (deleting) S25, which recognises the possibility of state laws disqualifying people of a particular race from voting in state elections
- repealing S51(xxvi), the race power provision, which allows the Commonwealth Government to make special laws for people of any race
- inserting a new S51A, which recognises that Australia was first occupied by Aboriginal and Torres Strait Islander Peoples; acknowledges their continuing relationship with their traditional lands and waters; respects the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander Peoples; and acknowledges the need to secure the advancement of these people
- inserting a new S116A, which prohibits discrimination on the grounds of race, colour or ethnicity
- inserting a new S127A, which recognises Aboriginal and Torres Strait Islander languages while confirming Australia's national language is English.

A Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was appointed in November 2012 to determine and report on the steps needed to progress towards a successful referendum.

The *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth), was passed with bipartisan support in early 2013. This Act states in its preamble that 'The Parliament is committed to placing

before the Australian people at a referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander Peoples'. The Act was seen to be a way to continue to build momentum for successful constitutional change.

The Joint Select Committee was re-established in December 2013 to help bring about constitutional change. It was charged with releasing its interim report to parliament by 30 September 2014 and its final report by 30 June 2015. The major political parties have all committed to bringing about constitutional recognition of Aboriginal and Torres Strait Islander Peoples in the current term of parliament.

Constitutional recognition of local government

There was a commitment by the former Commonwealth Labor Government to recognise local government in the Constitution. The Expert Panel on Constitutional Recognition of Local Government was established in August 2011, and undertook a national consultation process in order to determine the level of support, and models for, recognition of local government in the Constitution. In their final report of December 2011, the panel found that the ideas of 'democratic recognition' of local councils in the Constitution had little support, but 'financial recognition' had some support at both state and federal levels. A Joint Select Committee of the federal parliament recommended, in March 2013, that the government proceed with a referendum on financial recognition. The then prime minister, Julia Gillard, set a date for the referendum of 14 September 2013, to coincide with the planned federal election.

In June 2013 the *Constitution Alteration (Local Government) Bill 2013* (Cth) passed the houses of the Commonwealth Parliament by an absolute majority. The stated purpose of the Bill was 'to recognise local government by stating that the Commonwealth can grant financial assistance to local government, including assistance for community and other services'. This was to be achieved through an amendment to S96 to include local government bodies, in addition to states. However, due to a change in the election date to 7 September the referendum could not proceed. The current Coalition Government has stated that it has no intention of putting forward a referendum on local government funding in the near future.

>>GOING FURTHER

Referendum on the republic 1999

A referendum put to the people on 6 November 1999 included two proposed changes. These were for Australia to become a republic, and to change the preamble to the Constitution. The following Bills had been passed by both houses but were awaiting royal assent. Royal assent is only given if a referendum is successful. As both these referendums were rejected, the Bills did not receive royal assent and did not come into operation.

Establishment of a republic

The *Constitution Alteration (Establishment of Republic) Bill 1999* provided for:

- a president as head of state
- the mechanism for selecting a president, including a committee to receive and consider nominations
- the powers of the president
- the term of office and power for removal of the president
- the removal of monarchical references from the Constitution
- transitional arrangements.

Preamble

The *Constitution Alteration (Preamble) Bill 1999* provided for the insertion of a new preamble into the Australian Constitution. This change was put in the referendum because it would have altered the Constitution.

Pamphlet sent to households

The Australian Electoral Commission distributed a document to all households where a person who was eligible to vote lived. The document contained an explanation of the process for changing the Constitution, the existing system and the proposed republican model.

Analysis of referendums as a means of changing law-making powers

Table 3.3 Strengths and weaknesses of the process of changing the Constitution

STRENGTHS	WEAKNESSES
• **The people can have their say** – The Constitution can only be changed if a majority of the electors in Australia and a majority of electors in a majority of states agree to the change. • **Protection of the smaller states** – The double majority protects the smaller states from being dominated by the larger states because it is necessary to have a majority 'yes' vote in a majority of states. • **Protection of the Constitution** – The lengthy process involved in changing the Constitution protects the Constitution from changes being proposed that have not been thoroughly considered and do not have overwhelming support. • **One house can vote for a change twice for a referendum to be put to the people** – A change to the Constitution, introduced by the Commonwealth Government, can be put to the people even if an opposition-strong Senate does not agree to it. • **Compulsory vote** – The views of the community as a whole are more likely to be represented in a referendum because voting is compulsory. • **Change in the division of law-making powers** – Referendums are introduced by the Commonwealth Government and are therefore aimed at moving power from the states to the Commonwealth.	• **Distrust and lack of understanding** – People may see a referendum as giving politicians more power and will therefore tend to vote 'no'. People may also find referendum proposals difficult to understand and therefore vote 'no'. • **Double majority** – It is very difficult to achieve this. While 13 of the 44 referendum proposals received the support of a majority of Australian voters overall, five of these did not satisfy the majority of voters in a majority of states provision. • **Conservative** – Many changes that appear to have merit may not be successful because people are often conservative when it comes to voting for change. Most changes that have been successful have related to minor changes to the Constitution. Voters are less willing to vote 'yes' to major changes. • **Bipartisan support** – A referendum that does not have bipartisan support is unlikely to succeed. Voters generally vote according to their political preferences and the advice of their political party. • **Timing** – The focus of the referendum is lost to some extent when put to the people at the same time as an election. • **Costly** – it is very costly to put a referendum to the people. The cost of the 1999 referendum was $66 820 894. • **States' lack of power** – The only action the states can take to stop the movement of power as a result of a referendum is to lobby strongly against the referendum and encourage the voters in their state to vote 'no'.

LEARNING ACTIVITY 3.6

Factors affecting the likely success of referendum proposals

1 Why do you think a majority of Australian voters have voted 'yes' to some referendum proposals but these proposals have not been passed? Explain.

2 There have only been eight successful constitutional referendums out of 44. Why do you think this is the case? Discuss four factors that affect the likely success of referendum proposals. In your discussion, provide examples to illustrate points made.

3 Analyse the method of changing the wording in the Constitution. In your analysis discuss at least three strengths and three weaknesses of the process.

4 **Investigation**

Explain two possible future referendums. Conduct an investigation into how far these suggestions have been taken and write a short report. Are the referendums about to take place? Have they already taken place and, if so, what was the outcome? Have the suggestions been abandoned? In your report discuss the possible reasons for the current state of play.

The High Court interpreting the Constitution

The High Court was established under S71 of the *Commonwealth of Australia Constitution Act 1900*. Section 76 gives the Commonwealth Parliament the power to establish the High Court with the jurisdiction to hear disputes arising under the Constitution or involving its interpretation.

S71 OF THE CONSTITUTION

S71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

S76 OF THE CONSTITUTION

S76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

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

The High Court cannot change the wording of the Constitution but it can change the way words in the Constitution are interpreted. Whenever the High Court is called on to interpret any section or word, the interpretation adds meaning to the Constitution and can change the division of law-making powers between the states and the Commonwealth. This affects the law-making powers of

state and Commonwealth parliaments. In most instances High Court decisions have led to a shift of law-making power from the states to the Commonwealth. However, not all the early decisions favoured the Commonwealth. In *Melbourne Corporation v. Commonwealth* (the State Banking Case) (1947) 74 CLR 31, the High Court decided to uphold the rights of the states to be free from legislative interference by the Commonwealth Parliament.

The High Court was originally very **conservative** in its approach, preferring to interpret the words of the Constitution very strictly. This trend changed with the Engineers' Case in 1920 (*Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd & Others* (1920) 28 CLR 129) in which the High Court used a much broader interpretation, thereby setting the scene for future cases. As a result of this change in approach, the powers under S51 of the Constitution have been widened.

Disputes generally arise because a state parliament or the Commonwealth Parliament has passed an Act thought to be outside its constitutional power. Individuals or groups can challenge the Act in the High Court if they think the Act is legislating in areas outside the power of the particular parliament, and they are affected by that Act. A state parliament can launch a challenge if it thinks the Commonwealth Parliament has gone outside its law-making powers; the Commonwealth Parliament can launch a challenge against a state parliament if it thinks that state parliament has gone outside its powers.



Figure 3.12
The High Court

Role of the High Court

The role of the High Court in interpreting the Commonwealth Constitution is as follows.

- **to act as guardian of the Constitution** – It does this by influencing the day-to-day application of the Constitution and ensuring that it remains relevant to the Australian people. The High Court interprets the words of the Constitution and gives meaning to them.
- **to keep the Constitution up to date** – The need for the High Court to interpret words within the Constitution arises from changes that occur in society, such as changes in attitude, changes in

technology and changes in community standards. When the Constitution was first written there was no mention of law-making powers in relation to radios and televisions. This is because radios and televisions were not in general use at that time. The words in the Constitution therefore had to be interpreted to include this new technology. The words 'postal, telegraphic, telephonic and other like services' in S51(v) were interpreted by the High Court to include radios and televisions. Likewise, in S51(vi) the words naval and military were interpreted to include the air force.

- **to act as a check and balance on any injustices that may arise or any abuse of power** from the state or Commonwealth parliaments. Individuals, groups, state bodies and Commonwealth bodies can bring a matter to the High Court for a ruling to be made on whether a new law is constitutional. This can only be done by a party with standing; that is, by a person or group that is directly affected by the law being challenged. It is, however, expensive to bring a case before the High Court.
- **to give meaning to the words in the Constitution and apply the Constitution to everyday situations** – When a case is brought to the High Court, the court needs to give meaning to the words in the Constitution and apply the words to the case. The High Court must listen to the facts of the case and decide whether an Act that has been passed is unconstitutional. That is, the High Court will either confirm the right of the law-maker to make the law or deny that right. If the High Court confirms the right of the Commonwealth Parliament to make a law, and it conflicts with a state law on the same issue, then according to S109 of the Constitution, the Commonwealth law prevails over the state law, making the state law invalid insofar as it conflicts with the Commonwealth law.

CASE STUDY

Croome v. Tasmania [1997] HCA 5; (1997) 191 CLR 119

Under the Tasmanian Criminal Code during the 1990s, homosexual activities were illegal in Tasmania. Tasmanian gay activists lobbied against the law that violated a gay man's right to privacy. The matter was taken to the United Nations Human Rights Committee. The Tasmanian Government refused to change the law. The Commonwealth Parliament passed the *Human Rights (Sexual Conduct) Act 1994* (Cth) legalising sexual activity between consenting adults over the age of 18 throughout Australia. This Act prohibited the making of laws that interfered with this right.

The Tasmanian Government maintained that the Commonwealth Parliament did not have the power to make laws relating to homosexual activities in Tasmania because this was a residual power.

In 1997, Rodney Croome applied to the High Court of Australia for a ruling as to whether the relevant section of the Tasmanian Criminal Code was inconsistent with the Commonwealth Act. The High Court considered the facts of the case and decided that the Commonwealth Parliament did have the constitutional power to pass the *Human Rights (Sexual Conduct) Act* legalising sexual activity between consenting adults in private.

The reason for this decision was that the relevant section of the Tasmanian Criminal Code denied Tasmanians their right to privacy. This right to privacy was guaranteed under article 17 of the *International Covenant on Civil and Political Rights*, of which Australia is a signatory.

The High Court interpreted the words 'external affairs' in S51(xxix) of the Constitution to include any matter covered by an international treaty. This included the *International Covenant on Civil and Political Rights*.

As a result of this interpretation, the Commonwealth Parliament did have the right to pass the *Human Rights (Sexual Conduct) Act*. The section of the Tasmanian Criminal Code that was relevant to this case was inconsistent with this Commonwealth Act, and therefore inoperable to the extent of that inconsistency.

The Tasmanian Government later repealed the relevant section of the Criminal Code provisions.

Analysis of High Court interpretations as a means of changing law-making powers

Table 3.4 Strengths and weaknesses of High Court interpretations as a method of changing the meaning of the Constitution

STRENGTHS	WEAKNESSES
• A matter can be dealt with when a case is brought before the court and an injustice can be rectified. • The High Court justices are experts in constitutional law and are therefore very suited to interpreting the words in the Constitution and applying the Constitution to the case before the court. • The High Court can act as a check against any abuse of power by the states or the Commonwealth Parliament. • The High Court can keep the Constitution relevant and up to date by interpreting the words in the Constitution.	• The High Court cannot change the words in the Constitution. • The High Court must wait for a relevant case to be brought before the courts before it can interpret the words in the Constitution. • The party bringing the case must have standing. • It is expensive to bring a case to the High Court. • The High Court may be conservative in its interpretation of the Constitution and therefore changes in interpretation may not be made. • The decision in a case brought before the High Court may depend on the composition of the High Court. Some justices are more conservative in their approach to interpreting the Constitution.

LEARNING ACTIVITY 3.7

The High Court interpreting the Constitution

1 Which section of the Constitution gave the Commonwealth Parliament the power to establish the High Court?
2 How can the High Court be seen as the guardian of the Constitution?
3 Is the High Court able to change the words in the Constitution? Explain.
4 If the Commonwealth Parliament passes an Act that is thought to be outside its powers, what must happen before the High Court can make a ruling on this?
5 'The High Court is not able to change the division of law-making powers between the state parliaments and the Commonwealth Parliament when the need arises.' To what extent is this statement true? Explain.
6 Look back at the case study *Croome v. Tasmania* and answer the questions.
   a Why do you think it is necessary for the High Court to be able to interpret the words in the Constitution?
   b Which section of the Constitution was interpreted in this case? Why was this section relevant to the case?
   c Why was the Commonwealth Parliament able to pass the *Human Rights (Sexual Conduct) Act*, when the issue clearly came under the state's residual powers? Explain.
7 How is S109 of the Constitution relevant to changing the division of law-making powers between the state parliaments and the Commonwealth?
8 To what extent has the Commonwealth benefited as a result of High Court interpretation of the Constitution?
9 To what extent do you think the role of the High Court in interpreting the words in the Constitution is appropriate? Explain.

High Court interpretations of the Constitution and their impact on law-making powers

You need to know the significance of two High Court cases involving the interpretation of the Commonwealth Constitution and their impact on the division of law-making powers between state and Commonwealth parliaments.

CASE STUDY

R v. Brislan; Ex parte Williams [1935] HCA 78; (1935) 54 CLR 262 (Brislan's Case)



Figure 3.13
A typical wireless set of the time

Section 51(v) of the Constitution gave the Commonwealth power to legislate on postal, telegraphic, telephonic and other like services. The Commonwealth Parliament had passed the *Wireless Telegraphy Act 1905* (Cth) requiring all owners of wireless sets (radios) to hold a licence. The defendant was charged with not holding a licence.

Proceedings in the Court of Petty Sessions, Sydney 1934

The evidence showed that officers of the Postmaster-General's Department visited the defendant's premises on 26 September 1934 and found there a five-valve all-electric wireless receiving set connected to an indoor aerial. They heard the broadcasting station 2KY broadcasting speech. On the following day, the defendant admitted to the officers that she owned the wireless receiving set, that it had been installed for a week, and that she had no current wireless listener's licence. The defendant was charged and convicted. She was fined £1 with eight shillings in costs or, alternatively, three days of imprisonment.

The defendant challenged the validity of the Commonwealth *Wireless Telegraphy Act 1905* in the High Court, stating that broadcasting to a wireless set is NOT a service in the sense in which that term is used in S51(v). A 'wireless set' was not mentioned in the Constitution and did not fit within S51(v). Therefore, the section of the *Wireless Telegraphy Act* requiring people who had a wireless set to have a licence was invalid. If this had been found to be the case, the charges against the defendant would have been dropped and it would be up to the states to legislate in this area because the Commonwealth Parliament Act would be invalid.

Comments by the High Court in Brislan's Case

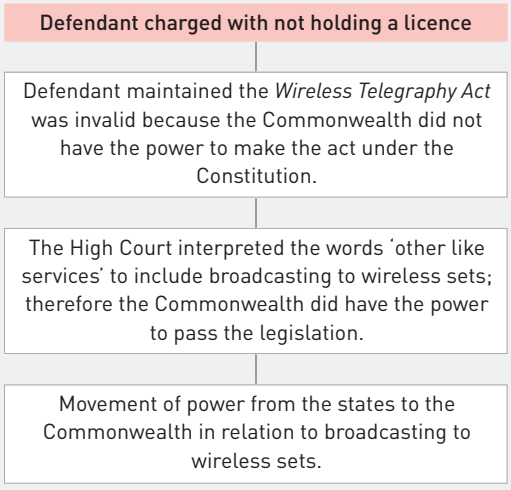
In his judgment, Chief Justice Latham stated:

> The common characteristic of postal, telegraphic and telephonic services, which is relevant in this connection is, in my opinion, to be found in the function which they perform. They are, each of them, communication services. This is also the characteristic of a broadcasting service in all its forms, which is therefore, in my opinion, a 'like service' within the meaning of S51(v) of the Constitution. If a new form of communication should be discovered, it too might be made the subject of legislation as a 'like service'.

The High Court interpreted the term 'other like services' in S51(v) to include broadcasting to wireless sets. This case moved the division of law-making powers to the Commonwealth by extending the Commonwealth Parliament's power to legislate regarding postal, telegraphic, telephonic and other like services to include broadcasting to wireless sets. This meant that the Commonwealth had moved into an area of law-making that was a residual power as broadcasting to wireless sets was not mentioned in the Constitution.

Impact of Brislan's Case

The impact of this case was that there was a shift in the division of law-making powers from the states to the Commonwealth. From the time of the High Court decision, the Commonwealth Parliament would have the power to make laws with respect to broadcasting to wireless sets. If a state passed a law in this area, and there was a conflict between the state law and the Commonwealth law, the Commonwealth law would prevail (according to S109).



LEARNING ACTIVITY 3.8

Brislan's Case

1. Why was the defendant charged?
2. The defendant felt that she should not have been charged under the *Wireless Telegraphy Act*. Explain her reasoning.
3. What did the High Court decide in this case? Why do you think it reached this decision?
4. Explain the impact of this case on the division of law-making powers between the state and Commonwealth parliaments.

CASE STUDY

Commonwealth of Australia & Anor v. The State of Tasmania & Ors [1983] HCA 21; (1983) 158 CLR 1 (The Tasmanian Dam Case)

In this case the High Court was called on to interpret the words 'external affairs' in S51(xxix) of the Constitution. The Tasmanian Government intended to dam the Franklin River to create a source of hydroelectricity for the state's power needs. This was a domestic issue for Tasmania and was within Tasmania's law-making power (residual power). The Tasmanian Parliament passed the *Gordon River Hydro-Electric Power Development Act 1982* (Tas.) to set up the hydroelectric power scheme and the Franklin River dam.

Australia-wide protests occurred as a result of the Tasmanian Government's intention to build a dam, causing the Commonwealth Government to seek to intervene in an area of state power.

The state of Tasmania maintained that it had the right to make laws about how to run the state and to decide where it wanted to build a dam. Dam building was a state issue, and the Constitution had not given the Commonwealth Parliament the power to legislate in that area.

The Commonwealth Parliament maintained that it had a duty to prohibit work likely to damage or destroy Australia's national heritage. The area covered by the proposed dam was nominated by the

Fraser Government in 1981 as an area to be placed on the World Heritage List. UNESCO included the area on the World Heritage List in 1982. After the Australian Labor Party came to power in 1983 under Bob Hawke, the *World Heritage Properties Conservation Act 1983* (Cth) was passed to prohibit construction of the proposed dam.

The Tasmanian Government argued in the High Court that the Commonwealth Parliament had passed law in an area of state responsibility, and the law was therefore unconstitutional. The Commonwealth argued that the law that they passed was within its law-making power under the 'external affairs' head of power. That is, the Commonwealth argued that it had the power to intervene because S51(xxix) gave it power to make laws relating to external affairs and the proposed dam area was an external affair because it was covered by World Heritage listing (an international treaty).

The High Court decided that as all aspects of Australia's relationships with other countries are included under the external affairs power, and because the Franklin River area was covered by an international treaty, it came under the external affairs power. This decision interpreted the words 'external affairs' to include any area covered by an international treaty.

As a result of this decision there was **inconsistency** between the *World Heritage Properties Conservation Act 1983* (Cth) and the *Gordon River Hydro-Electric Power Development Act 1982* (Tas.). Under **S109**, the Commonwealth Act prevailed and the *Gordon River Hydro-Electric Power Development Act* was made inoperable as far as the building of the dam was concerned because this section of the Act was in conflict with the Commonwealth Act.

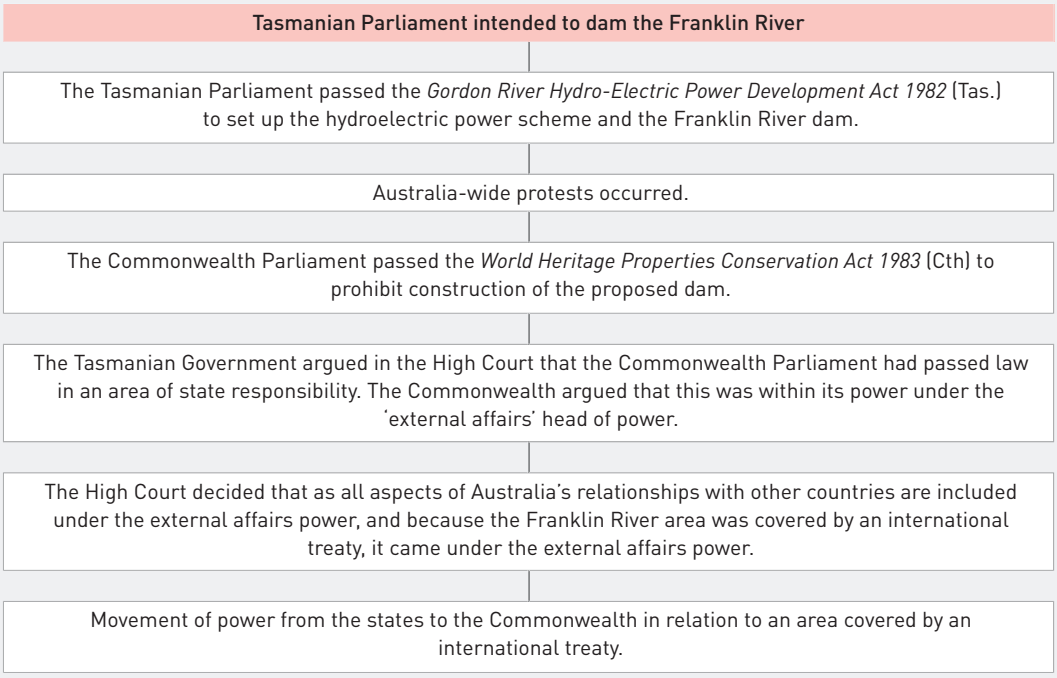
Impact of Tasmanian Dam Case

The impact of this case was significant. Through the High Court's interpretation of S51(xxix) of the Constitution in this case, the Commonwealth Parliament was able to move into a law-making area previously left with the states (an area of residual power), and stop the damming of the Franklin River. This increased the law-making power of the Commonwealth Parliament.

As a result of this case and its interpretation of 'external affairs' in the Constitution, there has been a movement of law-making power from the states to the Commonwealth in that the Commonwealth Parliament has the power to legislate in areas of residual power where there is an international treaty. This could also lead to the Commonwealth Parliament assuming power over other issues involving international treaties, such as human rights, which comes under the United Nations' *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. This interpretation of 'external affairs' was later used in the Tasmanian gay rights case, *Croome v. Tasmania*, discussed earlier in this chapter.



Figure 3.14 Protests against damming the Franklin River



LEARNING ACTIVITY 3.9

The Tasmanian Dam Case

1 Explain the arguments put forward by the Tasmanian Government relating to why it should be permitted to build the dam on the Franklin River.
2 Why did the Commonwealth Government oppose this?
3 Describe the decision of the High Court in this case.
4 Explain how the Tasmanian Dam Case allowed the Commonwealth to move into an area of law-making that was a residual power.
5 Describe the impact of the Tasmanian Dam Case on the law-making powers of the state and Commonwealth parliaments.

>>GOING FURTHER

South Australia v. The Commonwealth of Australia (1942) 65 CLR 373 (First Uniform Tax Case)

Section 51(ii) of the Constitution gives the Commonwealth the right to levy taxes. This power is held concurrently with the states. Before this case, the state and Commonwealth parliaments all levied income taxes. During World War II the Commonwealth Government thought that there was a need to coordinate this and other government functions for the good of the country. The states did not agree. The Commonwealth Parliament, however, passed four Acts implementing their scheme with respect to income tax. They increased income tax to an amount equivalent to the combined state and federal income tax, and passed an Act declaring that Commonwealth taxes took priority over state taxes. They agreed to grant to the states an amount equivalent to what they would have collected in state taxes. The High Court accepted the validity of this scheme, and the effect was that the state governments were prevented from levying their own income taxes, even though they have a constitutional right to do so.

The First Uniform Tax Case (1942) is an example of the Commonwealth Parliament gaining more power, in this instance by taking over the levying of income tax from the states. This gave the Commonwealth a considerable advantage over the states.

Victoria v. Commonwealth (1926) 38 CLR 399 (Roads Case)

The right to make tied grants was questioned in this case. The Roads Case confirmed the right of the Commonwealth Parliament to give tied grants. The legislation in this case was the *Federal Aid (Roads) Act 1926* (Cth). To make a tied grant it is necessary for the Commonwealth Parliament to pass legislation outlining the grant. This Act prescribed the types of roads to be built and made arrangements for maintaining the roads. The state government wanted an unconditional grant. The High Court decided that the Act was valid and thereby confirmed the right of the Commonwealth Parliament to make tied grants. As a result of this case, the Commonwealth is able to move into areas of residual power such as road construction because it is able to give money to the states with conditions attached.

Jones v. Commonwealth (1965) 112 CLR 206

The High Court was called on to interpret S51(v) Postal, telegraphic, telephonic and other like services. The Commonwealth Parliament had passed the *Broadcasting and Television Act 1942–62* (Cth), which provided for land to be acquired for the National Broadcasting and Television Service (that is, the Australian Broadcasting Commission or ABC). Television had not been invented at the time the Constitution was passed. However, in 1965, the High Court decided that the words 'other like services' also included television, thereby giving the Commonwealth Parliament the right to make laws relating to television and extending its law-making powers. This was seen as a valid use of Commonwealth power.

Victoria v. Commonwealth (1975) 134 CLR 338 (Appropriations Power Case)

In this case the High Court was called on to interpret S81 of the Constitution, which states that money raised or received can be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by the Constitution. It was decided that, although the Commonwealth Parliament has limits on what it can spend money on, it can spend money on areas that are mainly within state power as long as, in some respects, it touches on Commonwealth powers within the Constitution. The Act in question in this case was the *Appropriation Act 1974* (Cth), which was for granting funds to regional councils for social development. The Commonwealth Parliament does have legislative power in the area of social benefits under S51(xxiii) and (xxiiiA), but the Act stated that the money could be used for social services and benefits not necessarily included in S51 of the Constitution.

Ha and another v. The State of NSW; Walter Hammond and Associates Pty Ltd v. The State of NSW & others (1997) 189 CLR 465

The New South Wales Parliament passed the *Business Franchise Licences (Tobacco) Act 1987* (NSW), which required sellers of tobacco products to hold a licence and pay licensing fees to the NSW Government. The plaintiffs operated duty-free stores in metropolitan Sydney that sold tobacco, but they did not hold the relevant licences. They were charged with evading $22 million in state franchise fees under the Act.

The plaintiffs argued that these fees were excise duties, which states were not empowered to impose, due to the Commonwealth's exclusive power in this area of law-making.

The High Court had to interpret the meaning of excise duties in S90 of the Constitution. By a 4–3 majority, the High Court ruled that the fees being charged by the NSW Government were

excise duties, and so were unconstitutional, as the power to levy such fees was exclusive to the Commonwealth Parliament.

This decision effectively increased the power of the Commonwealth Parliament, and had huge financial implications for the states, which collectively raised over $5 billion a year from such taxes. This has led to the states becoming more reliant on the Commonwealth Parliament to levy taxes for them, thus eroding the financial independence of the states.

New South Wales v. Commonwealth (2006) 229 CLR 1 (Workplace Relations or Work Choices Case)

The plaintiffs (New South Wales, Western Australia, South Australia, Queensland, Victoria, the Australian Workers Union and Unions NSW) challenged the constitutional validity of the Commonwealth Parliament's *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), an Act that brought about major changes in the area of industrial relations.

The Commonwealth had relied on the corporations power in S51(xx) of the Constitution when passing the Act. The plaintiffs argued that the corporations power was limited to relationships between corporations and external entities, and not internal relationships such as between a corporation and its employees. The High Court decided, in a 5–2 majority, that the legislation was valid and that the corporations power gave the Commonwealth Parliament power in relation to both internal and external relationships in a constitutional corporation.

The corporations power was given a broad interpretation to include any regulations involving foreign corporations, trading or financial corporations. This could potentially greatly increase the law-making powers of the Commonwealth Parliament.

Referral of law-making powers

The states can refer or give any of their residual law-making powers to the Commonwealth. This may occur when the states find there is an area of law-making that would be better under Commonwealth jurisdiction because the law needs to be uniform across the country. However, the states have generally been reluctant to hand over any of their powers to the Commonwealth Parliament.

S51(xxxvii) of the Constitution gives the Commonwealth Parliament power over any matters referred to it by the states, but that power can only operate in those states that have referred their power to the Commonwealth.

The process of referral of law-making power involves the states agreeing to hand over an area of power to the Commonwealth, such as terrorist acts inside Australia. When this decision has been reached, the state parliaments pass an Act giving their law-making power to the Commonwealth and the Commonwealth Parliament passes an Act accepting this power from each state that has referred its power.

The impact of the referral of law-making powers is that there is a **change in the division of powers between the states and the Commonwealth in favour of the Commonwealth**.

An area where there has been a referral of power is that of **ex-nuptial children in family law matters**. The need for custody battles over ex-nuptial children to be heard in the Family Court has led some states to refer their powers in this area to the Commonwealth Parliament. Previously, disputes relating to ex-nuptial children had to be heard in state courts because the Family Court is a federal court and can only hear matters under federal jurisdiction.

In 2004, there was a further referral of power relating to family matters. It was decided that de facto couples should be placed in a position similar to that of married couples under family law, so that disputes over property belonging to de facto couples could be heard in the Family Court. Since that

time, the definition of de facto relationships has been changed to include same-sex couples as well as different-sex couples.

EX-NUPTIAL CHILDREN

The Constitution gives the Commonwealth Parliament the power to make legislation in matters of marriage, divorce and matrimonial causes.

S51(xxi) Marriage

S51(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.

The power to legislate in relation to custody battles for children within a marriage comes under these sections, but ex-nuptial (outside marriage) children did not. The states recognised this inconsistency and gave their power to resolve custody disputes involving ex-nuptial children to the Commonwealth.

The Victorian Act referring the power to the Commonwealth is called the *Commonwealth Powers (Family Law – Children) Act 1986* (Vic.).

The federal Act that implemented these referrals of power was the *Family Law (Amendment) Act 1987* (Cth).

These Acts did not change the Constitution, but since the referral of power the Commonwealth Parliament has had the power to legislate in relation to ex-nuptial children, thereby bringing them under the jurisdiction of the Family Court (a federal court).

PROPERTY AND FINANCIAL MATTERS OF DE FACTO COUPLES

De facto relationships were not included under S51(xxi) and S51(xxii), therefore matters relating to de facto couples could not be heard in the Family Court. This meant that de facto couples were denied access to the Family Court, which had the expertise to hear family matters.

In 2004, the Victorian Parliament referred its power over property and other financial matters arising out of the breakdown of de facto relationships to the Commonwealth Parliament through the *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic.). New South Wales, Queensland and Tasmania passed identical legislation.

Following the attack on the twin towers of New York city's World Trade Center in September 2001, there was great concern about similar acts of terrorism occurring in Australia. In 2003, it was agreed between the Commonwealth and the states of Australia that it was necessary to expand the defence power contained in S51(vi) to include **internal security**. This was done by all states referring their power to make laws regarding terrorism to the Commonwealth.

TERRORISM

The defence power in S51(vi) of the Constitution allows the Commonwealth to make laws on military matters. It is generally assumed that this defence power relates to making laws for external national security but does not extend to laws regulating internal security, which would normally be regarded as criminal law and the responsibility of the states.

With the threat of terrorism, the Commonwealth needed power to act for the whole of Australia. In 2003, all states referred a limited power to allow the enactment of the *Criminal Code Amendment (Terrorism) Act 2003* (Cth). This Act now allows the Commonwealth to make laws regarding terrorist acts inside Australia. The Victorian Act referring these powers was the *Terrorism (Commonwealth Powers) Act 2003* (Vic.).

In 2007, the then prime minister, John Howard, suggested a referral of powers to the Commonwealth relating to the **management of water in the Murray–Darling Basin** so the Commonwealth Parliament could work towards resolving the water shortage problems and the effects it was having on the Murray–Darling Basin.



Figure 3.15 The Murray–Darling Basin

MURRAY–DARLING BASIN

The *Water (Commonwealth Powers) Act 2008* (Vic.) was passed to refer certain matters relating to water management to the Commonwealth Parliament for the purposes of S51(xxxvii) (referral of powers) of the Commonwealth Constitution.

The Act also amended the *Murray–Darling Basin Act 1993* (Vic.) to provide for the carrying out of the Murray–Darling Basin Agreement between the Commonwealth, New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory with regard to the water resources of the Murray–Darling Basin.

The Murray–Darling Basin Agreement was established to put in place a process for the effective management of the water, land and other environmental resources of the Murray–Darling Basin.

In 2008, the Council of Australian Governments (COAG) agreed to the transfer of the regulation of consumer credit to the Commonwealth in line with recommendations from the Productivity Commission, to ensure consistency in credit regulation across Australia.

CREDIT

The Commonwealth Parliament passed the *National Consumer Credit Protection Act 2009* (Cth) in December 2009. This Act (as amended in 2011) provides a comprehensive scheme for the regulation of consumer credit that applies nationally. COAG agreed there was a need to ensure that a person in one state had the same protection when entering into a credit agreement as a person in a different state. The *Credit (Commonwealth Powers) Act 2010* (Vic.) referred the state powers of Victoria over credit regulation to the Commonwealth. The Act gave effect to the Victorian Government's commitment to transfer credit regulation to the Commonwealth.

In 2009, the Victorian Parliament referred its law-making powers in relation to certain workplace relations to the Commonwealth Parliament.

WORKPLACE RELATIONS

In 1996, Victoria referred certain industrial relations matters to the Commonwealth, in the *Commonwealth Powers (Industrial Relations Act) 1996* (Vic.). This was repealed by the *Fair Work (Commonwealth Powers) Act 2009* (Vic.) and a new referral of powers was created under this Act relating to certain workplace relations. This Act gave the Commonwealth Parliament more scope to make laws relating to workplace relations.

In November 2011, the Victorian Parliament referred its law-making powers in relation to the registration of business names to the Commonwealth, in line with an intergovernmental agreement made by COAG.

BUSINESS NAMES

In 2009, members of COAG agreed on the need for a national business name registration scheme. A national scheme would allow businesses to register their name once, regardless of how many states and territories in which they operated, and to have access to online business services common across the country.

Victoria passed the *Business Names (Commonwealth Power) Act 2011* (Vic.) to refer powers to the Commonwealth to allow national business name legislation. Other states passed similar legislation. The Commonwealth Parliament passed the *Business Names Registration Act 2011* (Cth) and two other related Acts, and can now legislate on matters related to business registration.

Areas of uncertainty with the referral of powers

The Commonwealth Parliament is able to make laws in law-making areas referred to it by the states. However, there are two issues which are uncertain with respect to these powers.

- Is a referral of powers able to be revoked? – If a state has referred power to the Commonwealth, can the state decide to cancel this referral of powers, or would a referendum be needed to make a change to a referral of powers?
- Is a referral of powers exclusive? – If a state has referred power in an area of law-making to the Commonwealth, does the state still have the power to make laws in this area or does it automatically become an area of exclusive power once the referral has been made?

These questions have not been tested in court as the need has not arisen for the states to take back or change a referral of power, although the original workplace relations referral of 1996 has been cancelled and a new referral of power has replaced it.

Analysis of referring power as a means of changing law-making powers

Table 3.5 Strengths and weaknesses of referral of powers as a method of changing the constitutional division of powers

STRENGTHS	WEAKNESSES
• The states are able to discuss the issue thoroughly and decide which law-making powers are to be referred to the Commonwealth. • The Commonwealth is able to make laws for the benefit of the whole country in areas not originally given to the states under the Commonwealth Constitution. • It is difficult to get the states to pass uniform laws on a particular issue. There are likely to be small differences. However, if the power has been referred to the Commonwealth, then the Commonwealth Parliament is able to pass one law that affects the whole country.	• States may find that it would have been better for them to keep control of the area of law that has been referred to the Commonwealth. • The states can agree to pass uniform laws without losing their law-making powers. • It is another way of centralising law-making and reducing the law-making powers of the states.

LEARNING ACTIVITY 3.10

Referral of power

1 What types of powers can be referred to the Commonwealth?
2 Which section of the Constitution gives the Commonwealth Parliament the power to make laws in areas referred to it by the states?

3 Why do you think the states might decide to refer their law-making powers to the Commonwealth? Use an example to illustrate your answer.
4 How do the states refer their law-making powers to the Commonwealth?
5 In 2003, the states referred powers to the Commonwealth regarding acts of terrorism. How might this have been a consequence of the attack on the twin World Trade Center towers in New York? Discuss.
6 Choose the referral of powers relating to property and financial matters of de facto couples or the Murray-Darling Basin issue. Investigate the area of choice and, using this example, explain the capacity of the states to refer law-making powers to the Commonwealth Parliament.
7 Discuss the advantages and disadvantages of the capacity of the states to refer their powers to the Commonwealth Parliament.
8 What uncertainties exist with respect to the referral of powers?

>>GOING FURTHER

Commonwealth Parliament influencing the states in areas of residual power

The Commonwealth Parliament can influence the states in areas of residual power, other than those mentioned earlier. Some of these are listed below.

- **financial dominance** – The Commonwealth can use its financial dominance to gain support from the states. Through High Court decisions the Commonwealth has gained greater power in the area of taxation. The main taxation revenue is from income tax (a Commonwealth tax). The Commonwealth gained even greater financial power in 2000 when the Goods and Services Tax (GST) was introduced. The states rely on the Commonwealth for money, although they are able to levy some taxes. As a consequence of this the Commonwealth is able to exert influence over the states.
- **tied grants** – The Commonwealth can use its power under S96 to give tied grants to the states. Section 96 gives the Commonwealth Parliament the right to 'grant financial assistance to any state on such terms and conditions as the Parliament thinks fit'.
- **the right to use money** – Section 81 gives the right to use money for purposes of the Commonwealth and subject to the charges and liabilities imposed by the Constitution. This right has been used by the Commonwealth Parliament to influence areas of state power.
- **unchallenged legislation** – The Commonwealth Parliament can pass legislation that may be outside its power, but may stand if not challenged.

PRACTICE EXAM QUESTIONS

1 a Explain, using examples, the distinction between the exclusive powers of the Commonwealth, the concurrent powers of the Commonwealth and the states, and the residual powers of the states. *(6 marks)*

b One of the roles of the High Court is to interpret the Constitution. Discuss the significance of two High Court cases that have interpreted the Constitution. Explain the impact these two cases have had on the division of law-making powers between the states and the Commonwealth. *(6 marks)*

c The states have referred their law-making powers to the Commonwealth Parliament in relation to ex-nuptial children in family law matters. Explain how this process occurred. Discuss the strengths and weaknesses of this method of changing the division of law-making powers between the states and the Commonwealth parliaments compared to another method of achieving this aim. *(8 marks)*

2 a Explain the method of changing the words of the *Commonwealth of Australia Constitution Act 1900* (UK). Use an example in your explanation. *(6 marks)*

b To what extent are the supreme law-making powers of the Commonwealth Parliament restricted by the Commonwealth Constitution? Discuss. *(6 marks)*

c Analyse the impact on the law-making powers of state and Commonwealth parliaments of:

- changing the words of the *Commonwealth of Australia Constitution Act 1900*
- High Court interpretation of the Constitution.

Illustrate your answer using an example of each. *(8 marks)*

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK STRUCTURED QUESTIONS

1 Explain the role of the Commonwealth Constitution. *(2 marks)*

2 Describe the division of law-making powers under the *Commonwealth of Australia Constitution Act 1900*. Give an example of each type of law-making power. *(6 marks)*

3 Explain the limitations that the Commonwealth Constitution places on the law-making powers of the state and Commonwealth parliaments. *(6 marks)*

4 Explain the significance of S109 of the Commonwealth Constitution. *(2 marks)*

5 Describe how the words in the Commonwealth Constitution can be changed. *(4 marks)*

6 Explain four factors that are likely to affect the success of referendums. *(8 marks)*

7 Analyse the impact of referendums on the division of law-making powers and discuss the effectiveness of referendums in the law-making process. *(6 marks)*

8 How can High Court interpretations of the Commonwealth Constitution change the division of powers between the Commonwealth and state parliaments? Explain. In your explanation use examples to illustrate the points made. *(8 marks)*

9 Explain what must occur for the division of law-making powers to change when the states decide that the Commonwealth should have power in a particular issue, for example ex-nuptial children. *(2 marks)*

10 Evaluate one method of changing the division of law-making powers from the states to the Commonwealth. In your evaluation discuss the strengths and weaknesses of that method. *(6 marks)*

(Total 50 marks)

ASSESSMENT TASK REPORT

Investigation

Choose one of the following that has occurred within the last five years (and is NOT explained in detail in this text):

- a referral of powers or suggested referral of powers
- a High Court decision, which changes the division of powers between the states and the Commonwealth parliaments
- a referendum.

Write a report, or complete a report in multimedia format, on your findings. In your report include:

- the details of the referral of powers, High Court decision or referendum (date, details of the change or proposed change and outcome)
- an explanation of how the High Court interpretation, referral of powers or referendum is instigated and takes place
- analysis of the impact of the referendum, High Court interpretation of the Constitution, or referral of powers on the division of law-making powers.

(Total 10 marks)

Summary

Federation

The role of the Constitution

- facilitate the division of law-making powers
- provide a legal framework for the creation of the Commonwealth Parliament
- outline the structure of the Commonwealth Parliament
- provide for direct election
- give the High Court power to interpret the Constitution

Division of law-making power

- residual powers left with the states
- specific powers divided into:
  - exclusive powers
  - concurrent powers

Inconsistencies in areas of concurrent power S109

- Commonwealth law prevails under S109

Restrictions on state power

- cannot legislate in areas of exclusive power, for example
  - raising military forces
  - coining money
  - customs
- cannot restrict free trade (*Cole v. Whitfield*)
- where there are inconsistencies in concurrent areas, federal law must prevail – S109

Restrictions on Commonwealth power

- guarantee of state powers, laws and Constitutions
- cannot legislate in areas of residual power
- S116 – prevented from legislating with respect to religion
- S117 – residents of states cannot be discriminated against
- S99 – cannot give preference to one state
- S92 – cannot restrict free trade
- S51(xxxi) – cannot acquire property without giving just terms
- S51(ii) – no discrimination regarding taxation
- cannot change the Constitution without a referendum
- cannot form a body that combines legislative, executive and judicial powers
- freedom of political communication

Changing the Constitution

- mechanism/process in S128
- parliament, people, governor-general
- referendum
- majority of voters in whole of Australia, and majority of voters in a majority of states, must vote 'yes' to change

Factors affecting likely success of referendum

- timing
- double majority
- lack of bipartisan support
- information confusing
- voter confusion
- opposition in the community
- erosion of states' rights
- high cost of holding a referendum

Strengths and weaknesses of process of changing Constitution

Referendum changing the division of powers

- example of one successful referendum changing the division of powers (e.g. 1910, 1928, 1946, 1967)

The High Court interpreting the Constitution

- act as guardian of the Constitution

- keep the Constitution up to date
- act as a check and balance on any injustices that may arise or any abuse of power
- give meaning to the words in the Constitution and apply the Constitution to everyday situations

Strengths and weaknesses of High Court interpretations

Significant High Court interpretations of Constitutional division of power

- Brislan's Case (1935)
- The Tasmanian Dam Case (1983)
- other cases
  - First Uniform Tax Case (1942)
  - Roads Case (1926)
  - *Jones v. Commonwealth* (1965)
  - Appropriations Power Case (1975)
  - *Ha and another v. The State of NSW* (1997)
  - Work Choices Case (2006)

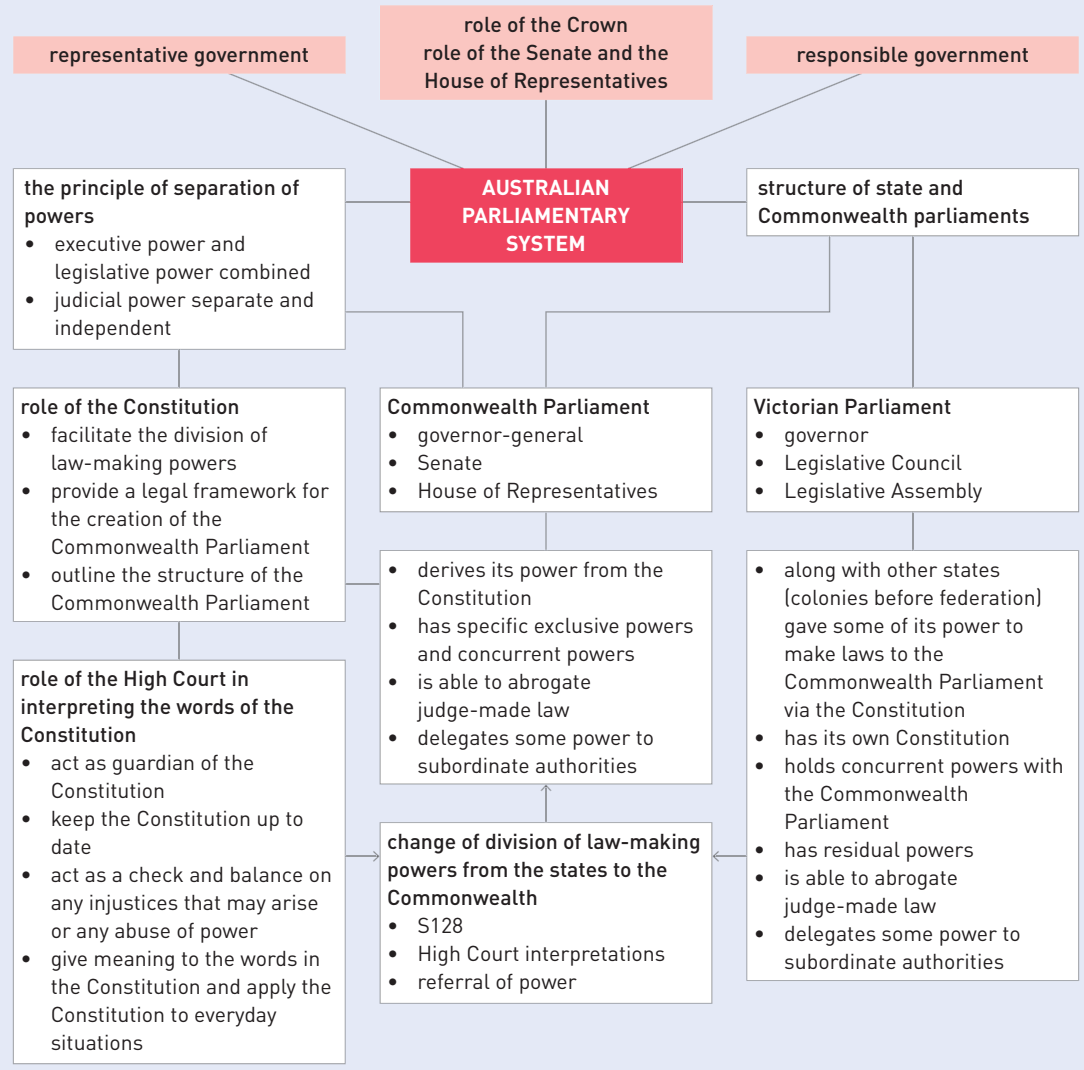
Referral of powers

- the states can refer or give their law-making power to the Commonwealth
- areas of uncertainty with the referral of powers

Strengths and weaknesses of referral of powers

Other methods of changing the division of powers

- financial dominance of the Commonwealth
- tied grants
- right to use money – appropriations power (S81)
- unchallenged legislation





CHAPTER 4

PROTECTION OF RIGHTS

OUTCOME

This chapter is relevant to learning outcome 2 in Unit 3. You should be able to explain the role of the Commonwealth Constitution in defining law-making powers within a federal structure, analyse the means by which law-making powers may change, and evaluate the effectiveness of the Commonwealth Constitution in protecting human rights.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- the means by which the Commonwealth Constitution protects rights, including structural protection, express rights and implied rights
- the significance of one High Court case relating to the constitutional protection of rights in Australia
- Australia's constitutional approach to the protection of rights and the approach adopted in one of the following countries: Canada, New Zealand, South Africa or the United States of America.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information and data
- apply legal principles to relevant cases and issues
- evaluate the means by which rights of Australians are protected by the Commonwealth Constitution, and the extent of this protection
- compare the approach used to protect rights in a selected country with the approach used in Australia.

KEY LEGAL TERMINOLOGY

bill of rights A document that describes the extent of individual democratic and human rights.

Constitution The *Commonwealth of Australia Constitution Act 1900* (UK), which came into force on 1 January 1901; a set of rules or principles guiding the way the nation is governed. States have their own separate constitutions.

entrenched rights Rights that are protected by a constitution and can only be changed through the methods set out in the constitution.

express or explicit rights Rights that are expressly referred to in a constitution, bill of rights or similar document. Some express rights are entrenched in a constitution. This means they cannot be easily changed by an Act of parliament. Express rights are also referred to as explicit rights.

implied rights Rights that are not expressly referred to but are read into a constitution by implication.

representative government Representative government refers to a government that represents the view of the majority of the people.

responsible government The executive government (prime minister, senior ministers and government departments) is accountable to parliament, and can only continue to govern as long as it has the support of the lower house of parliament. If the government loses the support of the lower house then it must resign.

separation of powers The principle of separation of powers refers to the fact that there are three separate types of powers in our parliamentary system. These are legislative power, executive power and judicial power. Each type of power is exercised by a different institution.

statutory or un-entrenched bill of rights A bill of rights that is part of an Act of parliament, and can be changed by an amending Act of parliament.

structural protection of rights The structural protection of rights refers to the protection of rights contained in the structure and text of the *Commonwealth of Australia Constitution Act 1900* (UK), which provides indirect protection of the rights of Australians in their dealings with the Commonwealth Parliament.

ultra vires Law that is beyond the legal power or authority of the body that created it.

RIGHTS

The protection of rights is a high priority for people living in a democratic society. Every person has a right to voice their opinion on the treatment of themselves and others. A right can be defined as:

> … an interest recognised and protected by the law, respect for which is a duty, and disregard for which is wrong …
>
> PG Osborn, *A Concise Law Dictionary*, 2005

The most basic human rights that should be protected were set out by the United Nations in the 1948 *Universal Declaration of Human Rights*, which included the right to freedom from discrimination, protection from unlawful detention, a presumption of innocence when charged with a criminal offence, protection from inhuman or degrading punishment, right to marry and own property, and freedom of religion, conscience and political expression.

There are many other international treaties that set out in more detail the sorts of rights that ought to be protected. However, the rights set out in the international treaties that Australia has signed do not automatically become part of Australian law. It is necessary for the law-makers in Australia to protect these rights through legislation and common law.

Some countries, such as the United States, have constitutions that contain a bill of rights, which protects the rights of their citizens.

Approaches taken to protect rights

Countries decide how to protect democratic and human rights for their own people. There are a number of approaches taken. In some countries, such as the United States, Canada and South Africa, there are express rights contained in a bill of rights that forms part of that country's constitution.

An **express right** (also known as an **explicit right**) is a right that is specifically listed in a document or constitution. Express rights can be entrenched in a constitution. An **entrenched right** cannot be changed by a normal Act of parliament, and can only be changed using the particular process set out in the constitution. An example of an express right in the Commonwealth Constitution is the right to freedom of religion.

In countries such as New Zealand, a bill of rights is part of an Act of parliament (a **statutory bill of rights**). It can be changed by an amending Act of parliament. This is an **un-entrenched bill of rights**, which exists as a separate Act that is passed by parliament and can be changed by the parliament that passed the Act. It is not as permanent as a constitutional bill of rights.

In Australia, rights are mainly protected by Acts of parliament and common law. Australia does not have a bill of rights (at a federal level), although it has been suggested. Victoria and the Australian Capital Territory (ACT) have a statutory bill of rights.

Table 4.1 Different approaches to the protection of rights

RIGHTS	PROTECTION OF RIGHTS	COUNTRY/STATE ADOPTING THIS APPROACH
Express rights	**Express rights** are rights written into a rights document. If these are part of a constitution, then they are entrenched, and cannot easily be changed. The process for changing any of these rights is laid down in the relevant constitution and this process must be followed by present and future governments (express rights are usually changed by a referendum).	**United States, Canada, South Africa, Australia** (some express rights)
Statutory rights	**Statutory rights** are contained in a bill of rights set out in a statute (or Act of parliament), which contains rights that can be amended or repealed by parliament. These are express rights but are not entrenched in a constitution. Parliament is a supreme law-making body; that is, a law-making body that prevails over all other sources of law, and therefore the bill of rights cannot be overridden by a court or regulation but can be amended by parliament.	**New Zealand, Victoria, ACT**
Rights protected by legislation and common law	**Rights protected by legislation and common law** where there is no bill of rights. Australia has five express rights that are entrenched in the Constitution, but human rights are mostly protected by Acts of parliament such as the *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth) and common law.	**Australia**

In some constitutions, parliament may **override** a right protected in a bill of rights, but due consideration must be given to the right before changes are allowed to take place. Some bills of rights contain a **limitation clause**. For example, in the Canadian *Charter of Rights and Freedoms* there is a limitation clause stating that 'rights are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

Enforcement of bills of rights

Various approaches are taken to enforce bills of rights. Three main approaches can be identified, but in practice there is considerable overlap between these.

Table 4.2 Different approaches to the enforcement of rights

APPROACH	METHOD	HOW CHANGES ARE MADE
Interpretive approach	This is a court-based approach which allows the courts to declare that a particular law is incompatible with the bill of rights. It is then up to the parliament to change the law so as not to interfere with a right contained in the bill of rights or to explain why the infringement of a right is necessary.	Parliament can change the law.
Watchdog approach	Rights are protected under Acts of parliament and it is the role of a human rights body to check that rights are not interfered with by Acts of parliament.	Parliament can change the law on the recommendation of the human rights body.
Complaints-based approach	This requires individuals or groups to bring a breach of rights action in a court to obtain an appropriate remedy. The court can then declare legislation invalid because it is incompatible with the bill of rights.	Courts can declare the law invalid.

Bills of rights differ according to:

- the extent of rights protected
- the way the rights are enforced
- the impact of judicial review
- whether Bills need to be scrutinised before they are passed through parliament to see if they will infringe any rights
- what guidance is given to courts for interpreting the protected rights.

LEARNING ACTIVITY 4.1

Rights

1 What are rights? Identify an international treaty that protects human rights. How binding are international treaties in Australia? Explain.
2 What are statutory rights? How do they differ from express rights entrenched in a constitution?
3 What approaches to protect rights are relevant to Australia?
4 What type(s) of enforcement of rights do you think are used in Australia?
5 'Countries around the world use different approaches to protecting rights.' Explain this statement.

AUSTRALIA – CONSTITUTIONAL PROTECTION OF RIGHTS



Australia is the only western nation that does not have a national bill of rights. In Australia, rights are mainly protected by a **legislation and common law approach**. However, there are some rights protected under the Constitution.

The means by which rights are protected by the Constitution include:

- **rights covered by structural protection** – the structure and text of the Constitution provides some rights, such as the limited right to vote
- **express rights in the Commonwealth Constitution** – there are five express rights protected in the Constitution, including the right to freedom of religion
- **implied rights in the Commonwealth Constitution** – rights may be implied in the Constitution or have been implied in a High Court decision, such as the right to freedom of political communication.

USEFUL WEBSITE

Commonwealth Constitution www.austlii.edu.au/au/legis/cth/consol_act/coaca430/

Structural protection of rights

The structure and text of the *Commonwealth of Australia Constitution Act 1900* (UK) provides mechanisms for the indirect protection of the rights of Australians in their dealings with the Commonwealth Parliament by preventing the abuse of power. These mechanisms are known as the **structural protection of rights**. For example, the Constitution provides for:

- responsible government
- representative government
- separation of powers and the High Court of Australia as a final arbiter of the power of the Commonwealth.

These three constitutional principles underlie our democratic system of government and provide checks and balances to prevent the abuse of power and thereby indirectly protect human rights.

Separation of powers

The Commonwealth Constitution provides the mechanisms for powers to operate at a federal level independently of each other. These powers are:

- **legislative power** – the power to make laws, which resides with the parliament as provided under Chapter I of the Constitution
- **executive power** – the power to administer the laws and manage the business of government is provided under Chapter II; this is vested in the governor-general as the Queen's representative, although in practice it is carried out by the prime minister, senior ministers and government departments
- **judicial power** – the power given to courts and tribunals to enforce the law and settle disputes provided under Chapter III; this is vested in the High Court and other federal courts.

The legislative power and the executive power are combined at a federal level. The judicial power is separate and independent, although the courts are created by parliament and the judges are appointed by the executive. The High Court has more clearly defined the principle of separation of powers through a number of court decisions.

This principle of separation of powers prevents power from being concentrated in one set of hands and **helps to protect individual rights by providing checks and balances** on the power of the Commonwealth Parliament. No one body can make law, administer law and also rule on its legality.

The law-making powers given to the Commonwealth Parliament are laid down in the Constitution. If the Commonwealth Parliament oversteps these powers and makes laws outside its jurisdiction, the High Court can (if a case is brought before them) declare that a law is unconstitutional, and therefore inoperable. However, High Court justices are appointed by the government and the composition of the High Court can affect decisions that are made.

Responsible government

Under the parliamentary system, the executive, in the form of the governor-general, acts on the advice of the prime minister and senior ministers. This means that the power of the government is exercised by an elected person who is responsible to the parliament and indirectly to the electors.

Section 53 of the Constitution gives legal recognition for the principle of responsible government. The government cannot operate unless it is able to collect tax and spend money (that is, pay defence forces and public servants and distribute money to the states). Only the House of Representatives can initiate appropriation Bills (for collecting taxes and distributing revenue) and therefore the government must have the confidence of the lower house to run the country.

The notion of responsible government therefore **protects the right of citizens to be governed by a government that has the confidence and support of the elected lower house**. This protects against the possibility of a government abusing its power.

Although members of the government will usually vote with their party, there are sometimes dissenting views and on occasion members of the government will vote with the opposition.

Representative government

The text and structure of the Constitution specifically describes the system of representative government. **Representative government** refers to a government that represents the view of the majority of the people. The founding fathers were united in their desire that the Commonwealth Parliament should embody the highest principles of direct representation. They demonstrated this by requiring both houses to be elected by the people.

Section 7 of the Constitution directs that the senators for each state shall be directly chosen by the people. Section 24 of the Constitution directs that members of the House of Representatives shall be directly chosen by the people. Sections 8 and 30 further emphasise the ideal of representative government by requiring that each elector shall only vote once.

The right to vote for all people aged 18 years and above is not expressly guaranteed in the Constitution. However, the High Court justices have expressed the view in **obiter** (also referred to as **obiter dictum** meaning statements on the side and not part of a reason for a decision) that the Senate and the House of Representatives could not be directly chosen by the people if sections of the people, such as people of a particular ethnic background, were disqualified from voting.

Direct election by the people of their political representatives gives the people the right to expect that those representatives will represent their needs in parliament as much as possible. If a government begins to ignore the needs and wishes of the majority of people, it is likely it will be voted out of office at the next election.

Representative government therefore protects the right of the people to be governed by the people of their choosing (or that of the majority). A government cannot continue to govern without the support of the people and therefore the people are protected from governments having too much power over people's lives.

However, the government may find difficulty in implementing its legislative program if the government does not hold a majority in the upper house.

Right to vote

Section 41 of the Commonwealth Constitution grants the right to vote in a federal election to anyone who has the right to vote in state elections. However, in 1983 in *R v. Pearson*, the High Court held that this right to vote only applied to people who had the right to vote in state elections in 1902 (the year in which the *Commonwealth Franchise Act* was passed to establish who could vote in Commonwealth elections).

To be eligible to vote in 1902 you had to be 21. Therefore, S41 only protects the right to vote of people who are over 134 years old now! The current situation is that the Commonwealth Electoral Commission is responsible for determining who can vote.

The Constitution does, however, provide a limited implied right to vote under S7 and S24 in that both the Senate and the House of Representatives '**shall be composed of members directly chosen by the people**'. These words restrict the Commonwealth Parliament from passing legislation that would interfere with the right to vote. Several High Court justices have expressed the view in obiter that the Commonwealth Parliament would not be 'chosen by the people' if people were restricted from voting because of their sex or race, or because they did not own property.

In the Vicki Lee Roach case (see the next case study in this chapter for more details), the High Court held that two sections of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) were unconstitutional because they were not consistent with the system of representative democracy established by the Constitution. These sections of the Act prohibited all convicted and sentenced prisoners from voting in elections. Chief Justice Gleeson concluded that the words of S7 and S24 had come to grant a constitutional protection of the right to vote.

The importance of representative government in relation to the protection of the right to vote was again confirmed by the High Court in the 2010 case of *Rowe v. Electoral Commissioner* (2010) 243 CLR 1. This case involved a challenge to the validity of provisions of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) that reduced the close of polls period once a general election was called. Before the 2006 amendment, the *Electoral Act* had allowed new electors to enrol, and existing electors to change their details with the Australian Electoral Commission (AEC), for up to seven days following the issue of the writs for an election. However, the 2006 Act stated that new enrolments and re-enrolments had to be received by the AEC by 8 pm on the day the election writs were issued, and changes to enrolment details could only be made up to three days after the issue of the writs. The High Court held that the sections were invalid as they contravened S7 and S24 of the Constitution. Justice Crennan held that the democratic right to vote is supported and protected by the Constitution.

In response to the decisions in the Roach case and the Rowe case, the Commonwealth Parliament passed the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011* (Cth), which restored the close of electoral rolls to seven days after the issue of election writs, and amended prisoner voting entitlements to allow prisoners serving sentences of less than three years to vote.



Figure 4.1 Prime Minister Tony Abbott voting in the 2013 federal election

The Crown

The Crown provides the ultimate safety check on the operation of the government. Under reserve powers (not expressly listed in the Constitution), the Queen's representative (the governor-general) is able to dismiss a government that is not acting in accordance with the Constitution.

LEARNING ACTIVITY 4.2

Structural protection of rights

1 How can the principle of separation of powers help to protect the rights of Australians?
2 How is S53 of the Constitution relevant to the constitutional principle of responsible government? How does responsible government protect rights?
3 In what way does the Constitution embody the highest principles of direct representation? How does representative government protect rights?
4 Evaluate the extent to which every Australian has the right to vote under the Constitution.
5 What constitutional protection does the Crown offer and how is this relevant to the protection of rights?
6 To what extent does the Constitution provide structural protection of rights?
7 Read the case study 'Vickie Lee Roach – the right to vote' and answer the questions.
   a Why did Vickie Lee Roach have standing in this case (how was the case relevant to her)?
   b Explain the reason for the High Court finding that the 2006 Act was unconstitutional and the 2004 Act was valid.
   c How was this case relevant to the system of representative government in Australia and the protection of rights?
   d Explain the effect that this case had on the rights of Vickie Lee Roach personally, the rights of prisoners in Australian jails, and the Australian legal system.

CASE STUDY

Vickie Lee Roach – the right to vote

In 2006, the Commonwealth Parliament passed the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), which prohibited all convicted and sentenced prisoners from voting in elections. Vickie Lee Roach, who was serving a six-year term of imprisonment for five offences, was enrolled to vote in the seat of Kooyong, Victoria. Before the 2006 Act, prisoners who were serving sentences over three years were banned from voting; the 2006 Act extended this ban so that no sentenced prisoners were able to vote. At the time there were around 20 000 prisoners in Australia who would be affected by the Act.

Vickie Lee Roach challenged the constitutional validity of the 2006 Act in the High Court in *Roach v. Electoral Commissioner* (2007) 233 CLR 162. She also challenged the constitutional validity of the previous Act passed in 2004, which banned prisoners serving a sentence of three years or longer from voting.

The High Court held the 2006 Act was inconsistent with the system of representative democracy established by the Constitution. The High Court found that the Act was unconstitutional because S7 and S24 of the Commonwealth Constitution, which require that parliament be chosen 'directly by the people', enshrine the right to vote. The notion of representative government, chosen directly by the people, means that the people must have an equal vote for those who govern the country.

The right to vote could only be limited for substantial reasons. Parliament can only restrict a person's right to vote if it is thought necessary to preserve representative government. Such

reasons could include unsoundness of mind, conviction of treason or committing a serious criminal misconduct. Prisoners serving a prison sentence of more than three years were thought to be appropriately included under this limitation.

Chief Justice Gleeson stated that the right to vote could be removed for serious criminal misconduct, but not removed for prisoners who had been sentenced for less culpable criminal offences. The 2004 legislation was therefore valid (banning prisoners serving three years or more). However, it was unconstitutional for all sentenced prisoners to be denied the right to vote. People serving short-term sentences were generally not involved in serious criminal misconduct.

The outcome of this case is that Australians have been given the constitutional protection to the right to vote because of the provision for representative government in the Constitution. This is a restriction on the law-making powers of the Commonwealth Parliament, which is unable to pass a law that restricts the right to vote, other than in the circumstances outlined. Representative government is a structural protection of our democratic rights.

Between 1976 and 2003, Roach had 125 convictions or findings of guilt from 23 court appearances. She was involved in a series of damaging relationships, and at the time of her arrest in 2002 she had alcohol, four kinds of tranquillisers, morphine and a cannabis-related substance in her blood. Roach, who was egged on by her partner, attempted to escape police capture by driving at high speed. Their car struck a stationary car. Both cars burst into flames and the young man in the other car suffered burns to 45 per cent of his body. Roach is serving a six-year jail term and therefore she does not have the right to vote under the 2004 Act, which was deemed by the High Court in this case to still be valid.

While in jail, Roach completed a master's degree in professional writing and is studying for a PhD. She has written poetry and a novel.



Figure 4.2 Roach receives her degree.

Express rights in the Commonwealth Constitution

The Commonwealth Constitution clearly sets out five express rights (explicit rights). These express rights are entrenched in the Constitution. This means they can only be removed from the Constitution

by amending the Constitution using the referendum procedure established by S128. Rights that exist in common law, and rights created by legislation, can be abolished at any time by the Commonwealth Parliament legislating to override them.

The five express rights are the right to:

- freedom of religion (S116)
- free interstate trade and commerce (S92)
- not be discriminated against on the basis of the state where you reside (S117)
- receive 'just terms' when property is acquired by the Commonwealth (S51(xxxi))
- trial by jury for indictable Commonwealth offences (S80).

These rights tend to be expressed as limits on the Commonwealth Parliament, rather than as positive rights for individuals. These five rights are protected because the parliament cannot pass legislation that infringes or goes against the protected rights.

Freedom of religion

Freedom of religion is an express right. Section 116 of the Commonwealth Constitution provides that the Commonwealth Parliament **cannot pass a law** which:

- establishes a state religion (that is, declares a particular religion as the official national religion)
- imposes any religious observance
- prohibits the free exercise of any religion (that is, prevents people from practising their religion) – although this can be limited because of national security or to ensure that people follow the laws of the country, as pointed out by Justice Rich in the *Adelaide Company of Jehovah's Witnesses Inc. v. the Commonwealth* (1943) 67 CLR 116
- requires a religious test as a requirement for holding any Commonwealth office.

S116 Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Section 116 restricts the powers of the Commonwealth Parliament with respect to religion, but it does not apply to the states.

The High Court has interpreted 'religion' widely. Chief Justice Latham of the High Court pointed out in *Adelaide Company of Jehovah's Witnesses Inc. v. the Commonwealth* that S116 also protects non-believers by providing for the right of a person 'to have no religion'. However, the High Court has interpreted other parts of S116 narrowly. As shown in the DOGS Case below, the government is able to provide funding to religious schools.

CASE STUDY

Attorney-General (Vic); Ex Rel Black v. Commonwealth [1981] HCA 2; (1981) 146 CLR 559 (2 February 1981)

In this case, known as the Defence of Government Schools (DOGS) Case, the plaintiffs claimed that the legislation by which the Commonwealth had provided financial assistance to non-government schools in states and territories via state grants was invalid due to this funding being directed to religious schools, and therefore contravened S116.

The High Court reinforced the right to freedom of religion and confirmed that the Commonwealth cannot establish a religion. A majority of the Full Bench of the High Court held that the legislation that allowed the Commonwealth to give grants to the states which were used to provide financial assistance to non-government schools was valid; there was no religious inequality, because the grants did not differentiate between different schools based on religion. Therefore, through this case the practice of assisting religions by continuing to fund religious schools was allowed.

CASE STUDY

Williams v. Commonwealth of Australia [2012] HCA 23; (2012) 248 CLR 156

In this case, Ronald Williams challenged the Commonwealth Government's power to fund a chaplaincy service that was running in his children's government primary school in Queensland. The Commonwealth Government had entered into a funding agreement with Scripture Union Queensland to provide chaplaincy services such as 'general religious and personal advice to those seeking it, [and] comfort and support to students and staff, such as during times of grief'. The chaplain was not to seek to 'impose any religious beliefs or persuade an individual toward a particular set of religious beliefs'.

Mr Williams argued that the funding agreement was invalid because it was beyond the executive power of the Commonwealth under S61 of the Constitution and/or prohibited by S116 of the Constitution. Section 116 states that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'. Mr Williams argued that the school chaplain is an 'office ... under the Commonwealth' and, further, that there is a religious test to hold such an office.

The High Court unanimously dismissed the challenge under **S116** relating to a 'religious test' because the chaplains were not employees of the Commonwealth. The High Court did, however, find that in the absence of statutory authority, **S61** did not empower the Commonwealth to enter into the funding agreement to make the payments for the school chaplaincy program. In other words, because there was no Act giving authority for the funding agreement, the agreement was invalid. The executive power of the Commonwealth did not extend to making such arrangements without authorising legislation.



Figure 4.3
Ron Williams, who challenged the federal government's power to spend taxpayers' money on the national school chaplaincy program

Immediately following the High Court's decision, the Parliament passed legislation (the *Financial Framework Legislation Amendment Bill (No. 3) 2012* (Cth)) to allow the chaplaincy program and other similar programs to be funded by the Commonwealth. Ronald Williams challenged the constitutional validity of this legislative change and its funding arrangements. The High Court found in favour of Mr Williams, declaring that the legislation was invalid in relation to the school chaplaincy program because it was not covered by a specific head of constitutional power.

Interstate trade and commerce/freedom of movement

Under S92 of the Constitution, interstate trade and commerce shall be free. This right prevents parliament from treating interstate trade differently from trade within a state. It provides freedom of movement between states, without burden or hindrance. For example, it restricts the imposition of taxes on goods moving from one state to another.

S92 Trade within the Commonwealth to be free

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

This right primarily refers to trade and commerce but it can also refer to movement of people between states. In *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1, Justice Brennan said that the protection in S92 is given to such things as the movement of people, goods and communications. He went on to say that the essential ingredient was that there is movement across state boundaries, although the movement need not be perceivable (able to be seen).

In *AMS v. AIF* (1999) 199 CLR 160, an injunction restraining a mother from taking her child interstate from Western Australia to the Northern Territory was found not to contravene S92. (See the case study further on in this chapter for more information.)

The case of *Betfair Pty Ltd v. Racing New South Wales and Others* [2012] HCA 12 involved a Tasmanian-based betting exchange company that was accepting wagers on horse races in New South Wales and therefore subject to the payment of fees. Betfair maintained that the legal and practical effect of the fees was to protect New South Wales wagering operators, particularly TAB Limited, from competition from wagering operators in other states. Betfair challenged the validity of the fee conditions, arguing that they imposed a burden or disadvantage on interstate trade and commerce, contrary to S92 of the Constitution. The High Court dismissed the challenge and found that the fees were imposed on both interstate and intrastate trade (within the state). The High Court justices emphasised that the focus of S92 is on how a law affects interstate trade, not on particular traders. Although there was some discrimination against Betfair, in favour of other wagering operators, the fees were not protectionist in nature and therefore did not contravene S92.

The scope of S92 was limited by *Cole v. Whitfield* (1988) 62 ALJR 303. This case referred to the importation of undersized crayfish from South Australia to Tasmania. In this case it was decided that although the states are restricted from making laws that interfere with free trade within the Commonwealth, some restrictions are acceptable as long as they do not impose a burden on interstate trade, or discriminate against interstate trade.

Discrimination on the basis of state

Under S117 of the Constitution, it is **unlawful** for state and Commonwealth governments to **discriminate against someone** on the basis of the **state in which that person resides**. This means, for example, that a resident of New South Wales in Victoria cannot be subject to a Victorian law that would make them in a worse position than if they were from Victoria. However, the High Court has said that states can favour their own residents in limited circumstances, such as the right for only residents of a state to vote in elections for that state.

In *R v. Loubie* (1985) 19 A Crim R 112, Loubie, who was a resident of New South Wales, was charged with an offence in Queensland. He was denied bail, because under the *Bail Act 1980* (Qld), bail was able to be denied for a person who resided outside the state of Queensland. The Supreme Court of Queensland declared that this section of the Queensland *Bail Act* was invalid because it contravened S117 of the Constitution and treated people differently because they resided in another state.

S117 Rights of residents in States

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

CASE STUDY

Street v. Queensland Bar Association [1989] HCA 53; (1989) 168 CLR 461 F.C. 89/048 (16 November 1989)

In this case, the High Court decided that the Queensland Bar Association regulations contravened S117 of the Constitution. Street was treated differently on the grounds of his New South Wales residence because he could not be admitted to practice in Queensland without giving up his residence and his practice in the state where he resides. The regulations were therefore invalid.

CASE STUDY

Goryl v. Greyhound Australia Ltd and Ano [1994] HCA 18; 179 CLR 463 (20 April 1994)

Street's case was followed in *Goryl v. Greyhound Australia Ltd and Ano* (1994) 179 CLR 463 where the plaintiff, a resident of New South Wales, was injured in a bus accident in Grafton, New South Wales; the bus was owned and operated in Queensland. The defendant tried to limit their liability under the *Motor Vehicles Insurance Act 1936* (Qld) based on the fact that the plaintiff was not a resident of Queensland. Justices Dawson and Toohey of the High Court stated that 'in applying S117, the comparison to be made is between a non-resident in the position of the plaintiff and the position that she would be in if she were resident in Queensland. Quite clearly the plaintiff is, upon such a comparison, subject both to a disability and to discrimination. She can only recover damages at a lesser rate than if she were resident in Queensland … S117 applies to relieve the plaintiff from that disability or discrimination so that she is entitled to recover the full amount of damages recoverable in Queensland at common law.'

Acquisition of property on just terms

Under S51(xxxi) the Commonwealth must provide **just terms when acquiring property** (that is, the Commonwealth must pay fair and reasonable compensation for property that is compulsorily acquired). However, although an independent valuer will decide on what is just terms, this may not be suitable to the seller who is forced to sell his or her property. The High Court has held that property includes both tangible and intangible property, and real and personal property. The Commonwealth is only able to acquire property for a purpose or area for which it has the power to make laws; for example, airports and national parks.

S51(xxxi) Acquisition of property on just terms

The Parliament shall … have power to make laws for the peace, order, and good government of the Commonwealth with respect to … 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 …

This section applies only to the Commonwealth Parliament and not the states. However, the High Court has found that S51(xxxi) can apply to state legislation that is passed under a Commonwealth funding agreement.

CASE STUDY

JT International SA v. Commonwealth of Australia; British American Tobacco Australasia Ltd and Ors v. Commonwealth of Australia [2012] HCA 43

These cases involved a challenge to the constitutional validity of the *Tobacco Plain Packaging Act 2011* (Cth) – the world's first plain packaging tobacco laws. The Act restricts the colour, shape and finish of retail packaging for tobacco products, requires that distinguishing marks be removed from packaging, and allows a brand or business name to be included only in a limited way. The plaintiffs, a group of tobacco companies, argued that under the Act the Commonwealth had acquired their intellectual property rights (e.g. trademarks, copyright images) and this was not on just terms.

The High Court held that there was **no acquisition of property** by the Commonwealth. The court recognised that the Act regulated the plaintiff's intellectual property rights and restricted the plaintiff's enjoyment of their rights, but it did not confer a proprietary benefit or interest on the Commonwealth or any other person. The court distinguished between taking rights and acquiring rights and stated that to engage S51(xxxi) an acquisition must involve somebody gaining a proprietary benefit or interest. Thus, the Act was found to be valid as it did not acquire property.

Jury trial

Under S80 of the Constitution, there must be a jury trial for indictable Commonwealth offences. The High Court has found that a decision of a jury in such a trial must be unanimous. However, S80 provides only a limited right to trial by jury for two reasons.

- Most indictable offences are crimes under state law, and S80 only applies to Commonwealth offences.
- The High Court has ruled that indictable means 'crimes tried on indictment'. Therefore, the government can avoid S80, and thus avoid a jury trial for even the most serious offences, by declaring that the offence is a summary offence, rather than an indictable offence to be tried on indictment. (This is unlikely but could occur for something such as acts of terrorism.)

S80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

CASE STUDY

Brown v. R [1986] HCA 11; (1986) 160 CLR 171

In *Brown v. R*, the appellant, Michael Rodney Jonathon Brown, was presented for trial before Justice White in the Supreme Court of South Australia. The Director of Public Prosecutions of the Commonwealth of Australia charged him with offences against the *Customs Act 1901* (Cth). He pleaded not guilty to the charges.

Before a jury was empanelled, the appellant elected to be tried by a judge alone under S7 of the *Juries Act 1927* (Cth). It was decided that S7 of the *Juries Act* contravened the requirement that there should be trial by jury for indictable offences under S80 of the Constitution and therefore S80 prevailed and Brown was not able to be tried by judge alone.

Brown appealed to the High Court. Justice Dawson of the High Court found that, under S80 of the Constitution, a person charged with an indictable offence 'must be tried by jury and cannot elect to be tried by a judge alone'.

Implied rights in the Commonwealth Constitution

Implied rights are rights that are not expressly written in the Constitution, but have been read into or implied in the Constitution by its structure and text. For example, the High Court has found that the Constitution contains the implied right to freedom of political communication.

Political communication

In two cases in 1992 the High Court found there was an implied right to freedom of political communication contained in the Commonwealth Constitution. These cases were *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) and *Nationwide News Pty Ltd v. Wills* (1992).

The *Australian Capital Television v. The Commonwealth* case dealt with Commonwealth legislation that banned all political advertising on radio and television during election periods; that was the *Political Broadcasts and Political Disclosures Act 1991* (Cth). This legislation allowed some free advertising to those political parties that already had members of parliament. However, it did not allow either free or paid time on television and radio to anyone else who had a political comment they wanted publicised. The High Court held that the legislation was invalid because it overrode an implied constitutional right to freedom of political communication.

The reasons for the decision varied among the justices, but in general terms it was linked to the notion of representative government. The justices all indicated that the Constitution established a system of representative government, and that representative government could only operate properly if there was freedom for people to communicate about political issues. Otherwise, people would not be fully informed when making choices about who should be elected to government.

Theophanous v. Herald and Weekly Times Limited (1994) 182 CLR 104 and *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 have confirmed the existence of the right to political communication. The Theophanous case extended the implied right to allow comments about members of parliament and their suitability for office. The Lange case (see the case study following Learning activity 4.3) went further, stating that the right to freedom of political communication exists at all times, not just prior to an election. This right is not a general right to free speech, but only a right to free communication on matters relating to political issues.

This implied right is not without its critics. The legislation that was found to be unconstitutional by the High Court was intended to ban political advertising just before an election. Many countries have adopted this type of ban because votes can be swayed at the last minute by those political parties with the most money to spend on advertising. This is seen as interfering with the democratic process.

Recent cases have continued to use and apply the two-stage test that was developed in Lange's case, to determine whether a law infringes the implied freedom of political communication.

1 Does the law burden the freedom of political communication about government or political matters?

2 If yes, is the law reasonably appropriate and adapted to serve a legitimate end that is compatible with the maintenance of representative and responsible government? In other words, is the degree of restriction on political communication reasonable and proportionate, taking into account the objectives of the particular law? If it is not, then the law will be contrary to the Constitution and invalid.

CASE STUDY

Wotton v. Queensland [2012] HCA 2; (2012) 246 CLR 1

The plaintiff, Lex Wotton, is an Aboriginal man who was convicted of rioting causing destruction following a protest on Palm Island in 2004 over the death of another Aboriginal man in police custody. Wotton served his minimum term of imprisonment and sought parole. In granting parole under an order made under S200(2) of the *Corrective Services Act 2006* (Qld), the Parole Board imposed 22 conditions on Wotton, which included prohibiting him from attending public meetings on Palm Island without the prior approval of the corrective services officer, having any interaction with the media, or receiving any direct or indirect payment or benefit from the media.

Wotton was also subject to S132(1)(a) of the Act, which made it an offence for a person to interview or obtain a statement from a prisoner (including parolees).

The plaintiff challenged the constitutional validity of sections 132(1)(a) and 200(2) arguing that they burdened the **implied freedom of political communication** about government and political matters. The High Court applied the *Lange* test and held that the sections in question did effectively burden freedom of political communication about government or political matters (stage 1), but that these sections were reasonably appropriate and adapted to serve a legitimate end compatible with the system of government; that is, community safety and crime prevention through humane containment, supervision and rehabilitation of offenders, and to ensure the good conduct of parolees (stage 2). Hence, the High Court held that the sections of the Act were **not** invalid.

CASE STUDY

Attorney-General for the State of South Australia v. Corporation of the City of Adelaide [2013] HCA 3

Brothers Caleb and Samuel Corneloup, members of an association called Street Church, challenged the validity of Adelaide City Council by-laws that prohibited people preaching on any road or distributing printed material to passers-by on any road without a permit. Street Church actively preaches on religious and political matters in Adelaide streets, particularly Rundle Mall, the main shopping street.

The brothers argued that the by-laws, made under the *Local Government Act 1999* (SA) infringed the implied constitutional **freedom of political communication** about government and



Figure 4.4 Caleb (left) and Samuel Courneloup outside the High Court in Canberra

political matters. The court accepted that the by-laws **did** burden communication about government and political matters, but applying the second stage of the Lange test, their honours held that the provisions in question served a legitimate end compatible with our system of representative and responsible government. The purpose of the by-laws was seen to be protecting the 'safety, comfort and convenience of road users' and 'keeping of the peace'. A majority of the High Court upheld the validity of the council by-laws.

For the first time since 1992, the High Court in the case of *Unions NSW v. New South Wales* [2013] HCA 58, found that legislation breached the implied freedom of political communication, and the offending sections were declared invalid.

CASE STUDY

Unions NSW v. New South Wales [2013] HCA 58

This case involved a challenge to sections 96D and 95G(6) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (*EFED Act*), which were inserted by a 2012 amendment to the Act.

Section 96D made it unlawful for a political donation to a political party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is an individual who is enrolled on the electoral roll. This prevented corporations, trade unions or anyone not enrolled to vote from being donors.

Section 95G(6) changed the way the cap on election spending was calculated, with the result that a political party's cap included spending by organisations affiliated with the political party as well as the political party itself. Each of the plaintiffs intended to make political donations to the Australian Labor Party, the Australian Labor Party (NSW Branch) or other entities and, as affiliates of the Labor party, to participate in the pre-selection of that party's candidates for state elections.

The High Court held unanimously that sections 96D and 95G(6) of the Act 'impermissibly burden the implied **freedom of [political] communication** about government and political matters, contrary to the Commonwealth Constitution', thereby satisfying the first limb of the Lange test.

The court also held that political communication at a state level may have a federal dimension, and that federal and state political issues cannot be meaningfully separated, therefore the implied freedom was relevant.

Applying the second limb of the Lange test, the court held that 'it is not possible to attribute a purpose to S96D that is connected to, and in furtherance of, the anti-corruption purposes of the *EFED Act*. The second limb of the Lange test cannot be satisfied. The burden imposed by S96D on the freedom of political communication cannot be justified. Section 96D is **invalid**'. The court also similarly found no clear purpose for S95G(6) that was appropriate for the purposes of the *EFED Act*, and this section was also declared **invalid**.

It is important to note, as stated in the majority judgment of *Unions NSW v. New South Wales*, that 'in the Australian constitutional context, the freedom of political communication operates as a restraint upon the exercise of legislative power by the Commonwealth and the states'. It is not a personal right.

Enforcement of rights in Australia

As has been seen in previous examples, the role of the High Court in constitutional cases is to hear cases brought before it and to interpret the words in the Constitution. Constitutional rights are fully enforceable by the High Court, which can declare legislation invalid if it violates any of these rights.

The Commonwealth Parliament (or any other parliament) cannot override a High Court interpretation of the Constitution.

If the High Court declares legislation invalid, the parliament's options are:

- to amend the legislation so that the unconstitutional provisions are removed from it, or
- to try and remove the right in the Constitution by amending the Constitution in accordance with S128.

This is a **complaints-based approach** to the enforcement of rights because people or groups who believe their rights have been infringed can bring a case to the High Court. The High Court's focus is on declaring that the law passed by parliament is valid or invalid. They do not provide a remedy such as damages.

The High Court gives meaning to the words in the Constitution by interpreting the words narrowly or broadly. The High Court, in its role as final arbiter on the interpretation of the words in the Constitution, can ensure that laws passed by the Commonwealth Parliament are not outside its law-making power.

The High Court has, during the process of interpreting the words in the Constitution, found that the Constitution includes the implied right of political communication. This has been confirmed by a number of cases that have been brought before the High Court.

Rights that are protected through Acts of parliament or common law can be enforced through the courts.

In Australia, there are also human rights bodies such as the Australian Human Rights Commission that investigate laws that may contravene human rights. The role of this Commission is to make human rights values part of everyday life and language, empower people to understand and exercise their human rights, and keep the government accountable to national and international human rights standards. This Commission and others can recommend to parliament that a law needs to be changed because it contravenes human rights. This is a **watchdog approach**.

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) a Parliamentary Joint Committee on Human Rights will examine Bills and legislative instruments that come before either house of the Commonwealth Parliament for compatibility with human rights, and then report to both houses of parliament on that issue.

HINT

The VCE Legal Studies Study Design states in the key knowledge that you should know 'the significance of one High Court case relating to the constitutional protection of rights'. This may be an example of a right that is protected by structural protection, an express right or an implied right.

Note that these cases are different to those cases studied in Chapter 3, which were examples of High Court cases involving the interpretation of the Constitution in terms of their impact on the law-making power of the state and Commonwealth parliaments.

LEARNING ACTIVITY 4.3

Australia – express and implied rights

1 How are rights in Australia mainly protected?

2 What is the role of the Constitution in protecting rights? Explain three of the express rights in the Constitution.

3 For each of the following cases, state:
- how each case is relevant to the protection of constitutional rights
- which right is being examined in the case
- the outcome of the case, if available
- the significance of the case.

a *Attorney-General (Vic); Ex Rel Black v. Commonwealth* (known as the DOGS Case) (1981)

b *Nationwide News Pty Ltd v. Wills* (1992)

c *Cole v. Whitfield* (1988)

d *R v. Loubie* (1985)

e *Street v. Queensland Bar Association* (1989)

f *Goryl v. Greyhound Australia Ltd and Ano* [1994] HCA 18 (20 April 1994)
g *Brown v. R* (1986).

4 Look back at the case study of *Williams v. Commonwealth* and answer the questions.
a What were Ron Williams' arguments for claiming that the school chaplaincy program was unconstitutional under S116?
b What was the finding of the High Court in relation to S116?
c Explain the High Court's finding in relation to S61.
d The High Court has never held a law to be in contravention of S116. Suggest reasons for this.

5 Look back at the case study *JT International SA v. Commonwealth of Australia; British American Tobacco Australasia Ltd v. Commonwealth* (2012) and answer the following questions.
a Which section of the Constitution is this case relevant to?
b What was the property that was the subject of the case?
c Distinguish between taking property and acquiring property.
d Explain why no property was deemed to be acquired in this case.

6 How can the express rights that are entrenched in the Constitution be changed?

7 Distinguish between an express right and an implied right.

8 Explain the implied right to freedom of political communication. Do you agree with the decision in *Australian Capital Television Pty Ltd v. The Commonwealth of Australia* (1992)? Give reasons.

9 Look back at the case studies *Wotton v. Queensland* [2012], *Attorney-General for the State of South Australia v. Corporation of the City of Adelaide* [2013] and *Unions NSW v. New South Wales* [2013] and answer the questions.
a Describe the two-stage test developed in Lange's case that the High Court used in these cases to determine the constitutional validity of the laws involved.
b Describe the High Court's application of this test to one of the cases. What was the outcome?
c What is the significance of these cases for the protection of rights?
d The majority judgment in *Unions NSW v. New South Wales* stated that 'the freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power'. Explain what this means.

10 To what extent is the right to vote protected by the Constitution?

11 How are the rights in the Constitution enforced?

12 Working in groups, prepare a mind map starting with the word 'Constitution'. Show the protection of structural rights, express rights and implied rights.

CASE STUDY

Lange v. Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520

Facts of the case

In 1996, David Lange, previous prime minister of New Zealand, brought defamation proceedings against the Australian Broadcasting Corporation (ABC) for comments made about him on the current affairs program *Four Corners*. The Australian program was aired on New Zealand television. David Lange maintained that comments made on this program about his time in office were defamatory.

Defamation

Defamation is the communication of a statement that makes a claim about a person or business, stated or implied, that is injurious to the reputation of the person or business referred to in the claim.

Defence

The ABC used the defence that there exists in the Australian Commonwealth Constitution an implied right of freedom of political communication.

Decision

The implied right to freedom of political communication was established in *Australian Capital Television Pty Ltd v. Commonwealth* (1992) and other High Court cases. In the Lange case, the High Court confirmed this right. The High Court's interpretation in the Lange case, however, went further in that the right to freedom of political communication extended to any time, not just before an election.

The High Court also extended the defence to defamation of qualified privilege and therefore agreed with the defence offered by the ABC.



Figure 4.5
David Lange was the prime minister of New Zealand from 1984 to 1989.

Explanation

The right of freedom of political communication is not a freedom to communicate. It is a right of members of the Australian community to be free from laws that effectively prevent communication with each other about political and government matters. Freedom of communication on matters of government and politics is essential for the system of representative government that is provided for in the Constitution.

The High Court stated that state, territory and Commonwealth legislation and common law must conform to the right to freedom of political communications implied in the Constitution.

The High Court considered the implied right to freedom of political communications and its effect on defamation laws. The High Court declared that the common law of defamation had to recognise that 'each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia'.

The High Court in this case modified the requirements of the qualified privilege defence to defamation. Under the defence of qualified privilege, it is a defence to a claim of defamation if the person making the statement believed the statement being made was of moral interest to the person receiving the information, if the statement was made without malice and if it was reasonable in the circumstances. Following the Lange case, that defence has been extended to cover situations where it was reasonable to publish information relating to the right to freedom of political communication.

This case confirms and extends the right to freedom of political communication.

LEARNING ACTIVITY 4.4

Case study – *Lange v. Australian Broadcasting Corporation*

1 Explain the implied right of freedom of political communication.
2 How is this implied right relevant to defamation cases?
3 Explain the role of the High Court in the protection of rights in relation to this case. How has this case contributed to our understanding of the constitutional protection of a right?
4 'This case confirms and extends the right to freedom of political communication.' Explain the meaning of this statement in relation to this case. How significant is this case in protecting the right of political communication? Discuss the extent to which this right is protected.
5 How does this case continue to be of relevance to the High Court today when deciding cases regarding the right to freedom of political communication?

CASE STUDY

AMS v. AIF [1999] HCA 26; (1999) 199 CLR 160

The case of *AMS v. AIF* involves a mother's attempt to move her child from Western Australia to the Northern Territory, and is relevant to the right to freedom of movement under S92 of the Constitution.

A couple met and had a child in Perth in 1990. The couple went to live in Darwin for some time and then returned to Perth. When the couple separated in 1994, the mother was granted custody of the child. The mother wanted to take her child from Perth to Darwin to live. The father applied for an order restraining the mother from removing the child from Western Australia because he would only be able to see his child rarely. The mother applied for consent to change the child's place of residence.

Under S92 of the Constitution there must be freedom of movement between the states. However, according to *Cole v. Whitfield* (1988) this was not meant to suggest that every form of movement must be left without any restriction or regulation in order to satisfy the guarantee of freedom.

In *Cunliffe v. The Commonwealth* (1994) 182 CLR 272, the test of infringement of the freedom of interstate intercourse (communication and interaction) guaranteed by S92 was stated by Justice Deane of the High Court that:

> ... a law which incidentally and non-discriminately affects interstate intercourse in the course of regulating some general activity, such as the carrying on of a profession, business or commercial activity, will not contravene S92 if its incidental effect on interstate intercourse does not go beyond what is necessary or appropriate and adapted for the preservation of an ordered society or the protection or vindication of the legitimate claims of individuals in such a society.

It was felt that in the *AMS v. AIF* case, consideration should be given to the welfare of the child and the fact that, although the mother had freedom of movement, because she had custody of the child, she was limited by this.

The High Court stated:

> For all of the child's life he has had the benefit of considerable contact with each of his parents. Each of them has had considerable input into the child's upbringing. Although the child has always enjoyed a relationship with members of the extended families, since the mother has moved to Perth he has been brought up in an environment of close interaction with members of both extended families. From the point of view of the welfare of the child it seems to me that he has been in as an ideal situation as he could possibly be in given that his parents do not live together. It is my opinion that the welfare of the child would be better

promoted by him continuing in that situation in the absence of any compelling reasons to the contrary. Accordingly, the mother's application for a release from her undertaking will be dismissed and an injunction will be made restraining her from removing the child from the Perth Metropolitan area.

The High Court therefore found that an injunction restraining a mother from moving her child from Western Australia to the Northern Territory did not infringe S92.

LEARNING ACTIVITY 4.5

Case study – *AMS v. AIF*

1 Why did the mother wish to move the child from Western Australia to the Northern Territory?
2 What relevance does this case have to S92 of the Constitution?
3 What other elements were considered when deciding this case?
4 To what extent do you think this case has recognised the constitutional right of freedom of movement between states? Discuss. How significant is this case in protecting the right of freedom of movement between states?

Rights protected through Acts of parliament or common law

The majority of rights in Australia are protected in the following ways.

- **parliament legislating to incorporate rights into an Act of parliament** – An Act of parliament is passed to protect a variety of rights. For example, all states have anti-discrimination laws that make it unlawful to discriminate against people on various grounds. In addition, the Commonwealth Parliament has legislated to make sex, race and disability discrimination unlawful. These Commonwealth laws are based on provisions set out in various international human rights treaties that Australia has signed. Following the passing of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), all federal proposed laws must be considered in the light of their impact on human rights. Under this Act, human rights mean the rights and freedoms established in seven international human rights treaties.
- **common law establishing rights through precedent** – A case is brought to court and a decision is reached. The reason for the decision creates a precedent that is followed in the future. Many rights are protected by common law. For example, the 'right to silence' when arrested or on trial for a criminal offence is a right that has always existed under the common law

Examples of rights protected under Australian laws

- right to silence, although there are exceptions
- right to communicate with a lawyer prior to police questioning
- right not to be questioned for longer than a reasonable time
- liberty of movement is protected by the tort of false imprisonment
- the right to freedom of expression is allowed by laws of defamation
- right to privacy
- right not to be discriminated against on specific grounds
- child protection laws
- health and education laws

These rights can be abolished or changed by parliament. For example, the right to silence has been modified by an Act of parliament in Victoria to allow the police to demand a suspect's name and address in some circumstances. In some instances, rights can be extended or restricted by courts.

(although people can be asked to give their name and address in certain circumstances). But the right can be removed if parliament legislates to overrule the common law, as it was when an Act of parliament was passed giving police the right to demand the name and address of a suspect in certain circumstances.

Victoria and the ACT have established their own state/territory bills of rights for the protection of rights in their own state/territory (the Victorian *Charter of Human Rights and Responsibilities* and the ACT *Human Rights Act*). These can be changed by an Act of the parliament that passed them.

LEARNING ACTIVITY 4.6

Rights protected by Acts of parliament or common law

1 Describe a right that is protected by parliament.
2 How can a court case protect a right? Give an example.
3 Read the case study 'The rights of refugees' and explain how the High Court is protecting the rights of refugees in this case.

CASE STUDY

The rights of refugees

Plaintiff M70/2011 v. Minister for Immigration and Citizenship and Plaintiff M106 of 2011 by his litigation guardian, plaintiff M70/2011 v. Minister for Immigration and Citizenship (Malaysian Declaration Case) [2011] HCA 32; (2011) 244 CLR 144

In August 2011, a case was brought before the High Court for the protection of the rights of refugees not to be sent to Malaysia for offshore processing. The High Court made a landmark decision in this case, which meant that it was unlawful for refugees to be sent to Malaysia. The Court held that, under S198A of the *Migration Act 1958* (Cth), the Minister cannot validly declare a country as a country to which asylum seekers can be taken for processing, unless that country is legally bound to meet three criteria. The country must be legally bound by international law or its own domestic law to:

- provide access for asylum seekers to effective procedures for assessing their need for protection
- provide protection for asylum seekers pending determination of their refugee status
- provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country.

In addition to these criteria, the *Migration Act* requires that the country meet certain human rights standards in providing that protection.

On the facts in this case, the High Court held that Malaysia does not meet the criteria required as a country to which asylum seekers can be sent for processing.

The court also held that the Minister for Immigration and Citizenship has no other power under the *Migration Act* to remove from Australia asylum seekers whose claims for protection have not been determined.

4 Read the case study 'The High Court affirms the right to identity and expression' and answer the questions.
   a What is the main issue in this case?
   b Whose rights are being protected by this case?
   c How is this case an example of common law protecting a right?

CASE STUDY

The High Court affirms the right to identity and expression

AB v. Western Australia (2011) HCA 42 (6 October 2011)

AB and AH were born as female but identified as male from an early age. Both had altered their gender characteristics through undergoing bilateral mastectomies and ongoing testosterone therapy. Both had the physical appearance of males. They were denied a gender reassignment certificate because they both had female internal organs. The High Court held that both AB and AH had the right to identify as male because they had altered their gender characteristics sufficiently to be identified as male. This required consideration of their physical appearance, behaviour and lifestyle in private and public.

The High Court decision in this case stands as a firm precedent that sex and gender may be ambiguous. In order to respect the rights of transgender people, it is necessary to have flexible understandings about the way that sex and gender are identified.

Evaluation of the protection of the rights of Australians by the Commonwealth Constitution

The Commonwealth Constitution protects very few rights, and the process of changing the Constitution to include more rights is very difficult because it would require a successful referendum. It would be extremely challenging to get a majority of people across Australia and a majority of people in a majority of states to agree to a list of rights being included in a bill of rights as part of our Constitution. It is more likely that a bill of rights would be included in an Act of parliament that could be changed by parliament, much the same as in New Zealand (statutory rights).

Many would argue that the rights of Australians are already protected by a series of Acts of parliament, such as the *Sex Discrimination Act 1984* (Cth). In a democratic society, individuals who feel their rights are not protected by the law can try to influence the government to introduce a change in the law. If enough people support them, it is likely changes will occur. However, there are minority groups whose needs may not be heard. All groups of people could be given more protection under a bill of rights.

It has been suggested that Australia no longer needs a bill of rights because the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires all proposed legislation to be checked for compatibility with human rights, according to various international treaties. However, the parliament can choose to ignore suggestions that a proposed Act of parliament will contravene a human right.

Table 4.3 Strengths and weaknesses of the Commonwealth Constitution as a means of protecting rights

STRENGTHS	WEAKNESSES
• Express rights cannot be changed unless through a referendum; that is, with the support of the community. • The implied right of freedom of political communication has been found to be contained in the Constitution, showing that rights can be declared and clarified by the High Court when needed to preserve justice.	• Rights contained in a constitution are difficult to change due to the referendum process. Rights may lag behind when attitudes change and technology advances with time. • Very few rights are protected under the Constitution.

STRENGTHS	WEAKNESSES
• The Constitution offers structural protection of rights in that there must be a responsible government answerable to the lower house, there must be a representative government that can be voted out of office if it does not listen to the wishes of the people, there is contained in the Constitution a limited right to vote, the separation of powers provides an independent High Court that is the final arbiter on government actions and abuse of power, and the Crown provides the ultimate safety check on the operation of the government. • The express rights in the Constitution are enforceable through the High Court. Any section of legislation that is found to be outside the power of the parliament under the Constitution is immediately inoperable to the extent of the section that is found to be ultra vires (outside the power). • Leaving most rights to the legislators to protect means that they can be changed easily as the need arises. • The courts can interpret legislation and the Constitution in a timely fashion as the need arises to avoid injustices. • Section 128 means that it is hard to remove the rights that are protected under the Constitution and new rights can be added by a successful referendum.	• The rights that are protected are limited in scope; for example, many rights only apply to the Commonwealth Parliament and not the state parliaments, and some rights are narrow, such as trial by jury. • The needs of minority groups may not be heard by the government and may not be catered for without a bill of rights. • Using common law as a means of protecting rights depends on a case coming before the courts, which is expensive and time-consuming. • The complaints-based approach to rights protection means that the High Court cannot declare an infringement of rights and the offending legislation to be invalid unless a case is brought before the court. • If rights were protected under a bill of rights contained in the Constitution, the courts would be called on to interpret the rights contained in the bill of rights, giving the judiciary more power and making the High Court justices the final arbiters of what rights should exist in society rather than the parliament, which is elected by the people.

LEARNING ACTIVITY 4.7

Evaluation of the protection of the rights of Australians by the Commonwealth Constitution

1 Evaluate the means by which the rights of Australians are protected by the Commonwealth Constitution, and the extent of the protection.

2 Do you think Australia should adopt a Bill of Rights? Discuss. In your discussion, comment on whether you think a Bill of Rights should be constitutionally entrenched or statutory. Explain the difference between these two approaches to the protection of rights.

>>GOING FURTHER

The Victorian *Charter of Human Rights and Responsibilities*

The Victorian Parliament has acted to protect and promote the human rights and freedoms of Victorian citizens through the passage of the *Charter of Human Rights and Responsibilities Act 2006* (Vic.). While existing legislation and common law protected many of these rights, they are now stated in the one Bill of Rights included in the Charter.

Protected rights under the Victorian Charter

There is an extensive list of protected rights, with a focus on civil and political rights. Such rights include:

- recognition and equality before the law
- a fair trial
- the right to life
- protection from torture and cruel, inhuman or degrading treatment
- freedom from forced work
- freedom of movement into, out of and within Victoria
- right to privacy and reputation
- freedom of thought, conscience, religion and belief
- freedom of expression, association and peaceful assembly
- participation in public affairs
- protection of families and children
- cultural rights
- property rights
- right to liberty and security, humane treatment
- rights for accused people.

Enforcement of rights

In addition to specifically stating the human rights that parliament seeks to protect and promote, the Charter enforces these rights in a number of ways. For instance, all Bills introduced into parliament require the preparation and tabling of a statement of compatibility with the human rights listed in the Charter. The Bills must also be considered by the Scrutiny of Acts and Regulations Committee, which will determine compatibility of the Bills with the Charter. However, the Victorian Parliament is able, in exceptional circumstances, to override the protection of the Charter and pass incompatible legislation.

Further protection of rights is offered through the courts. All statutes must be interpreted in a way that is compatible with human rights, and the Supreme Court of Victoria has been granted the power to make orders on questions of law that result from the application of the Charter. While the Supreme Court can declare provisions in a statute to be inconsistent with the Charter, this does not affect the validity, operation or enforcement of the statute or its provisions. However, the minister responsible for administering the statute must prepare and table a response to the court's declaration of incompatibility within six months.

The Charter promotes the involvement of the three institutions of government in the law-making process – the parliament, the executive and the courts – in the protection of rights and freedoms.

Monitoring human rights in Victoria

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is charged with examining and reporting annually to the attorney-general on the operation of the Charter, any declarations of inconsistent interpretation, and all overriding declarations made throughout the year. In addition, government departments can ask the commission to examine the practices of public authorities to ensure that they are acting in a way that is compatible with human rights.

Source: adapted from the Victorian *Charter of Human Rights and Responsibilities*

USEFUL WEBSITE

Charter of Human Rights and Responsibilities Act 2006
www.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/



CANADA – PROTECTION OF RIGHTS

Canada has a federal system of government, with a central federal parliament and government, 10 provinces each with its own unicameral legislature (single house), and three territories, which derive their power from the federal parliament. The *Canadian Charter of Rights and Freedoms* was adopted in 1982 under the *Constitution Act* and it sets out an extensive list of express rights. It applies throughout all the provinces and territories of Canada.

Written in simple, straightforward language, the Charter sets out fundamental freedoms and classifies express rights into the main categories of democratic, mobility, legal and equality rights; there are also language rights. The Charter commences with 'Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law'.

USEFUL WEBSITES

Canadian Charter of Rights and Freedoms http://laws-lois.justice.gc.ca/eng/const/page-15.html
Canada's Human Rights Program www.pch.gc.ca/progs/pdp-hrp/canada/guide/index_e.cfm

Structural protection of rights

Representative government

The rights that are given structural protection under the Australian Commonwealth Constitution are expressly guaranteed under the *Canadian Charter of Rights and Freedoms*. Section 2 of the Charter provides everyone with the general right to free speech. Section 3 of the Charter guarantees the right to vote for all its citizens.

These sections provide for representative government. If the government fails to act in a manner acceptable to the majority of the people, it can be voted out of office at the next election.

Separation of powers

The principle of separation of powers is limited in Canada. As in Australia, the legislature and the executive are combined. The members of the House of Commons (the lower house in Canada) are elected by the people. The members of the Canadian Senate are recommended by the prime minister and appointed by the governor-general. Their appointment is for life or until they reach the age of 75.

The Supreme Court of Canada is a separate body and anyone whose rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain a remedy. However, only democratic rights and mobility rights are fully enforceable by the courts. Other rights in the charter can be overridden by an Act of parliament. The principle of separation of powers therefore provides less protection in Canada than in Australia.

Express rights

The *Canadian Charter of Rights and Freedoms* is entrenched within the Canadian *Constitution Act 1982* in the same way that rights are entrenched within the Constitution in Australia. However, the list of express rights in Canada is much more extensive.

The Charter protects individuals from violations of their human rights and fundamental freedoms by acting as a restriction on governments and parliaments, their actions and laws. Its provisions apply to the federal parliament and the legislature of each province and territory. The main rights entrenched by the *Canadian Charter of Rights and Freedoms* are as follows.

EXTRACT

The *Canadian Charter of Rights and Freedoms*

Guarantee of rights and freedoms

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

(c) freedom of peaceful assembly

(d) freedom of association.

Democratic rights

3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Mobility rights

6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Legal rights

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9 Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10 Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefore

(b) to retain and instruct counsel without delay and to be informed of that right

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence

(b) to be tried within a reasonable time

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

(e) not to be denied reasonable bail without just cause

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Equality rights

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official languages of Canada

16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Enforcement

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Source: *Canadian Charter of Rights and Freedoms*

Enforcement of rights

Complaints-based approach

Under S24 of the Charter, anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court for a remedy. The Charter can be interpreted by the courts (with the Supreme Court of Canada being the ultimate authority) to determine whether there has been an infringement of rights and freedoms. In doing so the courts must have regard to the recognition of the rights of aboriginal peoples of Canada (including Indian, Inuit and Metis groups), equal treatment for males and females, and protection of multicultural character.

Legislation that infringes the Charter can be declared invalid by the courts under S52 of the Canadian Constitution, and will cease to have any effect. This is similar to a declaration of invalidity in Australia. In Australia, if the High Court declares a law invalid, the Commonwealth Parliament cannot override this provision.



Figure 4.6 The Canadian Supreme Court, the highest court of Canada

Overriding provision

Unlike Australia, the Canadian Charter (S33) permits parliament (federal, provincial and territorial) to pass legislation with a clearly expressed intent that the legislation is to override a specific right protected in the Charter. This overriding provision lasts five years (sunset clause) (general elections must be held at least every five years), after which time the legislation must be passed again. Thus, S33, known as the override or notwithstanding clause, allows parliaments to make some of their laws temporarily immune from judicial review under the Charter.

There are some exceptions to this right of parliament to override rights protected in the Charter. These are that parliament cannot override voting rights (democratic rights), the right to travel into and out of, and within, Canada (mobility rights) or language rights. In Canada, by prohibiting parliament from overriding democratic, mobility and language rights, the Charter achieves a compromise between parliamentary sovereignty and judicial supremacy when it comes to the protection of rights.

A Canadian government that wishes to override the Charter may experience political difficulties. For example, in *R v. Morgentaler* (1988) 1 SCR 30, the Supreme Court struck down legislation that regulated abortion as it infringed the right to 'life, liberty and security of person'. In obiter (a statement by the way), the court added that a less restrictive abortion law could possibly be upheld. Parliament responded to this by introducing a new Bill to regulate abortion, but the Bill failed to pass the Senate. Since then there has been no further attempt to legislate with regard to abortion.

In Canada the override power has been used only rarely. It has been used by only three of the ten provincial parliaments, and one of the three territories. The federal parliament has never used it.

Remedies where rights are infringed

When legislation has been declared invalid, the Supreme Court can temporarily suspend an order to strike down legislation to give parliament time to respond to the court's decision by amending the legislation to bring it into line with the Charter.

In addition to declaring legislation invalid, the court can make another appropriate remedy, such as an award of damages, where rights have been infringed. The court can:

- read down the impact of legislation (that is, interpret the legislation narrowly) to bring its operation within the boundaries set by the Charter
- make an appropriate remedy, such as an award of damages under S24(1)
- exclude evidence in a criminal or civil case that has been obtained in violation of Charter S24(2).

Pre-legislative scrutiny

Before Bills are passed by parliament in Canada, the minister for justice must certify that they do not infringe the *Canadian Charter of Rights and Freedoms*. In addition, each house of parliament has a standing committee that scrutinises Bills. The committees can hold public meetings and invite public comment on the possible impact of the Bill. This scrutiny by committee is similar to the process in Australia.

Limitation of rights

In Canada, parliament can limit the rights protected by the Charter where the limit 'can be demonstrably justified in a free and democratic society' (S1). This section is known as the limitation clause or the reasonable limits clause. For example, in the case of *R v. Sharpe* (2001), the Supreme Court had to decide whether legislation banning possession of child pornography infringed the right to free expression. The court found there was evidence establishing a link between harm to children and possessing child pornography, and accordingly the limitation on free speech was justified. Section 1 has also been used to uphold laws against hate speech and obscenity.

Advisory opinions

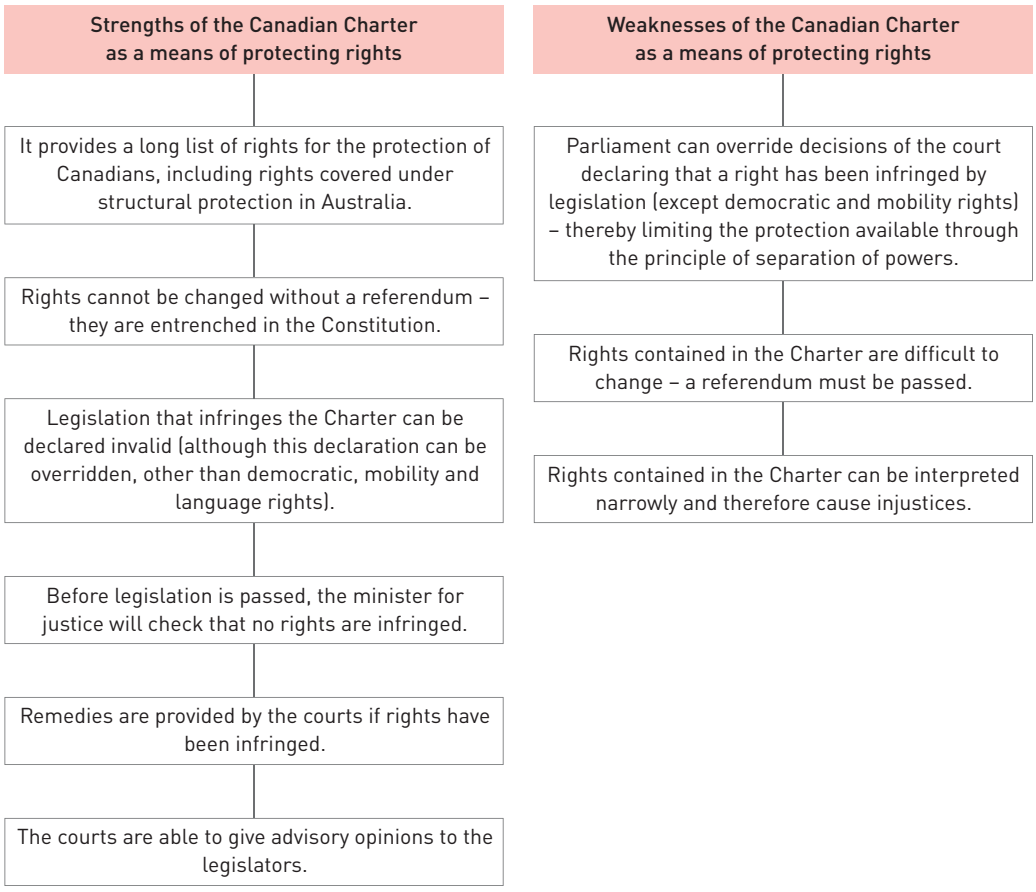
In Canada, dialogue or discussion is encouraged between the parliament and the courts so that the parliament can seek advisory opinions from the Canadian Supreme Court – the highest court in Canada. The parliament or governor in council may put forward a reference or questions to the Supreme Court, seeking advice on matters of the constitutionality or interpretation of legislation. Therefore, when passing legislation, the parliament can determine from the court whether the legislation is likely to infringe any of the rights protected in the Charter. If it is, the parliament can engage in a discussion with the judges about likely impacts, interpretation and so on.

The Australian High Court is not permitted to give advisory opinions regarding legislation, and will only consider a legal issue when a case comes before it on the matter in question.

Changing the Charter

The procedure for amending the *Canadian Charter of Rights and Freedoms* is similar to the process for amending the Constitution in Australia. The proposal must be passed by parliament, and then passed at a referendum that achieves a 'yes' vote from 50 per cent of the population and a majority in two-thirds of the provinces.

>>GOING FURTHER



Australian and Canadian approaches

There are similarities and differences between the approach adopted for the constitutional protection of democratic and human rights in Australia and the approach taken in Canada.

Table 4.4 Australia and Canada – similarities in the approach to constitutional protection of democratic and human rights

CANADA	AUSTRALIA
Numerous rights entrenched within its Charter; some the same as Australia, e.g. freedom of religion.	Some rights entrenched within the Australian Constitution.
Rights can only be removed from the Charter by holding a referendum to amend the Charter and rights can be similarly added.	Rights specified in the Australian Constitution can only be removed or added by amending the Constitution through a referendum.
There is pre-legislative scrutiny of Bills to determine their compliance with protected rights. This is undertaken by the Minister of Justice and parliamentary committees.	There is pre-legislative scrutiny of Commonwealth Bills to determine their compliance with protected rights. A parliamentary joint committee examines Bills and reports to parliament with a statement of compatibility.

CANADA	AUSTRALIA
Individuals and groups can bring a complaint that an Act infringes their rights set out in the Charter. The person bringing the action must be directly affected by the infringement of rights.	Individuals and groups can bring a complaint that an Act infringes their rights set out in the Constitution. The person bringing the action must be directly affected by the infringement of rights.
The Supreme Court can find a section of an Act is unconstitutional because it contravenes one of the express rights and therefore the relevant section of the Act is inoperable. Parliament can amend the offending Act.	The High Court can find that a section of an Act is unconstitutional because it contravenes one of the express rights (e.g. freedom of religion) and therefore the relevant section of the Act is inoperable. Parliament can amend the offending Act.
Democratic rights, mobility rights and language rights are fully enforceable by the courts; that is, if the courts declare legislation invalid because it infringes one of these express rights, parliament cannot override that ruling. (The other Canadian rights protected under sections 2, 7–15 of the Charter can be subject to the parliamentary override explained above.)	The rights protected by the Constitution are fully enforceable by the courts, and parliament cannot override a High Court ruling relating to these rights.

Table 4.5 Australia and Canada – differences in the approach to constitutional protection of democratic and human rights

CANADA	AUSTRALIA
The rights that are given structural protection under the Australian Commonwealth Constitution are expressly guaranteed under the *Canadian Charter of Rights and Freedoms*. Section 2 of the Charter provides everyone with the general right to free speech. Section 3 of the Charter guarantees the right to vote for all its citizens.	The Australian Commonwealth Constitution offers structural protection of rights in that there must be a responsible government answerable to the lower house, there must be representative government that can be voted out of office, and the separation of powers, which provides an independent High Court that is the final arbiter on government actions and abuse of power.
The list of express rights is extensive, and is contained in a bill of rights.	There are only five protected rights specified in the Constitution (which are scattered throughout the Constitution), plus the right to freedom of political communication, which the High Court has implied from the Constitution.
There is a limit on the enforcement of Canadian rights (except democratic, mobility and language rights) because S33 of the Charter permits parliament to pass legislation with a clearly expressed intent that the legislation is to override the right protected in the Charter. However, that overriding law is only in force for five years, and must then be passed again by parliament.	None of the express rights can be overridden by parliament.
The Canadian Charter provides that parliament can limit the rights protected under the Charter when it is 'demonstrably justified in a free and democratic society' (S1).	There is no similar limitation.

CANADA	AUSTRALIA
The courts can read down the impact of legislation; that is, interpret the legislation to bring its operation within the boundaries set by the Charter.	The Australian courts have not adopted this approach to statutory interpretation.
In addition to declaring legislation invalid, the Supreme Court can make another appropriate remedy, such as an award of damages, where rights have been infringed.	The High Court's approach has been to declare legislation valid or invalid.
In a trial, a court can exclude evidence that has been obtained in violation of the Charter.	Australia does not have a similar provision.
The Canadian Supreme Court (Canada's highest court) can be asked to give an opinion on whether proposed legislation will infringe the Charter. Dialogue is encouraged between the parliament and the courts.	The High Court will not give advisory opinions, but will only consider a legal issue when it is brought before it by parties seeking to have a dispute resolved.
In Canada, the principle of separation of powers is limited. The Senate is chosen by members of the House of Commons. Other than democratic and mobility rights, parliament can override decisions of the court that declare legislation to contravene a right provided under the Charter.	Australian citizens are protected by the principle of separation of powers. Under this principle the High Court is a separate independent body and can declare an Act of parliament invalid if it contravenes an express or implied right or rights provided by structural protection.
The Canadian Charter applies to both provincial/territorial parliaments as well as the federal parliament.	Protected rights in the Constitution apply to the Commonwealth Parliament. Only some rights apply to state parliaments as well.

LEARNING ACTIVITY 4.8

Canada – protection of rights

1 Describe five of the main rights protected under the *Canadian Charter of Rights and Freedoms*.
2 Which right or rights are common to the Canadian Charter and the Constitution of Australia?
3 In both Australia and Canada, legislation that infringes the rights contained in the Constitution/Charter can be declared invalid by the courts. Explain which rights this statement applies to in Canada and which rights it does not apply to.
4 How can the Canadian Parliament override rights protected under the Charter?
5 How can the Canadian Parliament limit the rights protected by the Charter?
6 What remedies are there in Canada when rights are infringed? How do these remedies differ from those in Australia?
7 What is a complaints-based approach to the protection of rights? How does it operate in Australia and Canada?
8 Discuss the advantages and disadvantages of having a bill of rights similar to the *Canadian Charter of Rights and Freedoms*.
9 Discuss the similarities and differences between the Australian approach to the protection of rights and the approach taken in Canada.

10 Read the case study 'Canada – same-sex marriage' and answer the questions.

- **a** According to the Ontario High Court, what right was breached by the exclusion of marriage of same-sex couples? Explain.
- **b** Explain how the Canadian Supreme Court was able to scrutinise this Bill.
- **c** Explain the outcome of this decision.
- **d** How does the role of the Canadian Supreme Court differ from the role of the High Court of Australia?

CASE STUDY

Canada – same-sex marriage

The legal doorway for same-sex couples to marry in Canada was opened in June 2003 by the case of *Halpen et al. v. The Attorney-General of Canada*, a decision of the Ontario High Court. Under Canadian law, the federal parliament has jurisdiction with regard to the laws of marriage and divorce, but the provinces have exclusive jurisdiction over the procedures for solemnising marriage.

The case was brought before the High Court by seven gay couples who were seeking marriage licences from the City of Toronto.

The federal marriage laws did not define marriage, but relied on the common law position that was set out in the English case of *Hyde v. Hyde* (1866), which defined marriage as 'the voluntary union for life of one man and one woman, to the exclusion of all others'. The Ontario High Court held that this exclusion of same-sex couples from civil marriage infringed the right to equality guaranteed by the *Canadian Charter of Rights and Freedoms*. The Court commented that 'the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage'.



Figure 4.7
Same-sex marriages became legal in Canada following an opinion of the Supreme Court that the Bill was constitutionally valid.

Following this decision, marriage ceremonies for same-sex couples became legal in the province of Ontario. Similar cases were brought in other Canadian provinces, and eventually the Canadian federal government decided to amend the marriage laws to include same-sex marriages.

In 2004, a draft Bill was submitted to the Canadian Supreme Court (the highest court in Canada), seeking an opinion on its legality. The Supreme Court held that the Bill was constitutionally valid, and consistent with the *Canadian Charter of Rights and Freedoms*. The Bill confirmed the right of same-sex couples to marry but exempted religious officials from having to perform same-sex marriages when they are contrary to their beliefs. The Supreme Court held that this exemption was valid because of the guaranteed right to freedom of religion contained in the Charter. In July 2005, the Canadian Parliament passed legislation recognising same-sex marriage.

11 Read the following case study 'Canada – exclusion of evidence' and answer the questions.

- **a** Which specific sections of the Charter were violated in this case?
- **b** Explain why the trial court excluded evidence obtained by the police that infringed Charter rights.
- **c** Do you agree with the Supreme Court's decision to uphold the accused's acquittal? Why?
- **d** Does the Australian Constitution have any similar provisions regarding the exclusion of evidence where rights are violated? Explain.

CASE STUDY

Canada – exclusion of evidence

In the case of *R v. Côté* (2011) the Canadian Supreme Court had to decide whether S24(2) of the *Canadian Charter of Rights and Freedoms* was appropriately applied to exclude evidence at the trial of an accused who was subjected to the violation of a number of legal and constitutional rights protected by the Charter.

The accused, Armande Côté, was charged with murdering her husband by inflicting a fatal gunshot wound to his head. At the conclusion of Côte's trial for second-degree murder, the trial judge found that the police investigators over several hours had violated virtually every Charter right accorded to a suspect in a criminal investigation, and shown systematic disregard for the law. Examples of violations included unreasonable search and seizure of the accused's property, detaining Ms Côté without informing her of the reasons, not advising the suspect of her right to retain legal counsel, violating her right to silence, and obtaining a statement that was not voluntary. In addition, it was found that police had misled a judicial office to obtain search warrants, and had been evasive and unbelievable witnesses at trial.

By an 8–1 majority the Supreme Court ruled that the trial judge was correct in excluding the evidence at trial under S24(2), and in acquitting the accused. The court stated, '... Both the police misconduct and its impact on the accused's Charter-protected interests were very serious ...' The trial judge was obviously and justly concerned about the continuous, deliberate and flagrant breaches of the appellant's Charter rights and this consideration played an important role in his balancing of the factors under S24(2).

12 Read the following case study 'Canada – freedom of religion' and answer the questions.

- **a** Explain how S1 and S2 of the Canadian Charter are relevant to this case.
- **b** Why was the school council of commissioners bound by the Charter?

c Explain the decision of the Canadian Supreme Court in this case.
d Do you agree with the decision in this case? Discuss.
e Compare the scope of freedom of religion and the means by which it is protected in Canada and Australia.

CASE STUDY

Canada – freedom of religion

The right to freedom of religion for Canadians is protected by S2 of the *Canadian Charter of Rights and Freedoms*. In *Multani v. Commission Scolaire Marguerite Bourgeoys* (2006), the Supreme Court of Canada had to determine whether this human right was violated by a Quebec school.

A Sikh boy, Gurbaj Singh, was banned from wearing a kirpan to school. A kirpan is a ceremonial dagger that must be worn by all baptised Sikhs. The school board decided that the kirpan was a weapon and therefore not allowed under the school's code of conduct.

The Supreme Court found that the school, as a statutory body, was bound by the Charter. The Court stated that the council of commissioners, which had banned the kirpan, was bound by the Charter. This was because the council was created by an Act of parliament and therefore it was a delegated body (it had received its powers from parliament).

The Court found that the violation of freedom of religion in this instance was considerable, given the connection between the wearing of the kirpan and Singh's religion. The court was asked to consider whether this violation could be upheld under S1 of the Charter as being necessary to maintain school safety. However, the Court held that the kirpan had religious meaning and did not represent violence. The school board's rule therefore constituted an infringement of freedom of religion, which could not be justified under S1 of the Charter.

He was allowed to wear the kirpan, but was asked to cover it at all times. The Court said that allowing him to wear his kirpan under certain conditions demonstrates the importance that the Canadian society attaches to protecting freedom of religion and to showing respect for its minorities.

13 Read the following case study 'Canada – right to security' and answer the questions.
a Outline the rights protected by S7 of the Charter.
b Explain the significance of the Supreme Court's comment regarding S1. Is there a similar provision in the Australian Constitution?
c Suggest advantages of the Supreme Court suspending its ruling for one year.
d Compare (using at least one similarity and at least one difference) the orders of the Canadian Supreme Court in this case, with the types of orders that are able to be made by the High Court of Australia.

CASE STUDY

Canada – right to security

The case of *Canada (Attorney General) v. Bedford* (2013) SCC 72 involved a challenge to sections of the *Criminal Code of Canada* by three appellants who had been charged with prostitution-related offences under the Criminal Code. While prostitution itself was not illegal, other related activities such as living off the proceeds of prostitution, keeping or being in a bawdy house (brothel), and communicating for the purpose of prostitution, were illegal.

The Supreme Court held unanimously (9–0) that the anti-prostitution laws were unconstitutional because they created severe dangers for vulnerable women and therefore violated the right to security under S7 of the Charter. The court stated that 'the prohibitions all heighten the risks ... by imposing dangerous conditions on prostitution; they prevent people engaged in a risky, but legal, activity from taking steps to protect themselves from the risks'. Further, the court stated that the offending sections could not be saved by the limitation clause in S1 of the Charter.

The court suspended its ruling for one year, giving the Canadian Parliament until December 2014 to issue a legislative response and change the offending sections, if they choose to.

SOUTH AFRICA – PROTECTION OF RIGHTS



South Africa is a central state that is divided into nine provinces. The *Constitution of the Republic of South Africa Act* of 1996 came into effect on 4 February 1997 as part of the reconstruction of South Africa's political system to make it democratic.

The *Bill of Rights* is contained in chapter two of the Constitution. It enshrines the rights of all South Africans. This is an **'express rights entrenched in a constitution' approach**. The 1996 Constitution repealed the earlier interim *Constitution Act* of 1993, which came into effect after the first democratic elections in South Africa.

The South African *Bill of Rights* contains a comprehensive list of civil, political, economic, social and cultural rights, and also includes rights such as the right to human dignity and environmental rights.

This *Bill of Rights* is a cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.

USEFUL WEBSITES

Constitution of the Republic of South Africa
www.info.gov.za/documents/constitution/1996/96cons2.htm
Constitutional Court of South Africa www.constitutionalcourt.org.za/site/home.htm

Structural protection of rights

Representative government

The rights that are given structural protection under the Australian Commonwealth Constitution are expressly guaranteed under the South African *Bill of Rights*. Section 16(1) of the *Bill of Rights* provides everyone with the general right to free speech and section 19(3) guarantees the right to vote for all its citizens.

These sections provide representative government; if the government fails to act in a manner acceptable to the majority of the people, it can be voted out of office at the next election.

Separation of powers

The separation of power between the three pillars of government is a crucial element of democracy. Democracy is protected by separating the three areas of power. The legislature makes the laws and monitors the executive (the president, deputy president and ministers). The executive makes policy, proposes laws and implements laws passed by the legislature. The judiciary hears disputes and administers justice.

The Constitutional Court is able to keep a check on the legislature and ensure that it does not abuse its power. The parliament cannot overrule decisions of the Constitutional Court relating to the interpretation of the Constitution. For example, in the case of *National Treasury and Others v. Opposition to Urban Tolling Alliance and Others* (2012), the Constitutional Court set aside an order of the High Court as it 'failed to consider or to give effect to the constitutional imperative of separation of powers'. The Constitutional Court stated that 'beyond the common law, separation of powers is a vital tenet of our constitutional democracy. Courts must refrain from entering the exclusive terrain of the executive and legislative branches of government, unless the intrusion is mandated by the Constitution'.

Some rights can be limited by parliament in extreme situations such as a state of emergency.

Express rights

Unlike Australia, the South African *Bill of Rights* contains an extensive list of protected human rights noted under various headings such as equality, human dignity, life, freedom and security of the person. The rights under the South African *Bill of Rights* are entrenched and may only be altered through constitutional amendment. This is like the rights protected in the constitutions of the United States and Australia and some of the rights in Canada.

The *Bill of Rights* applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. The *Bill of Rights* also applies between one citizen or private body and another.

EXTRACT

South African *Bill of Rights*

CHAPTER 2 BILL OF RIGHTS (ss 7–39)

7 Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

9 Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

10 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

11 Life

Everyone has the right to life.

12 Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right:

(a) not to be deprived of freedom arbitrarily or without just cause

(b) not to be detained without trial

(c) to be free from all forms of violence from either public or private sources

(d) not to be tortured in any way and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

13 Slavery, servitude and forced labour

No one may be subjected to slavery, servitude or forced labour.

14 Privacy

Everyone has the right to privacy, which includes the right not to have:

(a) their person or home searched

(b) their property searched

(c) their possessions seized or

(d) the privacy of their communications infringed.

15 Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

16 Freedom of expression

(1) Everyone has the right to freedom of expression, which includes:

(a) freedom of the press and other media

(b) freedom to receive or impart information or ideas

(c) freedom of artistic creativity and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to:

(a) propaganda for war

(b) incitement of imminent violence or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

17 Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

18 Freedom of association

Everyone has the right to freedom of association.

19 Political rights

(1) Every citizen is free to make political choices, which includes the right:

(a) to form a political party

(b) to participate in the activities of, or recruit members for, a political party and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right:

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret and

(b) to stand for public office and, if elected, to hold office.

20 Citizenship

No citizen may be deprived of citizenship.

21 Freedom of movement and residence

(1) Everyone has the right to freedom of movement.

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport.

24 Environment

Everyone has the right:

(a) to an environment that is not harmful to their health or well-being and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

(i) prevent pollution and ecological degradation

(ii) promote conservation and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

26 Housing

(1) Everyone has the right to have access to adequate housing.

27 Health care, food, water and social security

(1) Everyone has the right to have access to:

(a) health care services, including reproductive health care

(b) sufficient food and water and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

31 Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:

(a) to enjoy their culture, practise their religion and use their language and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

35 Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right:

(a) to remain silent

(b) to be informed promptly:

(i) of the right to remain silent and

(ii) of the consequences of not remaining silent

(c) not to be compelled to make any confession or admission that could be used in evidence against that person

(d) to be brought before a court as soon as reasonably possible, but not later than:

(i) 48 hours after the arrest or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right:
  (a) to be informed promptly of the reason for being detained
  (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly
  (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly

(3) Every accused person has a right to a fair trial, which includes the right:
  (h) to be presumed innocent, to remain silent, and not to testify during the proceedings.

36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
  (a) the nature of the right
  (b) the importance of the purpose of the limitation
  (c) the nature and extent of the limitation
  (d) the relation between the limitation and its purpose and
  (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Source: Constitution of the Republic of South Africa 1996

Enforcement of rights

Interpretive approach

The rights under the South African *Bill of Rights* are fully enforceable. Legislation that violates these express rights can be declared unconstitutional by any competent court, and be declared invalid by the Constitutional Court, and hence has no effect. A declaration of invalidity cannot be overridden by parliament. This is similar to Australia, because the High Court of Australia can declare that a section of an Act contravenes an express right in the Constitution and therefore that section of the Act will be invalid.

In South Africa, any individual or group can bring an action alleging that a right under the *Bill of Rights* has been infringed (**interpretive approach**). This differs from Australia because in Australia the person or group bringing the action must be directly affected by the infringement of rights (**complaints-based approach**).

Statutory interpretation and common law

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit and purpose of the *Bill of Rights* and interpret legislation in accordance with the *Bill of Rights*.

For example, in *Carmichele v. Minister of Safety and Security* (2001), a woman raped by a man on bail successfully sued the state for negligence. The man had been released unconditionally on bail despite his history of sexual violence. The court found that the *Bill of Rights* must shape the common law, and accordingly the state should protect the right of women to have their safety protected, a right which was promoted by the *Bill of Rights*.



Figure 4.8 The South African Constitutional Court

Remedies where rights have been infringed

Legislation that infringes the *Bill of Rights* can be declared invalid by the courts. In addition to declaring legislation invalid, the courts can make other appropriate remedies, such as an award of damages, where rights have been infringed.

Civil, political, economic, cultural and social rights

What distinguishes the South African *Bill of Rights* from the human rights protection provided by many other countries is that it protects significant civil, political, social, economic and cultural rights. These include the right to health care, food, water, social security, housing, the environment, education, language and culture.

A significant case dealing with these sorts of rights is *Minister of Health v. Treatment Action Campaign* (2002). The South African Government had restricted distribution of Nevirapine, an anti-retroviral drug that was effective in preventing transmission of HIV/AIDS from mother to child during childbirth.

The relevant South African government agency, the Medicine Control Council, had found the drug to be safe and effective. The Constitutional Court found that this restriction imposed by the South African Government was a violation of S27 of the *Bill of Rights*, which guarantees a right to health care. The court ordered removal of the restriction on the drug's distribution. In other words, the court changed government policy because the policy infringed protected rights. The government argued that such an order would infringe the principle of separation of powers, but the court rejected this and stated that it was requiring the government to act in accordance with its constitutional obligations.

Limitation of rights

The South African *Bill of Rights* contains a general limitation which provides that rights may be limited where it is 'reasonable and justifiable in an open and democratic society based on human dignity,

equality and freedom' (see S36 in the extract). For example, in the case of *Prince v. President, Cape Law Society* (2002), Mr Prince challenged provisions in legislation that prohibited the possession and use of cannabis. He was seeking admission to the attorneys' profession, but was refused as he had two convictions for the possession of cannabis, and stated that he intended to keep using it.

Mr Prince argued that as a Rastafari (a religion that requires its followers to use cannabis for religious purposes for reasoning and meditation), the prohibition unreasonably limited his right to freedom of religion. The Constitutional Court recognised Mr Prince's right to freedom of religion protected by sections 15 and 31, but applied S36 of the Constitution, and found that the prohibition in the legislation was not unreasonable. The majority held that the purpose of the legislation in preventing harmful drug use in the general public outweighed the impact on Mr Prince's right to freedom of religion.

There are also some specific limitations in a few of the descriptions of rights. Some rights (but not all) may be limited during a state of emergency (but a court can decide if it is a valid state of emergency). Other rights are considered to be non-derogable, meaning that they cannot be restricted or limited. Non-derogable rights include equality, human dignity, life, freedom and security of the person, rights against slavery and servitude, rights of children and rights during arrest and detention.

Changing the Constitution

Rights can only be changed by amending the Constitution. This does not require a referendum, but the amendment must be passed by two-thirds of the National Assembly members and then be supported by at least six of the nine provinces in the National Council of Provinces.

>>GOING FURTHER

Strengths of the South African *Bill of Rights* as a means of protecting rights	Weaknesses of the South African *Bill of Rights* as a means of protecting rights
It provides a long list of rights for the protection of South Africans, including rights covered under structural protection in Australia.	Parliament can override some rights in extreme situations, such as a state of emergency.
Rights cannot be changed without being passed by two-thirds of the National Assembly members and supported by at least six of the nine provinces in the National Council of Provinces.	It is difficult to change rights contained in the *Bill of Rights*.
Legislation that infringes the *Bill of Rights* can be declared invalid – this cannot be overridden by parliament.	Rights in the *Bill of Rights* can be interpreted narrowly and injustices can occur.
Remedies are provided by the courts if rights have been infringed.	The people are not asked to vote on a referendum for rights in the *Bill of Rights* to be changed, and are therefore not involved. This is a decision of the National Assembly although at least six of the nine provinces must agree.
The principle of separation of powers operates to protect citizens from the abuse of power of the government.	
Civil, political, economic, cultural and social rights are protected.	

Australian and South African approaches

There are a number of similarities and differences between the approach adopted for the constitutional protection of democratic and human rights in Australia and the approach taken in South Africa.

Table 4.6 Australia and South Africa – similarities in the approach to constitutional protection of democratic and human rights

SOUTH AFRICA	AUSTRALIA
Many rights entrenched within its Constitution – some similar rights to Australia, e.g. freedom of religion.	Some rights entrenched within the Australian Constitution.
Rights can only be altered, removed or added by amending the Constitution. This does not require a referendum, but the amendment must be passed by two-thirds of the National Assembly members and then be supported by at least six of the nine provinces in the National Council of Provinces.	Rights specified in the Australian Constitution can only be altered, removed or added by amending the Constitution, although in Australia a referendum is always required.
Individuals or groups can bring a complaint that an Act infringes their rights set out in the *Bill of Rights*.	Individuals or groups can bring a complaint that an Act infringes their rights set out in the Constitution, although they have to be directly affected.
A court can find that a section of an Act is unconstitutional because it contravenes one of the express rights and therefore the relevant section of the Act is invalid.	A court can find that a section of an Act is unconstitutional because it contravenes one of the express rights and therefore the relevant section of the Act is invalid.
All rights are fully enforceable by the courts. That is, if the courts declare legislation invalid because it infringes a particular express right, then parliament cannot override that ruling (except in extreme situations).	The rights protected by the Constitution are fully enforceable by the courts, and parliament cannot override a High Court ruling relating to these rights.
Parliament can change or amend the offending Act.	Parliament can change or amend the offending Act.
In South Africa, citizens are protected by the principle of separation of powers. Under this principle, the High Court is a separate independent body that can keep a check on the power of the government.	Australian citizens are protected by the principle of separation of powers. Under this principle, the High Court is a separate independent body and can declare an Act of parliament invalid if it contravenes an express or implied right or rights provided by structural protection.

Table 4.7 Australia and South Africa – differences in the approach to constitutional protection of democratic and human rights

SOUTH AFRICA	AUSTRALIA
The list of express rights is extensive. It includes rights relating to equality, human dignity, life, freedom and security of the person, slavery, privacy, religion, freedom of expression, political rights, environment, housing, criminal procedures.	There are only five protected rights specified in the Constitution, plus the right to freedom of political communication, which the High Court has stated is an implied right under the Constitution.

SOUTH AFRICA	AUSTRALIA
The rights that are given structural protection under the Australian Commonwealth Constitution are expressly guaranteed under the South African *Bill of Rights*. Section 16(1) of the *Bill of Rights* provides everyone with the general right to free speech. Section 19(2) of the *Bill of Rights* guarantees the right to vote for all its citizens.	The Australian Commonwealth Constitution offers structural protection of rights in that there must be a responsible government answerable to the lower house, there must be representative government that can be voted out of office if it does not listen to the wishes of the people, and the separation of powers provides an independent High Court that is the final arbiter on government actions and abuse of power.
Individuals and groups can bring a complaint that an Act infringes rights set out in the *Bill of Rights*. They do not need to be directly affected (interpretative approach).	A person bringing a complaint that an Act infringes rights set out in the Constitution must be directly affected (complaints-based approach).
In addition to declaring legislation invalid, the courts can make another appropriate remedy, such as an award of damages, where rights have been infringed.	The approach in Australia is to focus on declaring the legislation either valid or invalid.
A referendum is not needed to change the *Bill of Rights* although the amendment must be passed by two-thirds of the National Assembly members and then be supported by at least six of the nine provinces in the National Council of Provinces.	A referendum is needed before a change in the Constitution can take place.
The *Bill of Rights* provides that parliament can limit some rights when it is 'demonstrably justified in a free and democratic society'.	There is no similar limitation.
When interpreting legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit and purpose of the *Bill of Rights*.	There is no requirement to develop the common law, or to interpret legislation, in such a way as to promote the concept of protected rights.

LEARNING ACTIVITY 4.9

South Africa – protection of rights

1. When did the South African *Bill of Rights* come into effect?
2. Explain five of the main rights protected under the South African *Bill of Rights* that you think are significant or interesting and say why you think this is so.
3. Distinguish between the complaints-based approach and the interpretative approach to the enforcement of rights. What approach is used in each of South Africa and Australia?
4. When South African courts interpret statutes and common law, what must be considered and promoted? Explain.
5. Under what circumstances may the rights contained in the South African *Bill of Rights* be limited? Use an example to illustrate your answer.
6. What distinguishes the South African *Bill of Rights* from the human rights protection provided by many other countries?
7. Which right or rights are common to the South African *Bill of Rights* and the Constitution of Australia?
8. How can the rights contained in the South African *Bill of Rights* be amended?

9 What remedies are there in South Africa when rights are infringed? How does this differ from the approach taken in Australia?

10 Explain and discuss three similarities and three differences between the Australian approach to the protection of rights and the South African approach.

11 How did the case of *Carmichele v. Minister of Safety and Security* show that a right had been contravened?

12 In the case of *Minister of Health v. Treatment Action Campaign*, what right was infringed by the restriction of the distribution of Nevirapine? Discuss the outcome of the case.

13 Discuss the advantages and disadvantages of the South African *Bill of Rights* as a means of protecting rights.

14 Read the case study 'South Africa – same-sex marriages' and answer the questions.

- **a** Explain why the plaintiffs thought the *Marriage Act* was unconstitutional. In your explanation, identify the sections of the *Bill of Rights* that it was thought were inconsistent with the *Marriage Act* and explain why.
- **b** What was the decision of the Constitutional Court?
- **c** What occurred as a result of this decision?

CASE STUDY

South Africa – same-sex marriages

In the Fourie case (2004) the applicants, Ms Marie Adriaana Fourie and Ms Cecelia Johanna Bonthuys, complained that the law excluded them from publicly celebrating their love and commitment to each other in marriage. The common law definition of marriage refers to a man and a woman. Their case was heard in the Constitutional Court with the case of *Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others* (2005), where it was claimed that S30(1) of the *Marriage Act 1961* was unconstitutional as it made reference to husband or wife rather than spouse.

The Constitutional Court found that the common law definition of marriage and S30(1) of the *Marriage Act* of 1961 were inconsistent with the Constitution and represented 'a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples'.

The common law and S30(1) of the *Marriage Act* were held to be inconsistent with sections 9(1) and 9(3) (equality) and 10 (human dignity) of the Constitution (*Bill of Rights*) to the extent that they make no provision for same-sex couples to enjoy the status, entitlements and responsibilities they accord to heterosexual couples. Section 30(1) of the *Marriage Act* was declared invalid, to the extent of the inconsistency. However, the declarations of invalidity were suspended for 12 months to allow parliament to correct the defects in the Act.

The South African Parliament passed the *Civil Unions Bill* in November 2006, thereby making same-sex marriages legal in South Africa.

15 Read the case study 'South Africa – unlawful detention' and answer the questions.

- **a** Explain how Zealand's human rights were being infringed.
- **b** It was the enforcement of the law that was deemed to be in violation of rights here, rather than the law itself. Discuss and distinguish between these two situations.
- **c** Explain the process by which Zealand would receive a remedy in South Africa for the infringement of his rights. How does this process differ from Australia?

South Africa – unlawful detention

CASE STUDY

In *Zealand v. Minister for Justice and Constitutional Development and Another* (2008), the South African Constitutional Court found that the detention of Jonathan Zealand in a maximum security prison amounted to a violation of S12(1) of the Constitution. This section states that everyone has the right to freedom and security of the person, including freedom from arbitrary detention and detention without trial, and freedom from violence, torture and cruelty.

Zealand was serving 18 years in prison for murder and firearm convictions and was awaiting trial on earlier, unrelated charges of rape, murder and assault. A successful appeal saw the original sentence set aside, but Zealand continued to be detained in the maximum security section of the prison (with sentenced prisoners, in harsher conditions) while awaiting his trial. Almost five years later the charges against Zealand were dropped.

In a unanimous judgment, the court held that the detention of Zealand was unlawful from the time of his successful appeal. It emphasised the fundamental importance in the distinction in legal status between prisoners who are awaiting trial and those who have been sentenced. Zealand had remained imprisoned as a sentenced prisoner. This was an additional encroachment on his liberty and amounted to a form of punishment that was illegal. The case was remitted to the High Court for damages to be considered.

16 Read the case study 'South Africa – discrimination for wearing a nose stud' and answer the questions.

- **a** Describe the rights that were said to be infringed by the school's rule in this case.
- **b** Explain your understanding of the term 'reasonably accommodate', and suggest who would decide on its meaning in subsequent cases.
- **c** Suggest the implications of this decision on schools when making rules concerning uniform and jewellery.
- **d** Analyse the extent to which other students, who were not directly affected by this school rule, would have been able to challenge the constitutional validity of the rule.
- **e** Compare the scope of freedom of religion and the means by which it is protected in South Africa and Australia.

South Africa – discrimination for wearing a nose stud

CASE STUDY

In the case of *MEC for Education: KZN v. Pillay* (2007), Ms Pillay brought an action against her daughter's school, arguing that their refusal to allow her daughter to wear a nose stud was discriminatory. Miss Sunali Pillay had begun wearing the nose stud as part of her Hindu religion. Ms Pillay argued that this prohibition violated S9 (right to equality), S15 (freedom of religion, belief and opinion), S16 (freedom of expression) and S31 (right to association and enjoyment in cultural, religious and linguistic communities) of the Constitution.

The Constitutional Court held that the school and the Department of Education had discriminated against the student on the grounds of religion and culture, and that the Constitution requires the community to affirm and reasonably accommodate difference. They ordered that the school, in consultation with students, parents and staff, amend their school code to provide for a procedure to reasonably accommodate religious and cultural practices. Sunali was therefore allowed to wear the stud.



Figure 4.9 A nose stud, similar to the one Sunali Pillay was banned from wearing in her school

Justice O'Regan considered in some detail the relationship between religion and culture in the Constitution and emphasised that the Constitution required public educational institutions to foster environments in which learners from different cultural and religious backgrounds would feel that they are equally respected and valued.

17 Read the case study 'South Africa – freedom of expression' and answer the questions.

- **a** Outline the right infringed in this case.
- **b** Explain the limitation clause in the *Bill of Rights* and how it was applied in this case. Is there a similar provision in the Australian Constitution?
- **c** Explain the remedy given in this case.
- **d** Compare (using at least one similarity and at least one difference) the orders of the South African Constitutional Court in this case with the types of orders that are able to be made by the High Court of Australia.

CASE STUDY

South Africa – freedom of expression

The case of *Mail and Guardian Media Ltd and Others v. Chipu N.O. and Others* (2013) involved a constitutional challenge to S21(5) of the *Refugees Act 1998*, which stated that the 'confidentiality of asylum applications and the information contained therein must be ensured at all times'. This section prevented any member of the public or the media from attending and reporting on the proceedings of the Refugee Appeal Board (RAB). The applicants, newspaper companies wishing to report on RAB proceedings, argued that S21(5) of the *Refugees Act* was an unjustifiable limitation on the right to freedom of expression.

The Constitutional Court held unanimously that the limitation of the right to freedom of expression under S21(5) of the Act was unreasonable, unjustifiable and accordingly invalid. The court suspended the declaration of invalidity for a period of two years to allow parliament an opportunity to change the legislation to comply with the *Bill of Rights*. It also granted a temporary order to allow the RAB the discretion to allow any person to attend and report on its hearings.



UNITED STATES OF AMERICA – PROTECTION OF RIGHTS

The United States of America consists of 50 states with limited autonomy in which federal law takes precedence over state law. In general, matters that lie entirely within state borders are the exclusive concern of state governments. These include internal communications, regulations relating to property, industry, business and public utilities and state criminal codes. In recent years the

federal government has assumed broader responsibility in such matters as health, education, welfare, transportation, housing and urban development.

The US federal government consists of three separate branches. These are the executive branch (headed by the president), the legislative branch (Congress consisting of the House of Representatives and the Senate) and the judicial branch (headed by the Supreme Court).

The US Constitution contains a bill of rights in the amendments to the Constitution. The first 10 amendments (usually referred to as the *Bill of Rights*) were accepted in 1791. Since then, 16 more amendments have been added; the last in 1971 gave the vote to 18-year-olds. When you hear an arrested person in a US television program say that he or she 'pleads the 5th Amendment', that person is asserting the right to silence guaranteed by the 5th Amendment to the Constitution (that is, the right to refuse to answer a question which might incriminate).

The preamble to the Constitution of the US places the *Bill of Rights* and other amendments in context:

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

USEFUL WEBSITES

Cornell University Law School www.law.cornell.edu/constitution
National Constitution Center http://ratify.constitutioncenter.org/constitution/

Structural protection of rights

Protection from encroachment of rights by state and local governments

The US Supreme Court has found that the 14th Amendment prohibits state and local governments from encroaching on most of the civil liberties and rights in the US Constitution. The federal government can act on behalf of individuals against state and local governments.

Separation of powers

As in Australia, the principle of separation of powers protects US citizens' rights. Under the principle of separation of powers in the US, the legislative, executive and judicial are kept separate at a federal level. One of the founding fathers, Thomas Jefferson, noted that the separation of powers in the Constitution of 1787 would limit the power of government and prevent any person or group from exercising power tyrannically.

In practice, the principle of separation of powers means that each arm of government can keep watch over the power of the others. The courts can ensure that the legislature and the executive do not abuse their power.

Representative government

Representative government is expressly guaranteed under the US Constitution. Sections 1, 2 and 3 of the US Constitution require that members of the Congress, consisting of the Senate and the House of Representatives, shall be elected by the people. As is the case in Australia, the representative

government that is achieved through this process can be voted out of office at the next election if they no longer represent the wishes of the people. This process avoids the possibility of governments encroaching on the human rights of citizens.

The 18th Amendment of the US Constitution further promotes representative government by providing the right to vote to US citizens who are 18 years of age or older.

Responsible government

Unlike Australia, the concept of responsible government does not apply in the US. In Australia the term 'responsible government' applies to the people's control of the lower house in that it is voted into office by the people. The government is elected by the people and if it loses the confidence of the people and the lower house of parliament it cannot govern.

The US is not an example of responsible government. The US Congress is the federal bicameral legislature consisting of the Senate and the House of Representatives. The US president is elected separately and is not part of the Congress. The president selects the cabinet, which is also separate from Congress. Therefore, the president and the cabinet are not responsible to Congress.

It is possible for one political party to win the presidency without winning control in the lower house. This was the case during Bill Clinton's presidency. Bill Clinton is a Democrat. During six years of his eight years in office, the House of Representatives and the Senate were controlled by the Republican Party. President Barack Obama was in a similar situation after the November 2010 and 2012 elections, when his political party, the Democrats, kept their majority in the Senate, but the Republican Party had control of the House.

Express rights

The US *Bill of Rights* consists of the first 10 amendments of the US Constitution. The Constitution contains a comprehensive list of rights. It expressly provides for a range of individual rights considerably more extensive than in the Australian Commonwealth Constitution. The rights are fully entrenched and can only be removed by amending the US Constitution. Rights in the Constitution can be amended through a joint resolution (both houses) of Congress approving an amendment by a two-thirds supermajority in each house. The amendment then needs the approval of three-quarters of the US state legislatures.

US – THE RIGHT TO BEAR ARMS

In the first half of 2008, there had been 22 murders in the suburb of Trinidad, three kilometres from the White House, many committed with handguns. Some states, including the District of Columbia, which includes the city of Washington and the White House, had a blanket ban on owning a handgun.

In June 2008, the US Supreme Court ruled that a ban on handguns, introduced in 1976, was unconstitutional. The majority of 5–4 concluded that the 'right to bear arms' (2nd Amendment) extends to the individual, not just the states' right to maintain militias and police forces. The reason for this decision was that a ban interferes with the lawful right of citizens to defend themselves.

The US Constitution, which contains the *Bill of Rights*, provides an 'express rights entrenched in a constitution' approach to the protection of rights.

The *Bill of Rights* is contained in the first 10 amendments to the US Constitution, which was passed in 1789. It is mainly concerned with individual, civil and political rights. It protects individuals and

groups against abuse of rights by both the federal and state governments. (Application to the states came in 1868 following the inclusion of the 14th Amendment.) Congress cannot pass a law that is in conflict with the rights in the *Bill of Rights*.

EXTRACT

First 10 amendments to the US Constitution – *Bill of Rights*

1st Amendment: freedom of speech, press, religion and petition

This guarantees free speech, free press, right to peaceful assembly, freedom of religion and the separation of church and state and the right to petition the government for a redress of grievances.

2nd Amendment: right to keep and bear arms

This amendment provides for 'a well regulated Militia, being necessary to the security of a free state, [and] the right of the people to keep and bear arms, shall not be infringed'.

3rd Amendment: conditions for quarters for soldiers

This provides that troops cannot be quartered in someone's house without that householder's consent (this was regarded as an important guarantee in the eighteenth century but is less relevant today).

4th Amendment: right of search and seizure regulated

The 4th Amendment guarantees 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated'. (This has been interpreted to include a right to privacy, as well as restricting the circumstances in which police can search.)

5th Amendment: provisions concerning prosecution

This guarantees the following:

- the right not to answer a question which might incriminate
- the right not to be tried twice for the same crime (the double jeopardy rule)
- the right to a grand jury – provides that a person cannot be tried for a capital or infamous crime unless first indicted by a grand jury (a grand jury is larger than a usual jury and determines if there is enough evidence for a trial)
- the right not to be deprived of liberty without due process of law (that is, arbitrary detention or arrest is prevented)
- just compensation when property is taken for public use.

6th Amendment: right to a speedy and public trial

The 6th Amendment guarantees the right to a fair and speedy trial by an impartial jury, the right to legal counsel, the right to be informed of the nature of the accusation and the right to compel witnesses to testify during the trial.

7th Amendment: right to trial by jury

The 7th Amendment provides for a right to jury trial in civil cases.

8th Amendment: excessive bail, cruel punishment

This amendment provides protection from excessive bail being required, or excessive fines and cruel or unusual punishments being imposed (although this has not excluded capital punishment for adults).

9th Amendment: rule of construction of the Constitution

This amendment states that the enumeration of these rights does not deny the existence of other rights retained by the people.

10th Amendment: rights of the states under the Constitution

The 10th Amendment provides that powers not delegated to the United States by the Constitution are retained by the states or the people.

Source: adapted from the Amendments to the US Constitution, which form the *Bill of Rights*

Later amendments

There have been a number of amendments to the US Constitution since the initial 10 amendments that formed the *Bill of Rights*.

EXTRACT

Selected amendments to the US Constitution

13th Amendment: abolition of slavery (1865)

Officially abolished and continues to prohibit slavery and involuntary servitude, except as punishment for a crime.

14th Amendment: equal protection (1868)

Guarantees equal protection of the law to all persons. It provides that no state 'shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property'.

15th Amendment: full rights of citizenship (1870)

Gives full rights of citizenship to people of any race or colour (including the vote).

18th Amendment: prohibition (1919)

Started prohibition of the sale of alcohol.

19th Amendment: vote to women (1920)

Gave the vote to women.

21st Amendment: repealed prohibition (1933)

Repealed the 18th amendment relating to the prohibition of the sale of alcohol.

26th Amendment: vote to 18-year-olds (1971)

Gave the vote to those aged 18 years or older.

Source: adapted from the Amendments to the US Constitution

Implied rights

The High Court of Australia has found that the Constitution of Australia contains the implied right to freedom of political communication. Similarly, the US Supreme Court has read implied rights into the US *Bill of Rights*. For example, in *Griswold v. Connecticut* (1965), the Supreme Court found that legislation forbidding the giving of advice on contraception to married people infringed an implied constitutional right to privacy.

CASE STUDY

US – *Griswold v. Connecticut* (1965)

A physician had been arrested for giving information about contraception to a married couple because Connecticut law prohibited the use of 'any drug, medicinal article, or instrument for the purpose of preventing conception'. The Supreme Court overturned the Connecticut law stating that it infringed people's right to privacy. This decision raised more questions concerning the un-enumerated rights mentioned in the 9th Amendment.

The court also suggested that rather than one particular right guaranteeing privacy, there were various guaranteed rights that have 'penumbras' (shadows) formed by 'emanations from those guarantees', and that they 'create zones of privacy'. In particular, the 4th Amendment (covering the right of people to be secure in their persons, houses, papers and effects, against unreasonable searches) and the 5th Amendment (right against self-incrimination) protected against government invasion of the sanctity of the home and the privacies of life.

The right to privacy was extended in *Roe v. Wade* (1973) to cover the relationship between patient and doctor. Here the court found that the discussion and advice given as part of the patient–doctor relationship was a private matter, and accordingly, any state laws that made particular abortions unlawful interfered with that private relationship. On this basis the Supreme Court declared such a state law invalid. Here the court found the right of privacy was implied in the 14th Amendment that provides that no state 'shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'.



Figure 4.10 The US Supreme Court

Enforcement of rights

The US Supreme Court decides on the interpretation of the rights in the *Bill of Rights* and their application. The rights protected by the *Bill of Rights* are fully enforceable by the courts; that is, legislation that infringes the *Bill of Rights* can be declared invalid.

Individuals or groups can bring an action to the US Supreme Court claiming that their rights have been infringed by a law that contravenes the *Bill of Rights* (**complaints-based approach**). The party bringing the case must be directly affected by the offending legislation.

A judicial decision is final and Congress cannot overrule this decision. The judiciary have, in some instances, been thought to interpret the rights too narrowly; for example, the right to freedom of religion has been interpreted narrowly and prayer in schools has been seen as a possible infringement of this right because it could be construed as establishing a state religion.

Limitations of rights

There are no limiting conditions requiring the courts to balance the rights contained in the *Bill of Rights* with any other rights. The only limitations could be the way the rights are interpreted by the US Supreme Court.

Changing the US Constitution

The amending procedure is lengthier and more complex than the procedure that is required to amend the Constitution of Australia. In the US, a Bill to amend the Constitution must be passed by a two-thirds majority of both houses of Congress (the House of Representatives and the Senate). Then the Bill must be voted on in the states and be approved by three-quarters of the states. It is usually the state legislatures that must approve the amendment, but the Bill can specify that a special state people's convention is required to be established to approve the proposal.

It can take a long time for all the state legislatures to consider a proposal as they are not required to consider it all at the same time. For example, in 1972 it was proposed that the Constitution be amended to include a separate 'equal protection clause' specifically addressing gender equality. By 1982 an insufficient number of states had approved the proposal, so the proposal expired.

>>GOING FURTHER

Strengths of the US *Bill of Rights* as a means of protecting rights	Weaknesses of the US *Bill of Rights* as a means of protecting rights
It provides a long list of rights for the protection of US citizens.	The *Bill of Rights* is difficult to change – this can take years and it is not likely that all the states will agree on a change.
Structural protection of rights is included under Sections 1, 2 and 3 of the US Constitution.	The people may not be asked to vote on a referendum for rights in the *Bill of Rights* to be changed, and are therefore not involved, although states may decide to put a suggested change to the people by way of referendum.
Rights cannot be changed easily.	
Remedies are provided by the courts if rights have been infringed.	The rights contained in the *Bill of Rights* can be interpreted by the US Supreme Court very narrowly. This can cause injustices.
The US Supreme Court can declare that an Act or section of an Act infringes the *Bill of Rights* and is therefore invalid to the extent of the inconsistency – this cannot be overridden by Congress.	
The principle of separation of powers operates to protect citizens from the abuse of power by the government.	

Australian and US approaches

There are a number of similarities and differences between the approach adopted for the constitutional protection of democratic and human rights in Australia and the approach taken in the United States.

Table 4.8 Australia and the United States – similarities in the approach to constitutional protection of democratic and human rights

UNITED STATES	AUSTRALIA
Rights can only be altered, removed or added by amending the Constitution (and the procedure is complex). Rights are fully entrenched.	Rights specified in the Australian Commonwealth Constitution can only be altered, removed or added by amending the Constitution through a referendum. Rights contained in the Constitution are fully entrenched.
The US Supreme Court has found that the Constitution includes implied rights (for example, the right to privacy).	The Australian High Court has found that the Commonwealth Constitution includes an implied right (a right to freedom of political communication).
Individuals and groups can bring a complaint that an Act infringes their rights set out in the *Bill of Rights*.	Individuals and groups can bring a complaint that an Act infringes their rights set out in the Constitution.
A court can find that a section of an Act is unconstitutional because it contravenes one of the express rights and therefore the relevant section of the Act is inoperable.	A court can find that a section of an Act is unconstitutional because it contravenes one of the express rights and therefore the relevant section of the Act is inoperable.
All rights are fully enforceable by the courts. That is, if the courts declare legislation invalid because it infringes a particular express right, then Congress cannot override that ruling.	The rights protected by the Constitution are fully enforceable by the courts, and parliament cannot override a High Court ruling relating to these rights.
Parliament can change or amend the offending Act.	Parliament can change or amend the offending Act.
Separation of powers exists as a safeguard against abuse of power by governments.	Separation of powers exists as a safeguard against abuse of power by governments.
The US Constitution contains structural protection of the right to representative government.	The Australian Commonwealth Constitution contains structural protection of the right to representative government.

Table 4.9 Australia and the United States – differences in the approach to constitutional protection of democratic and human rights

UNITED STATES	AUSTRALIA
The list of express rights is extensive.	There are only five express rights specified in the Australian Constitution, plus the right to freedom of political communication, which the High Court has implied from the Constitution.
The procedure for amending the Constitution is very complex and can take a long time (details of the procedure are given above). Each state considers the proposal in its own time, so the process can spread over some years before a final result is known or the proposal expires.	The rights specified in the Constitution can only be removed by amending the Constitution through the S128 procedure. However, in Australia, this can only occur after a successful referendum.

UNITED STATES	AUSTRALIA
Executive powers, legislative powers and judicial powers are all separate.	Executive powers and legislative powers are combined but judicial powers are separate.
The principle of responsible government does not apply as the president and cabinet are not responsible to Congress.	The principle of responsible government applies. The government can only continue to govern as long as it has the confidence of the lower house of parliament.
The *Bill of Rights* applies to both federal and state legislatures and governments.	Protected rights in the Constitution apply to the Commonwealth Parliament. Only some rights apply to state parliaments as well.

LEARNING ACTIVITY 4.10

United States – protection of rights

1 How do you think the preamble to the US Constitution reflects national values?
2 In what document is the US *Bill of Rights* found?
3 Describe three types of rights protected in the US *Bill of Rights*.
4 Explain the right against self-incrimination. Why is it sometimes referred to as 'taking the 5th'?
5 Which right or rights are common to the US *Bill of Rights* and the Constitution of Australia?
6 How can the US *Bill of Rights* be amended? Compare this method of amending the *Bill of Rights* with the method of amending the Constitution of Australia.
7 Describe an implied right in the US *Bill of Rights*. In your description, refer to the cases of *Griswold v. Connecticut* and *Roe v. Wade*.
8 Discuss the similarities and differences between the Australian approach to the protection of express rights and the approach taken in the United States.
9 Discuss the advantages and disadvantages of the US *Bill of Rights* as a means of protecting rights.
10 Read the case study 'US – racial de-segregation of schools' and answer the questions.
   a How did segregation of schools infringe the US *Bill of Rights*?
   b What was the outcome of the case of *Brown v. Board of Education*?

CASE STUDY

US – racial de-segregation of schools

One of the most famous US Supreme Court cases, which had a profound effect on government policy, was the decision of *Brown v. Board of Education* (1954). At the time when this case was brought before the courts, many schools in the southern states of the US would not enrol black students.

The Supreme Court ordered these racially divided schools to be de-segregated (allow all students regardless of race or colour). The court held that the state legislation, which segregated schools on the basis of race, infringed the 14th Amendment.

11 Read the case study 'US – capital punishment and the *Bill of Rights*' and answer the questions.
   a Explain the circumstances in the case of *Roper v. Simmons*.
   b How did capital punishment in this instance infringe the US *Bill of Rights*?
   c What was the outcome of the case?

US – capital punishment and the *Bill of Rights*

CASE STUDY

In many states in the US, some people found guilty of murder are executed. Capital punishment was suspended for many years but reinstated in many states. However, in March 2005, the Supreme Court of the United States held in the case of *Roper v. Simmons* that to execute someone who committed murder when less than 18 years of age contravened the 8th Amendment (cruel and unusual punishment). The court had earlier held in the Atkins case that standards of decency also require that mentally retarded people should not be executed. (It is still lawful in some states of the US to execute adults convicted of murder.)

Simmons was 17 years old when he committed murder. He was carrying out a burglary at the victim's house when the victim woke up and recognised him. Simmons tied her up and then threw her into a river. He was caught soon after having bragged to friends about the crime.

The 8th Amendment provides that 'excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'. The court explained that the 8th Amendment guarantees individuals the right not to be subjected to excessive punishment. The right flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offence'.

By protecting even those convicted of heinous crimes, the court said, the 8th Amendment reaffirms the duty of the government to respect the dignity of all persons. The court took the view that people under 18 years of age, because of their age and immaturity, are less responsible for their behaviour, and hence less culpable. The death penalty, they said, should be restricted to the most serious of crimes.

Article 37 of the United Nations *Convention on the Rights of the Child* expressly prohibits execution of people under 18. The US has not ratified (that is, agreed to be bound by) this treaty.

12 Read the case studies 'US – free speech and schools' and 'US – free speech and school-supervised event' and answer the questions.

- **a** Explain why Betsy Hansen and Joseph Frederick sued their respective schools.
- **b** Describe the rights protected in the 1st Amendment. How were these rights applied in each of these cases?
- **c** Suggest reasons for the different outcomes in these two cases.

US – free speech and schools

CASE STUDY

Hansen v. Ann Arbor Public Schools (2003) was a case in which a high school student, Betsy Hansen, alleged that her constitutional right to free speech (contained in the 1st Amendment) had been violated. Betsy's high school had organised a discussion to be held at school assembly on the topic of homosexuality and religion. The members of the discussion panel were all pro-homosexuality, and Betsy wanted to join the panel to present the view that homosexuality is a sin.

Betsy was allowed to join the panel, but the organiser of the discussion asked her to delete some parts of her speech that were negative about gays. Betsy omitted those comments, but subsequently sued for violation of her right to free speech. The judge agreed that the school had breached the 1st Amendment guarantee of free speech.

CASE STUDY

US – free speech and school-supervised event

Morse v. Frederick (2007) also involved a question of an infringement of the 1st Amendment right to freedom of speech, within a school setting. Eighteen-year-old student Joseph Frederick attended a school-sanctioned and school-supervised event with his classmates to watch the passing by of the Olympic torch. Within the view of television cameras, Frederick and his friends unfurled a banner that read 'BONG HITS 4 JESUS'. The principal, Deborah Morse, seized the banner and Frederick was suspended for violating the school district's anti-drugs policy.

Frederick filed a civil rights lawsuit against Morse and the school board, arguing that they violated his right to free speech. On appeal to the Supreme Court it was held that, as the banner was displayed during a school event, this was a 'school speech' case, rather than a normal case of public speech, and that the 1st Amendment rights of students in schools were not as broad as for adults in other settings.

The court held that schools may take steps to protect their students from speech that can be reasonably regarded as encouraging illegal drug use. Thus, there was no violation of Frederick's right to freedom of speech.



Figure 4.11 Students with the group 'Sensible Drug Policy' demonstrate in front of the US Supreme Court building on 19 March 2007 in Washington, DC. The Supreme Court was hearing a case over free speech rights in US high schools after students in Juneau, Alaska, hung a banner saying 'Bong Hits 4 Jesus' in front of television cameras in 2002.

13 Read the case study 'US – federal recognition of the rights of same-sex spouses' and answer the questions.

- **a** Describe the right infringed in this case and other examples of rights protected by the 5th Amendment.
- **b** President Obama instructed the Department of Justice not to defend the case when it first arose, although he also decided that S3 of *Defense of Marriage Act* (DOMA) should continue to be enforced by the executive. He stated that his purpose in doing this was to 'recognise the judiciary as the final arbiter of the constitutional claims raised'. Explain what President Obama meant by this comment. To what extent does this support the principle of the separation of powers? Compare the operation of the separation of powers in the United States and Australia.

c Suggest why the Department of Justice continued to defend the case in the Supreme Court, despite agreeing with the plaintiff that S3 of DOMA was unconstitutional.

d Explain the outcome of the case.

e Analyse the impact of this outcome on the rights of couples in same-sex marriages in the United States. In your analysis consider other federal laws and those couples in states that do not recognise same-sex marriages.

CASE STUDY

US – federal recognition of the rights of same-sex spouses

The case of *United States v. Windsor* (2013) is a landmark decision in the United States, which involved a challenge to the constitutional validity of S3 of the *Defense of Marriage Act* (1996) (DOMA). This section stated that 'in determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife'. About 1000 federal statutes and regulations were bound by this definition in DOMA.

Edith Windsor and Thea Spyer were a same-sex couple living in New York, who were lawfully married in Ontario, Canada, in 2007. The state of New York recognised same-sex marriages, as did eleven other states at the time of the case. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption granted to surviving spouses. However, her application for exemption was refused under S3 of DOMA, and she was charged over $300 000 in estate taxes on her inheritance of her wife's estate. Windsor challenged the tax ruling and argued that S3 of DOMA violated the guarantee of **equal protection**, as applied to the federal government through the **5th Amendment**. (Though the 5th Amendment does not contain an equal protection clause, as does the 14th Amendment, which applies only to the states, the concepts of equal protection and due process are not mutually exclusive.)

As the case proceeded through the lower courts, President Obama instructed the Department of Justice not to continue to defend the constitutionality of S3 of DOMA in the case as they agreed with the plaintiff; however, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives were permitted by the court to continue the defence of the DOMA. The Department of Justice rejoined the case before the Supreme Court.

A 5–4 majority of the Supreme Court held that 'DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty … The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the 5th Amendment. This opinion and its holding are confined to those lawful marriages.'

NEW ZEALAND – PROTECTION OF RIGHTS



The *New Zealand Bill of Rights Act 1990* (NZBORA) was based on the entrenched model used in the Canadian Charter, although it is a **statutory model**; that is, it is an Act of parliament that can be changed by an Act of parliament.

The NZBORA provides protection to citizens from the actions of anyone in government (including government departments, courts, state-owned enterprises and local authorities) or 'any person or

body in the performance of a public function, power or duty' created by the law. The *Bill of Rights* also protects 'non-natural persons'; for example, companies and incorporated societies.

The purpose of the *Bill of Rights* is to affirm, protect and promote human rights and fundamental freedoms in New Zealand and affirm New Zealand's commitment to the *International Covenant on Civil and Political Rights*. It provides a set of minimum standards to which public decision-making must conform and is therefore a mechanism by which governments are made more accountable. Part 2 of the *Bill of Rights* includes an extensive list of civil and political rights that are protected.

USEFUL WEBSITE

New Zealand Bill of Rights Act 1990
www.legislation.govt.nz/act/public/1990/0109/latest/whole.html

Structural protection of rights

Representative government

The New Zealand *Bill of Rights* contains the right to vote and the right to freedom of expression. These two rights protect democracy in New Zealand. Freedom of expression allows citizens to criticise the government and suggest changes in the law that need to be made to protect citizens' rights. The right to vote allows the people to vote the government out of office if it is not representing the needs of the majority.

Separation of powers

The New Zealand *Constitution Act 1986* describes the roles of the head of state (the governor-general representing the Queen), the legislature, the executive and the judiciary. These roles overlap, but each provides checks and balances on the others. The judiciary is separate from the other arms of government and provides an independent arbiter to protect against any abuse of power by the government.

The court can rule that a piece of legislation is outside the power of the law-making body that passed it. However, the courts cannot declare that a section of a piece of legislation is invalid. The governor-general must report any inconsistencies with the *Bill of Rights* to parliament.

An individual who believes his or her rights have been infringed can apply to the court to determine if his or her rights have been breached. The courts will consider any justification from the government for limiting rights. Some rights need to be balanced against others, such as the right to a fair trial and the right to privacy.

Statutory rights

The *Bill of Rights* is contained in a statute, the *Bill of Rights Act 1990* (NZ). The first seven sections of this Act are general provisions such as S5 (justified limitations), which states that rights can only be limited if it can be 'demonstrably justified in a free and democratic society'. Section 6 (interpretation) requires that Acts should be interpreted consistent with the rights and freedoms contained in the *Bill of Rights*.

EXTRACT

New Zealand *Bill of Rights Act 1990*

The *Bill of Rights Act 1990* (NZ) contains the following rights and duties.

Life and security of the person

Section 8 right not to be deprived of life

Section 9 not to be subjected to torture, cruel or degrading treatment or punishment

Section 10 no medical or scientific experimentation without person's consent

Section 11 right to refuse to undergo medical treatment

Democratic and civil rights

Section 12 electoral rights for New Zealand citizens aged 18 years or older

Section 13 freedom of thought, conscience, religion and belief

Section 14 freedom of expression

Section 15 manifestation of religion and belief (freedom of religion)

Section 16 freedom of peaceful assembly

Section 17 freedom of association

Section 18 freedom of movement

Non-discrimination and minority rights

Section 19 freedom from discrimination on the grounds of sex (including pregnancy and childbirth), marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation

Section 20 rights of minorities, including that people belonging to an ethnic, religious or linguistic minority must not be denied the right to enjoy or practise their culture, religion or language

Search, arrest and detention

Section 21 security against unreasonable search or seizure

Section 22 liberty of the person – security against arbitrary arrest or detention

Section 23 rights of persons arrested or detained

- 1 a right to be informed of the reasons for the arrest
- 1 b right to consult and instruct a lawyer without delay
- 1 c determining the validity of the arrest or detention
- 2 right to be charged promptly or released
- 3 right to be brought before a court
- 4 right to refrain from making any statement
- 5 right to be treated with humanity and respect

Section 24 rights of persons charged with an offence

- a right to be informed promptly and in detail of the nature and cause of the charge
- b right to release on reasonable terms and conditions unless just cause for continued detention
- c right to consult and instruct a lawyer
- d right to adequate time and facilities to prepare a defence
- e right to trial by jury
- f right to legal assistance
- g right to the assistance of an interpreter

Section 25 minimum standards of criminal procedure

- a right to a fair and public hearing
- b right to be tried without undue delay

	c right to be presumed innocent until proved guilty
	d right not to be compelled to be a witness or confess guilt
	e right to be present at trial
	f right to examine and cross-examine witnesses
	g right to the benefit of the lesser penalty
	h right to appeal
	i right for a child to be dealt with in a manner that takes account of the child's age
Section 26	retroactive penalties and double jeopardy
	1 right not to be liable to conviction for retroactive offences
	2 protection against double jeopardy
Section 27	right to justice
	1 right to the observance of the principles of natural justice – a right to a fair trial
	2 right to the judicial review of determinations
	3 right to bring civil proceedings against the Crown and defend civil proceedings brought by the Crown.

Source: adapted from *New Zealand Bill of Rights Act 1990*



Figure 4.12 The Parliament of New Zealand. The *Bill of Rights* is contained in an Act of parliament.

Enforcement of rights

The *Bill of Rights Act* does not have the status of supreme law, so it cannot be used to override other legislation. According to S4 of the *Bill of Rights Act*, no court can repeal or revoke legislation to make it invalid or ineffective, or decline to apply any part of an Act, because it is inconsistent with the *Bill of Rights Act*. However, a culture has developed whereby governments are expected to comply with the *Bill of Rights*.

Section 6 of the Act states that the courts should interpret legislation, where possible, to be consistent with the *Bill of Rights Act*. However, a declaration of inconsistency does not mean that a law is invalid.

Remedies for infringement

There are no express remedies for infringement of the rights protected under the *Bill of Rights Act*, although the courts have developed a variety of remedies in individual circumstances; for example, excluding 'tainted' evidence from a court proceeding, awarding monetary compensation and making a formal declaration of inconsistency between the *Bill of Rights Act* and a particular statute.

Limitation of rights

Section 5 of the *Bill of Rights Act* states that 'rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. If an Act is found to be inconsistent with the *Bill of Rights*, it is up to the parliament to decide if the Act should be changed, or to recognise the infringement of the *Bill of Rights* but allow the Act to continue to operate.

In late 2013, a review of the New Zealand Constitution recommended that the *Bill of Rights Act* be strengthened to prevent the parliament passing legislation contrary to the Act.

Pre-legislative scrutiny – watchdog approach

Section 7 of the *Bill of Rights Act* requires the attorney-general of New Zealand to check all Bills before being passed through parliament and to report to the parliament if any proposed law appears inconsistent with the Act.

For example, before the passage of the *Employment Relations (Breastfeeding and Breaks) Amendment Bill 2008*, the attorney-general sought advice from the Ministry of Justice and the Crown Law Office to determine whether its provisions breached S19 of the *Bill of Rights Act*. The Bill required employers to provide appropriate facilities and breaks for nursing mothers in the workplace. The question was whether this was discriminatory because these provisions would only apply to women. It was decided that the Bill was consistent with the rights and freedoms affirmed by the *Bill of Rights Act*.

Changing the Bill of Rights

Because the *Bill of Rights* is contained in an Act of parliament, it can be changed by an Act of parliament and does not need to be taken to the people in a referendum as is the case in Australia.

>>GOING FURTHER

Strengths of the New Zealand *Bill of Rights* as a means of protecting rights	Weaknesses of the New Zealand *Bill of Rights* as a means of protecting rights
It provides a long list of rights for the protection of New Zealanders.	Rights can be changed by an Act of parliament without the possibility of the people voting on a change in a referendum.
The right to vote and the right to freedom of expression are included in the *Bill of Rights* – these rights protect democracy and provide representative government.	Legislation can be passed that is inconsistent with the *Bill of Rights*.
Rights can be changed easily as the need arises.	Courts cannot declare a piece of legislation, or a section of legislation, invalid because it is in breach of the *Bill of Rights*.
The attorney-general checks all proposed legislation and will report to parliament if a proposed law contains any inconsistency with the rights in the *Bill of Rights*.	
The principle of separation of powers operates to protect citizens from the abuse of power by the government, although parliament can override court decisions.	

Australian and New Zealand approaches

The main differences are that New Zealand does not have a constitution but Australia does, and Australia does not have a statutory bill of rights but New Zealand does.

Table 4.10 Australia and New Zealand – similarities in the approach to constitutional protection of democratic and human rights

NEW ZEALAND	AUSTRALIA
Individuals and groups can bring a complaint that an Act infringes their rights set out in the *Bill of Rights*.	Individuals and groups can bring a complaint that an Act infringes their rights set out in the Commonwealth Constitution.
Attorney-General checks all Bills and reports to parliament if they are inconsistent with the *Bill of Rights*.	Bills before the Commonwealth Parliament are scrutinised to ensure they do not unduly trespass on personal rights and liberties. A compatibility statement is also created to ensure the Bills do not contravene human rights.
There are no express remedies for infringement of the rights protected under the *Bill of Rights Act* but remedies are gradually being developed by the courts.	Individuals or groups can seek a remedy through the courts when rights that are set down in the legislation have been infringed.
Some of the rights protected are similar; for example, the right to freedom of religion.	Similar rights, such as the right to freedom of religion.
Parliament can change the offending Act.	Parliament can change the offending Act.
The principle of separation of powers operates to protect citizens from abuse of power, although parliament can override a court decision.	The principle of separation of powers operates to protect citizens from abuse of power. Under this principle, courts are separate from parliament and parliament cannot override constitutional decisions of the High Court.

Table 4.11 Australia and New Zealand – differences in the approach to constitutional protection of democratic and human rights

NEW ZEALAND	AUSTRALIA
Statutory rights (a bill of rights) listed in an Act of parliament.	No bill of rights, but rights protected in many Acts of parliament and common law.
No rights entrenched in a constitution.	Five express rights entrenched in the Constitution.
Many rights protected.	Only five express rights protected under the Constitution.
A court can declare an inconsistency between an Act and the *Bill of Rights* but the Act continues to operate – it is up to parliament to change the Act or allow it to continue. (Supremacy of parliament.)	The High Court can decide whether a section of an Act in question is valid or not valid.
Courts are developing express remedies for infringement of the rights protected under the *Bill of Rights*.	There are no specific remedies for infringement of the express rights.
Courts should interpret legislation, where possible, to be consistent with the *Bill of Rights*.	No such expectation in Australia.
The *Bill of Rights* provides that rights and freedoms can be limited but only as can be demonstrably justified in a free and democratic society.	There is no similar limitation.
Rights contained in the *Bill of Rights* can be changed by passing an amending Act of parliament.	Rights contained in the Constitution of Australia can only be changed according to S128, after a successful referendum has been held.

LEARNING ACTIVITY 4.11

New Zealand – protection of rights

1 What is the purpose of the *Bill of Rights Act 1990* (NZ)?
2 Give three examples of rights protected under this *Bill of Rights*.
3 What rights are common to the New Zealand *Bill of Rights* and the Constitution of Australia?
4 Explain the meaning of a statutory bill of rights, such as New Zealand's *Bill of Rights Act*. Analyse the implications of a statutory bill of rights in terms of enforcement of the rights and changing the *Bill of Rights*.
5 What right do individuals have to seek a remedy, such as damages, through the courts if one of the rights contained in the *Bill of Rights* has been infringed? Explain.
6 What is a watchdog approach to the protection of rights? How does it operate in New Zealand and Australia?
7 Evaluate the strengths and weaknesses of the *Bill of Rights* as a means of protecting rights.
8 Discuss the similarities and differences between the Australian approach to the protection of rights and the approach taken in New Zealand.
9 Read the case study 'NZ – right to deny blood transfusion' and answer the questions.
   a Explain the problem that has arisen in this situation and how it applies to S8 and S15 of the *Bill of Rights Act*.
   b Discuss how you think the High Court of Australia might have decided this case in the light of S116 of the Constitution of Australia.
   c Explain how S5 of the *Bill of Rights Act* may have come into play in this case.

CASE STUDY

NZ – right to deny blood transfusion

In the New Zealand case *Re J (An infant): Director-General of Social Welfare v. B and B* (1996) 2 NZLR 134, the parents, who were Jehovah's Witnesses, refused a blood transfusion for their child. They claimed they had the right to refuse the blood transfusion because it was inconsistent with their right to manifest their religious belief in accordance with S15 of the *Bill of Rights Act*.

However, in this situation this right is in conflict with S8 of the Act, which affirms the child's right to life. If the court upheld the parents' right to practise their religion, the state could have been seen to act in a way that was inconsistent with the child's right to life.

The Court of Appeal reconciled the issue by interpreting S15 so that the right of the parents did not extend to situations where the manifestation of their religious belief placed other people's lives in danger. In other words, it defined S15 so that it could not override the right in S8. This approach to balancing



Figure 4.13 The parents refused a blood transfusion for their child.

conflicting rights, meant the courts did not have to use S5 (justified limitations) of the *Bill of Rights Act* to balance the respective merits of S8 and S15.

The Court of Appeal finding in this case upheld an order that the child be made a ward of the court with a medical specialist acting as court agent to consent to any medical treatment involving a blood transfusion. The court observed that 'the parents' right to practise their religion cannot extend to imperil the life or health of the child'.

10 Read the two case studies 'NZ – freedom of expression' and answer the questions.

- **a** Describe the right that was the issue in these cases.
- **b** Explain the relationship between the New Zealand *Bill of Rights Act* and the ICCPR.
- **c** Explain the importance of sections 5 and 6 of the *Bill of Rights Act* when deciding these cases.
- **d** Suggest some other 'reasonable restrictions' that might be considered as limiting the right to freedom of expression.
- **e** Explain the outcome of the Morse case. Do you agree with it?

CASE STUDY

NZ – freedom of expression (1)

The case of *Brooker v. Police* (2007) NZSC 30 concerned whether a charge of 'disorderly behaviour' under S4(1)(a) of the *Summary Offences Act 1981* (NZ) was in breach of freedom of expression, as protected by S14 of the *Bill of Rights Act*.

Brooker believed that a police search of his property, which took place at 3 am, was unlawful because the search warrant was issued for his car and not his house. He protested against this search by showing signs and singing slogans outside the house of the police constable involved with the search. Brooker was convicted of disorderly behaviour. He appealed against the decision.

A majority of the Supreme Court held that the protest constituted expressive behaviour as protected by S14 of the *Bill of Rights Act*, which affirms New Zealand's commitment to Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR). The court stated that it was required to interpret legislation so as to give a meaning consistent with protected rights, subject only to reasonable restrictions necessary to protect other important rights, including public order. It found that Brooker's behaviour was not disruptive to public order, just annoying. His conviction was quashed.

CASE STUDY

NZ – freedom of expression (2)

The case of *Valerie Morse v. The Police* (2011) NZSC 45 also involved a charge of disorderly behaviour under S4(1)(a) of the *Summary Offences Act 1981* (NZ). The accused was charged with behaving in an offensive manner in a public place, namely, burning the New Zealand flag. Morse, along with other members of Peace Action Wellington, was protesting against New Zealand's military involvement in Afghanistan and other foreign conflicts. On ANZAC Day 2007, Morse set fire to a New Zealand flag in the grounds of the Law School of Victoria University, Wellington, behind, but within the view of, the 5000 people assembled for the ANZAC dawn service at the Wellington Cenotaph. Morse was convicted of the S4(1)(a) offence, but appealed on the grounds that her expression of opinion in this way was not offensive behaviour but was expression protected by S14 of the *Bill of Rights Act*.

The NZ Supreme Court unanimously (all five judges) upheld the appeal and Morse's conviction was quashed. The court held that burning the national flag in the course of a protest is expressive conduct, which is protected by the right to freedom of expression affirmed by S14 of the *Bill of Rights Act*. The court then had to determine whether the meaning of offensive behaviour under S4(1)(a) of the *Summary Offences Act* was consistent with Morse's right to freedom of expression. Chief Justice Elias stated that the court had to interpret the offence in accordance with S6 of the *Bill of Rights Act*, which 'requires the meaning the least restrictive of the rights in Part 2 to be given to the provision'.

The court also considered S5 of the *Bill of Rights Act* in order to determine whether these rights and freedoms were subject to a reasonable limitation. The court found that, in order to reasonably limit freedom of expression, the offensive behaviour 'must be confined to sufficiently serious and reprehensible interferences with the rights of others', and the behaviour must interfere with the use of public space. The court held that this test had been incorrectly applied in the lower courts in this case, and the evidence was not sufficient 'to allow a confident conclusion of impact on public order to be drawn'. Morse's appeal was allowed, and her conviction was set aside.



Figure 4.14 Police arresting Valerie Morse on ANZAC Day 2007

11 Read the case study 'NZ – right not to be discriminated against' and answer the questions.
- **a** What right does the applicant state has been infringed in this case?
- **b** Why do you think the court decided to leave the issue to the parliament?
- **c** Could the court have declared the relevant section of the Act invalid? Explain.
- **d** What is the relevance of S5 of the *Bill of Rights* to this case?

CASE STUDY

NZ – right not to be discriminated against

In *Quilter v. Attorney-General* (1996) 14 FRNZ 43 the High Court held that the *Marriage Act 1955* (NZ) did discriminate against same-sex couples who wished to marry. Section 5 of the Act entitles parliament to impose limitations on rights secured by the *Bill of Rights Act*. The judge determined that it was up to parliament to extend the scope of the marriage laws to homosexuals and accordingly refused to make an application in respect of the applicants.

The New Zealand Parliament passed the *Marriage (Definition of Marriage) Amendment Act 2013*, which redefined marriage as a union between two people, thereby giving marriage equality in New Zealand.

12 Read the case study 'NZ – rights for caregivers of disabled family members' and answer the questions.

- **a** Explain how Sections 19, 5 and 27 of the *Bill of Rights* were used by the courts in these cases.
- **b** Why would the plaintiffs in these cases need to bring a separate action to receive a compensatory remedy? Would this be a similar situation in Australia?
- **c** Explain the legal status of the attorney-general's advice on Part 4A of the *New Zealand Public Health and Disability Amendment Act 2013*.
- **d** The High Court declared Part 4A of the Act as inconsistent with the NZBORA. Explain the impact of this declaration on the validity of the Act. Compare this with the situation in Australia if our High Court declared parts of an Act to be inconsistent.

CASE STUDY

NZ – rights for caregivers of disabled family members

The case of *Ministry of Health v. Atkinson* [2012] NZCA 184 involved a challenge to the funding of disability services. The Ministry of Health policy was to provide funding to pay for support services for disabled people, but funding was not available to family members who provided care to disabled adult children.

The plaintiffs claimed that the policy discriminated on the basis of family status. The Human Rights Review Tribunal, the High Court and now the Court of Appeal in this case all declared the ministry's policy to be discriminatory and inconsistent with S19 of the New Zealand *Bill of Rights* (NZBORA).The ministry put forward arguments giving reasons for the policy restricting payments to non-family members only, including costs, concerns about not being able to monitor the quality of care provided, and the consequences of a family being reliant on a disabled person for income. However, the Court of Appeal held that the ministry's policy of not paying family carers involved unjustified discrimination on the grounds of family status, and the objectives set out by the ministry did not satisfy the justification requirement of S5 of the NZBORA.

This decision meant that affected families could pursue separate proceedings to seek a remedy for unpaid family carer's payments.

In response to the decision in this case, the New Zealand Parliament passed the *Public Health and Disability Amendment Act 2013*. The Act was passed through New Zealand's unicameral parliament in one day, despite the attorney-general advising that parts of the Act were inconsistent with the NZBORA. The Act allows relatives who care for disabled adults to be paid for support services in certain circumstances. However, Part 4A of the Act also removed the rights of disabled people and their families to seek compensation for discrimination under the former policy.

Mrs Spencer had tried for many years to obtain payment from the ministry for the care she provided to her adult disabled son. In the case of *Spencer v. Attorney-General* [2013] NZHC 2580, Mrs Spencer sought a declaration that the ministry had acted unlawfully by refusing to consider her application for support services. The ministry argued that the Act removed the rights of disabled people and their families to seek compensation for discrimination under their former policy. The High Court rejected the ministry's argument as being inconsistent with the right to justice under S27 of the NZBORA. The court upheld the rights of disabled people and their families to seek compensation.

PRACTICE EXAM QUESTIONS

1 Compare the approach adopted for the constitutional protection of rights in Australia with the approach taken in one of the following countries: the United States, Canada, South Africa or New Zealand. *(8 marks)*

2 Evaluate the effectiveness of the Australian Commonwealth Constitution in protecting rights as compared with the effectiveness of the approach taken in one of the other countries studied. *(12 marks)*

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK STRUCTURED QUESTIONS

Protection of rights

1 Explain three different approaches to the protection of rights. *(6 marks)*

2 Describe the ways that rights are protected in Australia. *(6 marks)*

3 Analyse the *Lange v. Australian Broadcasting Corporation* (1997) case and explain how this case is an example of the High Court's role in the protection of rights in the Constitution. *(8 marks)*

4 Choose a case from your selected country and analyse how this case is an example of the protection of rights in that country. *(6 marks)*

5 Evaluate the means by which rights of Australians are protected by the Commonwealth Constitution, and the extent of this protection. In your evaluation, discuss structural protection, express rights and implied rights. *(14 marks)*

6 Compare the approach adopted for the constitutional protection of rights in Australia with one of the following countries: the United States, Canada, New Zealand or South Africa. *(10 marks)*

(Total of 50 marks)

Summary

Rights

Approaches taken to protect rights

- express rights entrenched in a constitution
- statutory rights
- rights protected by legislation and common law

Approaches to enforcement of bills of rights

- interpretive approach
- watchdog approach
- complaints-based approach

Protection of constitutional rights in Australia

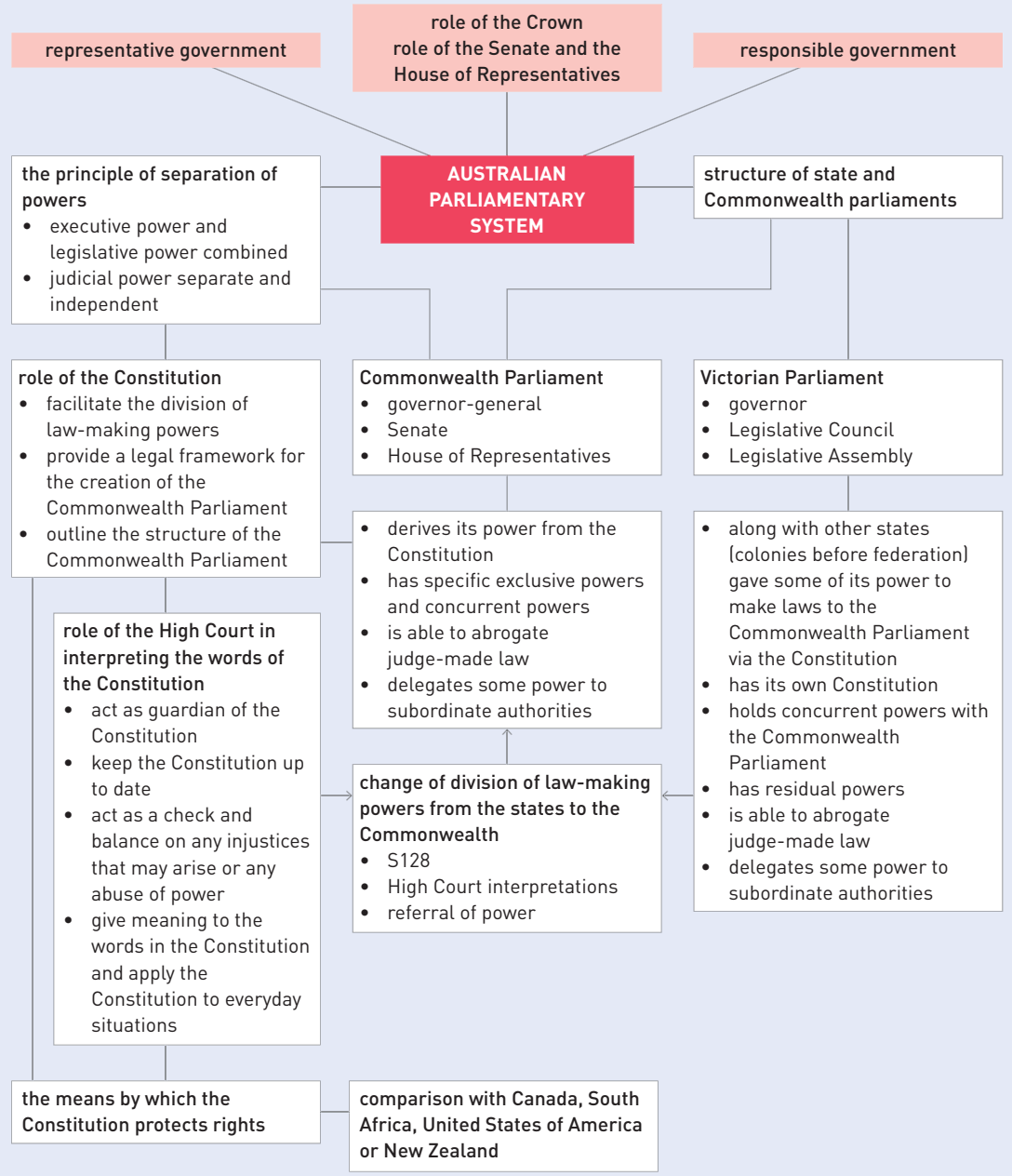
- structural protection
  - separation of powers
  - responsible government
  - representative government
  - the Crown
- express rights in the Constitution
  - acquisition of property on just terms (S51(xxxi))
  - trial by jury (S80)
  - freedom of interstate trade and commerce (S92)
  - freedom of religion (S116)
  - freedom from interstate discrimination (S117)
- implied rights in the Constitution
  - right to freedom of political communication

Role of the High Court in protecting constitutional rights

- constitutional rights are fully enforceable by the High Court, which can declare legislation invalid if it violates any of these rights
- complaints-based approach
- watchdog approach

Comparison with approach adopted for the constitutional protection of rights in one of:

- Canada
- South Africa
- United States
- New Zealand





CHAPTER 5

THE ROLE OF THE COURTS

OUTCOME

This chapter is relevant to learning outcome 3 in Unit 3. You should be able to describe the role and operation of courts in law-making, evaluate their effectiveness as law-making bodies and discuss their relationship with parliament.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- the ability of judges and courts to make law
- the operation of the doctrine of precedent
- reasons for interpretation of statutes by judges
- effects of statutory interpretation by judges
- strengths and weaknesses of law-making through the courts
- the relationship between courts and parliament in law-making.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- describe the nature, importance and operation of courts as law-makers
- analyse the impact of courts in law-making
- critically evaluate the law-making processes of courts
- discuss the relationships between law-making bodies.

KEY LEGAL TERMINOLOGY

accused Person against whom legal action is taken in a criminal case.

authority A term for a decided case.

binding precedent The reason for a decision of a higher court that must be followed by a lower court in the same hierarchy.

common law, case law, judge-made law Common law is a system of deciding cases that originated in England. It is based on decisions made by judges that form part of the law.

court hierarchy The ranking of the courts in order of importance or jurisdiction.

defendant Person against whom legal action is taken in a civil case.

disapprove A court expresses disapproval of an existing precedent but is still bound by it.

distinguish A court decides that the main facts of a case are sufficiently different to a previous precedent and therefore that the precedent is not binding.

doctrine of precedent The common-law principle by which the reasons for the decisions of courts higher in the hierarchy are binding on courts lower in the same hierarchy where the material facts are similar. This applies to important facts that could affect the outcome of the case.

ejusdem generis Legal rule meaning 'of the same kind', used by judges to help them interpret the words in a statute.

ex post facto After the act or omission took place – courts make laws ex post facto.

extrinsic material Material not part of an Act of parliament that may assist a judge to interpret the meaning of the words in the Act.

intrinsic material Material found within an Act of parliament that may assist a judge to interpret its meaning.

judicial creativity The creative interpretation of legal precedent or Acts of parliament by judges in superior courts.

negligence A common-law principle and a key area in the law of torts or civil wrongs; essential concepts are the 'neighbour principle' and breaches of a duty of care.

obiter dictum A statement made by a judge on a legal question (often referred to as a statement by the way), not requiring a decision to be made on the issue and therefore not creating a precedent, but which can be persuasive precedent.

overrule A new case in a higher court creates a new precedent, which means the previous precedent in a different case is no longer applicable.

persuasive precedent A reason for a decision of another court that is of persuasive value only. It is not binding, but it is relevant to the case and an important statement of law.

plaintiff Person bringing a civil action.

precedent The reason for a court decision that is followed by another court lower in the hierarchy.

ratio decidendi The reason for a decision (the binding part of a decision).

reverse A higher court makes a different decision than a lower court in the same case on appeal.

stare decisis The principle at the heart of the doctrine of precedent (literally 'to stand by what is decided').

statute An Act of parliament; a piece of legislation.

statutory interpretation When judges interpret the meaning of a word or phrase in an Act of parliament (a statute).

BACKGROUND INFORMATION

Historical development of common law

In England before the reign of King Henry II (1154–89) there were local customary laws, which differed from area to area. The feudal lord presided over local courts that administered the local customs. King Henry II, wanting a more unified England, built on this foundation and reorganised the legal system by sending out the king's judges on circuit, visiting the various areas and bringing the king's justice to everyone through the decisions of his judges.

The King's judges developed a set of principles for dealing with disputes. These principles took over from the local customary law, and from around 1289 were written down in the Year Books of England. The law developed and was applied by the king's judges. It became uniform throughout England and was known as the **common law of England**.

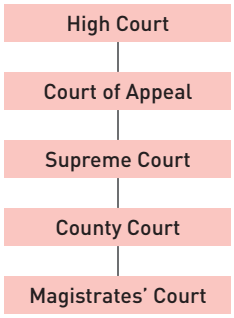
The binding nature of common law

Australia followed the principles of common law developed in England. One of these principles is that reasons for decisions of cases in higher courts are binding on lower courts in the same hierarchy.

The court hierarchy

The courts are arranged in a hierarchy of courts; that is, in order of importance with the superior courts at the top of the court hierarchy. The lowest court in the court hierarchy of Victoria is the **Magistrates' Court**, followed by the **County Court** and the **Supreme Court** (including the **Court of Appeal**). The **High Court** is a federal court. It is the highest court in Australia and the highest court in each of the state court hierarchies. The decisions of the High Court are binding on the state supreme courts.

The Supreme Court, Court of Appeal and the High Court are known as superior courts of record because the reasons for the decisions in the court cases that come before them are recorded for future reference.



WHAT IS COMMON LAW?

Common law was founded in England and adopted by the Australian legal system. It is law developed through the courts. It is also known as **judge-made law** and **case law**. It can only be created when a case is brought to the courts. It develops through the reasons for decisions of courts being followed by future courts.

Judges' ability to make law

Courts make law by:

- **deciding on a new issue that is brought before them** in a case or when a previous principle of law requires expansion to apply to a new situation
- **statutory interpretation** – interpreting the meaning of the words in an Act of parliament when applying them to a case the court is hearing.

The reason for the decision of a court establishes a principle of law that is followed by future courts and forms part of the law, along with Acts of parliament. The reason for the decision is called the **ratio decidendi**.

Restrictions on judges' ability to make law

Judges and courts are only able to make laws in the following instances.

- **if a case is brought before a superior court** – Judges can only develop or change the law when a relevant case is brought before them. A case will be brought by a person who feels aggrieved or injured and has decided to have the issue resolved in court. A person bringing a case must have 'standing'; that is, be directly affected by the case. Taking a case to a higher court is expensive. Further, the court can only make law on the relevant issues in question in that case.



Figure 5.1 The Honourable Marilyn Warren, Chief Justice of the Supreme Court of Victoria, a superior court able to make common law

- **if there is no previous binding decision in a higher court in the same hierarchy that must be followed by the lower courts** – The nature of common law is that the principles of law established in a higher court are binding on lower courts in the same hierarchy.

If a court is bound by a principle of law that has been established in a higher court, there may be an opportunity to establish a new principle of law, if it can be shown that there are **distinguishing differences** between the previous case and the case before the court.

LEARNING ACTIVITY 5.1

What is common law?

1. What is common law? Explain the background of common law.
2. Why is common law binding?
3. What are superior courts of record?
4. Why do you think the court hierarchy is relevant to the judges' ability to make law?
5. How can courts make laws?
6. How are judges restricted from making laws through the courts?

OPERATION OF THE DOCTRINE OF PRECEDENT

Just like the king's judges of the past who relied on previous decisions to guide them, the courts of today look to the reasons behind the decisions in past cases for guidance when deciding new cases. When a new situation arises, and is decided on, a precedent is created.

A precedent is the reasoning behind a court decision. It establishes a principle or rule of law that must be followed by other courts lower in the same court hierarchy when deciding future cases that are similar.

The principle of the doctrine of precedent creates **consistency and predictability**. When a person takes a case to court they will have some idea of the outcome because like cases are decided in a like manner.

The process of judges following the reasons for decisions of higher courts is at the heart of the doctrine of precedent.

Law-making through the courts generally occurs when a court is hearing an appeal (so there is no jury) or is hearing a civil case without a jury. The judge makes the decision and gives the reason for that decision; the reason for the decision is then binding on lower courts in the same hierarchy.

A jury decision cannot create a precedent. Juries do not decide on points of law; this is left to judges. Juries do not give reasons for their decisions.

THE COURT HIERARCHY AND THE DOCTRINE OF PRECEDENT

For the doctrine of precedent to operate it is necessary for inferior courts to follow precedents set in superior courts. Therefore, precedent depends on the courts being organised in a hierarchy. Courts high in the hierarchy, usually those that decide cases on appeal, are the courts involved in making law. In the Victorian court hierarchy these are the **High Court**, the **Court of Appeal** and the **Supreme Court**.

A decision made by the High Court on **appeal** from a state or territory court is binding on courts in all states and territories (provided that the subject matter in question applies to the law in that state or territory).

The principle of stare decisis

The principle of **stare decisis** is another way of describing the process of lower courts following the reasons for the decisions of higher courts. Stare decisis literally means 'to stand by what has been decided'.

Ratio decidendi

Ratio decidendi literally translated, is '**the reason for the decision**'. Put simply, the ratio decidendi is the binding part of the judgment. The **judgment** is the statement by the judge at the end of a case outlining the decision and the reasons for the decision. The ratio decidendi is not the decision itself, or the sanction or remedy given, but the reason for the decision, which is then regarded as a statement of law to be followed in the future.

CASE STUDY

Pinkstone v. R [2004] HCA 23; (2004) 219 CLR 444

In this case, the High Court had to decide if Anthony Pinkstone had supplied drugs to Wayne Yanko. The drugs had been packed in boxes and sent by airfreight. When the boxes of drugs arrived at Perth airport the police marked them and videotaped Yanko collecting them. Pinkstone claimed that he did not supply the drugs because the police had intercepted them.

The High Court decided that he had supplied the goods and could be charged with the supply of drugs. The reason for the decision (ratio decidendi) was:

> **The action of sending the drugs in a box through airfreight with the intention that it be received by a particular person at a particular place constituted the supply of drugs. Supply included forwarding, sending or delivery, and did not suggest that receipt by an intended recipient was a necessary element.**

The fact that Pinkstone was found guilty on two charges of supplying drugs and sentenced to 10 years and six months' jail on each charge is not relevant to the ratio decidendi.

CASE STUDY

Shaddock v. Parramatta City Council [1981] HCA 59; (1981) 150 CLR 225

In this case, Shaddock was given incorrect advice by the council about a piece of land he wished to purchase for redevelopment. It is usual practice for a purchaser to ask the local council for

information about any orders that may affect a piece of land. The council completed the usual form that gives information to the purchaser, and left the section relating to road-widening blank. It was therefore quite reasonably assumed that there was no road-widening order affecting the piece of land.

Shaddock purchased the land relying on this advice. He later found that this advice was incorrect as there was a proposal for road-widening, which made the land useless for the purpose for which it was purchased.

Shaddock sued the Parramatta City Council for negligent advice, also referred to as negligent misstatement.

The court decided that the council had given negligent advice because it did owe a duty of care to Shaddock (to provide accurate advice); that it had breached that duty of care and was therefore liable to pay damages.

The reason for the decision (ratio decidendi) was:

> **A duty of care is owed when information or advice is sought, and is relied upon, in the course of business and the supplier of information sets up as a centre from which that advice may be sought (that is, as an expert).**

The remedy that was given as a result of this decision is not part of the ratio decidendi.

Finding the ratio decidendi

The task of determining the ratio decidendi of a case can be very complex. It might not necessarily be placed at the end of the judgment; it could be found in various parts of the judgment, and may not appear conveniently in a single, succinct expression of the law.

In many cases heard on appeal, or in constitutional matters in the High Court, several judges are involved in reaching a decision. If a unanimous decision cannot be reached, the precedent created is that of the majority. In such cases the ratio decidendi has to be found by looking at the judgments of those judges who form the majority.

When extracting the ratio decidendi from the judgment as a whole or the individual judgments, only the material facts are relevant and are to be followed in future cases. For example, in the Shaddock case it is not vital to the decision to know that the item in question was a piece of land, that the advice-giver was a city council or that the information concerned road-widening.

The **material facts** are important facts that could affect the outcome of the case and are vital to the reason for the decision. In Shaddock's case the material facts are:

- that the information was being relied on in the course of business
- that the advice was given by an institution that had set itself up as a centre from which advice could be sought
- that it was usual practice for someone to seek the type of advice in question from the particular institution.

It is the ratio decidendi and these material facts that are considered when deciding cases in the future. The ratio decidendi of a case may be more clearly stated in a later judgment written by a court that has had to consider whether the previous case provides a binding precedent.

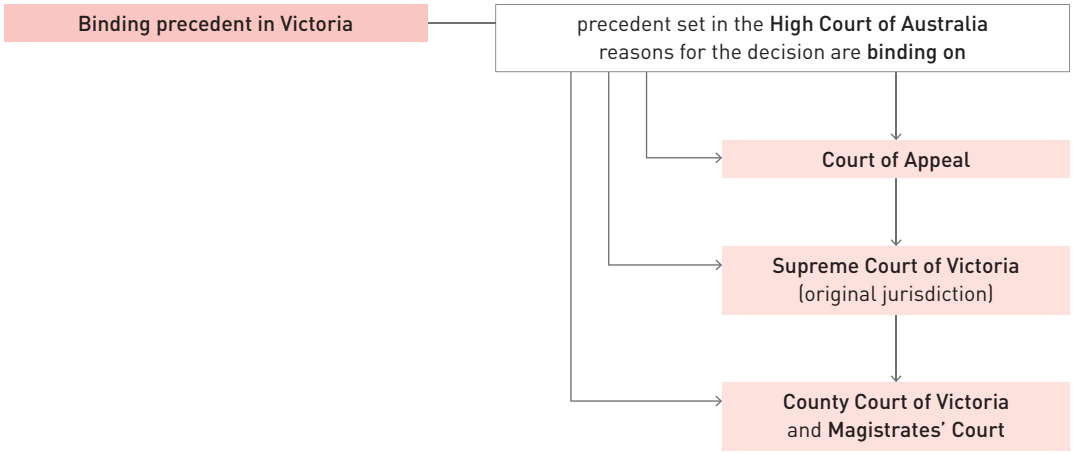
Binding precedents

Precedents in a superior court in the same hierarchy dealing with the same legal principles and material facts are referred to as binding precedents. If a precedent is binding on a case, then it must be followed by the judges in that case.

For a precedent to be binding on a particular case, the precedent must be:

- from the same hierarchy of courts
- from a superior court – one that is higher in the hierarchy.

The High Court is not bound by its own previous decisions. However, in the interests of consistency, it will usually follow its previous decisions, unless it believes that a previous decision is not good law, or a previous precedent is outdated because of changes in attitudes, technologies or other circumstances.



Persuasive precedents

Persuasive precedents are not binding on courts. However, because they are seen to be noteworthy and highly regarded propositions of law, some courts may consider persuasive precedents as influential on their decisions.

Precedents considered to be persuasive but not binding are:

- from courts in another hierarchy, such as other states or countries
- from courts on the same level of the hierarchy (which are not binding)
- from inferior courts (that is, courts lower in the court hierarchy)
- obiter dicta contained in a judgment of a court in the same hierarchy or in another hierarchy.

An example of a persuasive precedent is the British case of *Donoghue v. Stevenson* (1932) AC 562, which provided a clear proposition of the law of negligence. This case was not binding on Australian courts, but was used as persuasive precedent in *Grant v. Australian Knitting Mills* (1936) AC 85, which established the law of negligence in Australia.

CASE STUDY

Donoghue v. Stevenson (1932) AC 562

This is a British case. Donoghue poured half the contents of a bottle of ginger beer into a glass and drank it. The bottle was a dark opaque glass, and it was not possible to see the contents.

When she poured the rest of the contents into the glass she discovered the remains of a decomposed snail, which came out of the bottle. She became very ill.

Realising that the fault lay with the manufacturer who had not cleaned the bottle correctly and, as the bottle was sealed and opaque, that the seller was not in a position to know that the goods were faulty, she sued the manufacturer for negligence.



Figure 5.2 Bottle of ginger beer manufactured by Stevenson

The bottle of ginger beer had been purchased for her by a friend. She was therefore not party to a contract with either the seller or the manufacturer.

The court looked back at previous cases where there was an element of negligence being claimed, but at that time, there was no established precedent that had created the law of negligence. The court also looked at the **obiter dictum** in a previous case (*Heaven v. Pender*) that stated there ought to be a general law of negligence. This case was treated as **persuasive precedent**.

The House of Lords decided that the plaintiff should be successful and the reason (ratio decidendi) was that:

> **where a manufacturer sells a product which will reach the ultimate consumer without possibility of interference, and where inspection is not possible, the manufacturer owes a duty of care to the ultimate consumer.**

It was also stated that:

> **you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour; in law, your neighbours are people you ought to consider because it is possible for them to be affected by your acts or omissions. This is known as the 'neighbour principle'.**

The injured party was successful and the law of negligence was clearly established in Great Britain.

The **important elements** of the *Donoghue v. Stevenson* case can be summarised as follows.

- The injured party was not a party to the contract.
- There was no opportunity for the seller to inspect the goods before selling them.
- The goods reached the consumer in exactly the same condition as they had left the manufacturer, with no opportunity for interference.
- It was reasonably foreseeable that the careless action of the manufacturer would cause injury to the ultimate consumer.
- The injured person, Mrs Donoghue, was a neighbour in law of the manufacturer, in that she was closely and directly affected by the actions of the manufacturer.
- A duty of care was owed by the manufacturer to the consumer.
- Mrs Donoghue suffered gastroenteritis and shock as a result of the careless action of the manufacturer.

CASE STUDY

Grant v. Australian Knitting Mills (1936) AC 85

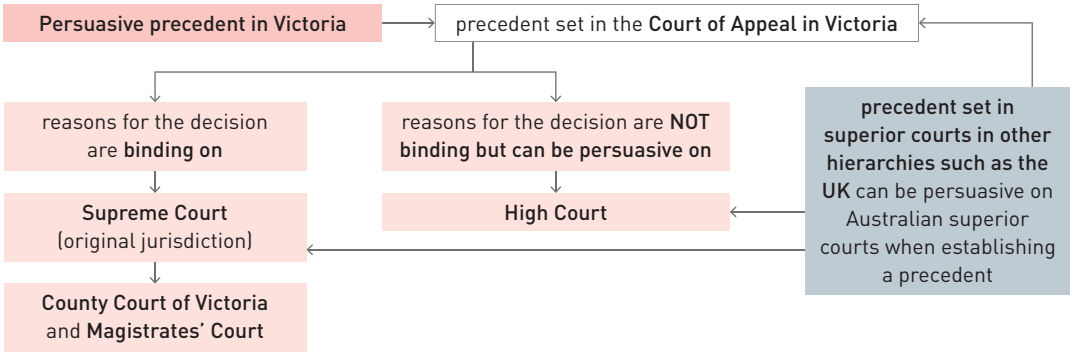
In this **Australian case**, Grant was affected by dermatitis from wearing a pair of underpants he had purchased. The manufacturer of the underpants had negligently left a chemical, metal sulphite, in the material.

Grant had a contract with the seller, but did not have a contract with the manufacturer. He sued the manufacturer for negligence.

The court referred back to the case of *Donoghue v. Stevenson*. Although this was a persuasive precedent as it was in another hierarchy, the court chose to follow the decision in that case and decided that the manufacturer owed a duty of care to the ultimate consumer.

As with *Donoghue v. Stevenson*, it was not possible for the seller to see the defect on examination of the product and the manufacturer ought to have had the ultimate consumer in mind at the time of manufacture.

The injured party was successful, and the law of negligence was clearly established in Australia.



Obiter dictum

Obiter dictum (plural **obiter dicta**) literally translated means 'things said by the way'. In the judgment given at the end of a case, the judge sometimes makes a statement that is not part of the ratio decidendi – that is, the statement was not a matter that was necessary to the decision in that case but it was still a matter of considered opinion.

This statement may be influential on decisions in the future – it will act as **persuasive precedent**. Such statements are obiter dicta (sometimes just referred to as 'obiter'). An example of obiter dicta is given in the *Hedley Byrne v. Heller* case.

Note that the *Hedley Byrne v. Heller* case (1964) was heard in England before the *Shaddock v. Parramatta City Council* case (1981) was heard in Australia. As the facts in Shaddock's case fitted the situation envisaged by the House of Lords in the obiter dictum in the *Hedley Byrne v. Heller* case, the obiter dictum was used as persuasive precedent in the Shaddock case.

CASE STUDY

Hedley Byrne & Co Ltd v. Heller and Partners Ltd (1964) AC 465

This case was decided by the Appellate Committee of the English House of Lords, which is the highest court of appeal in England, and is made up of the Lord Chancellor and various peers who have held high judicial office ('the law lords').

An advertising agency had approached a merchant bank to ask whether a client of the bank was creditworthy. The bank gave a favourable reference but stated that the reference was given 'without responsibility'. On this advice from the bank, the agency did business with the client of the bank, which resulted in the loss of £17 000.

The advertising agency sued the bank for giving negligent advice.

The decision of the court was that the bank did not owe a duty of care to the person who sought advice. The **reason for the decision (ratio decidendi)** was:

> **the bank had disclaimed responsibility when giving the advice.**

The court, however, went further, and by way of **obiter dictum** said:

> **if in the ordinary course of business or professional affairs a person seeks information or advice from another, and the person relies on the advice, then a duty of care ought to be owed unless the person giving the advice disclaims responsibility.**

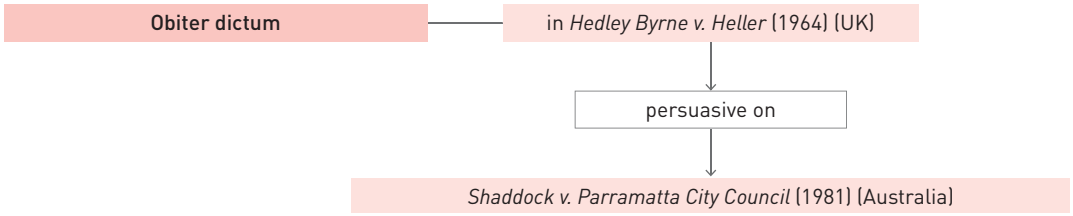


Table 5.1 Binding and persuasive precedent

BINDING PRECEDENT	PERSUASIVE PRECEDENT
Precedent must be followed if it is: • ratio decidendi from a superior court in the same court hierarchy	Precedent is influential if it is: • precedent from courts in another hierarchy • precedent from courts on the same level of the court hierarchy • precedent from courts lower in the court hierarchy • obiter dicta from a court in the same or another court hierarchy

LEARNING ACTIVITY 5.2

The operation of the doctrine of precedent

1 Define precedent.
2 'Judges who are following the reasons for decisions of higher courts, are at the heart of the doctrine of precedent.' Explain this statement.
3 Why does law-making through courts usually only occur when a case is heard on appeal?
4 What is the principle of stare decisis and how is it important to the doctrine of precedent?
5 Why are some precedents binding and some precedents persuasive? Explain. In your explanation, identify what factors a judge must take into account when deciding if a precedent is binding and what constitutes a persuasive precedent.
6 What is the ratio decidendi of a case?
7 What are material facts?
8 Which parts of a decision do not form part of the reason for the decision?
9 How can the ratio decidendi of a case be found when there is more than one judge?
10 Look back at the case study *Pinkstone v. R* and answer the questions.
   a What occurred in this case?
   b What was the reason for the decision in this case?
   c Which facts were not material facts? Why do you think this is the case?
11 Look back at the case study *Shaddock v. Parramatta City Council* and answer the questions.
   a Explain the facts of this case.
   b What is the ratio decidendi in the Shaddock case?
   c What are the material facts of the Shaddock case?
   d How did the Shaddock case follow the obiter dictum of the *Hedley Byrne v. Heller* case?
12 Read the case study 'Buying an empty factory' and explain how the material facts are essentially the same as in the Shaddock case. What do you think the outcome of this case would be? Give your reasons.

CASE STUDY

Buying an empty factory

Jessica was considering buying an empty factory with the intention of starting a panel-beating business. She made enquiries of the council about the zoning of the factory and was told that such a business was permitted in the area.

She purchased the empty factory on the basis of this advice, but was later told that the area was not one in which a panel-beating business could operate.

13 Look back at the case study *Donoghue v. Stevenson* and answer the questions.
- **a** What was the reason for the decision in this case?
- **b** Explain the important elements of *Donoghue v. Stevenson*.
- **c** Explain why you think *Donoghue v. Stevenson* was used as a persuasive precedent in *Grant v. Australian Knitting Mills*. In your explanation, point out the similarities and differences between these two cases.

14 Look back at the case study *Hedley Byrne & Co Ltd v. Heller and Partners Ltd* and answer the questions.
- **a** What is obiter dictum? Identify the obiter dictum in this case.
- **b** Explain the difference between ratio decidendi and obiter dictum in relation to their effect on precedent.

Ways judges can develop precedent or avoid following an earlier decision

When deciding cases, judges will look to precedents developed in earlier cases. They may decide to adopt the precedent (follow or apply it), affirm the precedent (agree with it), or they may try to avoid having to follow the earlier precedent.

Judges may not always have to follow a previous precedent and, in some cases, may be free to create new precedents. Apart from following a binding precedent, there are four other ways that judges can treat previous decisions.

Distinguishing a previous precedent

If there is a binding precedent from a superior court, the judge may find some material fact in the case presently being considered that is different from the facts of the previous case where the precedent was set, and can therefore decide that the court is not bound to follow the previous decision. This is known as distinguishing a previous decision.

CASE STUDY

Davies v. Waldron (1989) VR 449

In this case, the accused was found guilty of being in charge of a motor vehicle while more than the prescribed concentration of alcohol was present in his blood. The police gave evidence that the accused was sitting in the driver's seat of his car with the keys in his possession and he had attempted to start the engine. There was no other person near the car when the police found him.

The counsel for the accused argued that the accused started the car for his friend, who was going to drive the car, because the car was difficult to start.

The counsel for the accused also argued that the judge in this case should follow the precedent in the case of *Gillard v. Wenborn* (unreported).

In *Gillard v. Wenborn*, an intoxicated driver was found not to be 'in charge of a motor vehicle' while in an intoxicated condition. The accused was intoxicated and asleep on the back seat of his car. He awoke early the next morning, got into the front seat and tried to call for assistance on his car phone. He turned on the engine because he was cold and then fell asleep again. He was found at 6 am, asleep in the front seat of his car with the engine running.

The judge in the *Davies v. Waldron* case distinguished the case from *Gillard v. Wenborn*. He said it was necessary to link the intoxicated person in charge of the car with a risk that he will drive the car when in an unfit state. The case was distinguished on the difference in the facts of the two cases. The accused in *Davies v. Waldron* was found attempting to start the car (and was at risk of driving), whereas the accused in *Gillard v. Wenborn* was found asleep in the driver's seat, with the car running, and was not at risk of driving.

The judge found that the accused in *Davies v. Waldron* was in charge of the motor vehicle and did start to drive the motor vehicle within the meaning of the *Road Safety Act*.

CASE STUDY

Morris & Joan Rawlings builders and contractors v. Rawlings (2010) VSCA 306

The plaintiff, David Rawlings, worked for the defendant from January to April 1994. The defendant was a building business that was owned and operated by the plaintiff's parents, until the business went into receivership in April 1994.

From this time on the plaintiff was unwell, which affected his ability to work. The plaintiff suffered physical and emotional incapacity as a result of a knee injury that he sustained while working for the defendant, and he suffered from chronic anxiety and depression, alcoholism and a gambling addiction. The plaintiff received medical attention from a number of doctors in the following years, and was hospitalised several times. In August 2006, the plaintiff consulted another doctor, Ms Perrett-Abrahams. She diagnosed the plaintiff as suffering from a permanent severe mental or permanent severe behavioural disturbance arising out of, or in the course of, or due to the nature of, his employment. Ms Perrett-Abrahams was the first doctor to report a link between the plaintiff's psychiatric condition and the failure of his parents' business.

On 21 December 2007, the plaintiff brought an action with the Victorian WorkCover Authority under S135A(4)(b) of the *Accident Compensation Act 1985* (Vic.), claiming compensation for his injuries sustained while working for the defendant. The defendant argued that S135AC of the Act barred the legal action, as this section required that an action be made within three years of the date when the incapacity became known (time limit), and that the plaintiff's incapacity was known before 2004.

The issue for the Court of Appeal was the application of this time limit to the plaintiff's claim. The time limit was stated in the *Accident Compensation Act*, which also made reference to time limitations under the *Limitations of Actions Act 1958* (Vic.).

Looking at past cases, the Victorian Court of Appeal distinguished the 1922 High Court case of *R v. McNeil*, which involved a question of compensation in respect of several lots of ore delivered to the State Smelting Works of Western Australia. In *R v. McNeil*, the relevant time limit provision was contained in a part of legislation that was interpreted as providing a 'new mode' of enforcing claims against the Crown, which was not previously available. The legislation, which gave a right to make a claim, was all enacted at the one time. It was therefore held that the time limit that was provided for in part of the legislation was a condition of giving the right to make a claim, and therefore the time limit had to be fulfilled. That is different to Rawlings' case.

The Victorian Court of Appeal in Rawlings' case found that the relevant Victorian legislation in this case was of a different kind – there was legislation in operation (*Limitation of Actions Act*) prior to the *Accident Compensation Act* that conferred other time limits.

The court held unanimously (3–0) that the plaintiff was entitled to seek compensation. The judges found that until the plaintiff was diagnosed as suffering from psychiatric injuries due to his work, he could not have known, or be expected to have known, that his incapacity was the result of injuries sustained while working for the defendant.

Reversing a precedent (in the same case)

When a case is taken on appeal to a higher court, the superior court may change the decision of the lower court, thereby reversing the earlier decision (precedent) in the same case. The new precedent created by the superior court is then the one to be followed in future cases.

CASE STUDY

Queen v. Tomas Klamo (2008) VSCA 75

Tomas Klamo was convicted of manslaughter of his four-week-old son in the Supreme Court. The child died of a brain haemorrhage.

Klamo admitted to having shaken the baby a week or two before he died. He denied that he had done this again and stated that he had done nothing to harm the child.

The medical expert called by the prosecution conducted a post mortem and was unable to say what caused the fatal haemorrhage.

Unlike other cases referred to in the judgment, such as *R v. Hall* (1988) 36 A Crim R 368, there was no evidence to show that the accused was of unsound mind at the time of the death of the child.

According to the Court of Appeal, 'the learned trial judge erred in his directions to the jury in failing to direct the jury that in relation to the question of unanimity of verdict – for a finding of guilt the jury had to be unanimous as to the cause of death'.

The Court of Appeal also maintained that the jury's verdict was unreasonable, in that it was incapable of being supported having regard to the evidence presented by the prosecution at the original trial.

The Court of Appeal decided to uphold the appeal against the conviction and ordered that Klamo be acquitted. This therefore reversed the decision of the Supreme Court. The reason for the decision was:

> **There was insufficient evidence for the jury to reach any firm conclusion about how the baby had died. In particular, there was no evidence showing that the shaking by Klamo was the cause of death.**

Overruling a precedent

When a superior court decides not to follow an earlier precedent of a lower court in a different case, it can overrule the previous precedent. This means a new case in a higher court creates a new precedent that makes the previous precedent inapplicable. It can do this because it is not bound by precedents created in lower courts. For example, the High Court can overrule an earlier precedent created by the Supreme Court of Victoria.

When a precedent is overruled, the new ratio decidendi from the latest case has the effect of becoming the precedent to be followed in the future.

The High Court will generally provide consistency in the law by following its previous decisions. However, it is not bound by its previous decisions, and there have been occasions when the High Court has overruled its earlier decisions.

CASE STUDY

AON Risk Services Australia Ltd v. Australian National University [2009] HCA 27; (2009) 239 CLR 175

In this case the High Court overruled its own decision in *Queensland v. JL Holdings Pty Ltd* (1997) HCA 1.

In *AON Risk Services Australia Ltd v. Australian National University* (AON case), Australian National University (ANU) commenced proceedings against its insurance broker, AON Risk Services Australia Ltd (AON), and its three insurers, after ANU suffered damages to its buildings in Canberra after a bushfire in 2003.

The proceedings were commenced in Canberra in 2004 and the matter was set down for trial to commence on 13 November 2006. On the day the trial was to commence, ANU settled its claim against the three insurance companies; however, new information had come to light and ANU sought to amend its claim against AON and wanted to delay the trial in order to do so.

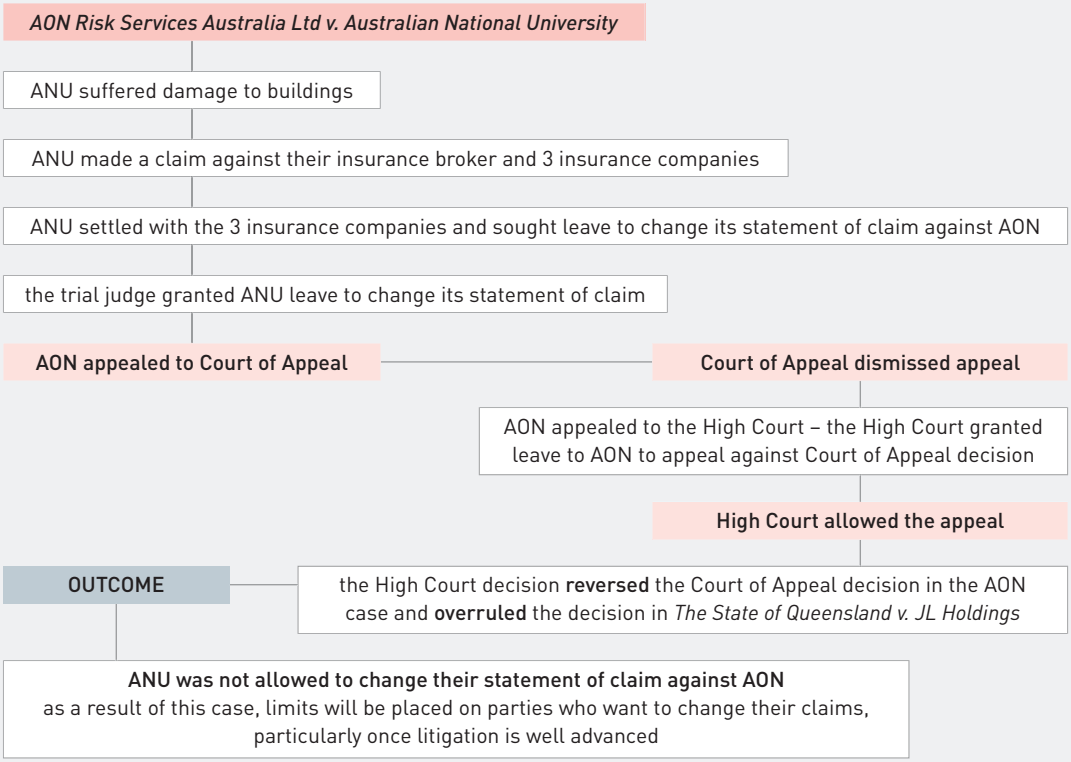
The trial judge granted leave to amend. The amended statement of claim introduced new claims against AON. AON appealed to the Court of Appeal against the decision to allow ANU to amend the statement of claim. The Court of Appeal dismissed the appeal. AON then applied to the High Court, who granted special leave to appeal.

The High Court allowed AON's appeal against the decision that allowed ANU to amend the original statement of claim against AON. In the process, the High Court overruled the previous 1997 decision in *Queensland v. JL Holdings Pty Ltd* (JL Holdings case).

The JL Holdings case was precedent, which determined that a party involved in litigation could at any stage of a matter, even after trial had commenced, seek leave to adjourn a trial in order to make substantial amendments to its case, as long as it paid some of the other party's costs to do so. It was authority for the principle that:

> **the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.**

The High Court in the AON case overruled this decision and took a different view. The High Court stated that an application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim as long as they compensated the other party by way of costs. It further stated that limits will be placed on parties to make changes to their claims, particularly once litigation is well advanced.



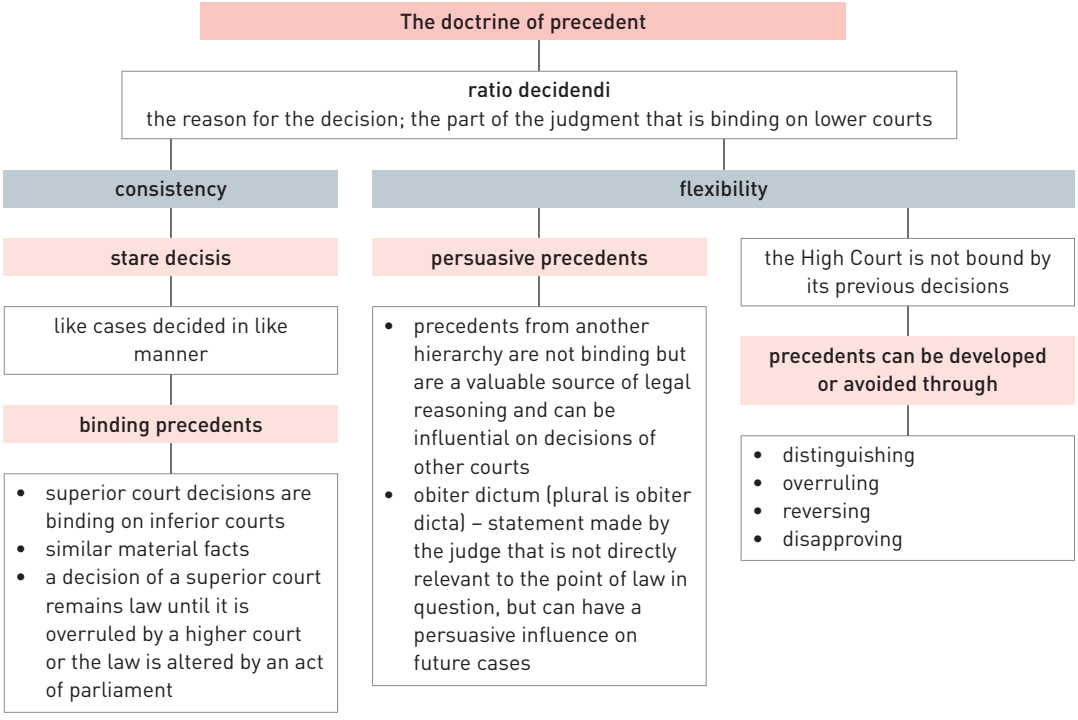
Disapproving a precedent

When a previous decision (precedent) has been made in a court at the same level in the court hierarchy, or at a lower level, the present court may disapprove the earlier decision, that is, it states that it does not agree with the earlier decision.

For courts on the same level in the court hierarchy, the present court is not bound to follow the earlier decision (although for the sake of consistency it usually will). If the later case does not follow the earlier case it may make a new precedent. Both the precedent created in the earlier case that has been disapproved and the precedent created in the present case remain in force until another case is taken to a higher court, which can overrule the previous decisions and create a new precedent.

For example, a single judge of the Supreme Court may make a decision in 2012 and in 2014 a single judge of the Supreme Court in a different case may disapprove the 2012 case and not follow it, thereby creating a new precedent. Both precedents will remain in force until a case is taken to the Court of Appeal or the High Court, which can overrule one of the precedents and clarify the area of law.

Judges in an inferior court can express **disapproval** about a precedent set in a superior court that they are bound to follow. For example, a judge could make a statement (obiter dictum) saying that they do not agree with the precedent but believe that it should be left to parliament to change the law, or to indicate to a higher court that he or she believes that the precedent needs to be reconsidered.



CASE STUDY

State Government Insurance Commission v. Trigwell & Ors [1979] HCA 40; (1979) 142 CLR 617

Mr and Mrs Trigwell were injured when a vehicle collided with their car after hitting two sheep. They sued the driver of the other car and the owner of the sheep for damages.

The High Court decided to follow the old common law that the landowner did not owe a duty of care for their stock straying from their land onto the highway. This followed an old common-law principle inherited from Britain that allowed animals to roam free.

Justice Mason said that:

> **even though there have been changes in conditions and circumstances, there are powerful reasons for the court to be reluctant to engage in changing the rule; such law-making should be left to parliament.**

The Victorian Parliament decided to follow the suggestion made by Justice Mason. It passed the *Wrongs (Animals Straying on Highways) Act 1984* (Vic.), which abolished the common-law immunity and made owners of land liable for damage negligently caused by their animals straying on highways.

LEARNING ACTIVITY 5.3

Developing and avoiding precedent

1. Explain how a precedent may be distinguished. Use the case of *Davies v. Waldron* earlier in this chapter to illustrate the points made.
2. Look back at the case study *Morris & Joan Rawlings Builders and Contractors v. Rawlings* and answer the questions.
   - **a** What was the complaint of the plaintiff in this case?
   - **b** How was this case distinguished from *R v. McNeil*?
3. When a decision is reversed by a higher court, which precedent is binding on later cases?
4. What is the difference between reversing and overruling?
5. Look back at the case study *Queen v. Tomas Klamo* (2008) and answer the questions.
   - **a** What was the reason for the decision in this case?
   - **b** Explain what occurs when a court reverses a decision from a lower court. Use the case of *Queen v. Tomas Klamo* (2008) to illustrate points made.
   - **c** Does the judgment in this case contain an example of a previous case being distinguished? Explain.
6. Look back at the case study *AON Risk Services Australia Ltd v. Australian National University* (2009) and answer the questions.
   - **a** What are the circumstances of this case?
   - **b** Why did AON appeal to the Court of Appeal?
   - **c** What relevance did the case *State of Queensland v. JL Holdings* (1997) have on the AON case?
   - **d** What was the outcome of this case? Why is this case an example of the High Court overruling a previous decision? Explain.
7. What occurs when a court disapproves a previous decision?
8. How did the judge disapprove the existing common law in the Trigwell case?
9. Read the following case study *Sydney Water Corporation v. Maria Turano & Anor* and answer the questions.
   - **a** What was the decision of the trial court in this case?
   - **b** What was the decision of the Court of Appeal?
   - **c** Did the Court of Appeal reverse or overrule the previous decision? Explain.
   - **d** Did the decision of the High Court reverse or overrule the decision of the Court of Appeal? Explain.
   - **e** Explain the outcome of this case for Mrs Turano.

CASE STUDY

Sydney Water Corporation v. Maria Turano & Anor [2009] HCA 42; (2009) 239 CLR 51

Napoleone Turano died on 18 November 2001 when a tree fell on his car while driving along Edmondson Avenue, near Liverpool in New South Wales. Two of his children, also in the car, were injured. Maria Turano sued the City of Liverpool Council and the Sydney Water Corporation.

The Sydney Water Corporation laid a water main in 1981 that ultimately affected the root system of the tree that fell on Mr Turano. This water main caused some obstruction to the free flow of water to the roots of the tree in question.

The trial judge found that the City of Liverpool Council owed a duty of care to the road users of Edmondson Avenue in relation to trees on the side of the road. The court, however, found that the Sydney Water Corporation was not liable.

The City of Liverpool Council appealed to the Court of Appeal against the decision that it was liable. Mrs Turano appealed against the decision that the Sydney Water Corporation was not liable. The Court of Appeal upheld both appeals. According to the Court of Appeal it was not the Council that owed a duty of care, but the Water Corporation had breached their duty of care when installing the water main in 1981.

Sydney Water Corporation appealed to the High Court against the decision of the Court of Appeal. According to the High Court, the Sydney Water Corporation could not reasonably be expected to have foreseen (in 1981) a risk that the tree might fall on users of the road in 2001. Sydney Water Corporation did not therefore owe a duty of care to Mr Turano.

However, the High Court said that the tree had been growing on land owned by the Council for 20 years, and the risk of it dying and falling over in a way that caused damage was one over which the Council had control. That is, the High Court upheld the trial judge's decision that the Liverpool City Council owed a duty of care to the road users of Edmondson Avenue and therefore to Mr Turano and his children.

10 Read the case study *Miller v. Miller* and answer the questions.

- **a** Explain the outcome of this case.
- **b** Distinguish between reversing and overruling.
- **c** How did this decision of the High Court both reverse and overrule previous precedent?
- **d** Would a case being heard in Victoria be bound by the precedent set in *Miller v. Miller*? Explain.
- **e** Do you agree with the decision in this case? Why or why not?

CASE STUDY

Miller v. Miller [2011] HCA 9; (2011) 242 CLR 446

The plaintiff, Danelle Miller, aged 16, was injured in an accident while she was a passenger in a car driven by the defendant, her second cousin, Maurin Miller, aged 27. Danelle had been drinking and wandering the streets with her sister and cousin, when she stole a car. Maurin saw her and offered to drive. Danelle knew Maurin had been drinking when she allowed him to drive. Initially Maurin drove sensibly, but then he began to speed and drive through red lights. Danelle twice asked Maurin to let her and her sister out of the car, but he did not. Shortly after, Maurin lost control of the car and

it struck a pole. One passenger was killed; Danelle was seriously injured, becoming a quadriplegic. Danelle sued Maurin, claiming damages for negligence.

The question for the court was whether Danelle's theft of the car and her subsequent use of the car defeated her claim for negligence. The District Court of Western Australia decided Maurin owed Danelle a duty of care.

On appeal, the Court of Appeal of the Supreme Court of Western Australia held that Maurin owed Danelle no duty of care, as both had engaged in a joint illegal enterprise of using a motor vehicle without consent of the owner. Danelle appealed to the High Court.

The majority of the High Court held (6–1) that by the time the accident happened, Danelle and Maurin were no longer engaged in a joint illegal enterprise; Danelle withdrew from the joint enterprise when she asked to get out of the car.

The High Court allowed the appeal. In allowing the appeal in this case, the High Court rejected the precedent set in the earlier High Court cases of *Smith v. Jenkins* (1970) and *Gala v. Preston* (1991) where it was held that one illegal user of a vehicle does not owe a duty of care to a passenger complicit in the illegal use.

11 Read the case study 'Drink driving, whose responsibility?' and answer the questions.

- **a** Explain the situation that occurred in this case.
- **b** Give two examples of reversing a decision.
- **c** Why do you think the High Court decided in the way it did? Do you agree with the decision of the High Court? Discuss.
- **d** Draw a flow chart showing how this case developed.

CASE STUDY

Drink-driving, whose responsibility?

Patrons of hotels have to take responsibility for themselves when it comes to deciding whether to drink and then drive, although there is some responsibility held by hotel proprietors and licensees.

In *C.A.L. No 14 Pty Ltd v. Motor Accidents Insurance Board; C.A.L. No 14 Pty Ltd v. Scott* (2009) HCA 47, the High Court had to examine the issue of the duties of the various parties when it came to deciding to drink and drive.

In this case, a person (the patron) went to the hotel after work on his motorcycle. He asked the hotel licensee to keep the motorcycle in the hotel storeroom and hold on to the keys. The arrangement was that when he was ready to go home, the licensee would call the patron's wife.

After drinking for three hours, the licensee offered to call his wife. The patron said he didn't want the licensee to do that and demanded his keys. Eventually the licensee relented and gave him his keys. The patron died in a road accident on his way home.

The Motor Accidents Insurance Board sued the hotel proprietor and its licensee for negligence, claiming they owed a duty of care to the patron and this duty of care was broken.

The Supreme Court of Tasmania found that neither the hotel proprietor nor the licensee owed a duty of care in this situation.

The patron's widow appealed to the Full Court of the Supreme Court of Tasmania, which found in favour of the patron's widow and the Motor Accidents Insurance Board. The appeal court found that the proprietor and the licensee did owe a duty of care.

The proprietor and the licensee appealed to the High Court. The High Court found in favour of the proprietor and the licensee stating that there was a general duty of care to provide safe premises and equipment but should not be extended to this situation, besides which, the patron refused to let the licensee telephone his wife.



Figure 5.3 How much responsibility do hotel licensees and proprietors have for their patrons who drive after drinking too much?

12 You have been asked to clarify some of the elements of the doctrine of precedent for a friend. Use your word-processing software to prepare a table identifying the key terms in relation to the doctrine of precedent and the meaning of each term.

Interpretation of past decisions

Courts can be called on to interpret the meaning of the words in past decisions and apply precedents set in previous cases.

Sometimes courts are bound by past decisions while at other times the courts are able to distinguish, overrule, reverse or disapprove past decisions. This allows the law to develop through the courts. Decisions may also be broadened or narrowed when interpreted by future courts. A precedent set by a court may not be a final statement of the law.

When interpreting past decisions it might be difficult to find precedents because there might be a number of precedents covering one issue. There may also be conflicting precedents. This situation will remain until a High Court decision can clarify the area of law.

The ratio decidendi can be difficult to find because there could be more than one judge. Each judge will write a judgment on the case. It is the judgments of the majority that form the ratio decidendi.

There has been a gradual development of the law through the courts. The law of negligence is a good example of the development of common law.

>>GOING FURTHER

Development of the law of negligence

Before the law of negligence, a person could sue for damages under contract law. However, this was only possible if the injured person was a party to the contract. On occasion, someone else bought the goods for the person who consumed or used them. That meant the person who consumed them was not a party to the contract and could not make a claim.

The law of negligence gradually developed to fill this void. The courts were conservative because it was thought that if the law of negligence was allowed to develop, there would be a flood of cases claiming negligence against manufacturers, which could cause enormous financial loss to the manufacturers and lead to economic downfall.

Langridge v. Levy (1837) ER 863

A father bought a gun for use by himself and his three sons. He was told by the seller that it was made by a famous gunmaker, Nock, and the seller guaranteed the safety of the gun. When one of the sons used the gun, the second barrel exploded, mutilating the son's arm. The son had not purchased the gun and was not a party to the contract between the seller and the father. The son was therefore not able to make a claim under the contract. The court decided that there was no contract between the seller and the injured person, but that the seller should pay damages for the injury sustained by the son because **there had been a type of fraud by the seller in selling an item he knew to be faulty, saying that it was in good condition in order to make the sale and claiming it had been made by a famous gunmaker.**

As there was no law of negligence at that time, the courts had to be inventive so that the injured person could get compensation for the injuries sustained.

Winterbottom v. Wright (1842) 152 ER 402

The driver of a mail coach was injured through a fall from the coach, which was in need of repair. The postmaster-general had contracted with the supplier of the mail coaches to keep the coaches in fit, proper and safe condition. The postmaster-general had not fulfilled his contract because the coaches were unsafe. The injury to the driver was as a result of this breach. The driver claimed compensation from the postmaster-general.

The court decided that the driver would not be successful in his claim because **he was not a party to the contract between the postmaster-general and the supplier of the mail coaches.**

The court looked back at the *Langridge v. Levy* case but **distinguished** that case from the present case in that **in the present case there was no fraud** as in the case of *Langridge v. Levy*.

George v. Skivington (1869) LR 5 Ex1

A man bought hairwash from a seller/manufacturer for use by his wife. His wife suffered loss of hair and a scalp disorder. As his wife was not a party to the contract she was not able to make a claim under the contract, although the court did say that the duty under the contract should extend to those whom the seller knew would be using the product. This case **followed** *Langridge v. Levy*, and the plaintiff was successful because **the seller/manufacturer knew that the product was negligently made and was going to be used by someone other than the purchaser.**

One of the judges substituted the word negligence for fraud and maintained that the circumstances were close enough to *Langridge v. Levy* to follow the decision in that case.

Heaven v. Pender (1883) 11 QBD 503

A ship's painter standing on a platform slung over the side of a ship was injured when the platform collapsed. The platform was faulty. The painter was employed by Gray, who had contracted with

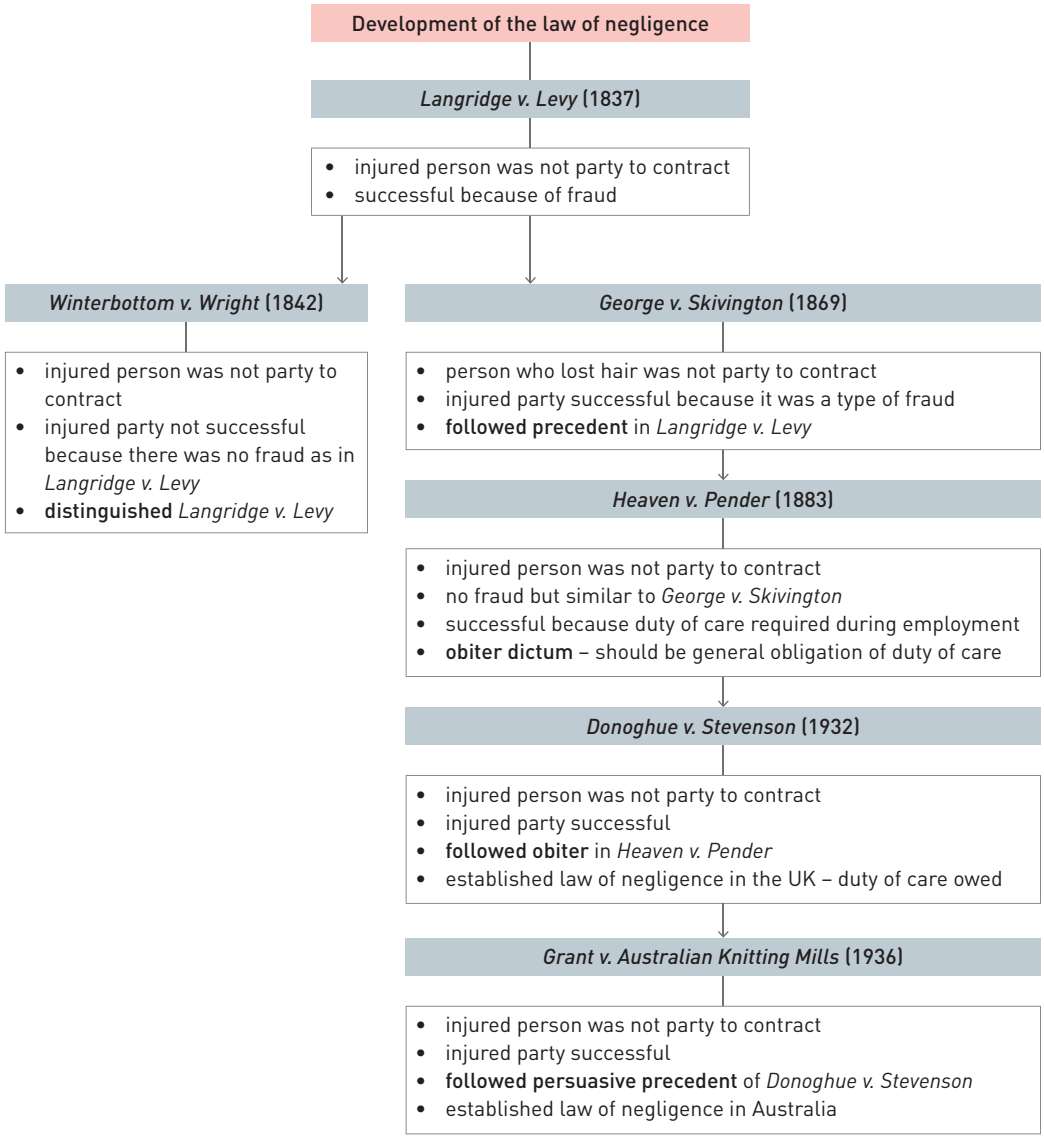
the shipowner to paint the ship. Pender, the dock owner, had a contract with Gray to supply a painting platform. Heaven, the painter, did not have a contract with Pender, the supplier of the platform.

In this case there was no element of fraud so *Langridge v. Levy* did not apply. The case was, however, seen as similar to *George v. Skivington* in that the supplier of the platform knew it would be used for painting the ship by the painter who was not a party to the contract (just as the hairwash was to be used by someone who was not a party to the contract).

In this case the plaintiff was successful because **a duty of care was owed to the person who was to use the platform especially as it was during his employment.**

The court went further, saying, as **obiter dictum**:

> **It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty.**



>>GOING FURTHER

Extension of the law of negligence

Once the law of negligence had been established, it became possible to expand it to apply to many other situations; for example, professionals, road users and in the home. The law of negligent advice was developed in the UK in the case of *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* (1964) AC 465.

Hedley Byrne & Co. Ltd v. Heller & Partners Ltd (1964) AC 465

The English case *Hedley Byrne v. Heller* sought to extend the concept of negligence further to include negligently given advice. An advertising agency sued a merchant bank for giving negligent advice that was being relied on. They were not successful because **the bank had disclaimed responsibility for the information when given.**

However, the court did make a statement, which was **obiter dictum** to the effect that there ought to be a duty of care owed when advice is given during the ordinary course of business or professional affairs without disclaimer and is to be relied on.

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

In *Shaddock v. Parramatta City Council*, Shaddock sued the council for giving negligent advice that was relied on in the course of business. The court referred back to the obiter dictum in the case of *Hedley Byrne v. Heller*, which it used as **persuasive precedent**. Shaddock was successful, and the court's reason for its decision was that **a duty of care is owed when information or advice is sought, and is relied upon in the course of business and the supplier of the information sets itself up as a centre from which that advice can be sought.** (See the case study earlier in this chapter for more information on this case.)

CASE STUDY

Norris v. Sibberas (1989) VR 161 (the Bonnie Doon Motor Inn case)

In this case, the trial judge followed the precedent of negligent advice set in *Shaddock v. Parramatta City Council*. In the original trial in the Supreme Court on 6 October 1988, Mr and Mrs Sibberas were awarded damages against a real estate agent, Mrs Norris, who had advised the couple that the motel she was selling was a 'goldmine' and a 'once-in-a-lifetime chance'.

The couple relied on this advice when purchasing the motel. This prediction proved not to be the case. Mr and Mrs Sibberas sued Mrs Norris for negligent advice. The trial court found that Mrs Norris owed a duty of care to the couple and that she had been negligent in giving advice. The reason for this decision was **the statements made by the estate agent, Mrs Norris, were relied on in the course of business, and the estate agent was setting herself up as a centre for giving advice.**

The Full Court of the Supreme Court (now called the Court of Appeal) **reversed** this decision on appeal. The Full Court of the Supreme Court decided that Mrs Norris was not liable, and that Mr and Mrs Sibberas should have relied on advice from their accountant.

Mrs Norris owed a duty of care in respect only of those matters on which her expertise was asked for and trusted. The reason for the decision of the Full Court of the Supreme Court (simplified from the court report) was:

> **there must be a close relationship between the two parties for negligence to exist, and that relationship must depend largely on one party knowing that the other party has a special skill which is being relied on.**

Mrs Norris did not have special financial skills or expertise.

In making their decision, the Full Court of the Supreme Court applied the cases of *Donoghue v. Stevenson*, *Hedley Byrne v. Heller* and *Shaddock v. Parramatta City Council* among others.

Development of the law of negligent advice

***Hedley Byrne v. Heller* (1964)**

- wrong advice given
- *not successful* because bank had disclaimed responsibility
- **obiter** – there ought to be a duty of care owed for negligent advice

***Shaddock v. Parramatta City Council* (1981)**

- wrong advice given
- **followed obiter** in *Hedley Byrne v. Heller* (**persuasive** because it was from another hierarchy and because it was the obiter dictum)
- *Shaddock successful* because a duty of care is owed when advice is given in the course of business

***Norris v. Sibberas* (1989)**

- wrong advice given
- Sibberas successful in original trial
- **trial judge followed precedent** set in *Shaddock v. Parramatta City Council*
- **decision in trial reversed on appeal**
- *Norris successful in the appeal*
- *appeal judge distinguished Shaddock v. Parramatta City Council* saying that Norris (the person giving the advice) was not an expert in financial matters, and therefore did not owe a duty of care. Her advice should not have been relied on as Mr and Mrs Sibberas did not depend upon her as someone with a special skill in financial matters

LEARNING ACTIVITY 5.4

Interpretation of past decisions

1 Look back at the case study *Norris v. Sibberas* and answer the questions.

- **a** What was the negligent advice given in this case?
- **b** What did the trial judge decide in this case?
- **c** In what way was the trial judge in *Norris v. Sibberas* relying on the *Shaddock v. Parramatta City Council* case? Explain.
- **d** Why did the Court of Appeal reverse the decision of the original trial court?
- **e** Explain the ability of judges to make laws and the operation of precedent.

2 What was the reason for the decision in the *Langridge v. Levy* case?

3 In what way did the court in *Winterbottom v. Wright* distinguish *Langridge v. Levy*?

4 How did *George v. Skivington* follow the *Langridge v. Levy* case?

5 What was the relevance of *Heaven v. Pender*?

6 You be the judge! Read the case study 'Family sues hospital' and answer the questions.

- **a** Explain the nature of the claim.
- **b** Outline the similarities and differences between this case and *Donoghue v. Stevenson* and *Grant v. Australian Knitting Mills*.
- **c** What would you, as the judge, decide in this case? Give the reason for your decision (ratio decidendi).

CASE STUDY

Family sues hospital

The family of a young baby who lost a hand and her feet due to meningococcal disease claimed that the hospital had been negligent in their treatment of their baby. The parents took the baby into the hospital at 3 am because she had a high temperature and had vomited. When they asked the doctor about meningococcal disease the doctor said, 'I don't think it's that serious'. No tests were done. They were given painkillers for the baby and were sent home.

The baby remained unsettled throughout the day and the parents took her back to hospital at 4 pm. Despite the fact that the baby was clearly distressed, and that they had been in the same hospital earlier in the day, they had to fill in various forms before she was looked at. While waiting in a cubicle for attention, she became unconscious. She spent five days in intensive care and a further 10 weeks in hospital. She had to have her lower legs, left hand and three fingers on her right hand amputated.

The barrister for the family said the hospital was negligent in failing to treat the baby promptly and effectively when she was first admitted. The hospital did not follow its own medical guidelines. 'Any child with a fever who appears seriously unwell should be investigated and admitted irrespective of fever and this was not done', the barrister said.

7 From the case studies shown earlier find two examples of cases that distinguished previous decisions.

8 Give one example of a decision in another hierarchy being used as a persuasive precedent.

9 Looking back at previous cases, why do you think the law needs to be interpreted?

10 What do you think the most likely outcome would be if a judge does not follow a precedent that is clearly binding on the court?

11 Why are judges often reluctant to change the law through the courts?

12 In what way can a court influence changes in the law made by parliament? Give an example.

13 How did the *Wrongs (Animals Straying on Highways) Act 1984* (Vic.) abrogate (change, cancel or override) the decision reached in the Trigwell case?

14 'Common law meets the changing needs of the community.' To what extent do you think this statement is true in relation to the doctrine of precedent? Discuss.

STATUTORY INTERPRETATION

Statutory interpretation is another way judges make law. This refers to the process by which judges interpret the words or phrases in an Act of parliament (statute), in order to give the words meaning.

Acts are often written in general terms and have to be interpreted and applied by judges so that they can decide the specific cases before them.

The need for this interpretation arises when a case is brought before a court in which there is a dispute about whether the words or phrases contained in an Act apply to the particular situation before the courts. For judges to provide interpretation of words in an Act there must be a case before the court.

When a judge interprets the meaning of a word, or words, in a statute, the reasoning behind this interpretation sets a precedent which other judges who are required to interpret the meaning of those words in the same Act will then follow in the future. The new precedent then becomes part of the law along with the statute.

The judges can therefore be said to be law-making by adding to existing law and clarifying what the law is. **For future cases, the Act and the precedent, which was created by the court when interpreting the Act, are read together and form the law.**

The judge's decision does not change the actual words of the Act of parliament, but adds meaning to the words to be applied in future cases and situations.

Methods used by judges to interpret Acts

Judges have developed certain principles to deal with the interpretation of statutes. If the meaning of the words of an Act is unclear to the courts, or the courts are unsure how to apply an Act to a particular set of circumstances, they will look further so they can apply the intention of the parliament, at the time the Act was passed, to the situation before them. The courts will also look back at past decisions to see how courts have interpreted the words in the Act in previous cases.

In their search for the intention of parliament when it made an Act of parliament, the courts are able to look at intrinsic and extrinsic materials.

Intrinsic materials are contained in the Act itself and include:

- the words of the Act – both the section being interpreted and other sections
- the long title
- preambles
- headings, margin notes, footnotes, punctuation
- schedules.

Extrinsic materials are those outside the Act that can be used to assist in the interpretation of the Act and include:

- parliamentary debates (recorded in Hansard)
- reports from committees and law reform bodies
- interpretation Acts
- dictionaries
- law reports.

Judges will generally look at the literal meaning of words in Acts (the literal approach) when interpreting the meaning of words. To ascertain the precise meaning of a word they may look at the following.

- **other sections in the Act** – Sections of the Act, such as a definition section, may give the precise meaning of the word according to the intention of parliament. Other sections may also more clearly show the way the word is to be applied.
- **dictionaries** – A dictionary will give the literal meaning of a word, but the meaning given may not convey the intention of the Act as a whole, or fit the particular situation of the case before the court. A particular word may also have a number of different meanings.

If the judge feels that using the literal approach to interpreting the words in the Act will not achieve the intention of the parliament when the Act was originally passed, the judge will interpret the words in the Act using the **purposive approach**. This involves looking at its purpose and what the Act was intended to achieve when it was originally passed.

The *Acts Interpretation Act 1901* (Cth) and the *Interpretation of Legislation Act 1984* (Vic.) provide guidance to the courts on how Commonwealth legislation and Victorian legislation, respectively, should be interpreted and what the courts are able to use to assist them in interpreting the legislation. Under these Acts the courts must look at what the intention or purpose of parliament was when the Act in question was passed; that is, use the purposive approach.

Following the passage of the Victorian *Charter of Human Rights and Responsibilities*, Victorian judges are now required to interpret legislation in a way that is compatible with human rights contained in the Charter. Section 32(1) states that 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

In interpreting a statutory provision, the court may refer to international law and the judgments of domestic, foreign and international courts and tribunals relevant to human rights.

>>GOING FURTHER

The class rule

A class of terms can be terms referring to different types of goods, businesses or activities that are related; for example, heroin, cocaine and cannabis are all illegal drugs.

When there are several specific terms, all in a particular class, which are followed by more general terms, the general terms will be interpreted in the same class as the preceding words, such as in S51 of the *Commonwealth of Australia Constitution Act*, which refers to 'postal, telegraphic, telephonic and other like services' – this is the **ejusdem generis** rule (class rule).

LEARNING ACTIVITY 5.5

Statutory interpretation

1. What is statutory interpretation?
2. How can judges make law when they are interpreting an Act of parliament?
3. Explain the difference between extrinsic and intrinsic materials that may be used by courts when interpreting Acts of parliament. Give an example of an extrinsic material and an intrinsic material used in interpreting Acts of parliament.
4. What is the difference between the literal approach and the purposive approach?
5. How is the Victorian *Charter of Human Rights and Responsibilities* relevant to the interpretation of Acts of parliament?
6. Read the case study 'Bread or biscuit?', look at the accompanying picture and answer the questions.
   - **a** Why is it important to know whether ciabatta is bread or a biscuit?
   - **b** In your opinion, is this bread or a biscuit? Do you agree with the decision in this case? Discuss.
   - **c** Search the Internet to find more information about the arguments presented in the case. Present a report giving the arguments of both sides. The case was heard in the Federal Court and is referred to as *Lansell House Pty Ltd v. Commissioner of Taxation* (2010) FCA 329 (9 April 2010).

CASE STUDY

Bread or biscuit?

Alfred Abbatangelo took the Tax Office to court over a tax office ruling that his ciabatta is a biscuit, not bread. If it is bread, it attracts no GST. If it is a biscuit, Abbatangelo should have been paying GST and he would owe $85000 to the Tax Office. Examples of GST-free bakery items include plain bread and rolls, plain focaccia, tortillas, pita, Lebanese and lavash bread, grissini breadsticks and Italian bread.

Abbatangelo says the ciabatta is made of the same ingredients as breadsticks. He told the Federal Court that his flat bread had a 300-year history in the Liguria region of north-western Italy.

During the court hearing, the ciabatta was broken to see if it cracked like crackers. Justice Sunberg of the Federal Court said: 'In my view the mini ciabatta is a cracker. Its ingredients are substantially the same as those of a cracker … I have concluded that the ratio of ingredients in the two products is substantially the same.' The Federal Court found in favour of the Tax Office. The mini ciabatta should be treated as a cracker and liable for GST.



Figure 5.4
Ciabatta – bread or biscuit?

7 Read the case study 'No definition of parent' and answer the questions.

- **a** What word had to be defined in this case?
- **b** What approach did the Minister for Immigration and Citizenship use to define this word? Compare this with the approach used by the Federal Court.
- **c** Do you agree with the decision of the Federal Court? Justify.

CASE STUDY

No definition of parent

Vanessa McMullen was born in Fiji. Her mother told her that her father was Melbourne man Fred McMullen, who has loved and cared for her all her life with his other three children. Eleven years ago DNA tests revealed that he was not her father.

In December 2008, when Vanessa applied for Australian citizenship, her mother claimed that Australian Bill Davidson, who died in 1990, was her biological father. The citizenship department refused Vanessa's application for citizenship because there was no evidence to show she had an Australian citizen parent at birth.

The Victorian Civil and Administrative Tribunal ruled that while the *Australian Citizenship Act 2007* (Cth) does not define the word 'parent', legal definitions of the word had to move in step with societal definitions. It would be 'restrictive, unfair and unreasonable' to decide that McMullen was not her father. The Minister for Immigration and Citizenship appealed against the tribunal ruling that Ms McMullen should be granted citizenship. He argued that the dictionary definition of 'parent' meant 'biological parent'. However, in 2010 the Federal Court dismissed the appeal and allowed Ms McMullen citizenship, stating that legal interpretations of 'parent' had to move with the times and included non-biological parents. The three judges of the Federal Court stated that 'being a parent within the ordinary meaning of the word may depend on various factors, including social, legal and biological'.

LEARNING ACTIVITY 5.6

Case study – *Deing v. Tarola* (the studded belt case)

Read the case study *Deing v. Tarola* and answer the questions.

1. What was Chanta Deing (the offender) charged with in this case?
2. Explain the finding of the Magistrates' Court. Why was the studded belt seen as a weapon?
3. What did Justice Beach have to decide?
4. Why was the case of *Wilson v. Kuhl; Ryan v. Kuhl* referred to?
5. Why was the definition of a weapon in the regulations seen as not relevant?
6. Identify two types of extrinsic material used in this case.
7. Could this case be used as an example of a reversed decision? Explain.
8. Explain why you think Justice Beach reached the decision he did. In your explanation, comment on the dictionary meaning of the word 'weapon' and the findings in the case of *Wilson v. Kuhl; Ryan v. Kuhl*.
9. What was the outcome of this case? Why was action taken to amend the law? Explain.

CASE STUDY

Deing v. Tarola (the studded belt case)

The case of *Deing v. Tarola* (1993) 2 VR 163 is an example of how judges make law through statutory interpretation. A 20-year-old man, Chanta Deing, was apprehended by the police at a McDonald's restaurant. He was wearing a black leather belt to hold up his trousers, which he had purchased earlier from a stall at the market. The belt had raised silver studs on it. He was charged with an offence under S6 of the *Control of Weapons Act 1990* (Vic.).

Section 6 of the Act stated:

1. A person must not possess, carry or use any regulated weapon without lawful excuse.
2. A person must not carry a regulated weapon unless it is carried in a safe and secure manner consistent with the lawful excuse for which it is possessed or is carried or is to be used for.

Section 5 of the *Control of Weapons Regulations 1990* (Vic.) provided a long list of weapons that were included under the term 'regulated'. This list included 'any article fitted with raised pointed studs which is designed to be worn as an article of clothing'.

The court had to interpret the words 'regulated weapon' as found in the *Control of Weapons Act 1990* and the *Control of Weapons Regulations 1990*, and decide if regulated weapons included studded belts.

The Magistrates' Court decided that a studded belt was a 'regulated weapon' as it fitted the description of one of the weapons listed in the *Control of Weapons Regulations 1990*.

The young man appealed against the Magistrates' Court's decision in the Supreme Court (*Deing v. Tarola* (1993) 2 VR 163). The Supreme Court decided differently to the Magistrates' Court. The judge concluded that the studded belt was not a regulated weapon.

In interpreting the meaning of 'regulated weapon', Justice Beach looked to a range of sources. His Honour noted the literal meaning of the word 'weapon' in the *Oxford English Dictionary* as 'an instrument of any kind used in warfare or in combat to attack and overcome an enemy', and stated that if this definition was used by the court, 'weapon' could include any number of things such as pieces of timber or lengths of pipe. His Honour also looked for assistance from *Halsbury's Laws of England*, which defined 'offensive weapon' as 'anything that is not in common use for any other purpose but that of a weapon. But a common whip is not such a weapon; nor probably a hatchet which is caught up accidentally during the heat of an affray'.

In his judgment, Justice Beach referred to other previous cases that had interpreted the words 'offensive weapon'. In *Wilson v. Kuhl; Ryan v. Kuhl* [1979] VR 315, Justice McGarvie stated: 'Any physical article is an offensive weapon if it is an article of a kind normally used only to inflict or threaten injury … A person armed with an article of a kind normally used only to inflict or threaten injury is armed with an offensive weapon, whatever his intention. An article of a kind which is not normally used only to inflict or threaten injury is an offensive weapon only if the person found armed with it had then any intention to use it for an offensive, that is, an aggressive, purpose. A carving knife is an article of this kind.'

Justice Beach decided that under the *Control of Weapons Act 1990*, a regulated weapon should be defined as 'anything that is not in common use for any other purpose but that of a weapon'. For example, a pair of stockings can be used as a weapon to strangle someone, but it is not common or normal to use them in this way, therefore they could not be classed as a regulated weapon under the *Control of Weapons Act*.

Deing v. Tarola ratio decidendi

The Supreme Court set a precedent in this case. The ratio decidendi in this case was the following.

- An item that is not in common use as a weapon cannot be classed as a weapon under the *Control of Weapons Act 1990*.
- The Executive Council (comprising the governor, premier and senior ministers), when making the *Control of Weapons Regulations 1990*, was outside the authority given to it by the *Control of Weapons Act 1990* (ultra vires), therefore the regulation that lists studded belts as 'weapons' is invalid.



Figure 5.5 The *Deing v. Tarola* case is about a studded belt that could have looked similar to the belt shown.

Justice Beach said that a studded belt used as an article of clothing was not a weapon within the meaning of the Act, although it could be used as one. He also said that it was not in the power of the Executive Council to make the regulation providing for regulated weapons to include articles fitted with raised pointed studs and designed to be worn as articles of clothing.

The *Control of Weapons Regulations 1990* have been amended to remove studded belts from the list of regulated weapons. The *Control of Weapons (Amendment) Act 2000* has been amended to change the terms in the previous legislation from 'regulated weapon and prescribed weapon' to 'controlled weapon and prohibited weapon'.

Reasons for the interpretation of statutes

Parliamentary counsel draft laws to cover all sorts of situations and possibilities. They try to use language with the least amount of uncertainty and imprecision. However, they do not always achieve this intention. It is also not always possible to draft an Act taking into account every possible situation that might arise.

Judges may therefore need to interpret the meaning of words in an Act. For example, the word 'supply' is in everyday use. It means to furnish, provide or satisfy a need. It conveys the idea of providing something that is wanted to meet the needs of another. But once a word is examined carefully, for purposes of interpretation, problems of definition may appear. If a person leaves drugs in a friend's car and the friend returns the drugs, is returning the drugs supplying drugs? Can a courier be regarded as supplying drugs, or is the person who employed the courier the supplier? If drugs are put into a safe deposit box in the bank for safekeeping does this mean that the bank has been supplied with drugs? It would seem that there should be some direct benefit to the person receiving the goods for it to be seen as supply.

The courts have to interpret the words in an Act in order to apply them to the specific situation before the courts.

Problems as a result of the drafting process

Problems that could occur as a result of the drafting process are shown below.

- **Mistakes can occur during the drafting of an Act.** Parliamentary counsel may make mistakes when drafting a Bill. For example, S51 of the *Crimes Act 1958* (Vic.) deals with the sexual exploitation of people with impaired mental functioning. In the original Act a witness was required to support the victim's evidence before the offender could be prosecuted. As it was unlikely that there was a witness to such acts, no prosecutions were brought under this part of the Act. This was clearly an oversight and the Act has now been amended. A witness is no longer required.
- **The Act might not have taken into account future circumstances.** For example, the *Commonwealth of Australia Constitution Act 1900* (UK) gives the Commonwealth Parliament the power to legislate over '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' (S51 VI). This section does not refer to the air force. At the time the Act was passed, an air force was not envisaged.
- **The intention of the Act might not be clearly expressed.** This can lead to confusion about how to interpret the Act.
- **There might be inconsistent use of the same word in the Act (giving it different meanings).** This could occur within the Act itself or could be caused by an amendment that is not consistent with the original Act in its use of a particular word.
- **An Act may not include new types of technology.** For example, an Act referring to CDs and DVDs may not include MP4 players.
- **Parliamentary counsel, when drafting the legislation, may have used incorrect technical terms.**

- **There may be inconsistencies with other statutes.**
- **A word in an Act may not be defined in the Act.**
- **The definition of a word might be too broad in an Act.**

Problems applying the Act to a court case

Problems that could occur when a court is applying an Act to a particular court case are shown below.

- **Most legislation is drafted in general terms**, but has to be applied to specific circumstances.
- **The Act may have become out of date** and may need to be revised to keep up with changes in society.
- **The meaning of the words may be ambiguous.** The words and phrases used in an Act attempt to cover a broad range of issues. As a result, the meaning of some of the words might be ambiguous. It is therefore necessary for the courts to interpret the words or phrases in order to decide on their meaning according to the intention of the Act. For example, in the case of *Davies v. Waldron* (1989), the court was asked to interpret the phrase 'start to drive' found in S48 and S49 of the *Road Safety Act 1986* (Vic.). Did the accused who was sitting in the car (with a blood alcohol level of over .05), while the engine was running, start to drive the car? The Supreme Court found that the accused was in charge of the motor vehicle and did start to drive the motor vehicle within the meaning of the *Road Safety Act*. (See the case study earlier in this chapter for more information.)
- **The Act might be silent on an issue and the courts may need to fill gaps in the legislation.** An Act tries to cover all situations that might arise in relation to the issues covered in the Act. This may not be possible as some situations may arise that were not foreseen, or gaps may have been left in legislation. An Act may therefore be silent on an issue that comes before the courts. For example, does the word 'man' or the word 'woman' in the *Marriage (Amendment) Act 2004* (Cth) include a person who has had a sex-change operation and has become a man or a woman?
- **The meaning of words can change over time.** The legal meaning of the term 'de facto relationship' was a man and a woman living in a domestic relationship. The definition of a de facto relationship is now a couple living in a domestic relationship, regardless of gender.

LEARNING ACTIVITY 5.7

Reasons for interpretation of statutes by judges

1. Explain why the meanings of words are sometimes ambiguous.
2. What are the ambiguous words in the *Davies v. Waldron* case? How have these words been interpreted by the Supreme Court?
3. Give an example of a situation when an Act has not foreseen future circumstances.
4. What does it mean to say an Act is silent on an issue?
5. Explain how a word you know of has changed its meaning over time.
6. Why might the word 'supply' require interpretation by the courts? Explain two situations when the word 'supply' may be used differently.
7. Explain two reasons for the need to interpret statutes, not already referred to in previous questions.
8. Read the case of *Victorian Workcover Authority v. Virgin Australia Airlines and Paul Tzovlas* and answer the questions.
   - **a** What was the keyword in S85(6) that needed interpreting? What was the effect of this interpretation?
   - **b** Why did the phrase 'under the law of any place outside Victoria' also need interpreting?

c What did Justice Bell use to help him reach his decision?

d Explain what is meant by Justice Bell's comment that the *Accident Compensation Act* had conflicting purposes?

e Explain Justice Bell's decision, and the reasoning for that decision.

f Would it be possible to draft legislation that does not need interpretation? Discuss.

g Justice Bell's judgment provides a detailed discussion of the principles and practices of statutory interpretation. Find this case using AustLII (www.austlii.edu.au). Summarise his key points relating to statutory interpretation.

CASE STUDY

Victorian Workcover Authority v. Virgin Australia Airlines and Paul Tzovlas [2013] VSC 720

Paul Tzovlas was injured while travelling on a Virgin aircraft for work. He sustained a serious back injury when a flight attendant dropped a portable EFTPOS machine on his head and he twisted his back. The injury occurred in the airspace above Tullamarine Airport in Melbourne, just before the aeroplane landed. Mr Tzovlas claimed compensation from Virgin's insurers under the *Civil Aviation (Carrier's Liability) Act 1959* (Cth). He was also paid workers' compensation under the *Accident Compensation Act 1985* (Vic).

Section 85(6) of the *Accident Compensation Act* states that where a worker who has been paid compensation under the Act also obtains an order for damages 'under the law of any place outside Victoria (whether within or outside Australia)', then the Victorian Workcover Authority can recover compensation paid under the Act. This is to avoid an injured worker from receiving a double payment of compensation.

The Victorian Workcover Authority brought proceedings in the Victorian Supreme Court to recover the compensation paid to Mr Tzovlas under the Victorian Act, up to the amount of damages paid under the Commonwealth Act. The question for the court in this case was to determine whether damages paid under the Commonwealth Act would constitute damages paid 'under the law of any place outside Victoria (whether within or outside Australia)' as stated in S85(6) of the Victorian Act. Mr Tzovlas argued that the section excluded the laws of the Commonwealth and was therefore entitled to keep the compensation.

In interpreting S85(6), Justice Bell consulted a number of sources. When interpreting the meaning of 'place', His Honour consulted dictionaries and determined that 'place' was not just a physical place (Mr Tzovlas had argued that 'place' could not include the Commonwealth because it is not 'outside Victoria'), but that it could also be a non-physical place, such as the jurisdictional source of law.

When interpreting the phrase in S85(6), Justice Bell consulted a number of Victorian Supreme Court and High Court cases in their approach to statutory interpretation. This included a discussion of the *Acts Interpretation Act 1901* (Cth), reports of law reform bodies, the context of the section in the rest of the legislation. His Honour discussed the legislative development of S85(6) since first being passed in 1958, other sections in the Act, similar legislation in other states and particularly the purpose of the Act. His Honour considered the competing purposes of the *Accident Compensation Act* – that the general purpose of the Act is a beneficial one in terms of providing 'adequate and just compensation to injured workers'; however, the workers compensation scheme needs to 'establish and maintain a fully funded scheme', hence S85(6), to avoid double payment of compensation, had a non-beneficial purpose.

Justice Bell found that parliament did not intend to exclude damages for payments made under Commonwealth law in the meaning of S85(6) and that there was a principle against double payment of compensation. He held that the expression 'under the law of any place outside Victoria (whether within or outside Australia)' includes all non-Victorian sources of law, including Commonwealth laws.

The Victorian Workcover Authority was entitled to recover the compensation paid to Mr Tzovlas.

The effects of statutory interpretation

The courts play an important role in the law-making process. The effects of statutory interpretation are shown below.

- **Acts of parliament are applied to the cases that come before the courts.** When a case before the courts relates to a law contained in an Act of parliament, it is necessary for the courts to apply the law to that case.
- **The words in the Act are given meaning.** The courts cannot change the words in an Act but can interpret the words and give them meaning that will then be followed in the future.
- **The parties to the case are bound by the decision.** Once a court has reached a decision, the parties to the case are bound by that decision unless one of the parties appeals against the decision and the decision is reversed; others in similar situations in the same court hierarchy in the future are also bound by the decision.
- **Precedents are set for future cases to follow.** The interpretation of the words in an Act forms a precedent that is then read together as part of the law with the Act of parliament. This type of law-making is carried out by the Supreme Court, the Court of Appeal and the High Court. The precedents created by these courts may be extended or changed in higher courts (the High Court can overrule its own decisions).
- **Consistency and predictability** – people in the future can, to some extent, predict the outcome of a case because of the consistency of the courts in following previous decisions of the courts and deciding like cases in a like manner.
- **Courts can overrule or reverse a previous decision of courts.** If a precedent is set when interpreting a word in an Act, and the case is taken to a higher court on appeal, the previous decision can be reversed and a new precedent set. Likewise, if a new case is taken to a higher court, the higher court can overrule the previous precedent and set a new precedent on the interpretation of the words in an Act.
- **Parliament can abrogate law made by courts.** Parliament is the supreme law-making body and is able to change law made through the courts. If parliament believes that the court's interpretations are not in line with its intention when passing the Act in question, the parliament can pass a law that overrides (abrogates) a decision of a court. This has the effect of cancelling a precedent set by a court (parliament cannot change a precedent set by the High Court when interpreting the Constitution – this would require a referendum).
- **Restricting the law through a narrow interpretation of a statute** – if the court interprets a word or phrase narrowly, this could restrict the scope of the law. For example, *Deing v. Tarola* restricted the definition of regulated weapon to items likely to be used for an offensive or aggressive purpose only. (See the case study earlier in this chapter for more information.)
- **Extending the law by a broad interpretation of a statute** – a broad interpretation of a word or phrase in an Act can extend the law to cover a new situation or area. For example, the decision

in the Tasmanian Dam case extended the interpretation of the phrase 'external affairs' in the *Commonwealth of Australia Constitution Act* to include areas covered by international treaties. This case set a precedent and, from that time, the meaning of the words 'external affairs' has been extended and the Commonwealth Parliament has jurisdiction over areas covered by international treaties. (See the case study in chapter 3 for more information.)



Figure 5.6 How final is a decision made by a court?

The finality of a court's decision

When a law is made through the courts, it applies to parties to the case and any person who may bring a similar case in the future. A decision made by a court is a final statement of law unless one of the parties decides to appeal against the decision. The **appeal court may then reverse the decision or let it stand**.

Reversing, overruling or abrogating a decision

The law made by courts remains in force until the precedent is reversed, or overruled by a higher court in a different case, or abrogated (cancelled) by an Act of parliament (although parliament cannot abrogate a High Court decision that is interpreting the Constitution).

Parliament can confirm a decision made by a court by passing an Act that enshrines the common law into legislation.

Extending a previous decision

The courts can extend previous decisions to include a wider meaning such as extending negligence by a manufacturer to cover all types of negligence.

Narrowing a precedent

Courts can also narrow previous decisions by interpreting a previous precedent more narrowly; for example, a general duty of care for negligent advice was narrowed (in a later case) to only include advice given by someone with special skill.

In the case of *Mutual Life & Citizens Assurance Co Ltd v. Evatt* (1971) AC 793, Evatt was unsuccessful in seeking compensation for negligent advice from Mutual Life & Citizens Assurance Co Ltd. The reason for the decision was:

> a duty of care only existed if the person whose advice was being relied on was holding himself out as possessing some special skill or competence to give that sort of advice.

LEARNING ACTIVITY 5.8

Effects of statutory interpretation

1. Explain three possible effects of statutory interpretation.
2. 'The decision of a court is the final statement of law on a particular issue.' To what extent is this statement true? Discuss.
3. Read the extract from the *Dangerous Goods Act 1985* and answer the questions.
   - **a** Would delivering explosives in a box fitted to a rubber ring to make it float be an offence?
   - **b** Would it be an offence to deliver the dangerous goods to a spaceship?
   - **c** How would you define 'dangerous goods'?
   - **d** How does the purpose clause at the beginning of the Act help in the interpretation of the Act?

EXTRACT

Dangerous Goods Act 1985 (Vic.)

Purpose

An act to promote the safety of persons and property in relation to the manufacture, storage, transfer, transport, sale, purchase and use of dangerous goods and the import of explosives, to consolidate and amend the law relating to explosives and other dangerous goods.

Section 37 Offences in relation to explosives

(3) A person who delivers explosives to a vehicle or boat knowing that the transport of the explosives in the vehicle or boat would be in contravention of this act is guilty of an offence.

Definitions

'boat' means any vessel not being a ship

'ship' means any vessel used in sea navigation but does not include any barge, lighter or like vessel

Source: *Dangerous Goods Act 1985* (Vic.)

4 Read the case of *Mansfield v. Kelly* and answer the questions.

- **a** Why did the words 'in a public place' need interpreting?
- **b** To what extent do you think that the judge in this case was making law? Explain.
- **c** What are the effects of the statutory interpretation in this case?

CASE STUDY

Mansfield v. Kelly (1972) VR 744

Under the *Summary Offences Act 1966* (Vic.) it is an offence to be drunk in a public place. Section 13 states:

> Any person found drunk in a public place shall be guilty of an offence.

In the case of *Mansfield v. Kelly*, the accused was found drunk in his car, which was parked in the street. As the street was a public place, the prosecution maintained that he was drunk in a public place. The accused argued that he was in his private car. The courts were called on to interpret the words 'public place'.

Did these words include in a private car in a public place? The court decided that the words public place included 'in a private car in a public place'. The accused was therefore convicted of the offence.

Following this decision the case of *Mansfield v. Kelly* and S13 of the *Summary Offences Act* are read together as the law on this issue.

5 Read the following brief case studies. In each case state:

- whether you think the *Mansfield v. Kelly* case would apply
- how it would apply to the situation shown
- what you think the outcome would be.

a Three youths were picked up by the police for being drunk in a public place. It was 11.30 pm, and they were in a campervan parked in a supermarket car park. They were drinking and singing loudly.

b A 20-year-old youth had been to a party and had a few drinks. He had set off to drive but had thought better of it. He pulled over to the side of the road and got into the back of his car to have a sleep. He was picked up by the police for being drunk in a public place.

6 Create a mind map starting with the word 'courts'.

7 Read the case studies 'The Tasmanian Dam case' and 'The Tasmanian human rights case' and answer the questions.

a Which phrase was being interpreted in each case?

b How did this interpretation extend the power of the Commonwealth Parliament?

c Explain two effects of statutory interpretation, using these two cases to illustrate your points made.

CASE STUDY

The Tasmanian Dam case

The High Court was called on to interpret the words 'external affairs' in S51(xxix) of the *Commonwealth of Australian Constitution Act 1901* (UK). The Tasmanian Government intended to dam the Franklin River to create a hydroelectricity scheme to provide electricity to the state. The Commonwealth Government wanted to stop the building of this dam.

In a case in the High Court, the Tasmanian Government maintained that building a dam was a state matter and was not part of the law-making powers of the Commonwealth.

The area of the Franklin River had been heritage listed and was therefore covered by an international treaty. The High Court interpreted the words 'external affairs' in the Constitution to include all areas covered by an international treaty. This gave the Commonwealth Parliament power to make laws in relation to all areas covered by an international treaty.



Figure 5.7 Wilderness area around the Franklin River in Tasmania

CASE STUDY

The Tasmanian human rights case

Tasmanian gay activists lobbied against Tasmanian laws that violated a gay person's right to privacy. Under these laws, homosexual activities were illegal. The precedent set in the Tasmanian Dam case was relied on when the Commonwealth Parliament passed the *Human Rights (Sexual Conduct) Act 1994* (Cth). This Act provides that consenting sexual conduct in private involving people over the age of 18 should not be subjected to interference by any law in Australia.

This Act would have been outside the power of the Commonwealth Parliament (ultra vires), under the Constitution, before the decision in the Tasmanian Dam case. Legislating on areas of sexual conduct is a state power under the Constitution.

According to the Commonwealth Parliament, this issue came under its jurisdiction because it covered an issue of human rights, and the *International Covenant on Civil and Political Rights* (an international treaty) was therefore applicable. It was the extension of the meaning of the term 'external affairs' in the Tasmanian Dam case that gave the Commonwealth Parliament the right to intervene in this issue.

8 Internet exercise

Using the Internet, investigate statutory interpretation. Search for a summary of a judgment that refers to legislation that is being interpreted in the judgment. Using your word processing software, write a report on the case that you have chosen. In your report include:

- the name of the court hearing the case
- the title of the case
- a brief summary of the facts
- the name of the Act being referred to
- the section of the Act that is being interpreted
- whether any precedent is being referred to – and if so the title of the case referred to.

USEFUL WEBSITES

Supreme Court of Victoria www.supremecourt.vic.gov.au
Australasian Legal Information Institute www.austlii.edu.au

STRENGTHS AND WEAKNESSES OF LAW-MAKING THROUGH THE COURTS

The process of law-making through courts is secondary to their role of applying the law and resolving disputes. However, when courts establish a precedent on an issue, it is a proposition of law and becomes part of the law to be followed in the future.

The **impact** of courts as a law-making body on the overall operation of the legal system and the body of laws created by the law-makers as a whole is both positive and negative.

Strengths of courts as a law-making body

The following are strengths of law-making by courts.

- **Precedents create certainty, consistency and predictability.** Similar cases are decided in a like manner to a previous case. People can look back to previous cases to give them some idea of how a court will decide a particular case. Precedent provides some protection and guidance for judges, in that they can refer back to previous cases and decide accordingly. However, it can be difficult to locate the common law relevant to a particular situation because of the many cases that may be decided in the relevant area of law.
- **Courts can change the law quickly.** Courts can make a quick decision that can resolve a dispute for the parties in the case before the courts, and create precedent to be followed by the courts and others in the community in the future. For example, in December 2013, the High Court acted quickly to determine whether the *Marriage Equality (Same Sex) Act 2013* (ACT), which legalised same-sex marriage in the Australian Capital Territory, was inconsistent with the federal *Marriage Act 1961* (Cth). The ACT Act permitted same-sex marriage ceremonies to commence from 7 December 2013. On 12 December 2013, the High Court held that the ACT Act could not operate concurrently with the federal Act, and the ACT legislation was struck down. However, the courts cannot make law unless a case is brought to court.
- **Courts are not subject to political influence when making a decision**. Judges are appointed, rather than elected, so they are not subject to the same political pressure experienced by members of parliament. Their independent and unbiased status allows them to make more objective assessments of the case and the law before them and of the need for change in the law. However, judges do not always reflect current community values when making a decision.
- **Courts are able to fill gaps in legislation.** Parliament can make laws about a whole range of issues but may not cover every set of circumstances that could arise. The courts can fill in the gaps left by parliament, which is essential because new situations are constantly arising. For example, there are gaps in the law relating to frozen embryos. The legislation is silent on the disposal of frozen embryos if the genetic parents of the frozen embryos decide to separate within the specified time for keeping frozen embryos (usually five years, although this can be extended by the Victorian Assisted Reproductive Treatment Authority). If a case relating to this comes before the courts, the courts must decide on a fair outcome for the parties. The reason behind this decision will be followed by future courts.
- **Courts can develop areas of law.** Courts may create a new area of law, or change the law, to cover a situation that was not previously covered by statute law or common law. This is essential because new situations are constantly arising. The law of negligence was first established in the courts and was developed further in the courts as the need arose in the community and in accordance with fairness for the parties. The courts have continued to develop the law in a wide range of human activities in order to keep the law applicable to changing times. However, courts may decide to act conservatively because they feel that law-making should be left to parliament.
- **Courts can give meaning to an Act of parliament.** Courts can interpret the words in an Act of parliament to fit with the current situation in the case before them and provide a just outcome. The judiciary often makes changes to the law when interpreting statutes or expanding on previous precedents, but when a major change is required the courts might decline to intervene because they see radical change as the responsibility of parliament.
- **Courts can keep the law from becoming too rigid and provide flexibility in the law-making process.** The courts can change the law when it has become outdated, if a case is brought before the courts. The processes of distinguishing, overruling and reversing previous decisions can be used to keep the law from becoming too static or rigid. If a precedent does exist, it may be able to be distinguished to create a fair result in a new set of circumstances. A precedent may also be overruled by a superior court. However, courts may be bound by an old precedent, or may decide to act conservatively because they feel that law-making should be left to parliament.

Weaknesses of courts as a law-making body

Some of the weaknesses of law-making through courts are shown below.

- **Courts can only make law when an appropriate case comes before them** and then they are **restricted to the specific area of law that is in the case before them.** Courts must wait until a party decides to pursue a case before they can create precedent. Further, they can only make laws relating to the points of law brought up in the case. It is also usually necessary for the case to be taken to a higher court on appeal. People may not be aware of their rights to take a matter to court to resolve it in a fair way. Parties may also be unable to afford the cost and time of taking a matter to court to rectify an unjust situation. People cannot bring a case to court unless they have standing (that is, they are directly affected by the issue). For example, in the case *John McBain v. The State of Victoria & Ors* (2000) (see chapter 3), Dr John McBain wanted the courts to change the law to allow all women to have access to IVF treatment. To have standing, so that he could take a matter to court, he had to relate the case against the State of Victoria and Ors (others) to one particular person who had been refused IVF treatment, which was Leesa Meldrum.
- **Changes in court-made law can be slow.** The courts can change the law immediately when a case is before them, but changes in a particular area of law through the courts can be slow to develop, such as the law of negligence, which continues to broaden its scope. Changing the law depends on litigants (a person who takes a matter to court is a litigant) taking a relevant case to court.
- **Finding precedents can be difficult.** The process of precedents can be an inefficient means of making and changing the law, because finding the relevant precedents can be time-consuming. Identifying the ratio decidendi for the particular cases may be difficult, as there could be judgments from different judges. In this situation, the lawyer must look at the decisions from judges who decided in a similar way and formed the majority. Judges who do not agree with the majority are referred to as dissenting judges. In some instances there are conflicting authorities. This means that there is more than one judgment on a particular issue, and there are differences in the reasons for the decisions in some judgments. If this occurs, the judge needs to decide which precedent is most appropriate to the set of circumstances before the court.
- **Courts may be bound by previous decisions.** A court's ability to change the law may be restricted by the doctrine of precedent. It may be bound by the decisions of an earlier case from a higher court in the hierarchy and may not be able to change the law when a case comes before it.
- **Courts make laws ex post facto.** Court decisions are made retrospectively (ex post facto – after the fact); that is, they decide on a situation that has already taken place. For example, in the case of *Grant v. Australian Knitting Mills* (1936) (see earlier in this chapter), the courts decided that a law of negligence existed after Australian Knitting Mills had negligently left the chemical in the underpants. This allows the court to achieve a fair result for the injured party, but means the other party was acting within the law at the time, even though they were later found to have acted outside the law.
- **Courts are not an elected body.** Members of parliament are elected by the people to make laws on behalf of the people. Judges are not elected. At times the courts are called on to make laws when deciding on a new issue or interpreting Acts of parliament. The laws made by courts form part of the law as a whole to be followed in the future.
- **Courts are not able to investigate an area of law.** Parliaments, through parliamentary committees, are able to investigate a whole body of law when deciding whether to change the law. They are also able to seek the advice of specialist bodies (for example the Victorian Law Reform Commission) and consult the public to determine what changes the people would like to occur. However, courts have no opportunity to investigate the views of the public or specialist bodies;

they are limited to the resources they have available in the court, although they can consult extrinsic material. Also, they are limited to the part of the law that is the subject of the case before them.

Table 5.2 Summary of the strengths and weaknesses of law-making through courts

STRENGTHS	WEAKNESSES
The doctrine of precedent ensures consistency, certainty and predictability	It can be difficult to locate precedent created by courts and the ratio decidendi can be difficult to find.
Courts can change a law quickly if a relevant case is brought before them.	Courts cannot change the law unless a case is brought before the court
Courts are not subject to political influence when making a decision.	Judges do not always reflect current community values when making a decision.
Courts can develop areas of law not currently covered by legislation by making a decision on a matter when it arises.	Changes in the law through the courts: • are ex post facto • are very expensive for the parties concerned • can be slow to develop and may occur throughout a number of cases.
Courts can interpret the words in an Act of parliament to give a more just result.	Parliament is sovereign and can override court-made law. Judges tend to be very conservative and prefer to leave law-making to parliament.
Courts can keep the law from becoming too rigid by distinguishing, overruling or reversing previous decisions.	Courts may be bound by an old precedent, or may decide to act conservatively.
Judges are expert and experienced in the law, and see the effects of laws and how they are applied in everyday cases.	Courts are unable to undertake community consultation or engage experts to provide advice about a change to the law.

LEARNING ACTIVITY 5.9

Strengths and weaknesses of law-making through the courts

1. What is the meaning of ex post facto?
2. What has occurred in a judgment if there is a dissenting judge?
3. How can a reason for the decision in a case be ascertained if there are conflicting judgments?
4. Explain two advantages of judge-made law (or court-made law).
5. Explain two disadvantages of judge-made law.
6. When might a court enforce a law that is generally unacceptable to the community?
7. What is judicial conservatism and how does this affect statutory interpretation?
8. Read the case study 'The High Court declares ACT same-sex marriage law invalid' and answer the questions.
   - **a** What was the decision in this case? How will this decision affect what the Commonwealth and state/territorial parliaments can do?
   - **b** Briefly explain the reason for the decision in this case.
   - **c** Courts can change the law quickly when a case comes before them, but how are they restricted in the law-making process?
   - **d** What strengths and weaknesses of courts as law-makers are evident in this case?

CASE STUDY

The High Court declares ACT same-sex marriage law invalid

Marriage is a concurrent area of law under the Australian Constitution. In the case of *The Commonwealth of Australia v. Australian Capital Territory* [2013] HCA 55, the High Court was called on to decide whether the ACT's same-sex marriage laws were inconsistent with the federal *Marriage Act 1961* (Cth) and therefore invalid.

The ACT *Marriage Equality (Same Sex) Act* passed the territory's Legislative Assembly in October 2013, and it came into effect in November 2013. Couples were required to provide four weeks' notice before conducting wedding ceremonies, so the earliest date on which marriages could occur was 7 December 2013.

The Commonwealth Government sought an expedited hearing in the High Court arguing that the ACT laws were inconsistent with the *Marriage Act 1961* (Cth). While the *Marriage Act* defines marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life', the ACT legislation allowed for 'the union of two people', thereby legalising same-sex marriage in the ACT.

The High Court heard the case on 3 December 2013 and delivered its judgment on 12 December. The court held that the object of the ACT Act was to provide for marriage equality for same-sex couples and not for some form of legally recognised relationship, which is relevantly different from the relationship of marriage, and which federal law provides for and recognises. The court found that the ACT Act could not operate concurrently with the federal Act and it was therefore invalid. (Section 109 of the Constitution is not relevant in this case because the ACT is a territory, coming under Commonwealth jurisdiction, not a state.)

In the week in which the ACT Act was in force, about two dozen same-sex marriage ceremonies were performed. These marriages now have no legal effect.

The High Court also found that S51(xxi) of the Constitution permits the Commonwealth Parliament to make a law in respect of same-sex marriage.



Figure 5.8 Newly married gay and lesbian couples pose for a photograph at Canberra's Old Parliament House on 7 December 2013, ahead of the High Court decision.

9 The fact that judges are appointed rather than elected to their position in courts is both a strength and a weakness of law-making through courts. Discuss.
10 Choose a case that has created a legal precedent, for example *Grant v. Australian Knitting Mills*, and discuss the strengths and weaknesses of courts as law-makers in relation to that case.
11 Analyse the impact of courts in law-making.

RELATIONSHIP BETWEEN COURTS AND PARLIAMENTS IN LAW-MAKING

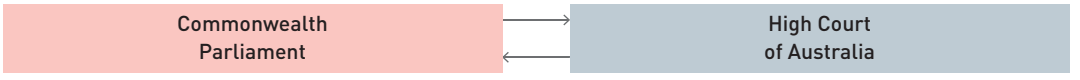
Courts and parliaments interact in the law-making process. They need to work together so that the law is flexible and can apply to any situation that might arise. Common law (law made through courts) arose from the local customs of England and existed before any statutes had been passed. Statutes have confirmed, added to and altered common law.

The courts are responsible for settling disputes. Many disputes are settled by the courts by interpreting the words in an Act of parliament. As a secondary role, the courts also occasionally make laws.

Parliament is the supreme law-making body. This is also referred to as **sovereignty of parliament**. Parliament's main role is to make laws. As a supreme law-making body, parliament can make laws that either confirm or reject laws made by courts, although the Commonwealth Parliament cannot override High Court interpretations of the Commonwealth Constitution.

Courts depend on parliament to make the bulk of the law. Parliament depends on courts to apply the law made by parliament and to establish new law on situations that have arisen for the first time. The relationship between courts and parliament can be summarised as follows.

- Parliaments pass Acts to establish courts and outline their jurisdiction.
- Courts apply and interpret the law made by parliament.
- Parliament can change law made by courts.
- Parliament can confirm law made by courts.
- Court decisions can influence changes in the law by parliament.







Parliaments pass Acts to establish courts and outline their jurisdiction

For a court to exist there must be an Act of parliament that establishes the court and sets out its jurisdiction. For example, the Victorian Parliament passed the *Supreme Court Act 1986* (Vic.) to establish the Supreme Court. Likewise the *Magistrates' Court Act* was passed in 1989. Both the *Supreme Court Act* and the *Magistrates' Court Act* replaced previous Acts that originally established these courts.

Parliament can pass legislation that changes the jurisdiction of courts so that the types and severity of cases heard by the court can be changed. For example, the *Magistrates' Court Act 1989* (Vic.) has been amended nearly every year since it was passed. Parliament has passed amendments to create the specialist lists (for example the Sexual Offences List) and specialist divisions of the Magistrates' Court (such as the Koori Court Division, the Drug Court Division and the Family Violence Division).

Courts apply and interpret the law

For legislation to be effective, the courts must apply the statutes, or delegated legislation, to the cases before them. To do this, it is sometimes necessary for a court to interpret the meaning of the words in an Act or piece of delegated legislation. Delegated legislation is made by bodies that have been given their law-making power by parliament through an Act of parliament.

Decisions about the meaning of the words in statutes form precedents that become part of the law to be followed in the future. For example, the interpretation of the words 'external affairs' by the High Court in the Tasmanian Dam case set a precedent to be followed in the future.

The High Court has played an important role in interpreting the words in the *Commonwealth of Australia Constitution Act 1900* (UK). In this way the High Court has helped to define the division of power between the Commonwealth Parliament and the state parliaments.

For the courts to be able to interpret the meaning of the words of an Act of parliament, an individual or group must take the matter to a court. This can be an expensive exercise. To help provide greater access to the courts, parliaments have passed laws setting up bodies that provide legal assistance; for example, the *Legal Aid Act 1978* (Vic.) established Victoria Legal Aid for this purpose.

Parliament can change law made by courts

Parliament can change the law to override (or abrogate) a decision made through the courts (other than High Court interpretations of the Constitution). On occasion, the courts interpret the meaning of the words in a statute in a way that was not the intention of parliament, or in a way that does not reflect the current meaning of the Act.

Courts also sometimes interpret the common law (made up of precedents set in the past) in a conservative way that no longer reflects current values in the community.

Following the decision in Trigwell's case (see earlier in this chapter), the Victorian Parliament passed the *Wrongs (Animals Straying on Highways) Act 1984* (Vic.), which abrogated or abolished the common-law rule. The law was changed by parliament so now stock owners are liable for the damage caused by their straying animals.

Parliament can confirm law made by courts

Parliament is the supreme law-making body within its jurisdiction and can make law that confirms a precedent set in a court by passing an Act of parliament that reinforces the principles established by the court.

For example, the Commonwealth Parliament codified (made into legislation) the principles of *Mabo & Ors v. State of Queensland* in the *Native Title Act 1983* (Cth).

Court decisions can influence changes in the law by parliament

Courts can influence changes in the law by parliament through their comments made during court cases. Parliament can also be influenced to change the law if a court is bound by previous precedent and makes a decision that creates an injustice.

A progressive decision reached by the courts could alert the parliament to the need for a major change in the law.

Reasons parliament can be influenced by courts

Parliament may be influenced by courts for the following reasons.

- **Courts may indicate in a judgment that they think the law should be changed by parliament (courts being conservative).** Courts may be reluctant to change the law because there is a need for the type of investigation that parliament can carry out on a whole area of law, but statements made by a judge (obiter dictum) within a court decision may influence parliament to change the law. In the Trigwell case, *State Government Insurance Commission v. Trigwell & Ors* (1978) 142 CLR 617, the court was reluctant to set a new precedent, but stated that the law should be changed by parliament.
- **Courts' decisions highlight problems** and can lead to a public outcry. The *Crimes Amendment (Bullying) Act 2011* (Vic.) was influenced by the tragic death of Brodie Panlock. This Act became known as 'Brodie's law'. Brodie Panlock was a 19-year-old waitress who tragically ended her life after being subjected to 'persistent and vicious' workplace bullying at Cafe Vamp in Hawthorn, Victoria. Brodie's parents wanted a change in the law because the perpetrators of the workplace bullying of Brodie escaped with fines rather than a jail sentence. The five defendants in this case pleaded guilty in court to workplace offences under the *Occupational Health and Safety Act 2004* (Vic.) and were fined a total of $335 000. There were many complaints in the media about the inadequacy of this punishment. The amendment to the *Crimes Amendment (Bullying) Act* provides for up to 10 years' imprisonment for bullying.
- **Creativity by courts** may alert the parliament to an area of law where new laws made by parliament are needed. The Mabo decision was an example of the High Court breaking new ground. According to common law, Australia was an empty land when it was taken over by the British. This is the concept of terra nullius. In the Mabo case, the High Court overturned the concept of terra nullius and stated that Mabo and the Meriam people had the right to their land under native title. See the case study further on for more details.
- **Lenient sentences can lead to changes in the law.** There was a public outcry in late 2013 and early 2014 following the lenient sentences that were handed down to a series of one-punch (also called coward's punch) assaults in a number of states of Australia. One case was that of Daniel Christie, who was punched in Kings Cross on New Year's Eve 2013 and died in hospital two weeks later. The New South Wales parliament passed the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) in a one-day and all-night sitting of parliament. The Act includes a mandatory eight-year minimum prison sentence for anyone who kills someone with a single punch while intoxicated or on drugs.



Figure 5.9 **Courts may be conservative.** Under old common law, sheep were allowed to stray on highways (see the Trigwell case earlier in this chapter for more details).



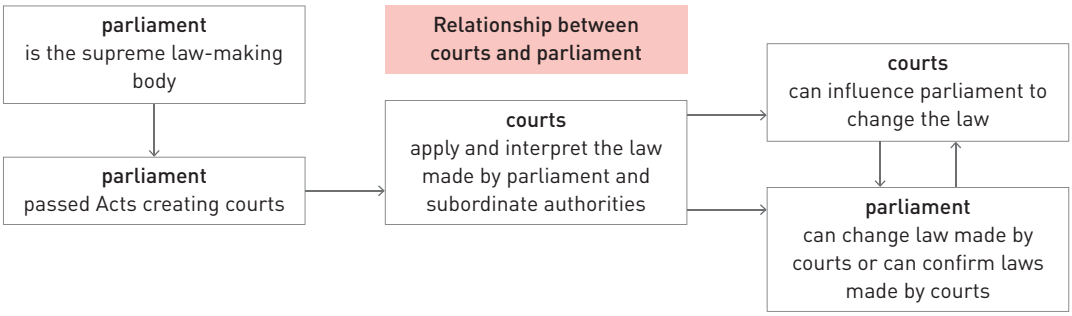
Figure 5.10 **Courts may highlight problems.** Damian and Rae Panlock on the steps of parliament after the passing of Brodie's law



Figure 5.11 **Courts being creative** – the Eddie Mabo case



Figure 5.12 **Lenient sentences can lead to changes in the law.** The scene of a one-punch assault



LEARNING ACTIVITY 5.10

Relationship between courts and parliaments

1. Why may law made by parliament be dependent on the courts?
2. How may law-making by courts be dependent on a previous law made by parliament?
3. How do courts fill in the gaps left by parliament when law-making?
4. Why might parliament decide to abrogate court-made law?
5. Describe an example of courts being too conservative. Why do you think the outcome of this case could be seen as too conservative?
6. How can courts influence the parliament to change the law? Explain using the example of Brodie's law.
7. How can the creativity of the courts lead to a change in the law? Explain with the use of an example.
8. 'Courts can change how an Act is applied.' To what extent is this statement true? Discuss.
9. Create a mind map starting with the word 'courts'.
10. Read the case study 'Lenient sentences' and explain the relationship between courts and parliament, referring to the information given. Also refer to the one-punch assault cases in NSW mentioned earlier in this chapter.

CASE STUDY

Lenient sentences

The courts are restricted in the sentences they can give by the maximum sentences prescribed in legislation and current court sentencing practices relating to the various offences.

In 2007, two child homicide cases resulted in sentences that the community thought were too lenient in the circumstances.

In the case of *DPP v. Arney* (2007), Arney was charged with manslaughter and recklessly causing serious injury after admitting to punching his five-month-old baby daughter on up to 10 occasions. He was sentenced to nine years' imprisonment with a non-parole period of five years, later increased to 11 years with a minimum of eight.

In the case of *Queen v. Stuart John McMaster* (2007), McMaster was charged with the manslaughter of the five-year-old son of his partner. McMaster beat the boy with a modified heavy belt. The child was found to have 160 bruises on his body. McMaster was sentenced to 13 years' imprisonment with a minimum of 10 years.

As a result of the public outcry that followed the lenient sentences in these cases, the Victorian Parliament passed the *Crimes Amendment (Child Homicide) Act 2008* (Vic.). This Act created the new offence of child homicide with a maximum sentence of 20 years.

LEARNING ACTIVITY 5.11

The Mabo case

Working in groups, investigate the Mabo case.

1. Outline how this case originated.
2. Highlight the key legal issues raised in this case.
3. Describe the process used by the court in this case to decide what the law should be.
4. To what extent do you believe the doctrine of precedent was followed in this case? Discuss.
5. Discuss the strengths and weaknesses of law-making by courts in relation to this case.
6. What are the consequences of this case?
7. Explain how the case illustrates the relationship between courts and parliament in law-making.
8. Develop a PowerPoint or podcast summary of this case for presentation to the class. Include in your summary:
   - the key legal issues of this case
   - the role of courts in law-making.

CASE STUDY

Mabo decision

In Mabo & Ors v. The State of Queensland (No. 2) (1992) 107 ALR 1, the High Court ruled that the common law of Australia recognised native title to land. The judgment overturned existing common law.

Up until this time, the 17th-century doctrine of terra nullius (no-one's land) applied. Under this doctrine, Britain laid claim to Australia on the understanding that it was an empty land at the time of colonisation.

In 1982, Eddie Koiki Mabo, Sam Passi, David Passi, Celuia Mapo Salee and James Rice joined together and began their legal claim for ownership of the lands on the island of Mer in the Torres Strait between Australia and Papua New Guinea. The case was brought as a test case to determine the legal rights of the Meriam people. While this case was in the Supreme Court of Queensland, the Queensland Parliament passed a law which stated:

> **Any rights to land that Torres Strait Islanders had after the claim of sovereignty in 1879 is hereby extinguished without compensation.**

Mabo challenged the right of the Queensland Parliament to pass this law, stating that it was in conflict with the *Commonwealth Racial Discrimination Act 1975*. This became Mabo (No. 1).

After a struggle of 10 years, a decision was finally reached by the High Court. It was an example of judicial creativity.

Eddie Mabo was successful in his claim for native title because the High Court decided **that the Murray Islanders of the Torres Strait were entitled, as against the whole world, to possession, occupation and enjoyment of the lands of the Murray Islands**. Eddie Mabo and Celuia Salee both died before the decision was reached.

The High Court said native title could continue if the following conditions existed:

- where Aboriginal and Torres Strait Islander people had maintained their connection with the land through the years of European settlement – native title was extinguished if the Aboriginal clan or group had ceased to acknowledge traditional laws and lost its connection to the land
- where native title had not been extinguished by valid Acts of state of Commonwealth parliaments

- where the content of native title could be determined according to the traditional laws and customs of the Aboriginal and Torres Strait Islander people.

The consequences of the Mabo decision are far-reaching, the most important of which is that Australia now recognises native title. According to Justice Michael Kirby, the basic principles of the Mabo decision are that:

- our system of real property law accommodates native title
- native title may be extinguished
- native title may be extinguished in a number of ways either by the Crown or by the Indigenous people themselves, and
- where native title has been extinguished there may (or may not) be a right to compensation.

Following the High Court decision in Mabo (No. 2), the Commonwealth Parliament passed the *Native Title Act* in 1993, which confirmed the decision of the court and established mechanisms for dealing with native title claims.

The purpose of the *Native Title Act* is:

- to provide for the recognition and protection of native title
- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings
- to establish a mechanism for determining claims to native title
- to provide for, or permit, the validation of past Acts, and intermediate period Acts, invalidated because of the existence of native title.

PRACTICE EXAM QUESTIONS

1 **a** What is statutory interpretation? Explain one reason why a court may be required to interpret a statute. *(4 marks)*

b If the County Court of Victoria makes a decision, and in the process it has interpreted an Act of parliament, explain the effect this will have on future cases. *(6 marks)*

c Critically evaluate the law-making processes of courts. *(10 marks)*

2 **a** Explain the nature and importance of the operation of courts as law-makers. *(6 marks)*

b A writer in a legal journal once wrote, 'Courts have had no influence on the laws made in Australia. We don't need them as law-making bodies'. Do you agree with this statement? Justify your reasons. *(8 marks)*

c Discuss the relationship between parliament and courts as law-making bodies. *(6 marks)*

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK CASE STUDY

Deing v. Tarola

Look back at the case study *Deing v. Tarola* and answer the questions, using details of this case to illustrate your answers.

1 To what extent are judges able to make law? Discuss. *(2 marks)*
2 Explain the doctrine of precedent. *(4 marks)*
3 Identify two reasons for statutory interpretation. *(2 marks)*
4 Explain the effect of statutory interpretation. *(2 marks)*
5 Discuss the strengths and weaknesses of law-making through courts. *(6 marks)*
6 Explain the relationship between courts and parliament in law-making. *(4 marks)*

(Total 20 marks)

ASSESSMENT TASK CASE STUDIES

Kevin and Jennifer's marriage

1 Read the following case study 'The Full Court of the Family Court ruling on the meaning of marriage' and answer the questions.
   - **a** What was the outcome of the trial and the appeal by the attorney-general to the Full Court of the Family Court? *(1 mark)*
   - **b** Which words in the *Marriage Act* were interpreted by the Court? *(2 marks)*
   - **c** Why did the Full Court of the Family Court say the case of *Corbett v. Corbett* was persuasive but not binding? What was the finding in the Corbett case? Did the Full Court of the Family Court agree with the decision in *Corbett v. Corbett*? Explain. *(4 marks)*
   - **d** Explain the reasons for statutory interpretation. In your explanation refer to this case. *(6 marks)*
   - **e** Discuss the effect that the statutory interpretation in this case may have on future cases. *(3 marks)*
   - **f** Evaluate the strengths and weaknesses of law-making through courts. *(8 marks)*
   - **g** Discuss the relationship between courts and parliament in law-making. Refer to this case study in your response. *(6 marks)*
2 Read the case study 'Expanding on the definition of male' and answer the questions.
   - **a** Explain how the cases referred to in this case study are examples of expanding an area of law. *(2 marks)*
   - **b** Identify two examples of reversing a decision. *(2 marks)*
   - **c** Using the two cases in this case study and the Kevin and Jennifer case, do you think AB or AH could marry a woman under the meaning of marriage in the *Family Law Act*? Discuss. *(4 marks)*
3 How are the cases referred to in the two case studies examples of law-making by courts? *(2 marks)*

(Total 40 marks)

The Full Court of the Family Court ruling on the meaning of marriage

The Attorney-General for the Commonwealth v. Kevin and Jennifer and Human Rights and Equal Opportunity Commission (Intervenor) (2003) FamCA 94

Kevin was born a girl, but grew up as if he were a boy, wearing boys' clothes and playing with boys' toys. Beginning in 1995, Kevin had hormone treatment that deepened his voice and created coarse facial and body hair. He had gender reassignment surgery in 1997 and 1998.

Kevin and Jennifer married in 1999. They have two children conceived through an IVF program. In October 1999, Kevin and Jennifer applied to the Family Court of Australia asking the court to validate their marriage. Justice Chisholm of the Family Court declared that Kevin and Jennifer's marriage was valid.

The attorney-general appealed against Justice Chisholm's decision to the Full Court of the Family Court, seeking to overturn the declaration. A successful appeal would have had the effect of making Kevin and Jennifer's marriage void.

The Full Court of the Family Court dismissed the attorney-general's appeal and declared Kevin and Jennifer's marriage valid.

The Full Court of the Family Court was called on to interpret the word 'man' for the purpose of the law of marriage in the *Marriage Act*, and the meaning of the word 'marriage'. The *Marriage Act* requires a celebrant to state that marriage is 'the union of a man and woman to the exclusion of all others, voluntarily entered into for life'. This definition is also found in the *Family Law Act* and the case of *Hyde v. Hyde and Woodmansee* (1866).

In the reason for the decision, the Full Court of the Family Court interpreted the word 'man' to include a person who was a man at the time of the marriage. This included a post-operative transsexual person such as Kevin.

The Full Court of the Family Court followed the New South Wales case *R v. Harris and McGuiness* that found the meaning of the words 'woman' and 'female' included a post-operative transsexual person who is both anatomically and psychologically female.

When deciding on the meaning of marriage, the Full Court of the Family Court stated that the English case *Corbett v. Corbett* (1970) was persuasive but not binding on Australian courts. They chose not to follow this persuasive precedent. In the Corbett case a marriage between a woman and a man who had undergone a sex change was found to be an invalid marriage.

The Full Court of the Family Court also stated that the words 'marriage' and 'man' should be interpreted according to today's attitudes, rather than according to the attitudes at the time the *Marriage Act* was passed.

The Full Court of the Family Court looked at other written material that presented arguments in relation to the meaning of marriage. The Law Commission of Canada stated that:

> The contemporary law of marriage is very different. Women have achieved recognition of their independent legal personalities and equal political rights. Gender-neutral laws have replaced legislation that accorded different legal rights and responsibilities to husbands and wives ... Just as the state does not recognise a single, officially established church, no longer is any single, official model of adult intimate relationship supported and enforced by the state.

In deciding the intention of parliament at the time of passing the *Marriage Act* the Full Court of the Family Court looked back to the parliamentary debates relating to this Act. During these debates, the attorney-general in the Senate commented that it was up to the courts to define marriage.

The Full Court of the Family Court said:

> ... we are not seeking to engage in judicial legislation. One of the functions of the judiciary is to interpret the meaning of legislation and we see ourselves as doing no more and no less than this ... Parliament did not choose to define marriage in the *Marriage Act*, nor did it define what is meant by the words 'man' and 'woman'. These issues being raised in this case, we feel that it is not only the right but the duty of courts to determine them.

The Full Court of the Family Court upheld the initial decision of Justice Chisholm. Justice Chisholm said the question of whether someone was a man or a woman should be determined at the date of the marriage and he declared the marriage of Kevin and Jennifer to be valid. Kevin has a passport that declares him to be male, and he has been living life as a man.

The Full Court of the Family Court rejected the attorney-general's argument that a principal purpose of marriage was having children.

The Kevin and Jennifer case

Kevin was born a girl but grew up as a boy. He had gender reassignment surgery in 1997 and 1998.

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Kevin and Jennifer married in 1999.

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They applied to the Family Court, asking the Court to validate their marriage.

↓

The Family Court declared their marriage was valid.

↓

The attorney-general appealed the decision to the Full Court of the Family Court.

↓

The Full Court of the Family Court was called upon to interpret 'man' and 'marriage' in the *Marriage Act*.

↓

The Full Court upheld the initial decision stating that whether someone was a man or a woman should be determined at the date of the marriage rather than at birth.

↓

The marriage of Kevin and Jennifer was declared valid.

Expanding on the definition of male

In the case of *AB v. The State of Western Australia & Anor* (2011) and *AH v. The State of Western Australia & Anor* (2011) HCA 42, AB and AH wanted to be recognised as male. Both were born as females and both retained some female sexual organs. Both had undergone a gender reassignment procedure to alter the genitals and other sexual organs. Both looked male and had adopted the lifestyle of a man. Both retained a female reproductive system.

AB and AH applied to the State Administrative Tribunal of Western Australia to be recognised as male. This was granted. The Court of Appeal of the Supreme Court of Western Australia reversed the decision of the Tribunal. AB and AH appealed to the High Court.

According to the High Court:

> Self-perception is not the only difficulty with which transsexual persons must contend. They encounter legal and social difficulties, due in part to the official record of their gender at birth being at variance with the gender identity which they have assumed.

The High Court stated that the question of whether a person is identified as male or female, by reference to the person's physical characteristics, is intended by the *Gender Reassignment Act 2000* (WA) to be largely one of social recognition. It is not intended to require an evaluation of how much of a person's body remains male or female.

On 6 October 2011, the High Court reversed the decision of the Court of Appeal and ordered that the decision and orders of the Tribunal be reinstated.

The High Court ruling has placed a person's self-knowledge and their lived experience as the pre-eminent indicators of whom they are and as whom they should be recognised.

The AB and AH cases

AB and AH wanted to be recognised as male. Both were born as females, had undergone a gender reassignment, looked male, had adopted the lifestyle of a man and retained a female reproductive system.

↓

The High Court agreed that whether a person is treated as a man or a woman depends on how they are perceived socially, rather than how much of a person's body remains male or female.

Non-specific sex

In the case of *NSW Register of Births, Deaths and Marriages v. Norrie* [2014] HCA, the High Court decided that a person may be neither male or female. The registration of a person's sex as 'non-specific' is therefore permitted.

ASSESSMENT TASK CASE STUDY

Wei Tang – madam or slave owner?

Read the case study *R v. Wei Tang* and answer the questions.

1. What was Ms Tang initially convicted of and what was her sentence? *(1 mark)*
2. Who appealed this decision? *(1 mark)*
3. What was the decision of the Court of Appeal and the reason for the decision? *(2 marks)*
4. Identify an example of a decision being reversed in this case. Why did the High Court reverse the decision? *(2 marks)*
5. To what extent are judges able to make law? Discuss. *(2 marks)*
6. Explain the doctrine of precedent. *(4 marks)*
7. Identify two reasons for statutory interpretation. *(2 marks)*
8. Analyse the effect of statutory interpretation. *(4 marks)*
9. A newspaper article once stated that courts are essential to the law-making process in Australia. Critically evaluate three strengths of courts as law-makers. *(8 marks)*
10. Explain the relationship between courts and parliament in law-making. Use examples from the case study to illustrate your points made. *(4 marks)*

(Total 30 marks)

R v. Wei Tang (2008) 237 CLR 1; [2008] HCA 39

The case against the brothel owner Ms Wei Tang was the first jury conviction for slavery offences under Australia's *Criminal Code Act 1995* (Cth). Ms Tang had five Thai women working for her as prostitutes in 2003. They had visas that had been obtained illegally.

The women were treated like slaves. Their passports and return tickets were confiscated by Ms Tang and their freedom of movement was restricted. They were forced to work 10 to 12 hours a day to pay off an apparent debt of between $40 000 and $45 000 each.

The brothel was raided in 2003 and Ms Tang was charged with possessing and utilising a slave. In 2006, Ms Tang was convicted in the County Court of Victoria and sentenced to 10 years' imprisonment on five charges of possessing and five charges of utilising a slave contrary to S270.3 (1)(a) of the Commonwealth *Criminal Code Act*. She was to serve a minimum of six years.

Ms Tang appealed against the conviction to the Victorian Court of Appeal in 2007. The Court of Appeal overturned her conviction and ordered a new trial. She was released on bail.

The Court of Appeal had found that the trial judge had not directed the jury about the necessity of proving intention to commit the offence of possessing and utilising slaves.

The Federal prosecutors appealed against the decision of the Victorian Court of Appeal to the High Court. Ms Tang cross-appealed to the High Court, asking for an acquittal.

The High Court challenge maintained that S270.3 of the *Criminal Code Act* was not within the legislative power of the Commonwealth Parliament under the Constitution. The High Court decided that the relevant section of the *Criminal Code Act* was within the jurisdiction of the Commonwealth Parliament because the definition of slavery is based on Article 1 of the International Convention to Suppress the Slave Trade and Slavery of 1926.

Following the Tasmanian Dam case, the interpretation of 'external affairs' in the Constitution includes any area or issue covered by an international treaty.

The High Court also had to decide if the actions of Ms Tang fitted the definition of slavery as provided in the *Criminal Code Act*. The High Court considered the phrasing of the definition in S270.1.

The High Court found that the Court of Appeal was wrong in its contention that it was necessary to show intention to possess and utilise slaves. According to Justice Hayne of the High Court, when considering the definition of slavery there are two interlinked questions: 'first did the accused possess, or exercise some other power attaching to the right of ownership over, the complainant and second, was the complainant a slave?'

Justice Michael Kirby (dissenting) said that if slavery was not carefully defined, 'then lots of harsh employment contracts are going to slip over into slavery and are going to be prosecuted with a potential of 24 years' imprisonment on conviction ...'

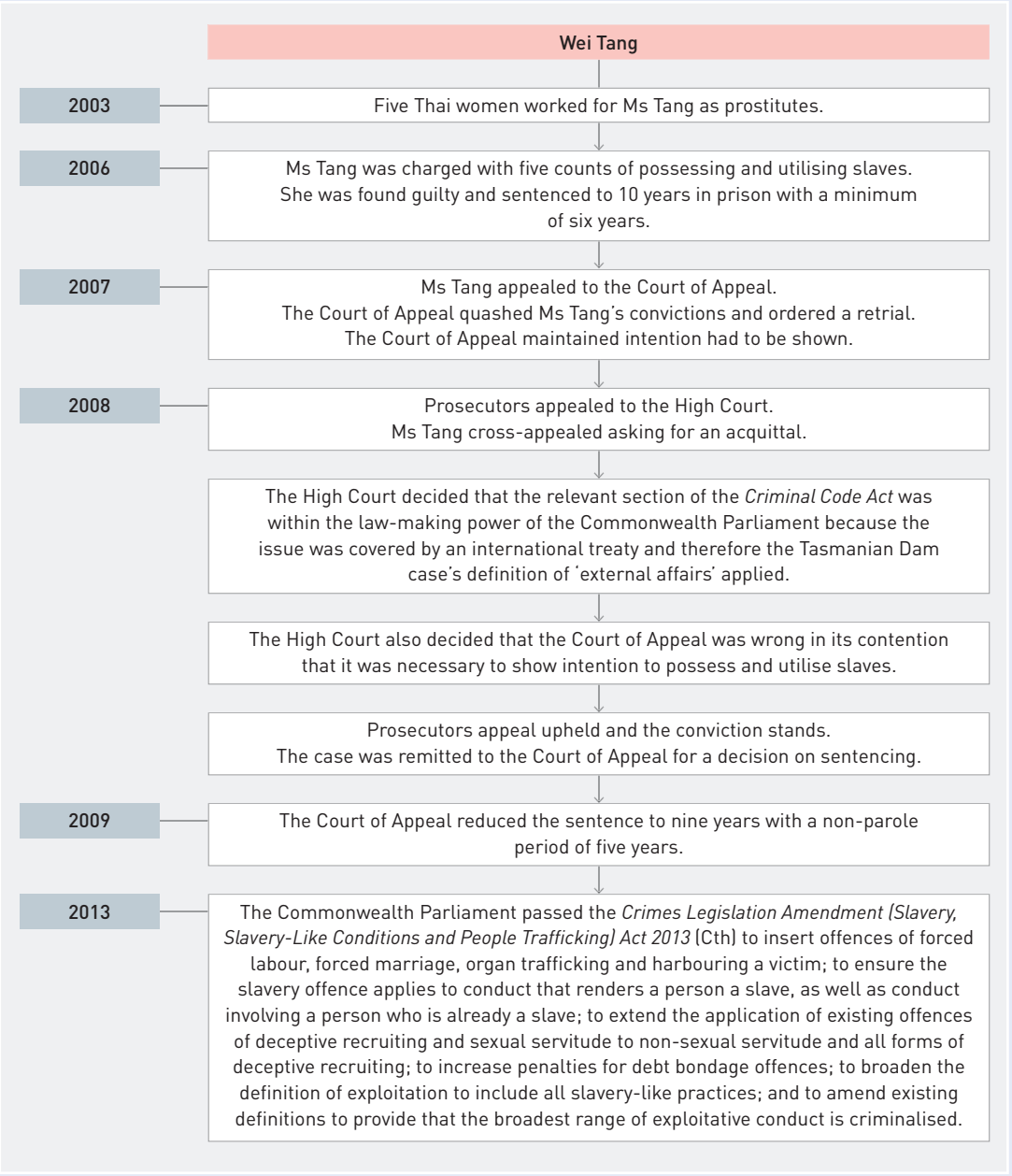
The majority of the High Court allowed the prosecutors' appeal and overturned the order for a new trial. It held that the prosecution did not need to prove that Ms Tang knew or believed that the women were slaves. She had used her power over the women, treating them as possessions, restricting their movements and making them provide their services without commensurate compensation.

Ms Tang's conviction therefore stood and the matter was remitted to the Court of Appeal to deal with the issue of the length of her sentence. In 2009, the Court of Appeal reduced the sentence to nine years with a non-parole period of five years.

Following this case, the Commonwealth Parliament passed the *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) to amend S270 and S271 of the *Criminal Code Act* to create separate offences of sex trafficking and causing a person to enter into debt bondage, slavery and slavery-like conditions.



Figure 5.13 Wei Tang



Criminal Code Act 1995 (Cth)

This Act was amended by the *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth), which, among other sections, added 270.3(aa), 270.4 and 270.6.

Division 270 – Slavery, sexual servitude and deceptive recruiting

270.1 Definition of slavery

For the purposes of this Division, slavery is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

270.3 Slavery offences

(1) A person who, whether within or outside Australia, intentionally:

(aa) reduces a person to slavery; or

(a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or

(b) engages in slave trading; or

(c) enters into any commercial transaction involving a slave; or

(d) exercises control or direction over, or provides finance for:

(i) any act of slave trading; or

(ii) any commercial transaction involving a slave;

is guilty of an offence.

Subdivision C – Slavery-like conditions

270.4 Definition of servitude

(1) For the purposes of this Division, **servitude** is the condition of a person (the **victim**) who provides labour or services, if, because of the use of coercion, threat or deception:

(a) a reasonable person in the position of the victim would not consider himself or herself to be free:

(i) to cease providing the labour or services; or

(ii) to leave the place or area where the victim provides the labour or services; and

(b) the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.

270.6 Definition of forced labour

(1) For the purposes of this Division, **forced labour** is the condition of a person (the **victim**) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free:

(a) to cease providing the labour or services; or

(b) to leave the place or area where the victim provides the labour or services.

Source: *Criminal Code Act 1995* (Cth) as amended in 2013

ASSESSMENT TASK STRUCTURED QUESTIONS

1 Why is the existence of a court hierarchy a necessary part of law-making through courts? *(1 mark)*

2 Explain two ways in which a judge's ability to make law can be restricted. *(4 marks)*

3 Define the following terms:

- ratio decidendi
- obiter dictum
- stare decisis
- persuasive precedent.

(2 marks)

4 Explain the difference between overruling a decision and reversing a decision. *(2 marks)*

5 What is meant when a case is distinguished from a previous case? What facts are considered in this process? *(1 mark)*

6 What is meant when a precedent is disapproved? *(1 mark)*

7 Explain why most law-making by courts is carried out by a court of appeal. *(1 mark)*

8 Why is it necessary for the courts to interpret Acts of parliament? *(6 marks)*

9 What are some of the disadvantages of law-making through courts? *(6 marks)*

10 Using relevant cases, explore the relationships between courts and parliament in law-making. *(6 marks)*

(Total 30 marks)

Summary

What is common law?

Judges' ability to make law

- judges not able to make law unless a case concerning the issue is brought before them
- bound by precedent, although may be able to distinguish, overrule, reverse or disapprove a previous precedent
- restrictions on judges' ability to make law

Operation of the doctrine of precedent

- principle of stare decisis
- ratio decidendi
- binding precedents
- similar material facts
- from a superior court in the same hierarchy
- persuasive precedents
- from a different hierarchy
- from a court lower in the same hierarchy, or the same court (if not bound by its own decisions)
- obiter dictum
- ways judges can develop precedent or avoid following an earlier decision
- distinguish
- overrule
- reverse
- disapprove

Interpretation of past decisions

- courts called on to interpret the meaning of the words in past decisions and apply precedents set in previous cases
- problems of interpreting past decisions
- difficulty of finding precedents
- difficulty of identifying the ratio decidendi
- conflicting authorities/precedents

Statutory interpretation

- gives meaning to words in Acts
- precedent created forms part of the law
- extrinsic and intrinsic materials
- literal approach
- purposive approach

Reasons for the interpretation of statutes

- problems as a result of the drafting process
- the Act is written in general terms
- mistakes can occur during drafting of an Act
- the Act might not have taken into account future circumstances
- the intention might not be clearly expressed
- inconsistent use of the same word in the Act
- new types of technology
- incorrect technical terms
- inconsistencies with other statutes
- word not defined in the Act
- definition too broad
- problems applying the Act to a court case
- most legislation is drafted in general terms
- the Act may have become out of date
- the meaning of the words may be ambiguous
- the Act might be silent on an issue
- the meaning of words can change over time

Effect of interpretation by judges

- Acts of parliament are applied to the cases that come before the courts
- the words in the Act are given meaning
- the parties to the case are bound by the decision
- precedents are set for future cases to follow
- consistency and predictability
- courts can overrule or reverse a decision of courts
- parliament can abrogate the law made by courts
- restricting law through narrow interpretation
- extending the law through wide interpretation
- judicial creativity
- the finality of a court's decision

Strengths of law-making through courts

- consistency and certainty
- fill gaps in legislation
- flexibility
- change the law quickly
- judges not subject to political influence

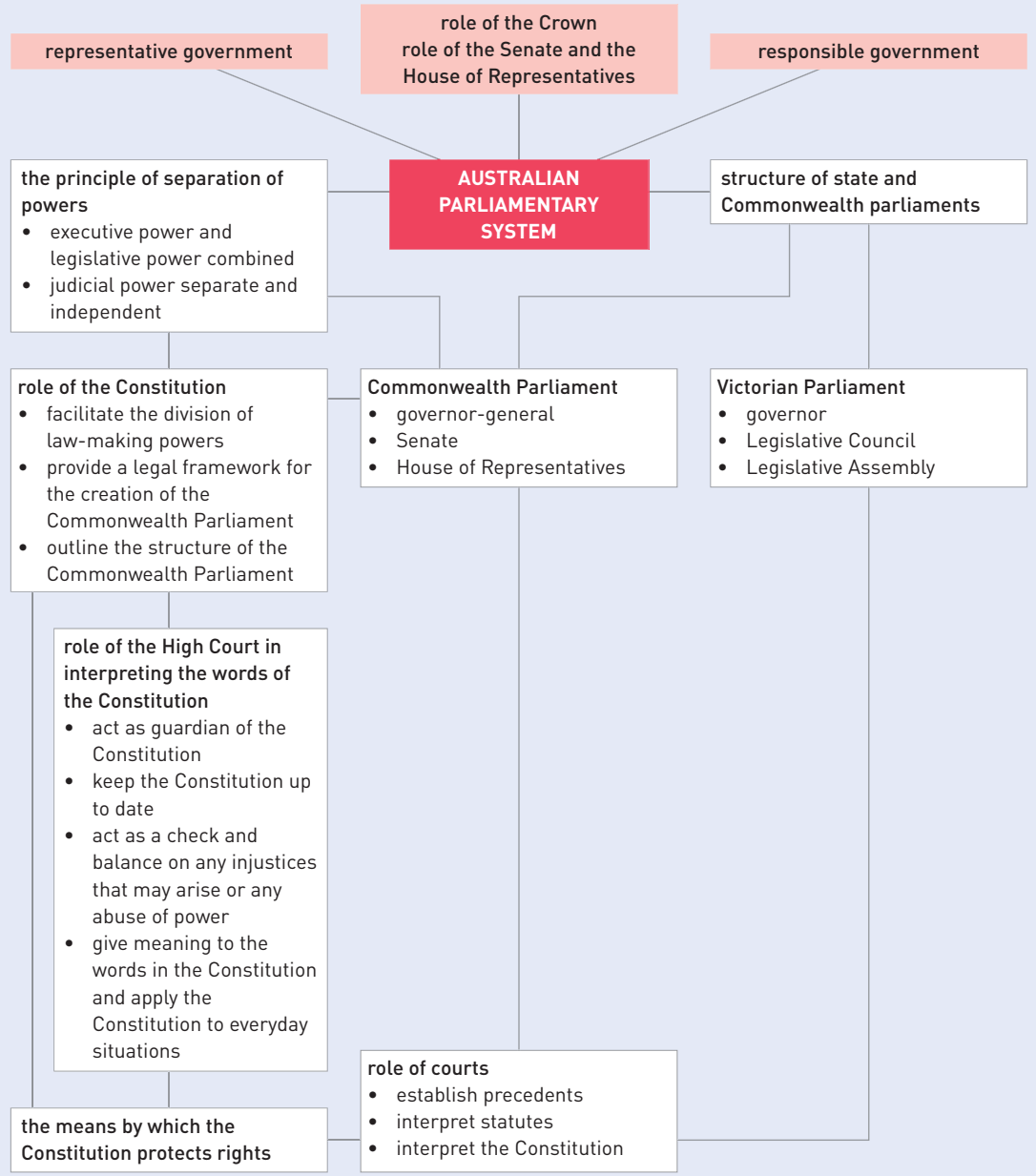
- courts can develop areas of law
- courts can give meaning to an Act of parliament

Weaknesses of law-making through courts

- restricted to cases before the courts
- costly
- changes can be slow
- difficulty of finding precedents
- ex post facto
- bound by previous decisions
- judges are not elected
- not able to investigate a whole area of law
- courts cannot seek public opinion
- conservatism

Relationship between courts and parliaments

- parliaments pass Acts to establish courts
- courts apply and interpret the law made by parliament
- parliament can change law made by courts
- parliament can confirm law made by courts
- court decisions influence changes in the law by parliament



UNIT 3 TEST 1

1 Explain the principles of representative government. *(4 marks)*
2 Explain the difference between government and parliament. *(4 marks)*
3 Explain the principle of separation of powers. What are the reasons for adhering to this principle? *(4 marks)*
4 Describe the structure of the Parliament of Victoria. *(2 marks)*
5 To what extent does the Commonwealth Constitution protect rights? *(2 marks)*
6 What is meant by the phrase 'the Senate is the states' house'? *(2 marks)*
7 Explain the role of the Victorian Law Reform Commission in assessing the need for changes in the law. *(4 marks)*
8 Explain two reasons for changes in the law. *(4 marks)*
9 Outline two methods by which an individual may influence a change in the law. *(4 marks)*
10 How can courts influence a change in the law? *(2 marks)*
11 Describe the progress of a Bill through parliament. *(2 marks)*
12 Explain three advantages and three disadvantages of law-making through parliament. *(6 marks)*

(Total 40 marks)

UNIT 3 TEST 2

1 The *Commonwealth of Australia Constitution Act* gave the Commonwealth Parliament specific powers to make laws. These specific powers are divided into two types of powers. What are these powers known as? Explain each. *(2 marks)*
2 Describe two restrictions on state power. *(2 marks)*
3 Explain how the division of power between the state parliaments and the Commonwealth Parliament can be changed through the process of holding a referendum. *(4 marks)*
4 To what extent can the High Court change the balance of power under the Constitution? *(4 marks)*
5 Explain the capacity of the states to refer law-making power to the Commonwealth Parliament. Give an example. *(2 marks)*
6 Explain two rights that are protected by the Australian Constitution. *(2 marks)*
7 Explain one approach to the protection of rights adopted in one of the following countries: United States, Canada, South Africa or New Zealand. *(2 marks)*
8 Explain the process of law-making through courts. *(5 marks)*
9 Why is the existence of a court hierarchy a necessary part of law-making through courts? *(2 marks)*
10 Explain the term 'persuasive precedents'. *(1 mark)*
11 Explain the term 'ratio decidendi'. *(1 mark)*
12 Outline two ways in which a judge's ability to make law can be restricted. *(4 marks)*
13 Give three reasons for statutory interpretation. *(3 marks)*
14 Discuss the advantages of law-making through courts. *(2 marks)*
15 Explain the relationship between courts and parliament in law-making. *(4 marks)*

(Total 40 marks)



UNIT

4

RESOLUTION AND JUSTICE

INTRODUCTION TO UNIT 4

AIM

Unit 4 focuses on how criminal cases and civil disputes are dealt with through the courts and tribunals, and the methods used by those bodies to resolve disputes. This includes an investigation of the processes and procedures that operate within the legal system, such as the adversary system of trial, pre-trial and post-trial procedures, and the operation of the jury system.

Unit 4 also includes a review of the legal system by considering the extent to which the legal system is effective, problems faced by individuals when using the legal system, and recent actual and proposed changes designed to enhance the effective operation of the legal system.

KEY AREAS OF KNOWLEDGE

The following key areas of knowledge are summarised in this introduction:

- criminal cases
- civil disputes
- law
- the differences between criminal cases and civil disputes.



THE DIFFERENCES BETWEEN CRIMINAL CASES AND CIVIL DISPUTES

The aim of this introduction is to explain the differences between criminal cases and civil disputes. Criminal cases and civil disputes are the main focus of Unit 4.

Criminal cases

Criminal cases are usually between the state and an individual or individuals and involve actions that are against the law, harmful to society and punishable by the law.

Parties to a criminal case

The parties to a criminal case are the **prosecution** (acting on behalf of the state to prosecute in the case) and the **accused** (the person accused of the crime). In most criminal cases there is a **victim** who has been offended against.

The task of taking the accused to court lies with the prosecution, on behalf of society. A victim of a criminal offence is likely to be a witness for the prosecution, explaining to the court what occurred. Examples of offences covered under criminal law include murder, theft and fraud.

Types of criminal cases

Criminal offences can be broken down into summary offences and indictable offences.

Summary offences

Summary offences are minor criminal offences that are heard before a magistrate in the Magistrates' Court; for example, offensive behaviour.

Many summary offences are breaches of local laws or laws made by subordinate authorities. Offences listed in most Acts of parliament are summary offences unless an Act declares them to be indictable offences.

Indictable offences

Indictable offences are serious criminal offences that are heard before a judge and jury in superior courts such as the County Court or Supreme Court; for example, homicide and fraud.

As a general rule, offences listed in the *Crimes Act 1958* (Vic.) and the *Wrongs Act 1958* (Vic.) are indictable offences unless these Acts state that an offence is a summary offence.

Indictable offences heard summarily

Certain indictable offences can be heard in the Magistrates' Court as if they were summary offences. These are known as **indictable offences heard and determined summarily**.

The *Criminal Procedures Act 2009* (Vic.) states that indictable offences punishable by imprisonment of 10 years or less or a fine of 1200 penalty units or less (or both) can be heard summarily. Schedule 2 of the *Criminal Procedures Act* also lists a range of offences under 30 Acts of parliament that can be tried summarily. Offenders will usually choose to have an offence heard summarily because it is quicker and cheaper to have the matter heard in the Magistrates' Court and the maximum penalty that can be handed down is less. The court must agree that the offence is appropriate for a summary hearing.

After a crime has been committed

Once a criminal offence has occurred and has been reported to the police, the police or the Office of Public Prosecutions will decide how the matter is to proceed. The seriousness of the case will determine the court in which the matter is to be heard. The police or the Office of Public Prosecutions may decide to drop the case because of insufficient evidence, or may decide to channel the accused into a diversionary program or a victim/offender mediation program.

If a criminal case goes to court, strict rules of evidence and procedure are used in resolving the case.

Civil disputes

Civil actions are disputes between two or more individuals or groups. Civil actions usually involve the infringement of rights.

The aim of a civil action is to return the party whose rights have been infringed to his or her original position (as far as possible). The most common types of civil actions are torts, which include negligence, trespass, nuisance and defamation, and contract law, which involves a dispute about a legally binding agreement between two or more parties.

Parties to civil disputes

A party who has been harmed, called the **plaintiff**, sues the party who has allegedly caused the harm, called the **defendant**. The plaintiff seeks a particular remedy. Individuals, organisations and the state can be a party to a civil action as the party whose rights have been infringed, or the party that has infringed the rights of another.

Resolving civil disputes

There are various ways of resolving a dispute in a civil case, and there are a variety of factors to be considered when deciding which is the best method of resolving a civil case.

- **courts** – The traditional way of resolving a dispute is to take it to a court for resolution through judicial determination. The judiciary (including judges and magistrates) presides over the case, and formal rules of evidence and procedure are used. A decision by a court is binding on the parties, although it can be appealed against. Sometimes the courts may refer a matter to a dispute resolution method, such as mediation, to give the parties the opportunity to settle the matter before it is judicially determined.
- **tribunals** – Tribunals have the power to resolve specific civil disputes within the area of law-making power they have been given; for example, discrimination cases, or disputes between landlords and tenants. Tribunals such as the Victorian Civil and Administrative Tribunal (VCAT) are less formal in the way in which they hear cases, but are still able to make binding decisions. Tribunals will often encourage the parties to settle their disputes themselves, if possible.
- **alternative dispute resolution (ADR) methods** – ADR includes mediation, conciliation and arbitration. These methods of dispute resolution are generally quicker, cheaper and less intimidating. However, other than arbitration, they are usually not binding on the parties. The parties may use an ADR method without going to a court or tribunal, such as attending mediation arranged by the parties, or the parties may be required by the court or tribunal to try to settle the matter through an ADR method before it is judicially determined.

Consequences of civil and criminal cases

The consequence of being found guilty of **breaking a criminal law** is punishment of the offender, determined by the court; for example, imprisonment, a community protection order or a fine.

Consequences of a successful **civil action** usually includes damages being paid by the defendant to the plaintiff or another civil remedy.

THE OVERLAP BETWEEN CRIMINAL LAW AND CIVIL LAW

There is considerable overlap between criminal and civil law. Some actions, such as an assault, can give rise to a criminal prosecution instigated by the state as well as a civil action instigated by the victim. However, the consequences of criminal and civil actions vary.

Both civil and criminal action

In instances where the same action gives rise to both a criminal action and a civil action, the two cases will be heard separately and may be heard in different courts. The outcome of one does not affect the outcome of the other, but a guilty verdict in the criminal action may provide a stronger basis for the plaintiff to succeed in the civil action.

It is possible for an accused to be found not guilty in a criminal case, but found liable in a civil case relating to the same wrong. This is often because the **standard of proof in a criminal case is much higher than in the civil case**. The jury (or magistrate if it was a summary offence or an indictable offence heard summarily) may not have found beyond reasonable doubt that the accused was guilty. However, in the civil case, the judge or the jury of six may believe that the plaintiff's version of facts is more believable than the defendant's version, and may therefore find the defendant liable.

CASE STUDY

Thomas Towle

On the night of 18 February 2006, Thomas Towle lost control of his car, ploughing into a group of teenagers on the side of the road in Myall Street, Cardross (near Mildura). Six lives were lost, and four more young people were seriously injured. Towle was charged with 17 offences, including culpable driving, negligently causing serious injury and leaving the scene of an accident.

The jury at Towle's criminal trial in March 2008 found him guilty of six counts of dangerous driving causing death, and four counts of dangerous driving causing serious injury. Justice Cummins of the Supreme Court sentenced Towle to 10 years' imprisonment with a minimum of seven years. Towle appealed his sentence to the Court of Appeal, but his application for leave to appeal was refused.

Following Towle's conviction, a number of family members of his victims sued Towle for negligence, claiming damages for psychological injuries, including post-traumatic stress disorders and depressive disorders, and loss of earnings. Twenty civil actions were settled out of court during 2008 and 2009, amounting to several million dollars in damages.



Thomas Towle leaving court

Differences between criminal cases and civil disputes

	CRIMINAL CASE	CIVIL DISPUTE
Person bringing the action	prosecution, on behalf of the state	plaintiff (the wronged party)
Person defending the action	accused*	defendant
Case name	DPP v. accused (also R v. accused)	plaintiff v. defendant
Aim	to protect society, to punish offenders, to denounce the crime, to deter the offender or others and to rehabilitate	to regulate conduct between parties and to provide compensation to an injured party to restore, as far as possible, the plaintiff back to where they were before the infringement occurred
Consequences of the action	sanction or sentence	remedy
Burden of proof at trial	prosecution	plaintiff
Standard of proof at trial	beyond reasonable doubt	on the balance of probabilities
Evidence/ investigations	the police investigate on behalf of the state	the plaintiff gathers their own evidence
Pre-trial procedures	the main purpose is to see whether there is sufficient evidence to support a conviction	the main purpose is to clarify issues and let each party know the other party's evidence
Jury	• no jury in the Magistrates' Court • jury of 12 in higher courts when the accused pleads guilty	• no jury in Magistrates' Court • jury of six in higher courts is optional

Verdict	guilty or not guilty	finding for the plaintiff or the defendant
Judicial outcome	sanctions, e.g. imprisonment, community-based order, fine	remedies, e.g. damages, order of specific performance, injunction
Resolution process	heard in court, although victim/offender mediation can be used in the process	could be resolved in court, tribunals, other methods of dispute resolution such as mediation, conciliation or arbitration, or another dispute-solving body such as the Dispute Settlement Centre
Examples of laws	• offences against the person: homicide, assault, sexual offences • offences against property: theft, arson, fraud • offences against the state: treason, sedition • offences against the legal system: perjury, contempt	• tort law: negligence, defamation, nuisance, trespass • contract law • constitutional law • property law • family law • wills and estates
Common words used in cases	accused, prosecution, victim, arrest, police, bail, remand, guilty, sentence, punishment	sue, plaintiff, compensation, damages, negligence, tort, litigation

* Following the passage of the *Criminal Procedures Act 2009* (Vic.) a person charged with a criminal offence is to be referred to as the accused, regardless of the court in which they appear. (Previous laws referred to the 'defendant' in the Magistrates' Court and the 'accused' in the County Court and Supreme Court.)

LEARNING ACTIVITY

Criminal and civil

1 Describe the nature of a criminal case.
2 Explain the difference between summary offences and indictable offences.
3 Can indictable offences be heard in the Magistrates' Court? Explain.
4 Describe the nature of a civil dispute.
5 Explain how there can be overlap between civil and criminal law in relation to one event.
6 Outline five differences between civil and criminal law.
7 Look back at the case study 'Thomas Towle' and answer the questions.
   a What occurred in this case?
   b How can this one set of circumstances lead to a criminal case and a civil case?

Summary

The differences between criminal cases and civil disputes

Criminal cases

- parties to a criminal case
- types of criminal offences
  - summary offences
  - indictable offences
  - indictable offences heard summarily
- after a crime has been committed

Civil disputes

- parties to civil disputes
- resolving civil disputes
- consequences of civil and criminal cases
- overlap between criminal law and civil law
- both civil and criminal action
- differences between criminal cases and civil disputes



CHAPTER 6

RESOLUTION BODIES AND METHODS

OUTCOME

This chapter is relevant to learning outcome 1 in Unit 4. You should be able to describe and evaluate the effectiveness of institutions and methods for the determination of criminal cases and the resolution of civil disputes.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- reasons for a court hierarchy
- original and appellate jurisdictions of the Victorian Magistrates' Court, County Court and Supreme Court (Trial Division and Court of Appeal)
- role of the Victorian Civil and Administrative Tribunal (VCAT)
- dispute resolution methods used by courts and VCAT, including mediation, conciliation, arbitration and judicial determination
- strengths and weaknesses of dispute resolution methods used by courts and VCAT
- strengths and weaknesses of the way courts and VCAT operate to resolve disputes.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- justify the existence of a court hierarchy in Victoria
- describe the jurisdiction of specific courts within the Victorian court hierarchy
- compare and evaluate the strengths and weaknesses of dispute resolution methods and the way courts and VCAT operate to resolve disputes.

KEY LEGAL TERMINOLOGY

alternative dispute resolution (ADR) A less formal method of dispute resolution than judicial determination, such as mediation, conciliation or arbitration, where a civil dispute is reconciled between the parties, with the help of an independent third party. It is also known as appropriate dispute resolution.

arbitration A method of dispute resolution for civil disputes, where a third party (arbitrator) is appointed to listen to both sides of the dispute and make a decision that is binding on the parties.

conciliation A method of dispute resolution for civil disputes using a third party to help disputing parties reach a resolution to their dispute. The third party can make suggestions, but the parties reach the decision between themselves. The decision is normally not binding.

judicial determination A method of dispute resolution which involves the parties to the case presenting arguments and evidence to a judicial officer who then makes a binding determination or decision about the outcome of the case.

jurisdiction The lawful authority of a court or tribunal to decide a particular case according to the severity of the case. Jurisdiction also refers to the geographical boundaries of a court's power.

mediation A method of dispute resolution for civil disputes using one or two third parties (mediators) to help the disputing parties reach a resolution. The mediators do not make suggestions, but help the parties feel able to negotiate for themselves. The decision made between the parties is not binding.

VCAT The Victorian Civil and Administrative Tribunal, a legal body consisting of numerous specialist lists that each resolve particular types of civil disputes.

THE VICTORIAN COURT SYSTEM

The Victorian court system consists of a variety of courts, each with different functions and jurisdictions.

Jurisdiction refers to the power that courts have to hear cases arising from particular areas of law. It indicates the type of cases that courts can hear and adjudicate on, for example minor cases or more serious cases. Jurisdiction can also refer to the geographical boundaries of a court's powers. For example, the Supreme Court of Victoria can only hear cases that relate to Victoria.

Original jurisdiction

When a matter is taken to court for the first time, it is known as the court of first instance. The court is sitting in its original jurisdiction. The court has the power to hear the particular case for the first time. A case heard in the Magistrates' Court is known as a **hearing** and a case heard in the higher courts is known as a **trial**.

Appellate jurisdiction

If a party to a court case is not happy with the decision and wishes to challenge it, and there are sufficient grounds, the case can be taken to a higher court on appeal. When the court is hearing an appeal, it is sitting in its **appellate jurisdiction**. The person bringing the appeal is known as the **appellant** and the other party is the **respondent**. There is no jury when a court is sitting in its appellate jurisdiction (hearing an appeal). Not all courts can hear appeals.

Grounds for appeal can include:

- on a point of law (where some law has not been followed; for example, the court was allowed to hear inadmissible evidence)
- on conviction (only in criminal cases)
- on the severity of the sentence (in criminal cases) or the remedy awarded (in civil cases).

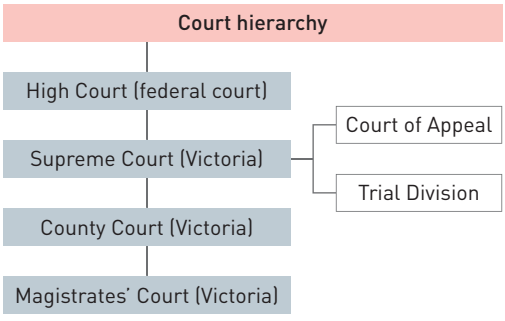
LEARNING ACTIVITY 6.1

Victorian court system

1 What is meant by the term 'jurisdiction'?
2 Define the terms 'original jurisdiction' and 'appellate jurisdiction'.
3 What is the name of the party bringing an appeal?
4 What is the name of the other party in an appeal?
5 What grounds can be used for an appeal?

COURT HIERARCHY

Victorian courts, like those in the other states, are arranged in a **court hierarchy**. That is, they are graded in order of importance and severity of cases heard, with the High Court being the highest court dealing with the most complex issues. The Magistrates' Court is at the bottom of the hierarchy and deals with less serious issues.



It has been suggested that a **one-court system** could be less complicated. There would be no confusion about which court a matter should be taken to, and the court costs would be the same whatever type of action was being heard. However, this system could be an administrative nightmare and could lead to very long delays.

In regional areas, there can be a number of courts operating in the same building. There are 12 **regional courts** that are multi-jurisdictional; that is, they house the Magistrates' Court, the County Court, the Supreme Court and the Victorian Civil and Administrative Tribunal (VCAT) all in one building. In the metropolitan area, however, the courts and VCAT are all situated in separate buildings.

REASONS FOR A COURT HIERARCHY

The four main reasons for a court hierarchy are the use of the doctrine of precedent, appeals, administrative convenience and specialisation.

Doctrine of precedent

The doctrine of precedent means that decisions made in higher courts are binding on lower courts in the same hierarchy. The ratio decidendi (reason for the decision) in the higher court, part of the judgment given, establishes a precedent that is to be followed in the future. This system provides consistency in that similar cases are treated in a similar manner. It also provides predictability. Solicitors are able to inform their clients of what the law is and what decision is likely to be made in a

particular case. This system would not be possible without a hierarchy of courts because there would be no higher courts to make precedents for lower courts to follow.

Appeals

Someone who is dissatisfied with a decision can, if there are grounds for appeal, take the matter to a higher court. This provides fairness and should allow any mistakes to be corrected. If there were no higher courts in the court hierarchy, a system of appeals could not operate and this may create unfairness if cases were incorrectly determined by a court.

CASE STUDY

Barbaro v The Queen; Zirilli v The Queen [2014] HCA 2 (12 February 2014)

The High Court has dismissed an appeal by Mr Pasquale Barbaro and Mr Saverio Zirilli, the appellants, that they suffered unfairness at their sentencing hearing.

The appellants pleaded guilty in the Supreme Court of Victoria to serious offences involving drug trafficking and attempting to possess commercial quantities of certain drugs. Mr Barbaro was sentenced to life imprisonment with a non-parole period of 30 years, and Mr Zirilli was given 26 years' imprisonment with a non-parole period of 18 years.

The appellants first appealed to the Court of Appeal, alleging that the sentencing hearing was procedurally unfair because the sentencing judge said at the outset that she did not seek, and would not receive, any submission from the prosecution about what range of sentences she could impose on each applicant. The Court of Appeal rejected the appeal.

The appellants sought and were granted special leave to appeal to the High Court. The High Court dismissed the appeal and held by majority that it is not the role or the duty of the prosecution to provide some statement of the bounds within which a sentence may be imposed, and it is for the sentencing judge alone to decide the sentence.

Administrative convenience

The system of a court hierarchy allows for the distribution of cases according to their seriousness. The more serious and complex cases are heard in the higher courts. These cases take longer to hear and require judges who are expert in complicated points of law. Minor cases can be heard quickly and less expensively in the lower courts. In this way delays are reduced in the lower courts, and the higher courts can more easily manage the allocation of time for the longer, more complicated cases.

Legal personnel are allocated to courts according to their level of expertise so that more-experienced personnel can deal with complex issues. It could, however, be argued that every matter, small or large, is very important and serious to the parties involved and that the parties should therefore be entitled to the same expertise.

Specialisation

Within the system of a hierarchy of courts, the courts have been able to develop their own areas of expertise. The lower courts are familiar with the smaller cases that need to be dealt with quickly and efficiently. The higher courts develop expertise in hearing complex cases involving major crimes or large sums of money. Other specialist courts such as the Children's Court and the Family Court have been developed to deal with specialised areas of law.

PROBLEMS WITH A COURT HIERARCHY

The system of a court hierarchy works well, but some problems exist. It would be easier if all court hearings were in the same place, so there would be no confusion about which court to attend. This could, however, be very cumbersome as small cases would be heard alongside long and complicated ones.

Currently the courts are structured so the more experienced judges hear the more complicated cases. Some people would argue each case is very important to the people who find themselves in court. Therefore, everyone should be entitled to the very best judicial determination. This would, however, increase the cost of small, simple hearings.

The system of appeals depends on there being a higher court to appeal to. If there were only one level of court this might discourage the high number of appeals, which would save time and money.

Each court requires administration. This administration might require less personnel if there were only one court, but again difficulties may be encountered mixing straightforward cases with complex issues. Court Services Victoria, established in July 2014, provides judicial services to the courts and VCAT. While the courts themselves remain separate and distinct entities, their executives and a separately appointed chief executive officer jointly manage Court Services Victoria.

COURT SERVICES VICTORIA

The Victorian Parliament passed the *Court Services Victoria Act 2013* (Vic). The purpose of this Act was to establish Court Services Victoria (CSV), operational from 1 July 2014.

CSV is a new independent statutory body which provides administrative services and facilities to the Victorian courts and to VCAT. Previously, these services and facilities were provided via a business unit of the Department of Justice. CSV will act independently of the government.

Its role is to support the performance of the functions of the Supreme Court, County Court, Magistrates' Court, Children's Court, Coroner's Court and VCAT. It is governed by a Courts Council composed of the six heads of each of those jurisdictions, as well as two non-judicial members.

Chief Justice Marilyn Warren of the Supreme Court has described this as a significant development.

Table 6.1 Summary of the advantages and disadvantages of a court hierarchy

ADVANTAGES	DISADVANTAGES
Allows the doctrine of precedent to operate, which creates consistency and predictability.	A precedent from a higher court may be distinguished by a lower court, or a binding precedent from a higher court may not be appropriate to the circumstances before the lower court.
Allows the operation of appeals to superior courts.	It could be said that there are too many appeals.
Administrative convenience – more-serious and complex cases heard in higher courts by more-experienced judges.	More administrative personnel needed to run the different courts.
Specialisation – the courts are able to specialise in their particular area of law.	There are more courts – a single court would be easier for people to find, as all matters would be heard at the same place.

Fewer delays are likely because less-complicated cases are heard in the lower courts and are not mixed in with the more complicated cases.	Parties to cases in the lower courts are not receiving the same high level of judicial expertise as parties in higher courts.

LEARNING ACTIVITY 6.2

Reasons for a court hierarchy

1. How can a court hierarchy provide administrative convenience?
2. Why do you think it is necessary to have specialisation in the court system?
3. Why is a court hierarchy a necessary element of a system of appeals?
4. Explain how precedents could not exist without a court hierarchy.
5. Rank the reasons for a court hierarchy in order of importance and provide justification for the order you have put them in.
6. Explain three disadvantages of a court hierarchy.
7. Explain the problem that could arise from having one court that heard all types of cases. Do you think this problem exists for the multi-jurisdictional courts? Explain.

VICTORIAN COURTS

Table 6.2 The hierarchy of Victorian courts

	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Magistrates' Court	**Civil** up to $100 000 for all civil matters including personal injury; civil claims less than $10 000 go to arbitration (one magistrate) **Criminal** • summary offences (minor offences) • indictable offences heard summarily (more serious offences) • committal proceedings (pre-trial procedure) • bail applications (released on conditions before going to trial) • issuing warrants (usually for arrest or search) (one magistrate)	• no appellate jurisdiction • rehearings can take place in some cases, such as one of the parties not appearing
County Court	**Civil** unlimited in all civil matters (one judge with an optional jury of six) **Criminal** indictable offences, except murder, attempted murder, certain conspiracies, corporate offences (one judge and a jury of 12 when the plea is 'not guilty')	**Civil** no appeals, unless under a specific Act **Criminal** from the Magistrates' Court against a conviction or sentence (one judge)
Supreme Court (Trial Division)	**Civil** unlimited in all civil matters (one justice with an optional jury of six) **Criminal** most serious indictable offences (one justice and a jury of 12 when the plea is 'not guilty')	**Civil** on points of law from the Magistrates' Court and from the Victorian Civil and Administrative Tribunal (one justice) **Criminal** on points of law from the Magistrates' Court (one justice)

	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Supreme Court (Court of Appeal)	no original jurisdiction	**Civil** **with leave** • on points of law • on a question of fact • on an amount of damages from a single judge of the County Court or Supreme Court and from the Victorian Civil and Administrative Tribunal when constituted for the purpose of making an order by the president or vice-president (3 justices) **Criminal** **with leave** • on points of law • conviction • on severity or leniency of sanction from a single judge of the County Court or Supreme Court (3–5 justices)
High Court (this is a **federal court**, but is also the highest court of appeal for the states) (1 justice)	• federal law matters • matters arising under a treaty • where the Commonwealth is a party • disputes between states or between residents of different states • disputes where an injunction is sought against an officer of the Commonwealth • criminal cases such as treason and sedition (inciting hatred against the Crown)	
Full Court of the High Court (not less than 2 justices)	special leave for appeal applications	• appeals against the decision of the supreme courts of states and territories, the Federal Court of Australia and the Family Court of Australia • appeals from the High Court in its original jurisdiction
Full Bench of the High Court (5–7 justices)	Interpretation of the Constitution	• cases where the court may be invited to depart from one of its previous decisions • cases where the court considers the principle of law to be of major importance

THE MAGISTRATES' COURT

The Magistrates' Court of Victoria is the lowest court in the Victorian court hierarchy. Its current jurisdiction is set out in the *Magistrates' Court Act 1989* (Vic.) although the court was established long before 1989. The Magistrates' Court is convened in Melbourne and various other large suburban and country areas; there are 53 different locations around Victoria. There are also some Magistrates' Courts that specialise in certain types of cases. Hearings are presided over by a magistrate addressed as 'Your Honour', 'Sir' or 'Madam'.

USEFUL WEBSITE

Magistrates' Court www.magistratescourt.vic.gov.au

Since 1978, magistrates appointed in Victoria must have a law degree and be able to practise as a barrister or solicitor.

Magistrates decide on the facts of the case and the relevant law. They decide whether an accused is guilty or not guilty in a criminal case and who is in the wrong in a civil dispute. They also decide on a sanction in a criminal case and a remedy in a civil dispute. A case in the Magistrates' Court is heard by one magistrate and there is no jury.



Figure 6.1
The Melbourne Magistrates' Court

>>GOING FURTHER

Judicial registrars of the Magistrates' Court

The role of judicial registrars is to assist the judiciary (magistrates) with managing their workload in an efficient and cost-effective way. Judicial registrars combine some of the functions of a magistrate and an administrative officer.

They are not judicial officers, but they are able to exercise some judicial power in routine and less complex matters such as restoration of driving licences, interim intervention orders, directions hearings and case conferences, applications to issue search warrants and bail applications.

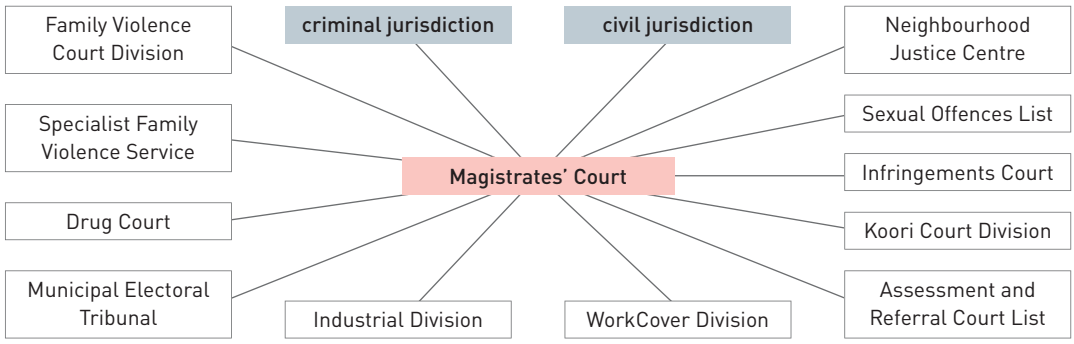
Review or appeal of decisions made by judicial registrars will be conducted as a rehearing by a magistrate. There are currently eight judicial registrars operating in Magistrates' Courts in Victoria.

The Magistrates' Court deals with small civil disputes and some less serious criminal offences, as well as all **committal proceedings**, which are used to establish whether the evidence in indictable cases is of sufficient weight to support a conviction at trial in the County Court or Supreme Court. It is the busiest court in Victoria, accounting for approximately 90 per cent of court appearances. The court hears approximately 250 000 criminal and civil cases every year. The criminal jurisdiction primarily deals with police prosecutions, although it also deals with prosecutions by various other prosecuting agencies, including local councils, VicRoads, the Office of Corrections and the Department of Environment and Primary Industries.

The overwhelming majority of criminal cases are, in fact, heard in the Magistrates' Court. That is because the Magistrates' Court hears all summary offences, and some indictable offences heard summarily to determine whether the accused is guilty, and then holds committal proceedings for those crimes that go to a higher court for trial.

Structure

The Magistrates' Court consists of the chief magistrate, deputy chief magistrates, magistrates, judicial registrars and registrars. The court is divided into a number of jurisdictions or specialist lists.



Criminal jurisdiction of the Magistrates' Court

The court has original criminal jurisdiction over:

- summary offences
- indictable offences heard and determined summarily
- committal proceedings
- issuing warrants
- bail applications.

The maximum sentence that can be given by the Magistrates' Court is two years for a single offence (and three years for certain prescribed offences). The Magistrates' Court cannot impose a sentence of more than five years in total for more than one offence.

Summary offences

Summary offences are minor criminal offences, such as road traffic offences (e.g. careless driving), minor assault, property damage and offensive behaviour. Some summary matters can be dealt with in the absence of the accused if the magistrate deems it appropriate. These are called ex parte hearings.

Indictable offences heard and determined summarily

Indictable offences are serious offences that can be heard before a judge and jury in the superior courts including the County Court and the Supreme Court.

The less serious indictable offences that are heard in the Magistrates' Court are known as **indictable offences heard and determined summarily**.

Indictable offences that can be heard summarily include offences for which the maximum jail term is 10 years or less (although the Magistrates' Court cannot give a sentence of that length). Indictable offences also include offences that carry a maximum fine of 1200 penalty units (approximately $160 000). In addition, indictable offences that can be heard summarily include offences under approximately 30 Acts that are listed in Schedule 2 of the *Criminal Procedure Act 2009*; such as causing serious injury recklessly, threats to inflict serious injury, burglary, perjury, firearm offences and offences involving property valued up to $100 000 (e.g. burglary, handling stolen goods, obtaining financial advantage by deception).

For an indictable offence to be heard summarily the following must occur.

- The prosecutor or the accused must apply to the court for the case to be heard summarily instead of before a judge and jury, or the court may decide to deal with the matter summarily.

- The court must be satisfied that the matter is suitable for hearing summarily (not too serious or complicated).
- The accused must consent to the matter being dealt with summarily.

When deciding whether to hear an indictable offence summarily, the court will look at criteria such as the nature of the offence, the adequacy of sentences that would be available if the case were heard summarily taking into account the accused's criminal record, if any, whether a co-accused is charged with the same offence, and any other relevant matters.

Offenders will usually choose to have the offence heard summarily as it is quicker and cheaper to have the matter heard in the Magistrates' Court and the maximum penalty is less. A magistrate can give a prison sentence of no more than two years for an offence (or five years for multiple offences).

An accused may prefer to have an indictable offence heard in the County Court before a jury, but this would involve the possibility of higher penalties and higher costs and delays.



Figure 6.2
A Magistrates' Court hearing a criminal case

CASE STUDY

Thomson guilty of fraud and theft charges

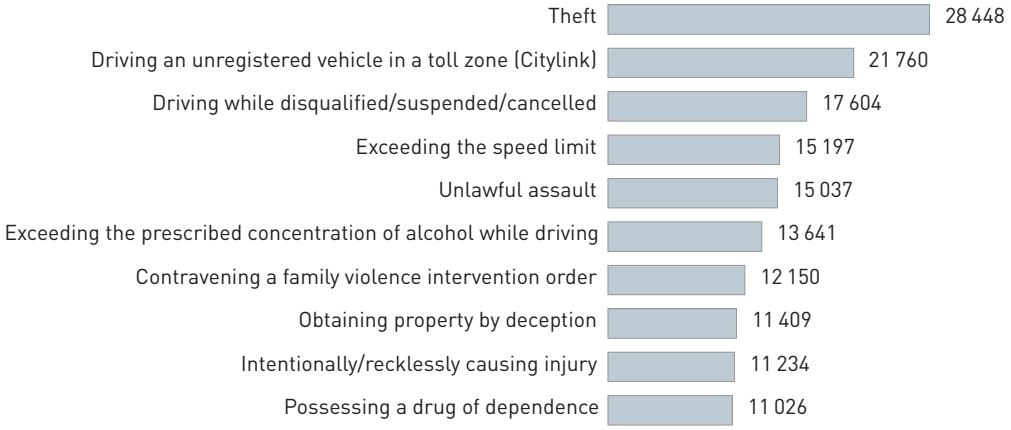
Former Labor MP Craig Thomson faced over 140 fraud and theft charges relating to his use of the Health Services Union (HSU) credit cards between 2002 and 2008.

It was alleged Thomson spent nearly $6000 of union funds on escort services, with the expenditure entered into the HSU's accounts as entertainment, meetings and teleconferencing expenses. It was also alleged Thomson had misappropriated over $20 000 for other personal purposes.

Melbourne magistrate Charlie Rozencwajg found Thomson guilty of defrauding the HSU and ruled that he had dishonestly obtained a financial advantage by using his union credit card to pay for prostitutes. He was sentenced to 12 months' jail with nine months suspended for two years.

Civil proceedings were being considered to recoup some of the money, but he agreed to pay the money back.

The 10 most common offences heard by the Magistrates' Court in 2012–13



Source: Magistrates' Court of Victoria *Annual Report 2012–13*

Diversion programs

The Magistrates' Court and the Children's Court provide a **diversion** program for first-time offenders. **These programs take the place of sentencing and provide first-time offenders with the opportunity to avoid a criminal record.** Offenders are required to do something appropriate which is aimed at making amends to the victim or assisting the offender to avoid reoffending. For example, an offender may be required to compensate the victim, send a letter of apology or attend a driver safety course. A drug diversion scheme allows the police to provide a caution to first-time drug offenders in place of a sanction.

Before a diversion can be recommended, all of the following criteria must be met.

- The offence is able to be heard summarily.
- The offence is not subject to a minimum or fixed sentence or penalty (except demerit points).
- The accused acknowledges responsibility for the offence.
- There is sufficient evidence to gain a conviction.
- A diversion is appropriate in the circumstances.

Diversion cannot commence without the prosecution's consent.

Committal proceedings

Committal proceedings are pre-trial procedures used for indictable offences that are not being heard summarily. Committal proceedings are conducted in the Magistrates' Court. As part of the committal proceedings, a **committal hearing** is held to establish whether a prima facie case exists; that is, whether the prosecution's evidence is of **sufficient weight to support a conviction by a jury at trial**. If the magistrate decides that there is sufficient evidence against the accused, the case proceeds to trial. If not, the accused is released until such time as the police find additional evidence. See chapter 8 for a more detailed discussion of committal proceedings.

Warrants

A warrant is an order of the court. The Magistrates' Court may issue the following warrants:

- warrant to arrest
- remand warrant
- search warrant
- warrant to seize property
- warrant to imprison
- warrant to detain in a youth training centre
- penalty enforcement warrant.

All warrants other than search warrants may be issued by a registrar or magistrate. A magistrate may only issue a search warrant. A bail justice may issue remand warrants.

A warrant to arrest in the first instance may be issued against an accused at the time of filing a charge or at any time before the mention date.

CASE STUDY

Hells Angels charged

Echo Taskforce detectives have arrested 13 members and associates of the Hells Angels outlaw motorcycle gang, following a number of search warrants across Melbourne on 11 February 2014.

The warrants were executed in relation to drug trafficking and firearms trafficking offences.

Several men were remanded to appear in the Melbourne Magistrates' Court on 12 February 2014. Five men were bailed and one woman was released pending further enquiries. One of the men, James Turner, applied for bail but was refused.

Bail applications

Applications for bail may be made at several stages in the criminal process. A police officer, magistrate or bail justice decides whether an accused person is allowed **bail**; that is, allowed to go free until the time of the trial on a promise to appear at the hearing or trial. Under the *Honorary Justices Act 2014* (Vic.), justices of the peace and bail justices will be known as 'honorary justices'.

Bail usually has conditions attached; for example, the accused may be required to surrender his or her passport and report to a police station.

Money is sometimes required to be deposited with the court when the promise to attend the hearing or trial is made. This money is forfeited if the person does not appear in court on the date of the hearing or trial. A person who lodges money with the court for the accused's bail is known as a **surety**. If an accused person is refused bail, then they will be remanded in custody. They will be taken to the remand centre to await their trial.

See chapter 8 for a more detailed discussion of bail and remand.

CASE STUDY

Victorian man faces court

Assam Cababidi, 44, from South Yarra, Victoria, has appeared in the Melbourne Magistrates' Court, charged with possessing approximately 25 kilograms of cocaine.

The cocaine was found after officers of the Australian Federal Police (AFP), Australian Crime Commission and Victoria Police executed a search warrant at premises in Abbotsford. Another search warrant executed in South Yarra found approximately $125 000 in cash.

Cababidi has been remanded in custody. He did not apply for bail.

Civil jurisdiction of the Magistrates' Court

The Magistrates' Court hears civil disputes up to $100 000. The type of dispute can vary. Examples of civil disputes heard in the Magistrates' Court include:

- claims in relation to a motor vehicle accident
- disputes about a contract
- claims under torts such as negligence, trespass and defamation
- personal injury claims.

The Magistrates' Court is also responsible for WorkCover and industrial claims.

Even though the Magistrates' Court is a state court and the Family Court is a federal court, **the Magistrates' Court has jurisdiction to operate as a Family Court** in certain matters. Child Support Agency applications against parents who do not pay maintenance can be heard in the Magistrates' Court. Urgent injunctions to remove a child from a family or for the personal safety of one of the parties to a marriage may also be heard in the Magistrates' Court.

CIVIL CASES IN THE MAGISTRATES' COURT

The Magistrates' Court hears approximately 34 000 civil matters a year, plus about 33 000 family law and family violence matters.

HINT

Even though the Magistrates' Court refers complaints seeking less than $10 000 to arbitration, the court's jurisdiction is not between $10 000 and $100 000. The Magistrates' Court civil jurisdiction is up to $100 000. That is because the arbitration is still heard within the Magistrates' Court by a registrar or a magistrate.

Referral to arbitration

The Magistrates' Court refers complaints in which the amount of money sought is less than $10 000 to **arbitration**. Arbitration is a method of resolving disputes without the formal court process. An independent arbitrator will listen to both sides and make a decision that is binding on the parties. The arbitrator can be either a court registrar or a magistrate.

Appeals

The Magistrates' Court is not able to hear appeals in criminal or civil matters because it has no appellate jurisdiction (as there is no court lower than the Magistrates' Court).

A civil matter can be **reheard** if a party to the case does not attend. If a sentencing order is made by the Magistrates' Court in a criminal proceeding against a person who did not appear in the proceeding, that person may apply to the Magistrates' Court for an order that the sentencing order be set aside and the proceedings reheard. This, however, is a rehearing, and is not an appeal.

Appeals from the Magistrates' Court

Criminal cases

In criminal cases, a person convicted of an offence by the Magistrates' Court can appeal to the County Court **against a conviction and/or the severity of a sentence**. The director of public prosecutions (DPP) can appeal to the County Court against a sentencing order imposed by the Magistrates' Court if satisfied that an appeal would be in the public interest. The appeal will be conducted as a rehearing (a de novo appeal) and the respondent (accused) is not bound by their plea entered in the Magistrates' Court.

Appeals are heard in the County Court before one judge. The County Court can decide to:

- discharge the appeal and allow the decision of the Magistrates' Court to stand
- reduce the sentence
- increase the sentence
- set the conviction aside and dismiss the case.

If the accused is not satisfied with the outcome of an appeal in the County Court, a further appeal can be made to the Court of Appeal before three justices. Such an appeal can only be heard by 'leave' of the Supreme Court; that is, with the permission of the Supreme Court. The DPP cannot bring a further appeal against the decision of the County Court.

The Supreme Court (one justice) can hear criminal appeals from the Magistrates' Court on points of law. The judge in the Supreme Court can decide to:

- quash or overturn the magistrate's decision because it was an error in law
- state the law on the issue and send the case back to the Magistrates' Court to be dealt with according to the law stated
- discharge the appeal and allow the decision of the Magistrates' Court to stand.

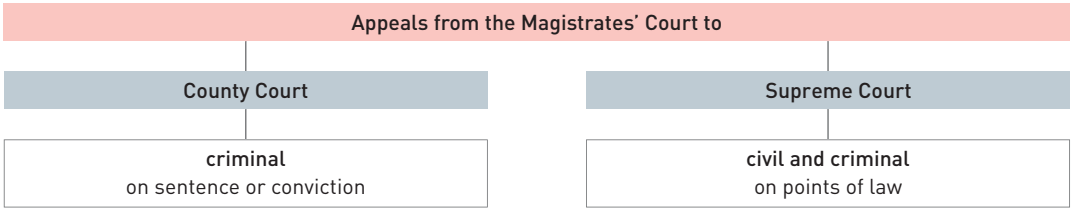
If a person appeals to the Supreme Court on a point of law, they cannot then appeal to the County Court on another ground relating to the sentence or conviction.

Civil cases

In civil cases, a party cannot appeal against a magistrate's decision to the County Court, but may appeal to the Supreme Court on a point of law.

The Supreme Court (one justice) can decide to:

- reverse the decision
- state the law on the issue and send the case back to the Magistrates' Court to be dealt with according to the law stated
- discharge the appeal and allow the decision of the Magistrates' Court to stand.



LEARNING ACTIVITY 6.3

The Magistrates' Court

1 Describe the jurisdiction of the Magistrates' Court.
2 Would a potential plaintiff be able to file a complaint in the Magistrates' Court seeking $120 000 in damages? Justify your answer.
3 Distinguish between a summary offence and an indictable offence.
4 Explain two reasons why you would generally decide to have the case tried summarily, if you were charged with an indictable offence and it was an offence that could be heard summarily.
5 Look back at the case study 'Thomson guilty of fraud and theft charge' and state why you think this case could result in a civil case as well as the criminal case referred to.
6 Look back at the case study 'Victorian man faces court' and answer the questions.
   a Who can issue a search warrant?
   b Why do you think Cababidi did not apply for bail?
   c What occurs if bail is refused?
7 Conduct some research and identify and explain an example of a case where a warrant was applied for.
8 Conduct some research and identify and explain an example of a case where a person made an application for bail in the Magistrates' Court.
9 Explain the diversion program used in the Magistrates' Court.
10 What are committal proceedings?
11 How is the process of holding committal proceedings beneficial to the accused and/or the legal system?
12 Is there a jury in the Magistrates' Court? Explain.
13 'Almost all criminal cases are at one stage heard in the Magistrates' Court.' Do you agree? Explain.
14 Read the extract 'Man jailed for racist bus rant' and answer the questions.
   a In which court was this case heard?
   b Is this a criminal or civil case? Give reasons.
   c What were the charges made against the accused?

d What punishment did the accused receive?

e If Mr Graham wished to appeal the decision of the Magistrates' Court, on what grounds could he appeal and to what court?

f Do you think that this decision was fair? Explain. In your explanation consider the point of view of:
- the victims
- the accused
- society as a whole.

g What decision would you have given in this case? Give reasons.

EXTRACT

Man jailed for racist bus rant

Adam Cooper, *The Age*, 17 January 2014

One man is in jail and another is awaiting sentence for racially abusing a French woman on a Melbourne bus, in violent, expletive-ridden tirades that gained international attention.

Hayden Stirling Stewart, 25, was taken into custody on Friday for his rant against Fanny Desaintjores and her friends while on a bus travelling between Mordialloc and Highett on 11 November 2012.

David Robert Mathew Graham, 36, also faces a jail term for what magistrate Jennifer Goldsborough described as the most vile, horrible and violent language she had heard in 17 years of sitting on the bench.

The tirades were captured on video with a passenger's mobile phone and gained international notoriety. The video had been viewed more than four million times since it was uploaded to YouTube, Moorabbin Magistrates Court heard.

Stewart, his then partner, Alixx Guest, and Graham threatened and abused Ms Desaintjores when she and her friends began singing in French, the court heard.

Stewart said he would cut the woman with a box cutter, while Graham told her to 'speak English or die' and said he would cut her breasts off with a filleting knife. Graham also made reference to the colour of the woman's skin and made references to slavery, the court heard.

Senior Constable Paul Collins, prosecuting, said when Stewart and Guest got off the bus with their daughter, Stewart smashed a window of the bus with his fist, covering passengers in glass.

Stewart, 25, of Hampton East, previously pleaded guilty to threatening to inflict serious injury, behaving in an insulting manner in public and causing intentional damage.

He was taken into custody and will be assessed for mental-health issues before he is formally sentenced on 20 March.

Graham was annoyed at having to catch a bus between Mordialloc and Caulfield railway stations when he abused the woman, mainly while he spoke to a friend on his mobile phone, the court heard.

Defence counsel Manny Nicolosi agreed the language Graham used was disgusting, and said his client had been sacked from his job as a builder's labourer and evicted from his rental property in the aftermath.

He said Graham had suffered immense embarrassment from his actions that day.

'Andy Warhol said everyone once had their 15 minutes of fame, but this man has had his 15 months of infamy', Mr Nicolosi said.

Graham pleaded guilty to making a threat to inflict serious injury and behaving in an offensive manner in public. Two other charges were struck out.

Mr Nicolosi said his client had had a problem with alcohol and had made substantial efforts to stop drinking since the incident.

Ms Goldsborough indicated she would likely send Graham to jail given the violent, sexist and offensive nature of his remarks. She said racist comments were the least of his concerns given the threats he made were aggravated because there were about 20 people on the bus, including children.

Graham said he had spent periods living on the streets since being evicted.

'Anything you can do is nothing compared to what I've been through the past 12 months', he told the magistrate.

Graham was bailed to return to court for sentence on 20 March.

Ms Goldsborough said Graham also needed to undergo mental-health assessment before he was sentenced.

Note: Graham was sentenced to 21 days in jail and placed on a 15-month community corrections order. Stewart who had already spent 63 days in jail was sentenced to 150 hours of community service.

Specialist divisions of the Magistrates' Court

The Magistrates' Court has a number of special divisions whose purpose is to improve outcomes for the parties and the community. Specialist courts tend to take a more individualised and service-focused approach to the sentencing of special needs groups. These are not separate courts, but are divisions of the Magistrates' Court that provide specialist functions or processes.

The Drug Court Division

The Drug Court is a division of the Magistrates' Court. It is responsible for sentencing and supervising **the treatment or support of offenders who have drug problems, and have committed an offence while under the influence of drugs or to support a drug habit**. It deals with offenders who plead guilty to drug-related crimes that are within the jurisdiction of the Magistrates' Court and punishable by imprisonment. The Drug Court will not deal with crimes that involve a sexual offence or an assault causing bodily harm.

The main aim of the Drug Court is to rehabilitate offenders from drug or alcohol addiction, and break the cycle of offending. An offender in the Drug Court can be sentenced to a **drug treatment order** (DTO), which can consist of a custodial part and a treatment and supervision part.

CASE STUDY

Charlie given a drug treatment order

Charlie pleaded guilty to eight charges involving stealing, unlawful use of a motor vehicle and possession of drugs. The Drug Court was satisfied that Charlie was dependent on drugs and this dependency contributed to the committing of the offences. He was given a drug treatment order for two years.

Charlie was ordered not to commit further offences and to attend the Drug Court at regular intervals. He agreed to undertake detoxification and be involved in a drug treatment program.

Through the help of the Drug Court, Charlie has managed to turn his life around.

The Koori Court Division

The Koori Court is a division of the Magistrates' Court, which was created under the *Magistrates' Court Act 1989* (Vic.) (amended by the *Magistrates' Court (Koori Court) Act 2002* (Vic.)). It was established to provide fair, equitable and culturally relevant justice services to the Indigenous community, as well as providing the Indigenous community with greater protection and participation in the sentencing process for summary offences.



Figure 6.3 Chief Magistrate Ian Gray and Aunty Joan Vickery at the Broadmeadows Koori Court

INDIGENOUS PERSON

An Indigenous person is defined as someone who is descended from, and identifies as, an Aboriginal person or Torres Strait Islander, and is accepted as such by that community. Aboriginal and Torres Strait Islander people are often referred to as **Indigenous people**. Koori people are Indigenous people who come from Victoria and parts of New South Wales and Tasmania.

The accused must be an Indigenous person and the offence must be within the jurisdiction of the Magistrates' Court, other than sexual offences, family violence cases or a breach of an intervention order. The accused must plead guilty or intend to plead guilty, or consent to an adjournment to enable him or her to participate in a diversion program. The accused must show an intention to take responsibility for his or her actions and must consent to the matter being dealt with in the Koori Court Division.

The court must ensure that proceedings are informal and conducted in such a way that they can be understood by the accused, the accused's family and any member of the Indigenous community who is present in court. An oval table is used as the bar table and Koori elders or respected persons (appointed by the Department of Justice) can advise the court on Aboriginal cultural issues. The accused sits with his or her family, rather than in the dock.

Proceedings may be transferred from other courts to the Koori Court Division, and can be transferred back to other courts.

In 2007, while the recidivism rate in the general community was 29.4 per cent, it was 12.5 per cent and 15.5 per cent respectively in the Shepparton and Broadmeadows Koori Courts. In 2012–13, the Koori Court heard 137 matters, which was less than in the previous two years.

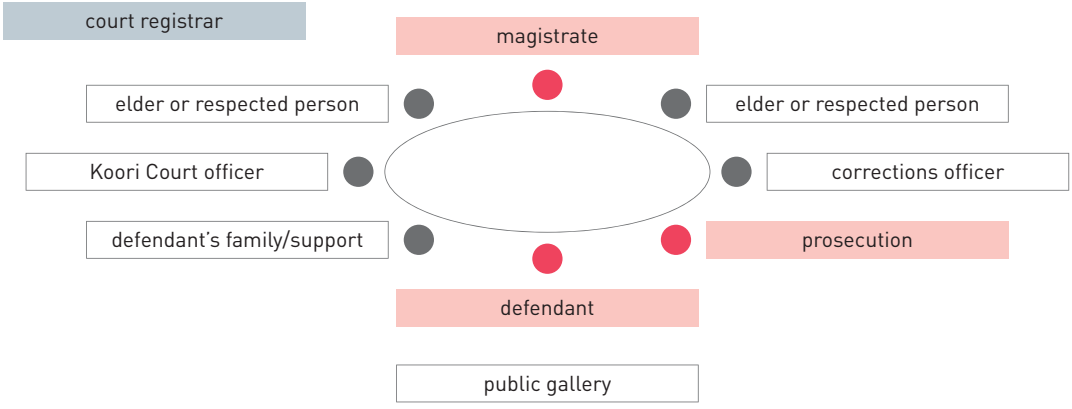


Figure 6.4 Koori Court layout

The Family Violence Court Division

The Family Violence Court Division was established to simplify access to the justice system for people affected by family violence and to promote their safety. **The emphasis is on making those who have committed acts of family violence more responsible for their actions, and helping them to change their behaviour.**

The Family Violence Court has the jurisdiction to deal with the following matters, **which arise from, or include, allegations of family violence by a person**:

- proceedings for a family violence intervention order or counselling order, and breaches of any existing orders
- civil proceedings with respect to damages for personal injury
- criminal proceedings for a summary offence or an indictable offence that may be heard summarily
- committal proceedings for indictable offences
- applications for crimes compensation, where the Family Violence Court is given the same functions, powers and duties as the Victims of Crime Assistance Tribunal.

Neighbourhood Justice Centre

The Neighbourhood Justice Centre (NJC) is located in Collingwood, Victoria. Residents of the City of Yarra district are able to have their **civil and criminal cases** heard at the Neighbourhood Justice Centre, except for serious sexual offences and committal proceedings.

USEFUL WEBSITE

Neighbourhood Justice Centre www.neighbourhoodjustice.vic.gov.au

The NJC is a one-stop, **multi-jurisdictional court** with the combined jurisdictions of the Magistrates' Court; the Children's Court (Criminal Division); the Residential Tenancies, Civil Claims, Consumer Credit and Guardianship Lists of the Victorian Civil and Administrative Tribunal (VCAT); and the Victims of Crime Assistance Tribunal (VOCAT).

The accused in a criminal proceeding must either reside near the NJC, be a homeless person who either lives in the area or is alleged to have committed the offence in the area, or be an Indigenous person with a close connection to the area and is alleged to have committed the offence there.

Hearings are in a **less formal setting**, which is designed to simplify access to the justice system, address the underlying causes of offending behaviour, and use a **case management and restorative approach to justice**. (See chapter 8 for more information on restorative justice.)



Figure 6.5 Neighbourhood Justice Centre, Collingwood

RESTORATIVE JUSTICE

Restorative justice is an approach to justice that focuses on the needs of victims and offenders, rather than concentrating on punishing the offender. Victims take an active role in the process, while offenders are encouraged to take responsibility for their actions. The community can also be involved in the process.

The NJC offers access to an array of services such as drug, alcohol, mental health, financial and employment assistance; legal aid; victim support; youth policing unit; mediators; and staff to address the needs of women, youth, people from culturally and linguistically diverse (CALD) backgrounds and Koori people. These services are aimed at improving access to justice for socially disadvantaged offenders, such as low-income, unemployed or poorly educated people.

Mediation is available to residents, government departments, agencies and community organisations through the NJC. These services are provided by the **Dispute Settlement Centre of Victoria** (DSCV). A representative of DSCV operates from the NJC.

An evaluation of the first two years of operation of the NJC revealed benefits of the program compared to statewide averages such as a lower rate for breach of family violence intervention orders, a higher rate of successful completions of community corrections, and a higher proportion of guilty pleas at first instance, thereby leading to greater court efficiencies.

Assessment and Referral Court List

A list is a division of the court. The Assessment and Referral Court List of the Magistrates' Court is designed to meet the particular needs of offenders who experience mental illness and cognitive impairment, and aims to assist courts to address appropriately the issues associated with their offending behaviour.

Research has shown that mentally impaired offenders often experience other problems such as homelessness, substance abuse, unemployment and poor social or interpersonal skills that contribute to offending behaviour. This specialist list takes a case management approach to offenders, providing offenders with a case manager and additional health and welfare services. It focuses on people whose risk of reoffending is related to their mental health issues.

The list deals with cases within the jurisdiction of the Magistrates' Court that do not involve serious violence or serious sexual offences.

Sexual Offences List

A specialist list of the Magistrates' Court has been created to deal with proceedings that relate (wholly or partly) to a charge for a sexual offence, which include summary matters and committal hearings. A pilot Sexual Offences List (SOL) commenced in the Melbourne Magistrates' Court in April 2006, and rural SOLs currently sit in the Magistrates' Courts in Ballarat, Bendigo, Geelong, Latrobe Valley, Mildura and Shepparton. A Sexual Offences List allows a more specialised approach to these types of cases, and recognises the difficulties faced by victims in these cases.

>>GOING FURTHER

Justice service centres

Justice service centres offer services such as consumer advice, mediation, dispute resolution through the Dispute Settlement Centre of Victoria, the Sheriff's Office (which enforces

sanctions, criminal warrants and warrants for non-payment of fines), Corrections Victoria (which administers community corrections orders) and the Regional Aboriginal Justice Advisory Committee. There are 18 justice service centres in Victoria, such as the Moorabbin Justice Centre.

Some of the regional justice service centres are combined with multi-jurisdictional courts, such as the Sale Justice Service Centre.

The **William Cooper Justice Centre** opened in 2012, in the heart of Melbourne. It offers administrative services, multi-jurisdictional courts and a variety of other services. One of the features of the William Cooper Justice Centre is a large trial courtroom, designed to hold massive trials such as the Kilmore East bushfires trial. The Human Rights Division of the Victorian Civil and Administrative Tribunal conducts its hearings here.

In 2014, a new international commercial arbitration and mediation centre opened at the William Cooper Justice Centre. The centre is to be a booking hub and advice service to assist clients and practitioners to locate the best facilities for their case and to help them resolve disputes quickly. The centre provides access to arbitrators and mediators, as well as purpose-built facilities for the arbitration or mediation to take place.

LEARNING ACTIVITY 6.4

Specialist courts of the Magistrates' Court

1 Why was the Drug Court established?
2 Look back at the case study 'Charlie given a drug treatment order' and answer the questions.
   a What is a drug treatment order?
   b How did Charlie benefit from being involved in this program?
   c Explain two general benefits of the Drug Court.
3 What is the purpose of the Koori Court Division?
4 Under what circumstances can a person have a case heard in the Koori Court Division?
5 How might an Indigenous person benefit from having a case heard in the Koori Court Division?
6 Explain the benefits associated with having a specialist Family Violence Court Division.
7 Explain the benefits of the Neighbourhood Justice Centre.
8 What is restorative justice?
9 How does the Neighbourhood Justice Centre differ from other justice service centres and multi-jurisdictional courts? What benefits does the Neighbourhood Justice Centre offer to individuals involved in a dispute or accused of a minor crime?
10 Suggest how specialised lists such as the Sexual Offences List and the Assessment and Referral Court List can benefit individuals involved in the case and the legal system.
11 'The formation of specialist divisions of the Magistrates' Court shows an understanding by the legal system of some of the main problems faced in society, and should be extended to other areas.' Discuss.

THE COUNTY COURT

The County Court of Victoria is an intermediate court, placed between the Magistrates' Court and the Supreme Court in the Victorian court hierarchy. It sits in Melbourne and goes on circuit to 13 major regional centres. County Court cases are presided over by a judge, and juries may be empanelled for trials. The court hears criminal and civil cases.

The County Court deals with a wide range of civil and criminal matters in its original jurisdiction (that is, hearing a matter for the first time). It also hears appeals from the Magistrates' Court in criminal matters relating to convictions and severity of sentencing.

The court's vision is stated as being 'to provide a high quality, accessible and efficient court system that ensures justice for all in the community at least cost'. It hears about 11 000 cases a year.

USEFUL WEBSITE

County Court www.countycourt.vic.gov.au

Structure

The court consists of a chief judge, judges, associate judges and the registrar of the court. A judge is addressed as 'Your Honour'.

Criminal jurisdiction

The County Court in Victoria has jurisdiction to hear most indictable offences, including drug trafficking, serious assaults and sex offences such as rape. The offences that cannot be heard in the County Court and must be heard in the Supreme Court are:

- murder and attempted murder
- certain conspiracy charges and corporate offences
- treason and misprision of treason (concealing an offence of treason).

In criminal trials the **prosecution** conducts the case on behalf of the state. When the **accused** pleads not guilty, the cases are heard before a judge and a jury of 12 (although 15 can be empanelled in cases that may take a long time). The jury listens to the facts and decides whether the accused is guilty or not guilty. The judge instructs the jury on the relevant law, sums up the evidence to the jury, and sentences the accused if he or she has been found guilty.

Note that proceedings can be transferred between the Magistrates' Court, County Court and Supreme Court.



Figure 6.6 The County Court of Victoria



Figure 6.7 Judge Jennifer Coate in front of the County Court of Victoria coat of arms

Civil jurisdiction

The County Court has unlimited jurisdiction to hear all civil disputes, irrespective of the amount claimed. The jurisdiction was increased by the *Courts Legislation (Jurisdiction) Act 2006* (Vic.), which came into effect on 1 July 2007.

The County Court can also hear claims against municipal councils for loss or injury sustained while using roads, land, buildings and so on, under the control of the council or municipality, and actions where the jurisdiction is specifically given to the County Court by an Act of parliament, for example the *Adoption Act 1984* (Vic.) and the *Property Law Act 1958* (Vic.).

A judge sitting alone hears civil cases in the County Court. A judge, a **plaintiff** (person bringing the case) or a **defendant** (person against whom the case is brought) may request that a jury be empanelled. If a jury is requested, it will be a jury of six (or up to eight for particularly long trials). The jury will decide on the facts, and will decide in favour of either the plaintiff or the defendant. If there is no jury, then the judge will decide on the facts and the outcome of the case.

The County Court has specialist civil lists which deal with specific matters. These include:

- the Commercial List, which deals with proceedings including those in which the plaintiff claims the recovery of a debt, damages or any property
- the Damages and Compensation List, which deals with proceedings in which the plaintiff claims the recovery of damages for a tort, or for wrongful dismissal, or for matters arising under certain Acts such as the *Transport Accident Act 1986* (Vic.)
- the Confiscation List, which deals with proceedings relating to confiscations and proceeds of crime.

CASE STUDY

Jury used in County Court case

The plaintiff, Clifford Ian Pert, issued proceedings against Ballarat Wildlife Park Pty Ltd. A judge and a jury heard the case. On 12 June 2013, the jury returned a verdict in favour of the defendant.

On 25 June 2013, Judge Kings, sitting in the Warrnambool County Court, ordered that the plaintiff pay the defendant's costs.

Appeals

Criminal cases

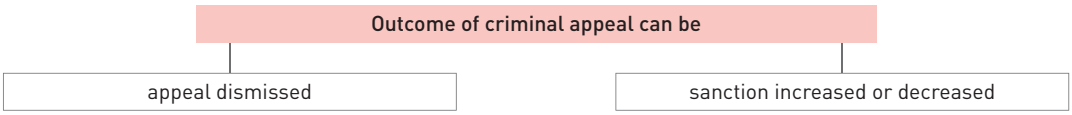
In **criminal cases**, the County Court can hear appeals from the Magistrates' Court by an offender against a conviction and/or sentence, bond or conditional discharge. The appeal operates as a rehearing (known as a de novo appeal), and the accused is not bound by the plea entered in the Magistrates' Court. The appeal should be lodged within one month of sentencing, and there is no need to seek leave to appeal, although leave to appeal must be sought if the appeal is not lodged within one month.

When the appeal is lodged, there is usually a **stay of sentence**; that is, the sentence is not immediately imposed and the accused does not have to go to jail (if that was the sentence). The accused must, however, apply to the Magistrates' Court to be released on bail if the accused received a sentence of imprisonment. The magistrate may decide not to release the accused pending the appeal, in which case the appeal is usually heard quickly.

When hearing the appeal, the County Court must set aside the order of the Magistrates' Court and may make any order it thinks just and which the Magistrates' Court could have made.

The accused can appeal against the severity of a penalty or against a conviction. If an appeal against a conviction is successful, the case is dismissed. If an appeal against a penalty is successful, the penalty may be reduced. If, however, the appeal against the penalty is not successful, the penalty may stay the same or be increased.

The Office of Public Prosecutions may also appeal against a sentence because of its leniency.

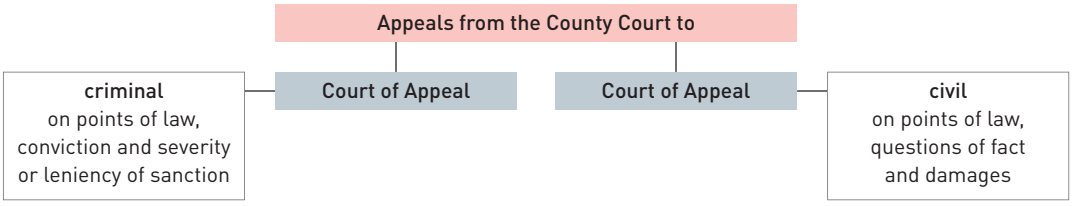


Civil cases

The County Court does not have the jurisdiction to hear appeals in civil matters except where an Act specifically provides for appeals to be heard in the County Court.

Appeals from the County Court

In both civil and criminal cases, the Court of Appeal, with three justices, hears appeals from the County Court.



Specialist divisions of the County Court

The County Koori Court

The Koori Court division of the County Court sitting at the Latrobe Valley Law Courts in Morwell was the first sentencing court for Indigenous offenders in a higher jurisdiction in Australia. In June 2013, the County Koori Court commenced hearings in Melbourne.

In the same way as the Koori Court in the Magistrates' Court and the Children's Court, the objective is to ensure greater participation of the Aboriginal community in the sentencing process. This is achieved through the Indigenous elders or respected persons and others, such as the Koori Court officer, providing Aboriginal and Torres Strait Islander people with a more culturally appropriate justice process.

The jurisdiction of the Koori Court includes sentencing for all offences dealt with in the criminal jurisdiction of the County Court except sexual offences and family violence cases, although some family violence cases are allowed.

To be eligible for the proceeding to be held in the Koori Court Division, the accused must be Aboriginal, plead guilty and take responsibility for his or her actions, and must consent to the proceedings being dealt with in the Koori Court. The offence must be within the jurisdiction of the County Court, other than a sexual offence or a family violence offence, and the Koori Court Division must consider that it is appropriate in all the circumstances that the proceeding be dealt with by it.

The County Koori Court also has the jurisdiction to hear an appeal against a sentence imposed by the Magistrates' Court, whether or not it was heard in the Koori Division. It will be conducted as a rehearing.



Figure 6.8
The Koori Court provides for greater participation by the Aboriginal community in the court process.

EXTRACT

First Koori County Court launched in Melbourne

Rachel Baxendale, *The Australian*, 25 June 2013

Australia's first Koori County Court launched in Melbourne yesterday, with elders and judges congratulating the Victorian government on embracing a model trials suggest will play a dramatic role in reducing recidivism and engaging the indigenous community.

The court will sit regularly in Melbourne from July, following a successful four-year pilot in the Latrobe Valley in the state's east.

State government funding will enable hearings in both locations.

Addressing a gathering of politicians, elders, indigenous community members and members of the legal fraternity at the launch, County Court Chief Judge Michael Rozenes said 12 judges and numerous elders had undergone training for the court's expansion to Melbourne.

'This is a significant day for the Victorian justice system,' he said.

'What has been important in establishing the County Koori courts in the Latrobe Valley and Melbourne is the level of support shown by Koori communities in engaging with a justice system which has previously failed them.

'There has been a dramatic decrease in the amount of reoffending and a dramatic increase in the compliance with orders.'

Judge John Smallwood, in charge of the Koori County Court, was at pains to stress that there was no 'special treatment' involved in the system, with elders playing no part in sentencing and the Koori Court jailing at similar rates as the mainstream system.

He said that of 80 cases heard under the Latrobe Valley Koori County Court pilot, only three of those convicted had since reoffended.

'I would have expected that to be more like 50 per cent,' Judge Smallwood said.

Sexual offences and breaches of intervention orders cannot be heard in the Koori Court.

The court operates by seating an accused person who has pleaded guilty and been arraigned around a table with the Judge, elders, family members or support people, a Corrections Victoria officer, the Koori Court officer, the prosecution and the legal practitioner for the accused.

A victim impact statement is read at the table by the prosecution, and the elders then address the accused, playing a role Judge Smallwood described as 'extraordinarily moving and powerful'.

'So often, this is when you immediately see somebody with years of drug use, years of being abused, years of alcohol abuse actually tune in,' Judge Smallwood said.

'Here's somebody telling them who they are, whenever you thump somebody, every blackfella cops that,' he said.

Victorian Department of Justice Koori Justice Unit Director Andrew Jackomos spoke of the positive power elders can exert in court.

'In our culture there is no greater power or authority than to be shamed in front of your ancestors,' he said.

The Koori County Court launch follows the successful introduction of Koori Magistrates' Courts and the Koori Children's Court.

The County Court is the only sentencing court in Australia for indigenous accused in a higher jurisdiction.

Victorian Attorney-General Robert Clark said all involved were to be congratulated on the success the Koori County Court had 'proved to be to date'.

Victorian Aboriginal Legal Service CEO Wayne Muir said the Victorian government had shown leadership where other jurisdictions such as Queensland, which cut funding to the Murri court system last year, had failed.

Sexual Offences List

A Sexual Offences List of the County Court was established in 2005 to manage pre-trial hearings with respect to sexual offence cases. A sexual offence is defined as being any offence involving a sexual act or an attempt to commit a sexual act or an act alleged to be committed for the purpose of committing a sexual act.

Pre-trial management of directions hearings and committal hearings by a listing judge is undertaken with a view to identifying and defining issues early and resolving the issues where possible and appropriate. This is intended to ensure a more efficient trial process and be more responsive to the needs of all participants, including the victims of sexual offences.

LEARNING ACTIVITY 6.5

The County Court

1 Describe the original jurisdiction of the County Court in criminal cases. Which types of criminal offences cannot be heard in the County Court?
2 Describe the original jurisdiction of the County Court in civil disputes.
3 Look back at the case study 'Jury used in County Court case'. Describe the outcome in this case. Is this a civil or a criminal case? Justify your answer.
4 Describe the appellate jurisdiction of the County Court.
5 Explain the types of cases heard by the County Koori Court.
6 Look back at the extract 'First Koori County Court launched in Melbourne'. Using that article, justify three reasons to support the continued existence of the County Koori Court.
7 What is the role of the Sexual Offences List?
8 Read the case study 'Teenage girl jailed' and answer the questions.
   a Would a jury have been used in this case? Justify your answer.
   b Why was this case heard in the County Court?
   c If the accused thinks the sentence is too severe, to which court could she appeal? Explain.

CASE STUDY

Teenage girl jailed

A 19-year-old girl from Tarneit in Victoria has been jailed by Judge Lacava of the County Court of Victoria.

Sarah Elis was drunk when she attended the Commercial Hotel in Werribee on 9 April 2013 with her boyfriend's brother. The County Court heard that Sarah and her boyfriend's brother objected to the victim staring in their direction and attacked him. The attack was caught on CCTV.

Elis punched the man twice and then called her boyfriend, who arrived a short time later with another man. The victim, while sitting on a bench bent over, was then allegedly kicked in the head by Elis' partner. Elis then kicked him in the head.

The victim was in an induced coma for nine days and may suffer permanent brain injury. Elis pleaded guilty to recklessly causing serious injury.

Judge Lacava heard that Elis had led a traumatic life, had no prior convictions and was controlled by her abusive boyfriend. On 15 February 2014, Judge Lacava convicted Elis to two and a half years in jail, to serve a minimum of 15 months.

THE SUPREME COURT

The Supreme Court of Victoria is a **superior court of record**. Cases heard in the Supreme Court (both the Trial Division and the Court of Appeal) are recorded and may be used as precedents in future cases. It is the highest court in the state hierarchy although appeals can be made to the High Court. The Supreme Court sits in Melbourne and goes on circuit to 12 major regional centres. The court hears criminal and civil cases.

Structure

The Supreme Court has two divisions:

- Trial Division
- Court of Appeal.

USEFUL WEBSITE

Supreme Court of Victoria www.supremecourt.vic.gov.au

The Supreme Court (Trial Division)

The Supreme Court (Trial Division) deals with the most serious matters and has wide powers in its original jurisdiction. It has extensive appellate jurisdiction in both criminal and civil matters.

The Trial Division is divided into the Criminal Division, the Common Law Division and the Commercial and Equity Division. The Common Law Division and the Commercial and Equity Division deal with civil matters, whereas the Criminal Division deals with criminal cases.

The court consists of the chief justice, judges, associate judges and registrars. A judge is addressed as 'Your Honour' and has the title of 'Justice'. The chief justice of the Supreme Court is the state's most senior judge.



Figure 6.9 The Supreme Court of Victoria, Melbourne. The court's library is contained in the dome and all courtrooms are located around the dome.

Criminal jurisdiction

The Supreme Court (Trial Division) hears the most serious criminal cases, such as murder, attempted murder, treason and some conspiracy offences. All criminal cases in which the accused is pleading not guilty are heard before a judge and a jury of 12 (additional jurors can be empanelled for longer trials). If the accused is pleading guilty, no jury is empanelled.

CASE STUDY

Conviction, retrial and not guilty verdict

A jury has delivered a not guilty verdict in a trial involving a dismembered body.

In July 2008, Lawrence Butler was charged with the murder of Trevor John Tascas. It was alleged that Mr Tascas was killed in October 2005 and that Mr Butler had killed him by chopping up his body using a hacksaw and then burning it in a barrel in the backyard of their Geelong home.

After pleading not guilty, Mr Butler was tried and convicted of murder before Justice King and a jury in the Supreme Court in Geelong. On 15 December 2009, Lawrence Butler was sentenced to 23 years' imprisonment.

Mr Butler appealed the decision. One of the grounds for the appeal was that the jury verdict could not be supported by the evidence.

On 20 December 2011, the Court of Appeal allowed the appeal, quashed the murder conviction, directed an acquittal of murder and directed a retrial on manslaughter. Mr Butler was bailed awaiting his retrial after having spent three years and eight months in custody.

On 9 September 2013, the trial began and, 10 days later, the jury returned a verdict of not guilty.

Civil jurisdiction

The Supreme Court has unlimited civil jurisdiction and can hear civil cases claiming any amount. A civil case is heard before a judge alone or, if the parties agree, before a judge and a jury of six. The Supreme Court refers some civil cases to mediation so that they can be dealt with quickly, informally and cheaply. A jury of six is optional (up to eight can be empanelled).

Due to the County Court and the Supreme Court both having unlimited civil jurisdictions, it is up to the parties to decide in which court to lodge their paperwork to commence legal proceedings.

Appeals heard by the Supreme Court (Trial Division)

Criminal cases

In criminal cases, a single judge of the Supreme Court can hear appeals from the Magistrates' Court on a point of law. If the appeal is not initiated within 28 days, the person wishing to appeal must apply for leave to appeal.

If the judge decides that the magistrate's decision should stand, the appeal is dismissed. If the judge agrees that there has been an error in law and the magistrate's decision should be quashed (overturned) then the appeal is allowed.

If a person appeals on a point of law to the Supreme Court from the Magistrates' Court, they are then unable to appeal on other grounds to the County Court.

The following example describes a situation where an appeal could occur on a point of law.

THE DEFINITION OF TRAFFIC LIGHTS – A POINT OF LAW

A man sitting at traffic lights stuck on red decides to drive through the traffic lights, thinking they are broken. If he is picked up by the police for driving through traffic lights showing red, the case will be taken to the Magistrates' Court. If he is found guilty of driving through traffic lights showing red, and the traffic lights really were broken at the time, the question could be raised whether broken traffic lights fit the description of 'traffic lights'.

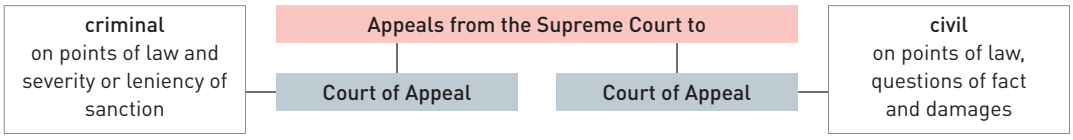
The interpretation of the words 'traffic lights' is a point of law, not a point of fact. The accused could therefore appeal to the Supreme Court to clarify the definition of 'traffic lights'. If the Supreme Court decided that broken traffic lights are not traffic lights under the law, the conviction would be quashed and any penalty cancelled.

Civil cases

In civil cases, a single judge in the Supreme Court can hear appeals from the Magistrates' Court on a point of law. A single judge can also hear appeals from the Victorian Civil and Administrative Tribunal (although when the tribunal is constituted for the purpose of an order being made by the president or the vice-president, an appeal from such an order would go to the Court of Appeal).

Appeals from the Supreme Court (Trial Division)

In criminal and civil cases, the Court of Appeal hears appeals from a single judge of the Supreme Court.



Specialist courts of the Supreme Court (Trial Division)

Victorian Costs Court

Following recommendations from legal bodies such as the Law Institute and the Master and Cost Office, the Victorian Costs Court was created as a division of the Supreme Court, commencing operations in 2010. It is presided over by an associate judge known as the 'costs judge'.

The Victorian Costs Court is responsible for hearing and determining the assessment, settling, taxation or review of costs in proceedings in the Supreme Court, County Court, Magistrates' Court and VCAT. Determinations by the Victorian Costs Court can be appealed to the Trial Division of the Supreme Court.

Commercial Court

In 2009, the Supreme Court combined its two specialist lists, the commercial list and the corporations list, into the Commercial Court, which is in the Commercial and Equity Division of the Trial Division of the court.

The Court has introduced various procedures to resolve matters more efficiently, including a case management conference and an evaluation procedure in which a judge who is not assigned to the case gives the parties a confidential, without-prejudice evaluation of what he or she thinks will be the result of one or more issues in the trial.

Court of Appeal

The Court of Appeal is a division of the Supreme Court of Victoria. It has **no original jurisdiction**, and is the highest Victorian appeal court, hearing appeals from judgments by single judges of the Supreme Court and the County Court. Cases are usually presided over by three Court of Appeal judges. There is no jury in the Court of Appeal. Leave must be sought for appeals to the Court of Appeal.

The Court of Appeal hears criminal and civil appeals. It has no original jurisdiction. The Court of Appeal hears:

- all appeals from the Supreme Court Trial Division constituted by a single judge
- all applications for new trials
- all appeals from the County Court constituted by a judge
- all appeals from the Victorian Civil and Administrative Tribunal when the tribunal was constituted for the purpose of making an order by the president or a vice-president of that tribunal
- all appeals where a particular Act states that the appeal must be heard before the Court of Appeal.

Structure

The Court of Appeal consists of nine permanent judges, a president and the chief justice of the Supreme Court. The chief justice of the Supreme Court is the state's most senior judge. The court usually sits with three judges but can have five judges if the matter before it is of 'significant importance'.

Criminal jurisdiction

A person who has been found guilty in the County Court or Supreme Court may appeal to the Court of Appeal (consisting of three to five justices) on the following grounds:

- on a point of law
- on a conviction
- on the severity of the sanction.

The Office of Public Prosecutions may only appeal against the leniency of the sentence, not against an acquittal. The accused (now the appellant) does not have an automatic right to appeal; in some instances leave has to be granted by the court. The Court of Appeal will not hear the facts again but reads through the written record of the evidence presented at the trial and listens to the legal arguments presented by both sides at the appeal. The court may:

- dismiss an appeal
- allow an appeal
- quash the sentence passed at trial and impose a new sentence, which may be longer or shorter than the original sentence – a sentence cannot be increased because of evidence received by the Court of Appeal that was not given at the trial
- order a new trial.

The Court of Appeal will only set aside the jury's verdict if it considers that no reasonable jury could have come to such a decision on the evidence given. If the appeal is against a sentence, the Court of Appeal will only consider the material relevant to the question of the sentence.

CASE STUDY

Appeal dismissed

Evangelous Goussis was found guilty on one count of murder and one count of intentionally causing serious injury after a trial was heard in the Supreme Court. He was sentenced to life imprisonment with a minimum term of 30 years to be served before Goussis was eligible for parole.

The prosecution argued at trial that Carl Williams and Tony Mokbel engaged XP to kill Lewis Moran. XP engaged Noel Faure and Evangelous Goussis to kill Lewis Moran. On 31 March 2004, Goussis shot Moran twice in the head at the Brunswick Club.

Goussis appealed on the grounds that the trial judge had failed in her instructions to the jury. He also argued there was fresh evidence that had been discovered that was not available at the original trial. The fresh evidence was a letter signed by XP, who was a main witness at the trial, stating that Goussis was not involved in the crimes.

In addition to appealing on conviction, Goussis also appealed against the severity of the sentence.

The Court of Appeal dismissed Goussis' appeal, finding that there was no significant possibility that the jury would have acquitted Goussis if the new evidence had been available at trial. The Court also found that the judge's instructions to the jury were appropriate, and the sentence was also appropriate.

Changes to the appeal system

The *Criminal Procedure Act 2009* (Vic.) introduced the first major changes to appeals in Victoria in almost a century. It simplified the grounds for appeal.

Table 6.3 Changes to the Victorian appeal system

APPEAL AGAINST CONVICTION (AVAILABLE ONLY TO ACCUSED)	
Grounds for appeal	**Orders on appeal**
• The verdict of the jury was unreasonable and cannot be supported having regard to the evidence. • The result of an error or irregularity in the trial causes a substantial miscarriage of justice. • For any other reason there has been a substantial miscarriage of justice.	• Set aside the conviction and order a new trial (the Court of Appeal can remand the appellant in custody or grant bail). • Enter a judgment of acquittal. • Enter a judgment of guilty of a lesser offence and impose a sentence. • Find the appellant not guilty due to mental impairment. • Dismiss the appeal.

APPEAL AGAINST SENTENCE	
For the accused	**Orders on appeal**
Leave to appeal against a sentence may be refused if there is no reasonable prospect that the Court of Appeal would impose a less severe sentence. The appellant must satisfy the court that there is an error in the sentence first imposed and that a different sentence should be imposed.	• Set aside the sentence and impose a sentence that it considers appropriate – whether more or less severe. • Remit the matter to the original court, with directions for the court. • Dismiss the appeal.
For the director of public prosecutions (DPP)	
The DPP can appeal against a sentence if the DPP: • considers that there is an error in the sentence imposed and that a different sentence should be imposed, and • is satisfied that an appeal should be brought in the public interest.	

Civil jurisdiction

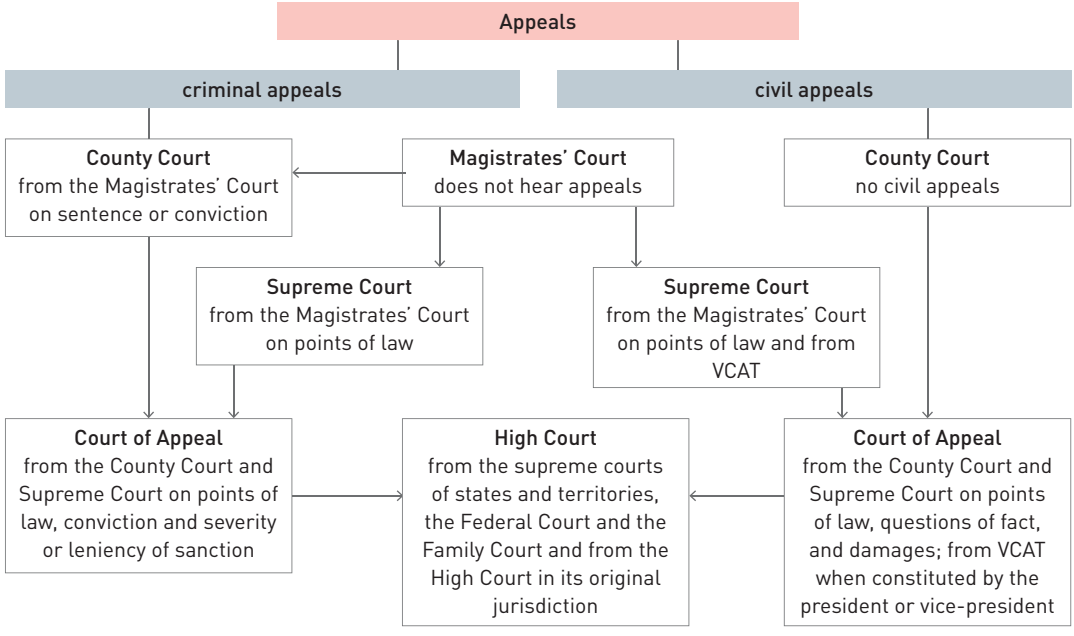
The Court of Appeal hears appeals in its civil jurisdiction from the County Court and from a single judge of the Supreme Court. It also hears appeals from the Victorian Civil and Administrative Tribunal when the tribunal has been constituted for the purpose of an order being made by the president or a vice-president.

The grounds for appeal in a civil matter include:

- a point of law
- a question of fact
- the amount of damages.

Appeals from the Court of Appeal

Criminal and civil appeals from decisions of the Court of Appeal are heard by the Full Court of the High Court.



Case transfers

While courts tend to hear mainly the cases within their jurisdictions stated above, it is possible for cases to be transferred between the Magistrates' Court, County Court and Supreme Court on the decision of the chief justice of the Supreme Court. This may be done due to the seriousness or complexity of the case, or to spread the workload. For example, the chief justice has directed some sex crime cases and serious drug matters to be heard by the Supreme Court to 'show judicial leadership in these difficult types of cases'.

The trial of Thomas Towle, who was charged with six charges of culpable driving among other offences, was transferred to the Supreme Court from the County Court because of the severity of the offences. See chapter 8 for more information on this case.

LEARNING ACTIVITY 6.6

Supreme Court (Trial Division and Court of Appeal)

1 Outline the jurisdiction of the Supreme Court (Trial Division).
2 Look back at the case study 'Conviction, retrial and not guilty verdict' and answer the questions.
   a What was the initial charge for, and why was it heard in the Supreme Court?
   b What happened on appeal?
   c What was the outcome of the retrial?
3 Given that the original civil jurisdiction of the Supreme Court (Trial Division) is the same as the County Court, who decides in which court a case involving a claim over $100 000 will be heard? Explain your answer.
4 What types of appeals can be heard in the Supreme Court (Trial Division)?
5 What grounds are required for a civil appeal to be heard in the Supreme Court (Trial Division)?
6 Look back at the case study 'Appeal dismissed' and explain the reasons for the appeal in this case.
7 What is the role of the Court of Appeal?
8 When may the Court of Appeal set aside a jury's verdict?
9 Read the case study 'Farquharson's appeal allowed, conviction quashed and retrial' and answer the questions.
   a Why was Farquharson's original conviction quashed?
   b What was the outcome of the retrial?
   c What was the outcome of *DPP v. Farquharson, ex parte Gambino* (2009)? Was this a criminal case? Explain.

CASE STUDY

Farquharson's appeal allowed, conviction quashed and retrial

Robert Farquharson, who was found guilty of murdering his three sons on Father's Day in 2005 by driving them into a farm dam, had his conviction quashed. The Court of Appeal, in 2009, found that the prosecution had not revealed to the defence team that one of the witnesses for the prosecution had criminal charges pending. The Court of Appeal also found that the trial judge had failed to properly instruct the jury about how much weight they should give to the evidence presented by this witness. It was the belief of the Court of Appeal that no reasonable jury could have come to a guilty decision on the evidence presented if proper directions had been made.

A retrial was ordered and Farquharson was granted bail.



Figure 6.10
Cindy Gambino, the mother of three sons murdered by their father, Robert Farquharson

Farquharson maintained his innocence and pleaded not guilty in the retrial in June 2010. He was again convicted of murder on 22 July 2010. On 15 October 2010, he was sentenced to life imprisonment with a minimum of 33 years. He unsuccessfully appealed to the Court of Appeal in 2012 and the High Court in 2013.

In the case *DPP v. Farquharson, ex parte Gambino* (2009), Cindy Gambino, the ex-wife of Robert Farquharson claimed compensation under the *Sentencing Act 1991* (Vic.). This Act provides victims of crime with the opportunity to seek compensation directly from offenders. The Supreme Court, criminal division, awarded Gambino $75 000 in respect of the murder of each child, making a total of $225 000 in compensation for grief and grief-like suffering.

10 Read the following cases and decide which court would hear each case and whether it would be in that court's original or appellate jurisdiction:
   - **a** Richard pulled out of a parking spot in his red Holden EH. He did not look carefully and bumped into a brand new Rolls Royce. The damage to the Rolls Royce was valued at $26 000. Richard was not insured, and the driver of the Rolls Royce is suing Richard for repairs to her car.
   - **b** Georgina was convicted of murder and sentenced to 20 years in prison. She wishes to take the matter back to court to challenge the severity of the sentence.
   - **c** Kristen recently sued Lorraine and Barry for negligence and was successful. The court awarded her $10 000 in damages. Lorraine and Barry were not happy with the decision. They feel that they have been unfairly treated by the court and want to take the matter further to change the decision.
   - **d** Harrison was awarded $60 000 in a personal injury case against Jessica. Jessica is appealing against the decision on a point of law.

11 Read the case study 'Woman acquitted of killing' and answer the questions.
   - **a** What is the original jurisdiction of the Supreme Court (Trial Division) for criminal matters?
   - **b** What was Claire MacDonald charged with and what was the outcome? Why do you think the jury reached this decision?
   - **c** If the woman had been found guilty, to which court could she appeal against the decision if the judge had given incorrect instructions to the jury?

CASE STUDY

Woman acquitted of killing

A jury acquitted 39-year-old Claire MacDonald of the murder and manslaughter of her husband, Warren MacDonald. During their 17-year marriage, Mrs MacDonald had been subjected to physical, emotional and sexual abuse by her controlling husband, who also abused their children.

The court heard that Mrs MacDonald lured her husband into a paddock. She then lay in wait for him in a sniper's nest for 90 minutes before fatally shooting him. The jury took one and a half days of deliberation before acquitting Mrs MacDonald.

12 Read the case study *Ejupi v. The Queen* and answer the questions.

- **a** What sentence did the trial judge give to Ejupi?
- **b** Would a jury have been used in this case? Explain.
- **c** On what grounds did Ejupi appeal to the Court of Appeal?
- **d** What decision did the Court of Appeal reach and why?

CASE STUDY

Ejupi v. The Queen [2014] VSCA 2

On the evening of 30 April 2012, Michael Jones, the victim, was at home at his address in Braybrook. After being alerted to the possibility of a theft, he, his father, his cousin and friends confronted Avji Ejupi, the appellant, in the front yard of neighbouring premises about breaking into vehicles. A scuffle eventually took place between Michael Jones, his father, his cousin and the appellant. The appellant fled down the street with the three men in pursuit.

The victim caught up with the appellant and grabbed him, intending to turn him over to the police when they arrived. Ejupi and Jones struggled. During the struggle, the appellant produced a long steak knife, which he used to stab the victim several times in the body and forehead. The appellant escaped the scene in a taxi.

The victim underwent life-saving emergency surgery. He had cuts to the forehead and three stab wounds to his torso, which had ruptured his spleen and collapsed his left lung.

On 11 June 2013, the appellant pleaded guilty in the County Court to two charges of attempted theft and one charge of recklessly causing serious injury. He was sentenced to a total effective sentence of five years' imprisonment, and was to serve a minimum non-parole period of three years and six months.

On 16 October 2013, Justice Nettle granted the appellant leave to appeal on the grounds that the sentence was manifestly excessive. The Court of Appeal was not persuaded that the sentence was excessive, taking into account factors such as the victim's injuries, the carrying of the knife while stealing and the appellant's relevant prior convictions. The appeal was dismissed.

13 Complete the following table.

OFFENCE/CLAIM	WHICH COURT WOULD HAVE ORIGINAL JURISDICTION?	WHERE WOULD THE CASE GO ON APPEAL?
Driving while disqualified		
Rape		
Attempted murder		
Burglary		
Treason		
Drunk in a public place		

HINT

The Study Design states that you only need to know the jurisdictions of the Victorian Magistrates' Court, County Court and Supreme Court. However, it would be useful to also have a background understanding of some other courts.

>>GOING FURTHER

Victorian specialist courts

There are other courts that form part of the Victorian court hierarchy. These are specialist courts that have jurisdiction to hear particular types of cases.

Children's Court

The Children's Court is a court that deals with children's particular problems. All proceedings are conducted in an informal manner, and the best interests of the child must always be paramount.

The court is divided into three divisions.

- **Family Division** – This division deals with children under 17 years who are in need of care and protection. Matters include interim accommodation orders, interim protection orders, irreconcilable differences applications and guardianship orders.
- **Criminal Division** – This division hears cases involving children aged between 10 and 18 at the time the offence was allegedly committed. All criminal charges except murder, attempted murder, manslaughter, defensive homicide, arson causing death and culpable driving can be heard in the Criminal Division, as well as committal proceedings and bail applications. Changes to defensive homicide have been suggested.
- **Koori Court (Criminal Division)** – This division hears cases where the child is an Aboriginal person who has committed an offence within the jurisdiction of the Criminal Division of the Children's Court, other than sexual offences. The child must consent to the case being dealt with by the court, and must either plead guilty, intend to plead guilty, or have been found guilty of the offence by the Criminal Division.

USEFUL WEBSITE

Children's Court www.childrenscourt.vic.gov.au



Figure 6.11 The Melbourne Children's Court

Coroner's Court

The Coroner's Court is a specialised Victorian court. Its primary role is to investigate the cause of unexpected deaths and fires in Victoria. A coronial inquest is presided over by a single coroner who must be a magistrate. It is an investigative court and is therefore not adversarial in nature

(it does not have two opposing sides trying to win a case). The aim of its investigations is to find the true cause of a death or a fire. The Coroner's Court can identify circumstances of death that might be avoided in the future, and encourage public debate that can lead to changes in the law.

The Coroner's Court investigates reportable deaths, which include deaths that are unexpected, violent, from an accident or of a person held in care. The Coroner's Court also investigates fires occurring in Victoria.

USEFUL WEBSITE

Coroner's Court www.coronerscourt.vic.gov.au

Federal courts

There are federal courts that administer Commonwealth laws.

High Court

The High Court is the highest court in the federal hierarchy of courts. It hears state and territory matters in its appellate jurisdiction, and as such is also the highest court in the court hierarchies of the states and territories. It is therefore able to impose some uniformity through its law-making power. If a precedent is established in the High Court, it applies to all states and territories where the law is relevant.

The High Court comprises a chief justice and six other justices; a sitting of the High Court can therefore involve up to seven justices. See table 6.2 in this chapter for more information on the High Court's jurisdiction and see also the discussion about the High Court's role in interpreting the Constitution in chapter 3.

The High Court hears appeals from the state supreme courts and the Full Court of the Federal Court. Leave must be sought before an appeal can be lodged.

USEFUL WEBSITE

High Court www.hcourt.gov.au

Family Court

The Family Court is a federal court that was established in 1976 under the *Family Law Act 1975* (Cth) and has courts in every state except Western Australia, which has its own state Family Court. The Family Court was established as a specialist court dealing only with matrimonial and associated proceedings, such as dissolution of marriage. Its jurisdiction has been expanded to deal with bankruptcy, administrative law and taxation appeals.

USEFUL WEBSITE

Family Court www.familycourt.gov.au

Federal Court

The Federal Court hears civil and criminal matters that come under federal law. It is a superior court of record and part of the federal hierarchy of courts. It sits in all capital cities and in other places from time to time.

Under its original jurisdiction, the Federal Court hears matters such as:

- matters arising under the *Trade Practices Act 1974* (Cth), such as restrictive trade practices and consumer protection, misuse of market power, exclusive dealing or false advertising
- corporations law covering winding-up of companies, corporate management and misconduct
- bankruptcy orders against persons who have committed acts of bankruptcy

- administration law, which provides for judicial review of most administrative decisions made under Commonwealth Acts
- taxation matters relating to objections to decisions of the commissioner of taxation, and appeals relating to taxation from the Administrative Appeals Tribunal.

USEFUL WEBSITE

Federal Court www.fedcourt.gov.au

The Federal Circuit Court

The Federal Circuit Court, formerly the Federal Magistrates Court, is able to hear matters relating to family law, human rights, consumer protection, bankruptcy and industrial law.

USEFUL WEBSITE

Federal Circuit www.federalcircuitcourt.gov.au

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

Tribunals provide a cheaper, quicker and less formal method of dispute resolution for **civil disputes** than taking the matter to court. They usually deal with a limited area of the law, and build up expertise in that area. In some instances legal representation is not allowed, which means the parties are able to conduct their own cases. The process of dispute resolution is less adversarial (two sides battling to win) than the courts. The emphasis is on finding an appropriate resolution acceptable to both parties.

Before 1998, there were a number of tribunals operating in Victoria, and the system was becoming cumbersome, expensive to administer and confusing to the public. This problem was addressed through the creation of the Victorian Civil and Administrative Tribunal (VCAT), which amalgamated 15 boards and tribunals to offer a one-stop shop dealing with a range of civil disputes.

VCAT began operations on 1 July 1998 and deals only with civil disputes. It does not deal with any criminal cases. It is made up of three divisions:

- Civil Division
- Human Rights Division
- Administrative Division.

The cases are divided into various lists, which are sections that specialise in particular types of cases. For example, the Human Rights List hears equal opportunity cases.

VCAT now hears many more civil cases than all of Victoria's courts combined. For the past few years it has typically resolved almost 90 000 cases per year.

USEFUL WEBSITE

VCAT www.vcat.vic.gov.au

VCAT'S VISION

To be 'an innovative, flexible and accountable organisation which is accessible and delivers a fair and efficient dispute resolution service'.

Structure

VCAT consists of the president, a number of vice-presidents, and deputy presidents, and senior and ordinary members. The president must be a judge of the Supreme Court. Vice-presidents must be judges of the County Court. Each deputy president manages one or more of the lists.

Hearings are conducted in the VCAT building in Melbourne, in addition to sittings being held at Magistrates' Court premises and other appropriate centres – nine in the metropolitan area and 27 in country locations. The Human Rights Division is now situated and conducts hearings at the William Cooper Justice Centre.

The divisions and lists of VCAT are shown in table 6.4.

Table 6.4 The Victorian Civil and Administrative Tribunal

ADMINISTRATIVE DIVISION	CIVIL DIVISION	HUMAN RIGHTS DIVISION
Legal Practice List – hears disputes between clients and lawyers, and discipline cases brought under the *Legal Professionals Act 2004* (Vic.) about a lawyer's conduct	**Civil Claims List** – deals with disputes between buyers and sellers of goods or services, including claims involving faulty consumer goods and services and deceptive conduct. Also hears disputes relating to owners' corporations (body corporates) in multi-unit developments, including issues involving common property	**Guardianship List** – hears cases involving people who cannot make reasonable personal or financial decisions for themselves due to a disability so a guardian needs to be appointed to look after the person's legal affairs
Planning and Environment List – deals with appeals and applications about the use and development of land, such as complaints about local council planning decisions or permits. It also hears disputes regarding land valuation and compensation for damage to or acquisition of land	**Domestic Building List** – hears disputes involving domestic building works between owners and builders, and appeals against decisions of insurers	**Human Rights List** – hears disputes regarding discrimination and equal opportunity, reviews of decisions made by the Mental Health Review Board, and complaints under various Acts relating to access to private health records
Review and Regulation List – deals with reviews of decisions made by licensing bodies, such as those bodies that regulate estate agents, motor car traders, taxis, racing and teachers	**Owners Corporation List** – hears applications in relation to owners corporations, often known as 'body corporates'	
	Real Property List – hears disputes relating to real estate, such as disputes between co-owners and water flow disputes	
	Residential Tenancies List – deals with disputes between landlords and tenants, such as non-payment of rent, damage to premises, bond refunds, maintenance of property	
	Retail Tenancies List – hears disputes between landlords and tenants of retail premises such as shops	

VCAT RESTRUCTURE

In February 2013, VCAT restructured its lists, which resulted in some lists being merged, or lists taking over responsibilities of lists that no longer exist. The restructure reduced the number of lists within VCAT from 16 to 11, making it easier for the community to navigate the jurisdictions of the tribunal and simplifying administrative procedures.

In summary, the restructure involved the following:

- the creation of the **Review and Regulation List**, which merged the General List, the Occupational and Business Regulation List and the Taxation List
- the creation of the **Human Rights List**, which merged the Anti-Discrimination List, the Health and Privacy List and the Mental Health List
- the inclusion of the Land Valuation List in the **Planning and Environment List**
- the inclusion of the Credit List applications in the **Civil Claims List**.

The restructure did not change or reduce the types of civil matters that can be heard in VCAT but rather enabled VCAT to create efficiencies in the way it manages its lists.

Role of VCAT

VCAT was established as an avenue of dispute resolution that is easily accessible to people in the community, using informal processes that are easy to understand. The tribunal aims to provide low-cost proceedings and timely resolution of civil disputes, as well as experts in particular fields of law, such as anti-discrimination. The decisions of the tribunal are binding on the parties and can be enforced through the courts.

Since its inception, VCAT's purpose has been to provide Victorians with a low-cost, accessible, efficient and independent tribunal delivering high-quality dispute resolution.

Each of these objectives is examined next.



Figure 6.12 Sisters Alisha and Cassie Prpich hold a dress that had a hole in it when Cassie bought it. The retailer would not replace the dress. Eventually she had to go to VCAT to get the problem fixed – she won the case with the help of her sister Alisha, a law student.

Low cost

For many proceedings the parties need only pay a **nominal amount for filing their claim**, although costs vary from list to list. Lodging an application with the Legal Practice List, Guardianship List or Human Rights List is free of charge (but for one exception). For claims less than $500 in lists such as the Civil Claims List and Residential Tenancies List, the fee is $44.90 (but changes from year to year and generally increases by a small amount).

As approximately 82 per cent of claims in the Civil Claims List, for example, fall into the small claims category (less than $10 000), this provides cost-effective access to the legal system for many people in civil disputes. For claims between $500 and $10 000, the fee is $132.30. Claims for more than $10 000 but less than $100 000 incur an application fee of $428.90.

Substantial changes were made to VCAT's fees in July 2013. One of the major changes was the introduction of fees for each day of hearing a proceeding for which a filing fee is payable, with no hearing fee payable for the first day (except in major cases in the Planning and Environment List). The hearing fee is $377.50 per day for days two to four, $631.70 per day for days five to nine, and $1054.20 per day for day 10 and any subsequent day.

The Magistrates' Court charges a filing fee of $273.50 for claims between $1000 and $10 000. The charges for the Magistrates' Court for claims between $10 000 and $40 000 is $416, and $624 for claims between $40 000 and $100 000. With the Magistrates' Court and County Court, there are additional costs associated with having a complaint heard (including legal costs).

The County Court fee for filing a writ is $769.10. Further fees are charged for the hearing.

If payment of the VCAT fee is likely to cause financial hardship, the principal registrar has the power to waive the fee.

Costs are further reduced for disputes heard at VCAT because **the parties are able to represent themselves**, rather than having to engage legal representation. VCAT provides assistance to parties who are unrepresented through members' guidance in hearings; Victoria Legal Aid duty lawyers will also provide unrepresented parties with free and confidential legal advice.

CHANGES TO VCAT'S FEES

On 21 May 2013, the *Victorian Civil and Administrative (Fees) Regulations 2013* were made by the Governor-in-Council. The new regulations replaced the *Victorian Civil and Administrative Tribunal (Fees) Regulations 2001* (Vic.) and set down a new regime and structure for VCAT fees.

The new regulations followed an extensive review by the Department of Justice of VCAT's fee structure. The Regulations reflect a significant shift in government policy in relation to the funding of courts and tribunals. As a result, fees charged within VCAT were calculated to aim to recover 45 per cent of the cost of running proceedings at VCAT.

Some of the extensive changes to the fees are:

- an overall increase in the application fees – some have substantially increased; an application under certain sections of the *Owners Corporations Act 2006* (Vic.) used to be $39, but is now $1553.60
- an introduction of fees for each day after the first day of a hearing for a proceeding for which an application fee is payable
- an increase of fees to inspect a file
- for major cases in the Planning and Environment List, a hearing fee of $3306.30 per day is now applicable.

The regulations stipulate that the fees will increase in 2015 and 2016. See the VCAT website at www.vcat.vic.gov.au for further details.

Timely resolution

A matter before VCAT can be heard in a shorter time than taking a matter to a court. For example, in the Residential Tenancies List, the busiest list of VCAT, the average time delay from application to hearing is two weeks. In the Civil Claims List, the second-busiest list, the average time is currently 18 weeks. The time taken at the actual hearing is also short, depending on the complexity of the case, with most hearings taking less than a day.

Accessible and informal

Hearings are less formal than using the courts and are not bound by the rules of evidence and procedure used in courts. Tribunals use a more conciliatory process rather than the adversarial process used in the courts of two parties fighting to win; in some instances the parties may be directed to attend mediation or a compulsory conference.

VCAT conducts hearings in various locations in Victoria. Its main centre is at King Street, Melbourne, but VCAT has a further 36 centres across the state, 27 of which are in country areas.

VCAT actively tries to increase its accessibility for ordinary people, using processes such as SMS reminder messaging for tenants in residential tenancy hearings, telephone and video conferences in place of attending the tribunal, lodging documents online and conducting hearings online via the Internet using VCAT Online.

Despite these initiatives, the president's review of VCAT in 2009 found that there was a perception in the community that the tribunal had become too legalistic and complex for ordinary members of the community. He said VCAT must address this problem. VCAT has continued to aim to improve its access to justice by ensuring its procedures are, as far as possible, informal.

CASE STUDY

Discrimination against youth suicide group

In 2010, VCAT found that Christian Youth Camps Ltd (CYC), which operates Phillip Island Adventure Resort, discriminated against Cobaw Community Health Services. Cobaw manages the WayOut Project, which is a youth suicide prevention project targeting same-sex attracted teenagers in rural Victoria. The discrimination occurred when youths from the WayOut Project telephoned CYC, inquiring into hiring the resort for a weekend retreat. CYC refused to make the booking. CYC appealed the decision to the Court of Appeal, which heard the case in February 2013. In April 2014, the Court of Appeal dismissed the appeal and found that CYC and the Christian Brethren Church did discriminate against the youth suicide prevention group.



Figure 6.13 Youths from the WayOut Project

Expert bodies

Each of the lists within VCAT is staffed by personnel who are experienced in working in that list. This enables members and support staff to develop expertise in dealing with the specific laws and related disputes in that area. VCAT members include legal practitioners and other professionals with specialised knowledge or expertise, such as planners, engineers, architects, medical practitioners, accountants, land valuers and real estate agents. Some work across a number of lists.

Professional development for members and staff is ongoing. VCAT established an in-house learning centre in 2009, which works closely with the Judicial College of Victoria, to ensure that VCAT provides ongoing professional development, training and support for staff.

Types and incidence of disputes heard

As can be seen from table 6.4, the range of disputes heard by VCAT includes:

- consumer matters
- credit
- discrimination and equal opportunity
- domestic building works
- guardianship and administration
- residential tenancies and retail tenancies
- disputes between people and government agencies about land valuation; about licences to carry on businesses including travel agents, motor car traders and others; and about planning or state taxation
- government decisions, such as Transport Accident Commission decisions and freedom-of-information issues.

Table 6.5 Cases received for each list in the 2012–13 financial year

LISTS		CASES RECEIVED	PERCENTAGE OF TOTAL CASES RECEIVED
Human Rights Division	Guardianship	10 942	12.1
	Human rights	323	0.4
Civil Division	Civil claims	9 205	10.2
	Domestic building	1 497	1.7
	Legal practice	230	0.2
	Owners corporations	3 246	3.6
	Real property	206	0.2
	Residential tenancies	59 455	65.6
	Retail tenancies	333	0.4
Administrative Division	Planning and environment	3 622	3.9
	Review and regulation	1 567	1.7
TOTAL		**90 626**	**100.0**

Source: VCAT *Annual Report 2012–13*

Original jurisdiction

VCAT's power comes from many Acts, including the *Victorian Civil and Administrative Tribunal Act 1998* (Vic.) and other enabling Acts such as the *Residential Tenancies Act 1997* (Vic.) and the *Equal Opportunity Act 2010* (Vic.).

Review jurisdiction

The tribunal hears disputes involving individuals and organisations, and also reviews decisions of some other decision-makers. An Act may specify that a review of a decision may be made by VCAT. For example, the *Victims of Crime Assistance Act 1996* (Vic.) specifies that a decision of the Victims of Crime Assistance Tribunal can be reviewed by VCAT. The *Transport Act 1983* (Vic.) specifies that a decision of the Public Transport Corporation can be reviewed by VCAT.

When VCAT reviews a decision of a decision-maker, it can:

- affirm the decision
- vary the decision
- set aside the decision and make another decision in substitution
- set aside the decision and remit the matter for reconsideration by the decision-maker.

As with the courts, the decision of VCAT is binding on the parties.

CASE STUDY

Is Mylo a restricted breed?

Jessica Gray has been to VCAT three times in relation to a dispute with Brimbank City Council about whether her dog Mylo is a restricted breed of dog (American pit bull terrier). The applications were made in the Review and Regulation List, which reviews decisions made by councils about restricted breeds of dog. Jessica Gray appealed to the Supreme Court after VCAT ordered that Mylo be put down. The case is to be heard in VCAT again.

Orders

The types of orders that VCAT can make in a hearing vary from list to list, as appropriate. In general VCAT can:

- require a party to pay money
- require a party to do something, such as perform work, carry out repairs, vacate premises
- require a party to refrain from doing something
- declare that a debt is or is not owing
- review, vary or cancel a contract
- dismiss a claim.

Decisions of VCAT are **binding** on the parties. When VCAT has made an order requiring money to be paid to a person, and the money has not been paid, the person to whom the money is owed can have the tribunal's order enforced by filing a copy of the order with the relevant court, for example the Magistrates' Court for orders under $100 000. That court will then certify the order so that the person can enforce it.

Orders that do not require the payment of money, such as an order that work be done to fix a defective good, can be certified by filing the order at the Supreme Court.

Appeals

Appeals from a decision made by VCAT may only be made on a point of law. If the tribunal was presided over by the president or a vice-president, the appeal will be heard in the Court of Appeal. All other appeals will be heard in the Trial Division of the Supreme Court.

CASE STUDY

Sinclair & Anor v. Tripodis Constructions Pty Ltd & Anor [2013] VSC 722

The applicants, Mr and Mrs Sinclair, sought leave to appeal an order made by VCAT on 16 May 2013, in which VCAT ordered that a permit be granted to redevelop land at Black Rock for the construction of four double-storey dwellings on the site.

The applicants complained that VCAT did not take into account evidence from an architect about the character of the neighbourhood, and did not carry out any analysis of area density.

The appeal came before Justice Emerton of the Supreme Court in October 2013. On 19 December 2013, Justice Emerton handed down her decision and found that VCAT made no error. Further, Justice Emerton noted that the applicant must identify a question of law arising out of the tribunal's decision, but need not establish that VCAT erred. She found that in this case there was no real or significant argument that an error of law existed and refused leave to appeal.

LEARNING ACTIVITY 6.7

VCAT

1. Explain two advantages of having a 'super tribunal' such as VCAT, compared with having many different tribunals.
2. How does VCAT help to keep costs low for parties with a dispute?
3. Look back to 'Changes to VCAT's fees'. To what extent do these changes affect VCAT's ability to achieve its purpose of having a 'low-cost' resolution centre? Justify your answer, giving examples.
4. What steps does VCAT take to ensure that complainants can readily access its services?
5. Suggest two reasons why VCAT has grown in importance in the Victorian legal system.
6. Look back at the case study 'Discrimination against youth suicide group'. Explain the key facts of the case and the outcome.
7. Look back at the case study 'Is Mylo a restricted breed?' Which VCAT list heard this case? Why do you think this case was able to be appealed in the Supreme Court?
8. Look back at the case *Sinclair & Anor v. Tripodis Constructions Pty Ltd & Anor* and answer the questions.
   a. Which list would have heard this claim?
   b. On what grounds can an appeal be made? Were such grounds made out in this case? Explain.
   c. Describe the outcome of this case. Do you agree with the decision? Explain.
   d. Why was this case appealed to the Supreme Court (Trial Division) and not the Court of Appeal?
9. Read the case study 'Taxi driver's accreditation reinstated' and answer the questions.

a Which list would have heard this claim?
b Who is likely to appeal this case, and to which court would it be appealed?
c Explain two benefits to Mr Hothi of having this matter heard by VCAT rather than in a court.

CASE STUDY

Taxi driver's accreditation reinstated

The Victorian and Civil Administrative Tribunal has reinstated the accreditation of two taxi drivers.

Mr Harjinder Hothi had been a taxi driver for the past 15 years and had more recently operated a taxi business in partnership with his son, Jason Singh Hothi. In 2008, following a new accreditation regime imposed on taxi drivers, Mr Hothi made an application to operate taxis and own a taxi licence.

After submitting a police certificate in December 2012, it was disclosed that Mr Hothi had been convicted in 1991 for giving false testimony and for conspiracy to prevent or defeat the execution or the enforcement of a law. In light of the provisions of the *Transport Act 1983* (Vic.), the Taxi Services Commission cancelled the accreditation of both Mr Hothi and his partnership, and imposed a period of disqualification.

Mr Hothi appealed the decision to VCAT, which had discretion to reinstate the accreditation. After considering the issue, VCAT decided to reinstate the accreditation, taking into account that the offences took place 23 years ago, the good and honest character of the applicants and the fact that there was no evidence to suggest that Mr Hothi would commit further offences.

10 **Investigation**

Look up VCAT on the Internet at www.vcat.vic.gov.au. Investigate the role of VCAT and prepare a report or PowerPoint presentation on its role.

HUMAN RIGHTS LIST – A STUDY OF ONE OF THE VCAT LISTS

The Human Rights List in the Human Rights Division of VCAT is one of the newest lists of VCAT. The Human Rights List has absorbed the matters heard by the now non-existent Anti-Discrimination List, the Health and Privacy List and the Mental Health List.

In 2012–13, the Human Rights List heard 298 cases, 237 of which were anti-discrimination cases, 39 were cases related to health and privacy, and 22 were cases dealing with mental health.

Jurisdiction of the Human Rights List

The Human Rights List has jurisdiction to hear matters arising out of Acts such as the *Equal Opportunity Act 2010* (Vic.) and the *Assisted Reproductive Treatment Act 2008* (Vic.).

The majority of cases heard by the Human Rights List are anti-discrimination cases. Under the *Equal Opportunity Act 2010* (Vic.) it is unlawful to discriminate on a number of grounds including age, physical features, gender identity, marital status, race and religious belief. It is also unlawful to discriminate in a number of areas such as education, employment, accomodation and sport.

Complainants must establish discrimination on at least one ground, which must have occurred within at least one recognised area, in order to pursue a case.

CASE STUDY

Allegations of discrimination

In November 2013, VCAT conducted a hearing about whether or not the applicant had been discriminated against in the area of employment on the basis of his disability. The applicant had sought a job as a parking officer and claimed he was discriminated against because of a physical disability. The claim was denied.

VCAT dismissed the case, finding that there was no evidence to support the claim.

Dispute settlement process

A person who has been unlawfully discriminated against in Victoria can first take their complaint to the **Victorian Equal Opportunity and Human Rights Commission**, which will investigate the complaint and try to help the parties reach a resolution through conciliation. Since new legislation was passed in 2010, an applicant may either apply to the commission or directly to VCAT for some types of applications.

Where possible, the Human Rights List will refer the parties to **mediation** or order that the parties attend a compulsory conference. Disputes that are not successfully resolved at mediation will then be sent to a hearing before a VCAT member. The Human Rights List has sought to actively manage applications at an early stage to identify the most appropriate hearing process. (See further in this chapter for information on mediation and conciliation.)

Orders of the Human Rights List

In discrimination cases, VCAT can require a person to stop discriminating against the complainant; order the person to pay compensation to the complainant; order the person to perform specified acts to redress any loss, damage or injury suffered by the complainant; decline to take further action or dismiss the action.

VCAT cannot order an employer to dismiss a person who has been employed in place of the person who has been discriminated against, but it can order that the complainant be considered for the next available position. This also applies in situations such as accommodation.

For mental health and privacy matters which deal with a complaint made about the decision of a state body, the tribunal can either affirm or reverse the decision of that body.

LEARNING ACTIVITY 6.8

Human Rights List

1 Describe two types of cases heard by the Human Rights List of VCAT.
2 Look back at the case study 'Allegations of discrimination' and answer the questions.
   a What was the complaint made in this case?
   b What was the outcome?
   c Explain the reason for the decision given by VCAT.
3 Read the extract '*Lloyd v. Lay* (Human Rights) [2013] VCAT 1980 (29 November 2013)' and answer the questions.

a State the grounds and area of discrimination for which Mr Lloyd is claiming discrimination.
b The applicant did not have legal representation. Discuss one strength and one weakness relating to the decision not to have legal representation.
c What was the outcome of this case?
d Try to find the case referred to within this extract at www.austlii.edu.au/au/cases/vic/VCAT (select the year 2013, scroll down to November and look up the case name). Once found, scan the document and identify the basis on which this case was dismissed.
e What is meant by the standard of proof? What standard was applied in this case?
f Which party may appeal this decision, what grounds for appeal would be needed, and where would the appeal be heard?
g Explain two benefits of having this dispute resolved through VCAT, rather than through the courts.

EXTRACT

Lloyd v. Lay (Human Rights) [2013] VCAT 1980 (29 November 2013)

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
Human Rights Division – Human Rights List

APPLICANT	Allan Lloyd
RESPONDENT	Ken Lay
INTERVENER	Victorian Equal Opportunity and Human Rights Commission
WHERE HELD	Melbourne
BEFORE	J. Grainger, Member
HEARING TYPE	Hearing
DATE OF HEARING	23, 24, 25, 26 and 27 September 2013
DATE OF ORDER	29 November 2013
DATE OF REASONS	29 November 2013

ORDER

The application is dismissed.

J. Grainger, Member

APPEARANCES:

For Applicant	In person
For Respondent	Richard Niall, Senior Counsel, with Jack Tracey, Counsel
For Intervener	Jennifer Jones, Solicitor

REASONS

BACKGROUND

1 The applicant, Allan Lloyd (Mr Lloyd), is a Leading Senior Constable employed by Victoria Police.
2 Mr Lloyd has worked for Victoria Police as a sworn member for 15 years. He currently has facial hair, which he describes as a neatly trimmed goatee. He has done so since about 2005, after [the then] Chief Commissioner Christine Nixon amended the Grooming Standard contained in the Victoria Police Manual (VPM) to allow sworn members to have neat and tidy goatees.

Source: Victorian Civil and Administrative Tribunal



Figure 6.14 Ken Lay, the respondent

FURTHER INFORMATION ON *LLOYD V. LAY*

In December 2011, Chief Commissioner Ken Lay informed all Victoria Police members by email that the guidelines had changed and male members would no longer be allowed to have ponytails or buns, beards, goatees, soul patches and other forms of facial hair other than clean, tidy and neatly trimmed sideburns and moustaches under the new grooming standards. Chief Commissioner Lay stated, 'these changes will become force policy and there is a requirement to comply with the new standards'.

In February 2012, Mr Lloyd complained to the Victorian Equal Opportunity and Human Rights Commission. Mr Lloyd was exempted from the new standards until his complaint had been heard.

In June 2012, the commission conducted a conciliation session. The dispute was not resolved. Mr Lloyd made an application to VCAT.

Mr Lloyd alleged direct discrimination on the basis of physical features in the area of employment in breach of S18(d) of the *Equal Opportunity Act 2010*. The specific physical feature claimed is facial hair.

Mr Lloyd maintained that he had suffered from stress and anxiety as a result of the dispute and his relationship with his partner has been affected.

VCAT dismissed the case.

DISPUTE RESOLUTION METHODS

Courts and tribunals employ a range of methods to resolve disputes, particularly in civil matters.

Most **criminal cases** use **judicial determination** as a method of resolving disputes. That is, they are heard before a judge and jury (except cases in the Magistrates' Court or appeals). The judge hears the case and a legally-binding decision is reached (by the jury, if present).

Civil cases also use judicial determination as a method of resolving disputes. However, most civil cases are resolved through other dispute resolution methods such as mediation, conciliation and arbitration. This is less formal dispute resolution, where a dispute is reconciled between the parties with the help of an independent third party.

Often mediation is a compulsory step in most state courts before civil matters reach a hearing before a court or VCAT.

Mediation, conciliation and arbitration are generally not appropriate for criminal cases, although victim–offender mediation is used in some instances.

Mediation, conciliation and arbitration are **alternative dispute resolution** (ADR) methods, or **appropriate dispute resolution** methods, and can be used by the parties without going to VCAT or the courts. However, these methods are also used by the courts and VCAT to resolve disputes before, or as an alternative to, judicially determining the case.

Mediation

Mediation is a **cooperative method of resolving disputes** and is widely used by courts, tribunals and other dispute resolution bodies.

It is a tightly structured, joint problem-solving process in which the parties in conflict sit down and discuss the issues involved, develop options, consider alternatives and reach an agreement through negotiation. They do this with the help of one or two trained mediators, who are neutral and impartial. Parties may bring support people or representatives with them to mediation; lawyers may be permitted in some instances.

A **mediator does not interfere**, but allows the parties to have control of their dispute, explore the options and attempt to resolve the dispute by reaching an agreement that satisfies the needs of both parties. The role of the mediator is to facilitate discussion between the disputing parties, and ensure that both parties are being heard. The mediator does not need to be an expert in the field that is the subject of the dispute, but does need to possess a high level of conflict resolution skills. They will not make decisions about whether there has been a breach of the law, or offer legal advice.

Although mediation is not legally binding, in most situations of mediation a deed of settlement is drawn up. This deed of settlement is enforceable through the courts.

MEDIATION

- involves two parties
- the mediators help the parties to negotiate, but do not give suggestions for ways to resolve the dispute
- not binding (unless the parties enter into terms of settlement which can be legally enforceable)

Steps often followed in mediation

- introduction by mediator and explanation of the rules
- each party makes an uninterrupted statement of their side of the dispute
- the main issues or concerns are listed by the mediator
- parties separate into two rooms and the mediator speaks to each party privately and confidentially in turn
- offers and solutions are passed between the parties through the mediator
- if an agreement is reached, a voluntary agreement, normally by way of a 'deed of settlement' is drawn up and executed by the parties

Disputes suitable for mediation

Types of disputes suitable for mediation include:

- when a continuing relationship is required, such as when the dispute is between neighbours or family members
- when both parties are prepared to meet in a spirit of compromise and are willing to stick to any agreement reached

- where a defendant may admit liability but the only issue to determine is the amount to be paid to the plaintiff
- where the dispute is one where a combination of remedies can achieve the plaintiff's outcome
- where the parties expect the legal costs will be extraordinary and the matter is best resolved at an early stage.

Disputes unsuitable for mediation

Types of disputes unsuitable for mediation include:

- disputes where there is no continuing relationship between the parties
- where there are overwhelming emotions that can interfere with the negotiating process
- where there is a history of broken promises
- disputes involving violent and threatening behaviour, including domestic violence and child abuse
- disputes where both parties are not willing to try to reach a mutual agreement
- disputes where there is evidence of a gross imbalance of power
- disputes where the mental health of one or both of the parties suggests that mediation is unlikely to be effective
- disputes relating to a debt clearly owing by one party (e.g. failure to pay the balance of a car)
- disputes between landlords and tenants over rent arrears or occupancy.



Figure 6.15 Commencement of a mediation session

Mediation

- two disputing parties, with possible representatives
- third party = mediator whose role is to facilitate communication between the parties
- resolution is made by the parties, voluntarily
- resolution is not legally binding
- used extensively in Victorian courts and VCAT

Use of mediation in resolving disputes

Courts

The **Magistrates' Court**, **County Court** and **Supreme Court** refer civil cases to mediation to speed up their resolution and reduce the backlog of cases. Mediation is seen as working alongside courts. It is offered in suitable cases at a fixed point before the cases are set down for trial or hearing, or earlier if possible.

Courts may order a proceeding to mediation, with or without the consent of the parties, or parties can ask the court to refer them to a mediator. The mediator can be appointed by the court, or agreed

upon by the parties. The cost of the mediator is usually split between the parties. Associate judges in the County Court and Supreme Court can also mediate disputes. **Associate judges** are members of the court who carry out judicial functions, and generally hear and determine issues that arise before and after trial in civil cases.

In 2012–13, the Supreme Court reported that the number of mediations conducted by associate judges or registrars had increased. In that year, mediation was listed in 259 cases. Of those that proceeded to mediation, 131 were settled, 62 were not resolved and the balance were either partly finalised, adjourned or vacated.

The chief justice of the Supreme Court has stated that: 'It should be stressed that mediation is not an inferior type of justice. It is a different type of justice. All studies of dispute resolution show that people greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements.'

Specific mediation programs include the following.

- **mediation in the Magistrates' Court** – Mediation can be used to resolve a non-violent dispute. The Dispute Settlement Centre of Victoria provides a free mediation service. This involves all defended civil disputes where the amount claimed is less than $10 000 ($40 000 in some locations including Broadmeadows and Bendigo).
- **judicial resolution conferences** – In certain civil cases, the Magistrates' Court, County Court, Supreme Court and Children's Court can order that a judicial resolution conference takes place. Mediation, early neutral evaluation, judicial settlement conferences and conciliation are used during this process.
- **civil appeals** – Mediation has also been used in civil appeals. The success of this program has been outstanding.

JUDICIAL SETTLEMENT CONFERENCES

In 2012, the County Court of Victoria implemented judicial settlement conferences in serious injury cases.

The aim of the program was to encourage early settlement of cases by using judicial settlement conferences. The conferences are informal but held in a courtroom. The parties are encouraged to discuss issues and resolve the dispute early and without having to go to trial.

By 30 June 2012, roughly 30 per cent of these cases had settled at the judicial settlement conference or within the following 60 days. In 2012, it was proposed to hand over the conduct of the settlement conferences to the parties.

Judicial settlement conferences continue to be used in the County Court but without the use of a judge. The parties are responsible for arranging and attending a conference.

Some cases are settled during the mediation process; others resolve some issues and continue to trial. In the Supreme Court a range of management models involving mediation are provided so that litigators may find the model that suits their case. The asbestos cases, for example, are intensively managed before the same associate justice and are prepared for trial in weeks and sometimes, if the death of the plaintiff is imminent, even days.

Victorian Civil and Administrative Tribunal

VCAT encourages parties to try to resolve their dispute using mediation, as it minimises costs and disruption to the parties, and helps them to stay in control of the outcome. The preferred forms of dispute resolution other than judicial determination and a final hearing at VCAT are mediation and compulsory conferences, although other methods are also used.

Mediation is used extensively in the:

- Human Rights List
- Domestic Building List
- Planning and Environment List
- Retail Tenancies List
- Legal Practice List.

In 2012–13, approximately 65 per cent of cases lodged with VCAT were resolved during or after mediation.

If the parties agree to a settlement in mediation, then the mediator will notify VCAT, which will make the necessary orders to give effect to the agreed settlement. If a settlement is not reached, the matter will proceed to a hearing.

A stated aim of the President of VCAT is for VCAT to be a centre of excellence for ADR. To this purpose, VCAT has been involved in developing and implementing ADR strategies.

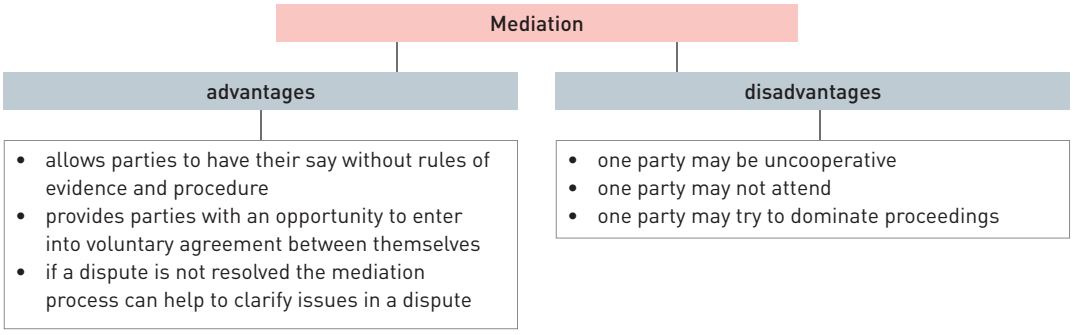
Specific mediation initiatives at VCAT include the **Mediation Centre** on the second floor of VCAT's Melbourne offices in King Street, which offers amenities conducive to achieving settlements at mediation. The centre comprises dedicated hearing rooms, meeting areas and a suite of mediation break-out rooms.

In small claims (less than $10 000), VCAT uses the **Short Mediation and Hearing** (SMAH) program. This program requires the parties to attend a brief mediation on a Thursday morning, conducted by a VCAT mediator before the hearing. If the matter does not settle, the parties are scheduled for hearing on the same day. This provides the parties with a 'final' opportunity to explore resolution at a mediation immediately before the hearing.

Other uses

The use of mediation as a method of dispute resolution for civil disputes is growing throughout the legal system. Individuals may attempt mediation at any time, without needing a court direction. Examples would include the following.

- The parties may contact the **Dispute Settlement Centre of Victoria** (DSCV) or private mediators, such as through the Institute of Arbitrators & Mediators Australia.
- Professionals such as social workers, lawyers and police officers can also refer or advise disputing parties to attend mediation. The Law Institute of Victoria has an ADR Mediation Service, which is a panel of approved mediators. The cost of mediation varies depending on the providers used.
- Sometimes, the parties may have entered into a contract which stipulates that the dispute must first be resolved through mediation, or another method such as arbitration, before court action can begin. In 2012, Gina Rinehart argued that in 2006 she signed an agreement with her children to resolve any disputes over the family trust in confidential mediation or arbitration, after her children launched legal action against her.



LEARNING ACTIVITY 6.9

Dispute resolution methods – mediation

1 Explain what is meant by mediation. Identify two types of disputes that could be suitable for resolution through mediation.
2 Briefly describe the processes used in reaching an agreement through mediation.
3 Discuss the advantages of using mediation as a method of resolving a dispute.
4 What are some of the problems that might be experienced when attempting to resolve disputes through mediation?
5 Choose three types of disputes that are not suitable for mediation and explain why you think this would be the case.
6 Describe the ways in which mediation is used in the Supreme Court.
7 How is mediation used in VCAT? Comment on how successful mediation is in settling disputes.
8 Give an example of the success of mediation when used by courts in resolving disputes.
9 Explain what is involved in judicial resolution conferences.
10 Read the extract 'Tea and a chat' and answer the questions.
   a Identify the three types of dispute resolution methods or dispute resolution bodies that are identified in this article.
   b Briefly explain the benefits of VCAT and mediation that are identified in the article.
   c Briefly explain the downsides of using VCAT and mediation to resolve a dispute that are identified in the article.
   d Identify at least two disputes where a 'tea and a chat' without any third party involvement is likely to be unsuitable to resolve the dispute.

EXTRACT

'Tea and a chat' could avert many VCAT conflicts between neighbours, planning experts advise

Cassandra Stanghi and Rebecca McGavin, *The Age*, 16 February 2014

It started with a complaint to the council over music and chatter from relatives staying in a former caretaker's residence on a neighbour's Park Orchards property.

But Jessica Paterson says she was unprepared for the rift that developed after Manningham City Council then refused to let her neighbours use the building as a second dwelling.

'Our kids used to play together, but now we just get dirty looks,' Ms Paterson said of the council decision last year upheld by the Victorian Civil and Administrative Tribunal. 'It's a shame because my young kids really liked their older sons.'

Some say neighbours' disputes heard by Victoria's planning appeals tribunal could have been resolved over a cup of tea. Dr Beau Beza, of RMIT University, said appeals to VCAT over neighbourhood planning disputes were not uncommon.

'Much of this can be avoided, in my opinion,' said Dr Beza, who directs the university's international urban and environmental management program.

'For example, one way is proposing the owners involved invite the others over for a cup of tea and start the conversation. A lot of the time that does not happen, and the first thing that happens is they know about it when a notice appears.'

Property lawyer Robert Bradley, of Aitken Partners, agreed tea could help, but before a dispute: 'A cup of tea has no curative value.'

He doubted the value of mediation, saying many people were determined to win rather than find a solution. 'It is often a case of who is going to give in first because they are sick of it, not who is right or wrong.'

Mr Bradley said appealing to VCAT was often the only solution, with mediation another step in protracting conflict. 'I would like to see more neighbourhood and property disputes being able to be referred to VCAT rather than go off to the courts.'

Planning lawyer David Vorchheimer said while VCAT could and did conduct mediation, there were times when adjudication was the best option.

'At VCAT sometimes the pettiness fades down – not always,' he said.

'With neighbourhood disputes the reality is that anything in the planning sphere represents change at your doorstep in terms of your private home, which people feel passionately about and feel the need to protect at literally any cost.

'Sometimes we have to let it go to the adjudicator because we are not going to get a result any other way.'

Dr Beza, who would 'strongly encourage' disputants to accept mediation, said recourse to VCAT could sour relations permanently. 'Always then there is a tension between the parties, and it is very hard to recover from that.'

Dr Beza said councils often took a 'hands-off or black-and-white kind of approach', particularly in cases where neighbours were allowed 'as of right' to carry out their plans without formally notifying the people next door.

Conciliation

Conciliation is a process of dispute resolution involving the assistance of a third party, with the aim of enabling the parties to reach a decision between themselves. The third party does not make the decision, but listens to the facts, makes suggestions and assists the parties to come to their own decision. The conciliator assists by exploring solutions to the dispute and suggesting possible options.

Conciliation differs from mediation in that the conciliator exercises a greater influence over the outcome than is done in mediation. The conciliator, who is usually someone with specialist knowledge, suggests options and possible solutions and is more directive than a mediator.

The decision made by the parties is not binding unless the parties enter into terms of settlement, which can be legally enforceable. However, a decision reached through conciliation is more likely to be followed because it has been made in front of a third party.

CONCILIATION

- involves two parties
- the conciliator helps the parties to negotiate and makes suggestions
- not binding (unless the parties enter into terms of settlement which can be legally enforceable)

Conciliation

- two disputing parties, with possible representatives
- third party = conciliator whose role is to facilitate communication between parties, and offer suggestions and solutions
- resolution is made by the parties, voluntarily – it may be on the advice of the conciliator
- resolution is not legally binding
- used in some courts and VCAT, as well as other dispute resolution bodies



Figure 6.16
A conciliator and two parties to a dispute

Use of conciliation in resolving disputes

Courts

Conciliation is used in a number of situations where a third party is needed to assist the parties to reach a resolution.

- Similar to mediation, a court may refer a matter to a **conciliator**. While it is rare for a court to refer a matter to conciliation as opposed to mediation, it may be more appropriate in cases where the parties need more direction from the third party.
- Matters where a notice of defence is filed in the Magistrates' Court (with the exception of claims for motor vehicle collisions or claims for less than $1000) are referred to a **pre-hearing conference** or mediation before they are listed for hearing. A pre-hearing conference is a compulsory meeting of parties and/or their legal representatives at the court at a date and time fixed by the court. The conference is normally conducted by a registrar in the form of conciliation, but may be conducted by a judicial registrar or a magistrate. The process is informal and discussions are confidential. The conferences save costs and valuable court hearing time because matters can be settled without going to court. If a settlement cannot be reached, the registrar can refer the matter back to court. It is likely that some of the issues will have been clarified before the court hearing.
- The Family Court (a federal court) will often send the parties to a **conciliation conference** before the matter goes to court. The Family Court sees this as a genuine attempt to resolve the dispute and encourages the parties to attend in a spirit of compromise.

Victorian Civil and Administrative Tribunal

The **Victorian Civil and Administrative Tribunal (VCAT)** can order the parties to a dispute to take part in a compulsory conference to identify and clarify the nature of the issues in dispute in the proceedings, and to promote a settlement before a matter is heard in the tribunal. This conference is conducted using a conciliation process. If the parties are unable to reach an agreement at the conference, the matter can be resolved in the tribunal. **Compulsory conferences** are commonly used in the Civil Claims List (for disputes over $10 000), the Domestic Building List and the Guardianship List of VCAT.

In 2012–13, of the 1196 cases that went to a compulsory conference, 678 were resolved at the conference, and 117 were resolved before final hearing.

Other uses

Conciliation is used by several bodies that help disputing parties to resolve disputes, including:

- **Victorian Equal Opportunity and Human Rights Commission** – may conduct conciliation between parties in a discrimination dispute
- **Consumer Affairs Victoria** – assists with the resolution of consumer and tenancy disputes
- **Accident Compensation Conciliation Service** – statutory body charged with resolving workers' compensation claims in Victoria
- **Estate Agents Resolution Service** – deals with disputes regarding the conduct of estate agents
- **Fair Work Commission** – the national industrial relations tribunal given power to hear disputes between employers and employees (and sometimes unions)
- **Building Advice and Conciliation Victoria** – assists consumers and builders in resolving domestic building and renovation disputes.

Each of these bodies offers the assistance of trained conciliators to guide disputing parties to reach a resolution. If the process is unsuccessful, these matters are generally referred to VCAT.

Conciliation may also be used by parties without any direction by a court or tribunal, or when organised by their legal practitioners.

Conciliation

advantages	disadvantages
• not as formal as going to court • conciliator can provide direction and suggestions	• parties may prefer to reach agreement between themselves without interference by a third party • parties may feel directed into making a resolution that they do not want

Arbitration

Arbitration is a method of resolving disputes without the formal court process. An independent arbitrator (person given the task of presiding over the discussion) will listen to both sides and make a decision that is binding on the parties. This may be compulsory arbitration, such as in the Magistrates' Court, or parties may have previously agreed to settle their dispute by arbitration. For example, a contract between two parties might include a clause stating that if a dispute arises, both parties agree to follow the decision of an independent arbitrator.

ARBITRATION

- involves two parties
- the arbitrator helps the parties to negotiate and makes a resolution
- binding

Arbitration	
	• two disputing parties, with possible representatives • third party = arbitrator whose role is to listen to the evidence and arguments of the disputing parties, then make a decision • resolution is decided by the arbitrator • arbitrator's decision is legally binding • used in the Magistrates' Court for claims of less than $10 000, and in private and commercial disputes

Use of arbitration in resolving disputes

Courts

In civil matters before the **Magistrates' Court** where the claim is less than $10 000, the parties must (except in special circumstances) settle their dispute before an arbitrator, usually a magistrate, or in minor issues the court registrar.

In conducting the arbitration, the Magistrates' Court:

- is not bound by rules of evidence but may inform itself on any matter as it thinks fit
- is bound by the rules of natural justice
- is not required to conduct the proceedings in a formal manner
- may exercise any powers that the court may exercise in hearing and determining a complaint.

This process avoids the formality of the court and the strict rules of evidence and procedure. It also avoids the need for legal representation, although it is acceptable for the parties to be legally represented if they wish.

An arbitration list has been established in the Commercial Court division of the Supreme Court, which began operations in February 2010. The aim of the arbitration list is to provide an opportunity for greater speed and flexibility in the resolution of commercial or business disputes.

Victorian Civil and Administrative Tribunal

Under S77 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic.), VCAT is able to refer a matter to arbitration on the basis that it is a more appropriate forum. For example, the parties may make a request to VCAT that an order be made that the matter be referred to arbitration because the contract between the parties dictates that disputes are to be resolved by arbitration.

CASE STUDY

Subway Systems Australia Pty Ltd v. Ireland [2013] VSC 550

The two parties had entered into an agreement which contained a clause stating that any dispute was to be resolved by arbitration. Mr and Mrs Ireland had purchased a Subway franchise business in Doncaster and a dispute arose regarding whether the agreement constituted a 'lease' or a 'licence'.

Subway Systems Australia Pty Ltd argued that the arbitration clause applied and that VCAT is required to refer the matter to arbitration in accordance with S10 of the *Commercial Arbitration Act* 2011 (Cth). Section 10 states that a court must refer the parties to arbitration if the parties are subject to an arbitration agreement. VCAT found that the word 'court' in the Commercial Arbitration Act was limited to the Magistrates' Court, County Court or Supreme Court and therefore does not apply to VCAT. VCAT refused to refer the matter to arbitration.

Subway Systems Australia Pty Ltd appealed to the Supreme Court. The Supreme Court upheld the decision of VCAT but found that the parties can still request that the matter be referred to arbitration under S77 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic.)

Other uses

The **Victorian Bar Dispute Resolution Scheme** has trained arbitrators available for use in private or commercial situations. Its aim is to provide parties with the opportunity to resolve a dispute privately, quickly and cheaply and with the least disruption to personal relationships. The scheme covers arbitration between parties and court-annexed arbitration under an order of a court. It also extends to other forms of alternative dispute resolution. There is a cost to the parties for this type

of resolution process. Arbitration is used by many dispute resolution bodies in Victoria to resolve a dispute, including the Fair Work Commission.

Arbitration is conducted in purpose-built facilities at the international commercial arbitration and mediation centre housed in the William Cooper Justice Centre.

Arbitration

advantages

- more formal
- decision is binding
- faster than going to court

disadvantages

- parties are less able to discuss matters freely and only certain cases are suitable for arbitration
- parties may prefer to reach a decision between themselves
- parties may not be happy with the decision of the arbitrator

Judicial determination

Judicial determination refers to dispute resolution processes which involve the parties to the case presenting arguments and evidence to a **judicial officer**, such as a judge, magistrate or president or vice-president of VCAT, who then makes a binding determination or decision about the outcome of the case. Judicial determination is not a form of alternative dispute resolution.

During trials or hearings, parties are given the opportunity to present evidence, question witnesses and make submissions. Cases are conducted using strict rules of evidence and procedure, as well as adhering to rules regarding the burden and standard of proof required in cases. Due to the complexity of proceedings, legal representation is generally advised so that parties can present their case in the best possible light. At the conclusion of the case, the judicial officer will make a legally binding decision regarding the case.

JUDICIAL DETERMINATION

- involves two parties
- the judicial officer hears the case and makes a resolution
- binding

Judicial determination

- two disputing parties, being represented by lawyers. The case is presented according to rules of evidence and procedure
- third party = judicial officer (e.g. judge) whose role is to listen to the evidence and arguments of the disputing parties, then make a decision (although jury, if present, decides on the facts and reaches a verdict)
- resolution is decided by the judicial officer (or jury)
- the decision is legally binding
- used in courts for both criminal and civil disputes and hearings of VCAT presided over by the president or vice-president

Use of judicial determination in resolving disputes

Courts

Most courts in the **Victorian court hierarchy** engage in judicial determination to resolve cases. The processes by which this occurs are called trials in superior courts and hearings in the Magistrates' Court.

Trials conducted by magistrates or judges in courts, with judicial determination, are the predominant method used to hear criminal cases. Courts also use judicial determination to resolve civil disputes if alternative dispute resolution methods have been unsuccessful or are inappropriate.

Victorian Civil and Administrative Tribunal

Decisions made by the **president** or **vice-president** at the Victorian Civil and Administrative Tribunal could also be considered to be judicial determination as the president and vice-presidents are required to be judges of the Supreme Court and County Court, and are thus judicial officers.

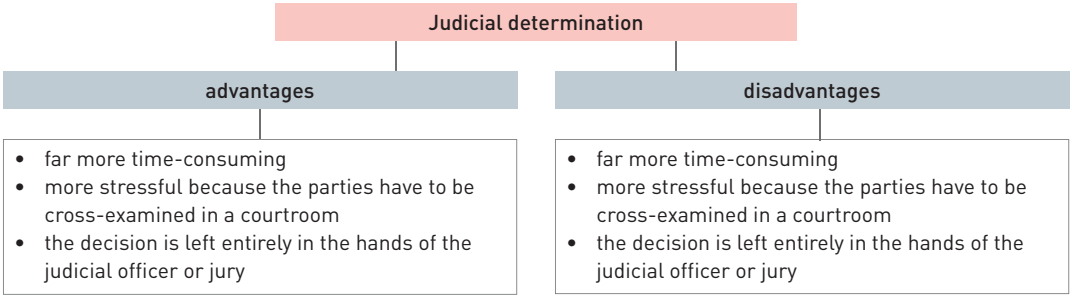
JUDICIAL MEMBERS OF VCAT

The definition of 'judicial member' in the *Victorian Civil and Administrative Tribunal Act 1998* (Vic.) is 'the president or a vice-president'. The definition of 'non-judicial member' is a member other than the president or a vice-president. The Act further states that service in the office of president must be taken to be service in the office of judge of the Supreme Court, meaning that the president is acting in his capacity as a judicial officer while acting as president. The same provision applies to vice-presidents. The president and vice-president will from time to time hear and determine cases. This can therefore be considered to be judicial determination. Some legislation requires that the president or a vice-president must hear a proceeding, particularly in circumstances where VCAT oversees a rehearing or when the hearing must be constituted by more than one member.

If the hearing was heard by the president or a vice-president, a party must appeal to the Court of Appeal. All other matters are appealed to the Supreme Court (Trial Division).

The evidence and arguments of the disputing parties are heard, and a binding decision or resolution of the case is reached.

VCAT hearings are not subject to the strict rules of evidence and procedure used in courts.



LEARNING ACTIVITY 6.10

Conciliation, arbitration and judicial determination

1 How does the role of the third party in conciliation differ from their role in mediation?
2 Explain the role of compulsory conferences in VCAT.
3 Read the case study 'Conciliation talks break down' and answer the questions.
   a Why do you think this dispute was referred to conciliation? Where did the conciliation take place?
   b Explain the conciliation process.
   c If this matter does not resolve at conciliation, what options are available to the parties to resolve the dispute?

CASE STUDY

Conciliation talks break down

The Victorian state government and Ambulance Employees Australia of Victoria are in dispute about the enterprise bargaining agreement which sets out the pay and conditions of ambulance employees in the state. The parties attended a voluntary conciliation at which it was reported the government made a lower offer than what was initially made in November 2013.

The conciliation was arranged by the Fair Work Commission.

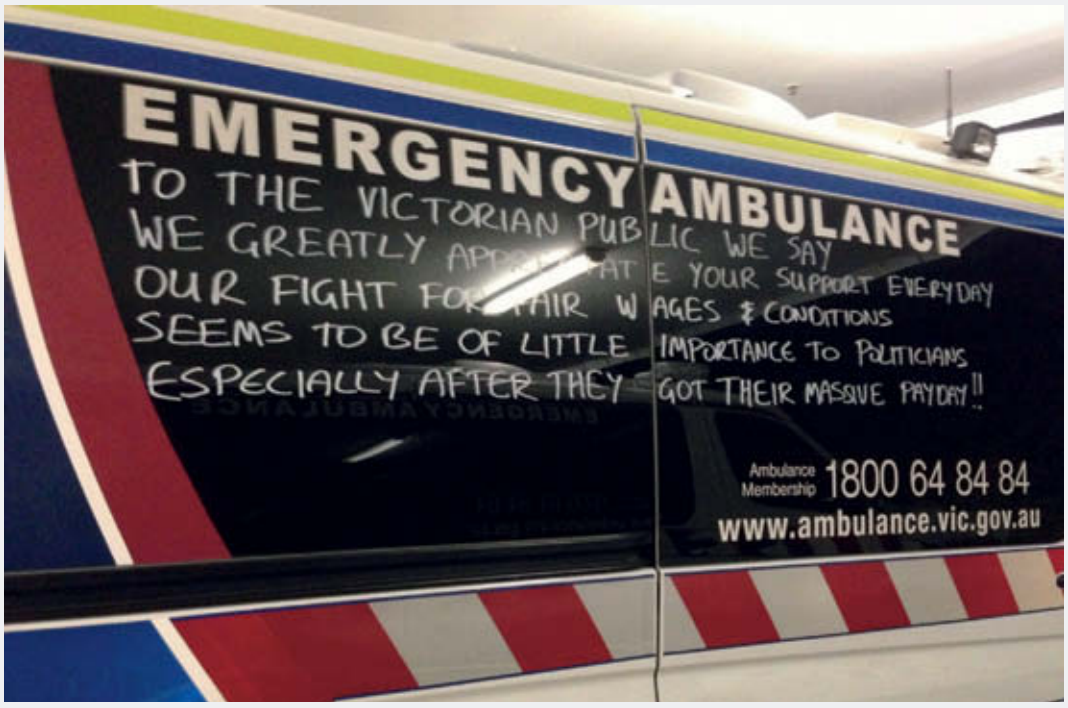


Figure 6.17 Part of the action taken by Ambulance Victoria in their dispute with the Victorian government about pay and conditions

4 Suggest one way in which arbitration differs from mediation, and one way in which it is similar.
5 How does arbitration differ from a formal court hearing?
6 Look back at *Subway Systems Australia Pty Ltd v. Ireland*. Can a matter be referred to arbitration from VCAT? Explain.
7 Read the case study 'Matter determined by arbitration' and answer the questions.
   a Explain why you think this matter was heard through arbitration.
   b Describe the process of arbitration.
   c Explain the outcome of this case.
   d Do you think there could be a better way of resolving this case? Explain.

CASE STUDY

Matter determined by arbitration

A plaintiff has been awarded an amount of $5500 after a magistrate heard his dispute against his neighbour. The plaintiff built a fence around his property and served a fencing notice on his neighbour, requiring his neighbour to pay half. His neighbour refused. The plaintiff took the matter to the Magistrates' Court in Melbourne, who heard the matter through arbitration. The Magistrates' Court ordered the defendant to pay half the costs of the fence plus a small amount of legal fees.

8 Distinguish between judicial determination and mediation. When might the two types of dispute resolution overlap?
9 Explain two examples of each, when conciliation, arbitration and judicial determination might be used.
10 Read the case study 'Stepdaughter wins Supreme Court case' and answer the questions.
   a What occurred in this case?
   b Why do you think this case was suitable for judicial resolution rather than alternative methods of dispute resolution?
   c What was the outcome of this case?

CASE STUDY

Stepdaughter wins Supreme Court case

The stepdaughter of a wealthy father won a Supreme Court case in relation to a dispute about her father's will. Lisa McCann, 55, equestrian competitor and former model, was left nothing in the will of her father, Harold (David) Ward, when he passed away in 2007. The value of his estate was around $30 million. Justice Hargrave ordered that the estate pay Ms McCann $750 000 plus $50 000 a year in living expenses until her mother dies, but the lump sum must be held in trust given he found that Ms McCann and her husband were 'spenders, not savers'.

11 Discuss the effectiveness of judicial determination in courts and VCAT.
12 Construct a concept map showing the different types of dispute resolution for civil disputes. Use the concept map to show similarities and differences between the different dispute resolution methods.

>>GOING FURTHER

Collaborative law

Collaborative law is a people-friendly approach to dispute resolution that uses problem-solving and negotiation and empowers the parties to help them reach a satisfactory resolution to the dispute. It helps people who want to resolve their differences to stay out of court. It has been used mainly in family law disputes but can also be used in civil and commercial disputes.

In collaborative law, the clients and lawyers agree in writing to reach a settlement without going to court. This process is carried out by collaborative law lawyers who use their skills to help the people involved in a dispute to reach a resolution to their dispute with the added security of being guided by good legal advice throughout the process. Each of the parties retains their own lawyers who are present at all negotiations. The aim is to reach a fair agreement with minimal cost, delay and stress.

Other professionals such as counsellors, financial advisers and accountants can be involved in the process. The process will only be successful if the parties:

- are non-aggressive in the resolution process
- wish to reach an agreement suitable to all parties
- want to keep costs down
- value retaining control over decision-making
- want the dispute and any terms of settlement to be confidential
- need the assistance of a lawyer.

Not all cases are suitable for collaborative law. If the issues are complex and varied it may be preferable to have the dispute settled in the more formal atmosphere of a court. Collaborative law will not be the right option if one of the parties:

- wishes to seek revenge
- is looking for a soft option
- thinks the process will allow one party to outmanoeuvre the other
- thinks he or she can get away with not disclosing all the financial details.

Decisions in this process are not binding, unless they are confirmed by a court order. However, because the negotiations are made between the parties with the help of their lawyers, final decisions are generally complied with.

COMPARISON OF DISPUTE RESOLUTION METHODS

There are a number of similarities and differences between the different dispute resolution methods of mediation, conciliation, arbitration and judicial determination.

Similarities between dispute resolution methods

Some of the similarities are that each method:

- makes use of an **independent third party** to resolve a dispute
- normally requires the **attendance** by the parties or their legal representatives to make arguments or submissions about the strength of their case
- may involve a **consideration of the evidence or the claims being made** for the dispute to be resolved
- may involve an **enforceable decision** being made – in mediation and conciliation, this may involve terms of settlement signed by the parties; in arbitration, an arbitration award will be handed down; in judicial determination, it will be a court order
- can involve the **use of a legal representative** who appears on behalf of the parties.

Differences between dispute resolution methods

Some of the differences are as follows.

- A **binding decision** is only made in arbitration and judicial determination, whereas in mediation and conciliation no binding decision is made by a third party (though the parties can enter into terms of settlement, which can be legally enforceable).
- The **fees and costs** involved in judicial determination are much higher than in mediation and conciliation.
- The **types of disputes** each method is used for are different. Conciliation, where the third party has more involvement, can be more appropriate for family matters than mediation, whereas judicial determination can be more appropriate where there is hostility between the parties.
- The **role of the third party** is substantially different in each method. In mediation, the mediator makes no suggestions but is there to keep the parties on track and focused. In conciliation, the conciliator can offer solutions to the parties. In arbitration and judicial determination, the third party will listen to the arguments and make a binding decision.

- Mediation, conciliation and arbitration can be conducted **privately and in confidence**, whereas judicial determination is normally conducted in an open courtroom.
- The binding decision is called an **arbitration award** in arbitration, whereas in judicial determination the binding decision is referred to as a **court order** or a **VCAT order**.

EVALUATION OF DISPUTE RESOLUTION METHODS

Consideration should be given to the strengths and weaknesses of dispute resolution methods used by courts and VCAT. The methods of mediation, conciliation and arbitration can be considered together, as they all refer to processes, other than judicial determination, in which an impartial person assists the parties to resolve the dispute.

Strengths of mediation, conciliation and arbitration

About 85 per cent of all civil disputes use mediation, conciliation or arbitration to try to settle disputes, or reach an agreement over some of the issues. Organisations that use alternative dispute resolution, such as VCAT, courts and the Dispute Settlement Centre of Victoria assist the public to generate win-win solutions as an alternative to judicial determination.

Some of the strengths of these methods are as follows.

- Mediation, conciliation and arbitration are **much less formal** than court processes, as strict rules of evidence and procedure are not followed, and are therefore less likely to be intimidating for parties. Research by the National Alternative Dispute Resolution Advisory Council (NADRAC) shows that participants have a high level of satisfaction with the mediation process (as well as the outcome).
- They are **conducted in a safe and supportive environment** – mediators are trained to make the parties feel comfortable, supported in their point of view and listened to. This will assist the parties to feel less intimidated and more open to reaching a resolution.
- They are **usually held in a more suitable venue** for both parties rather than in a courtroom. The William Cooper Justice Centre, for example, has mediation rooms available for parties who wish to resolve a dispute. That centre is in the heart of Melbourne and can be a convenient location for parties.
- They make **use of a third party** who normally has expertise in resolving matters through mediation, conciliation and arbitration. The third party will encourage the parties to resolve the dispute in mediation, will offer up solutions in conciliation, and will hear both sides and make a determination in arbitration.
- They are able to **save time** in having the dispute resolved rather than waiting for the pre-trial procedures to be completed, and for a hearing or trial date to be obtained.
- They are **generally cheaper than judicial determination**. This is because the parties can avoid many of the pre-trial procedures that are expensive, such as discovery, preparing evidence for trial and attending directions hearings.
- They are **private and confidential**, unlike a court, which is usually open to the public. This can be beneficial, particularly for parties that wish to avoid public knowledge of the dispute or the outcome, such as large corporations or families.
- They are **voluntary**, which means the parties can leave at any time and are not forced into doing or saying anything they do not wish to.

- There is **flexibility** in how proceedings are conducted, which can be modified to suit the needs of the parties. For example, one party may wish to speak first and the parties and the third party may agree to this. The rules of evidence and procedure in judicial determination generally do not allow much flexibility in the procedure used.
- They are **better able to address the needs of the parties** rather than working out who is in the wrong, and are more concerned about the future relationship between the parties.
- The parties are able to **consider a broad range of solutions** as parties can tailor a resolution or compromise that suits them, rather than being restricted to orders available to judicial officers or the remedies being sought in the statement of claim.
- The parties are **more likely to reach decisions that will be followed** because they have reached the decisions themselves (except arbitration).
- They are **not adversarial** and therefore both parties can come away from the process feeling as if they have won.
- The parties are **able to identify or clarify the issues** even if they do not reach an agreement.
- They are able to offer **savings for the justice system** as cases resolved through ADR save time, money and resources of the courts and VCAT so that these are available for other cases.

CASE STUDY

Cost effectiveness of mediation

A personal injuries claim of $30 000 involving a car accident was taken to mediation rather than going through the court. Both sides had legal representation. The total preparation cost of solicitors for the plaintiff and the defendant was $3000. The cost of the mediator was $200 per hour. The process took four hours. Total cost: $3800. Had the dispute gone through the court process, it would have cost in the vicinity of $20 000.

Weaknesses of mediation, conciliation and arbitration

Mediation, conciliation and arbitration are in most instances very successful for resolving disputes. However, some problems do exist.

- Other than arbitration, the **decision is not binding** (although at the conclusion of mediation or conciliation a binding deed of settlement can be drawn up, which can be legally enforceable through the courts). This can result in one party not following through with what had been resolved at the mediation or conciliation.
- One party may **compromise too much** because he or she is trying to cooperate as much as possible.
- One party may be more **manipulative or stronger** than the other party and the other party may feel intimidated into reaching a resolution.
- The methods used in ADR may not be appropriate if there is **animosity** between the parties as the parties are unlikely to attend them in a spirit of cooperation.
- One party to the dispute may **refuse to attend** the resolution process if it is voluntary and therefore it will be a waste of time.
- It is **not appropriate** for the resolution of most criminal cases or for large civil disputes.
- If a decision cannot be reached between the parties the matter **may need to be taken to court anyway**, delaying the time of final resolution.

- Some parties may make **claims on principle** or make a stand against actions that they think are reprehensible and should be known to the public through a full hearing or trial, which would not occur if the matter settles beforehand.
- The decision will **not form any precedent** and will not change any existing precedent. This is a downside for any areas of law where the dispute had the potential to create a new precedent or change the nature of an old precedent.
- One party may feel **compelled** to reach a resolution and may therefore feel dissatisfied that he or she has not achieved the desired outcome.

Strengths of judicial determination

Judicial determination provides a binding, final resolution to both criminal cases and civil disputes heard in courts.

Some of the advantages of judicial determination are as follows.

- The **decision is binding** and can be enforced through the courts, although in some instances it can be appealed against. This provides comfort to the party who is successful, who will now have a court or VCAT order which is enforceable.
- Judicial officers are **experienced legal professionals**, with expertise in the law and its application, which can assist the parties during the hearing or trial, as well as ensure that the outcome is being decided by someone who understands the law.
- Parties may **feel more satisfied with the formality** of having a judge deciding a case for them, rather than having a method that is flexible.
- It is appropriate for **all types of disputes**, both criminal and civil.
- **Strict rules of evidence and procedure** would have applied to the trial or hearing, thus ensuring both parties are subject to the same rules of what evidence can be admitted and how the parties are to proceed. This ensures natural justice and fairness in the way the dispute is resolved.
- Parties are **tried by peers** when there is a jury present, which can result in a fair and unbiased hearing.
- The decision may form a new or developed **precedent** which can be used in future cases. This is particularly important for areas of law where there is an outdated precedent, or where there is room for the precedent to develop further.
- It gives parties **certainty** in the outcome, rather than relying on one party to fulfil what they said they would do in a mediated outcome.

Weaknesses of judicial determination

There are some weaknesses or problems in using judicial determination to resolve disputes.

- It is usually **expensive**, due to the court fees, the costs associated with pre-trial procedures and preparing for trial, as well as the need to engage legal representation.
- Judicial officers are bound by **formality** in their dispute resolution, such as strict rules of procedure in courts, which causes some parties anxiety and intimidation.
- The **time** it takes for a case to be ready for hearing or trial, for the court to set down the matter to be heard, and for the judicial officer to reach a decision can result in the remedy being delayed even longer.
- The process can be **very stressful**, particularly for those parties who are individuals or who are self-represented. The rules of evidence and procedure, the formalities and the general layout of a courtroom can all add to the stress on one party.

- If the matter is being heard in a lower court, the judicial officer may be **bound by a precedent** that is outdated. This will mean that the party will have to incur the expense of appealing the case to a higher court in the hope that the precedent is changed.
- The final resolution of the judicial officer will usually be a win to one party and a loss to the other – this can lead to one of the **parties feeling dissatisfied** with the decision.

EXTRACT

Inquiry into alternative dispute resolution by the Law Reform Committee

The Victorian Parliament's Law Reform Committee undertook an inquiry into alternative dispute resolution, releasing their final report in May 2009. It found a number of advantages of ADR for the individual, including participant satisfaction, individualised justice, time and cost savings, confidentiality and preservation of relationships, as well as benefits for the state in terms of saving public resources and alleviating pressure on the courts.

However, it also identified a number of areas for improvement. The committee's recommendations included that:

- there be better coordination amongst ADR providers, a new ADR committee and a better system for referring people between ADR providers
- existing barriers to access for parts of the community be reduced, including establishing more dispute settlement centres throughout the state, providing more assistance for people from non-English speaking backgrounds and developing culturally appropriate services
- protections be introduced for people using ADR, such as training ADR providers to identify and address power imbalances between parties
- Victorians be empowered to resolve disputes themselves by raising conflict resolution skills in the community
- the supply of ADR services be increased, particularly by exploring the scope for additional industry ombudsman schemes and by undertaking research into the potential use of online ADR.

Source: Law Reform Committee

LEARNING ACTIVITY 6.11

Comparison and evaluation of dispute resolution methods

1 Compare mediation and arbitration as dispute resolution methods.
2 'Arbitration and judicial determination are the same things'. Do you agree? Justify your answer.
3 Look back at the case study 'Cost effectiveness of mediation' and answer the questions.
   a How does this case illustrate the cost effectiveness of mediation?
   b Explain two other strengths and two weaknesses of having a dispute resolved through mediation rather than judicial determination.
4 In what situations could judicial determination be a more appropriate way to resolve cases than other forms of dispute resolution?
5 Look back at the extract 'Inquiry into alternative dispute resolution by the Law Reform Committee' and suggest how implementation of two of the Law Reform Committee's recommendations could improve access to justice for disputing parties.
6 Collect two or more newspaper articles or pieces of information on the Internet that relate to dispute resolution of civil cases. Choose two of these articles, each referring to a different type of dispute resolution.

Give a brief report about each article, including:
- the date of the article
- the facts of the civil dispute
- the method of dispute resolution being used
- whether you think this type of dispute resolution will be effective.

7 **Role play and debate**

a Form into groups. Each group is to create a role play of the resolution of a civil dispute using one of the following:
- mediation
- conciliation
- arbitration
- judicial determination.

Choose students to play the parties to the type of dispute resolution chosen. Write a scenario to be acted out.

b Prepare a discussion about the strengths and weaknesses of the method of dispute resolution your group has chosen.

c Conduct a class debate about the most effective way to resolve civil disputes.

d Write a report on the different types of methods of dispute resolution for civil disputes. In your report:
- describe the main features of the method of dispute resolution your group has chosen
- explain the differences between your type of dispute resolution and the other types of dispute resolution acted out by the rest of the class
- explain which type of dispute resolution you think is likely to be the most effective and why.

8 'Dispute resolution processes such as mediation and conciliation provide a more efficient method of resolving all cases compared with judicial determination.' Discuss.

HINT

You will need to know the strengths and weaknesses of dispute resolution methods, and the strengths and weaknesses in the way courts and VCAT operate to resolve disputes. There is a difference between the two – one evaluates the methods, whereas the other evaluates the bodies. You should be familiar with both sets of strengths and weaknesses.

COMPARISON OF THE OPERATION OF COURTS AND VCAT

There are a number of similarities and differences between the courts and VCAT in the way they operate to resolve disputes.

Similarities between the operation of courts and VCAT

- Both VCAT and the courts charge a **fee** for most types of cases. The fee is charged at the time the application is made at VCAT, or at the time the complaint in the Magistrates' Court and the writ in the County Court and Supreme Court are filed.

- Both use an **independent third party** to resolve a dispute. Courts use magistrates and judges, while VCAT use members, the vice-presidents or the president.
- Both **make use of dispute resolution methods** such as mediation, conciliation and arbitration. Both bodies have the power to refer parties to these methods before finally resolving the dispute.
- The parties can **use legal representation** in resolving the dispute, though legal representation is used much more in courts than in VCAT.
- Both hear **civil cases.**
- The parties can **appeal a decision** made by courts and VCAT, except for a decision made by the High Court (full bench), and VCAT appeals can only be on a point of law.
- A decision that is **binding** is made at the final hearing or trial, which can be enforced by the parties (though the enforcement method is slightly different).
- Depending on who hears the case in VCAT, both can use **judicial determination** as a method to resolve disputes.

Differences between the operation of courts and VCAT

- VCAT is a one-stop shop for the resolution of disputes, whereas the courts are **separated** into a hierarchy and can hear different cases depending on their jurisdiction.
- The **fee structure** is substantially different. For some VCAT cases, there is no application fee (such as cases relating to discrimination). There is also no hearing fee for the first day of hearing. In contrast, the courts charge a fee on filing a claim and for each hearing day.
- A **jury** is not available in VCAT for civil cases; on the other hand, a jury of six is optional for civil cases in courts .
- While both make decisions that are binding, **a VCAT decision has to be certified** in the relevant court before it can be enforced on the other party, whereas a court decision is immediately enforceable.
- **Legal representation** is generally not used in VCAT, whereas in courts legal representation is usually required.
- VCAT generally **does not use rules of evidence and procedure**, whereas courts do, therefore VCAT is more informal than courts.
- VCAT cases do not generally require the completion of **pre-trial procedures**, whereas courts use these procedures in both criminal and civil cases.
- Not all VCAT members are judicial officers, whereas all court decisions are made by judicial officers.
- VCAT is not available for **criminal cases**; on the other hand, courts hear both criminal and civil cases.

EVALUATION OF THE OPERATION OF COURTS AND VCAT

There are a number of strengths and weaknesses in the way the courts and the Victorian Civil and Administrative Tribunal operate in the resolution of disputes.

Strengths of courts in resolving disputes

- The **courts can hear all types** of cases, both criminal and civil. They are not limited by any legislation which specifies the types of disputes that can be heard.
- The courts have developed **specialised lists or courts** to allow for greater administrative convenience and specialisation for certain cases. Examples of specialised lists or courts include the Drug Court and the Assessment and Referral Court List in the Magistrates' Court, the Koori Court Division in the Magistrates' Court and County Court, and the Commercial Court in the Supreme Court.
- The **use of legal representation** ensures that parties are equally represented and able to argue their case, which can benefit the parties in ensuring rules of evidence and procedure are complied with and their best case is put forward.
- The courts use **independent experts** whose specialist skills help determine the outcome of cases. The judges are experts in their area and will use their skills and experience in handing down a decision.
- **Rules of evidence and procedure** ensure that all parties are treated in a fair manner.
- The **adversarial** atmosphere is more suitable when there is animosity between the parties.
- There is an ability to have **trial by one's peers**, via a jury (for indictable offences in higher courts, and optional in civil cases).
- The decision is **binding**, ensuring certainty in the outcome and allowing the winning party to enforce the decision if it is not complied with.
- The courts are **able to refer matters** to mediation, conciliation or another form of dispute resolution, such as early neutral evaluation or a case management conference to resolve or narrow the issues.
- The courts enable parties to **appeal** a case if one party is dissatisfied with the decision.

Weaknesses of courts in resolving disputes

- **High court fees** and the need for legal representation make it **expensive**, which may lead to people not pursuing their cases.
- **Delays** are very common and often there is a backlog of cases waiting to be heard. This can cause issues for the parties, such as longer delay in getting a just outcome, problems with witnesses being able to recall their evidence, and the possibility of some parties or even witnesses dying before the case is heard.
- Strict rules of evidence and procedure are followed; this **formality** could be intimidating for parties.
- It is **adversarial** in nature, with one party winning and the other losing, which could increase tension between the parties.
- Due to the need for **legal representatives** and their influence on the case, the better prepared and more experienced barrister may win rather than the party with right on their side.

Strengths of VCAT in resolving disputes

- VCAT is normally **cheaper** than courts due to low application fees (about $44.90 for small claims) and parties being able to represent themselves.

- There is **quicker** resolution of disputes – the average time from application to resolution of disputes in some lists is about five weeks.
- An **informal** atmosphere ensures that parties can put their case forward in their own way, rather than be subject to strict rules of evidence and procedure. Telephone and video conferences are also available in place of attending the tribunal, as well as online resolution.
- Each list operates in its own **specialised** jurisdiction, resulting in the tribunal personnel developing expertise in resolving disputes in that area.
- **Parties are encouraged to reach a resolution** between themselves, and often VCAT will refer matters to mediation or conciliation, or a compulsory conference, before the matter is determined by the tribunal.
- The decision is **binding** on the parties.

Weaknesses of VCAT in resolving disputes

- VCAT is **only able to resolve civil disputes**, not criminal disputes, therefore it is limited in its ability to hear all matters.
- Due to **increased use of legal representation**, the costs of taking a matter to VCAT can increase and often be as high as taking the matter to court. Further, recent changes to VCAT's fees mean that there are now fees for some hearings, as well as large fees for major cases in the Planning and Environment List.
- For large and complex civil claims, VCAT is sometimes **not an appropriate forum** to resolve the dispute.
- There is a **limited right to appeal** VCAT decisions. Decisions can only be appealed on a point of law, and to the Supreme Court (Trial Division or Court of Appeal), making it very difficult and very expensive to appeal a case.
- It can be **too informal** – some parties may feel uncomfortable or ill-equipped to deal with the lack of formal procedure.
- **VCAT members are normally non-judicial officers**, meaning they may be casual, sessional members without as much experience in hearing matters as judges and justices.
- Recently VCAT has suffered long **delays** in some of its lists, particularly the Planning and Environment List. Some have argued this is hurting the economy as many construction projects are unable to go ahead without the appropriate permits.

LEARNING ACTIVITY 6.12

Comparison and evaluation of the operation of courts and VCAT

1 Identify and explain two similarities and two differences between the operation of courts and VCAT.
2 Is a binding decision made in VCAT just as easily enforceable as a binding decision made in the courts? Explain.
3 Evaluate the way in which courts operate to resolve disputes.
4 Evaluate two strengths of VCAT as a dispute resolution body.
5 'Tribunals operate more effectively in the resolution of all disputes. They should be used in preference to courts.' Discuss.

6 **Class quiz**
Starting from the back of the class, each student is to say one fact gained from this chapter. You need to listen carefully to the fact that each student gives because you must not repeat any facts. Each student who repeats a fact, or cannot think of a fact, is out. Keep going round the class until one person remains.

7 **Court visit**
Arrange to visit the Magistrates' Court, County Court or Supreme Court. While you are at the court take notes of observations. Write a report outlining details of your visit. In your report include:
- the court visited
- the jurisdiction of the court in criminal cases and civil disputes
- the case or cases heard on the day and any details you can recall
- the impressions you got from the parties in the court and the court personnel
- a discussion of strengths and weaknesses of the operation of the court you observed.

PRACTICE EXAM QUESTIONS

1 a Justify the existence of a court hierarchy in Victoria. *(6 marks)*
b Outline the jurisdiction of the County Court. *(4 marks)*
c Evaluate the strengths and weaknesses of methods of dispute resolution. *(10 marks)*

2 a Explain the role of the Victorian Civil and Administrative Tribunal. *(4 marks)*
b Identify one difference between mediation and conciliation. Explain when these types of methods of dispute resolution could be used. *(4 marks)*
c Outline the jurisdiction of the County Court in criminal cases and civil disputes. *(2 marks)*
d Evaluate the operation of courts and the Victorian Civil and Administrative Tribunal in resolving civil disputes. *(10 marks)*

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK CASE STUDY

Melbourne Cricket Club v. Clohesy

Read the case study *Melbourne Cricket Club v. Clohesy* and answer the questions.

1 Outline the jurisdiction of the Magistrates' Court. Comment on why this case was heard in the Magistrates' Court. *(3 marks)*
2 Briefly explain whether other methods of dispute resolution would have been likely to be used here. *(2 marks)*

3 Explain one advantage and one disadvantage of using mediation to resolve civil disputes such as this one. *(4 marks)*
4 State the decision of the Magistrates' Court in this case. *(1 mark)*
5 Suggest the grounds for appeal used by the MCC. *(2 marks)*
6 If Clohesy wished to appeal the decision of the Supreme Court, in which court would such an appeal be heard? *(1 mark)*
7 Having an avenue for appeal is one of the advantages of a court hierarchy. Describe one other advantage of a court hierarchy. *(2 marks)*
8 Examine the operation of the Supreme Court as an effective means of dispute resolution. *(5 marks)*

(Total 20 marks)

Melbourne Cricket Club v. Clohesy (2005) VSC 29 (18 February 2005)

Frank Clohesy had been working as an 'events person' with the MCC since 1984, and he applied for long service leave in April 2004. Clohesy had been employed as a casual employee during that time, and had worked regularly at football matches, for concerts and some cricket games, particularly Test matches and international games. The MCC recognised his years of service by granting him free entry to all AFL home and away games, but not his request for long service leave, based on his employment status as a casual worker.

With the support of the Media, Entertainment and Arts Alliance, Clohesy applied to the Magistrates' Court under the *Long Service Leave Act 1992* (Vic.) for the MCC to pay him long service leave, which would have amounted to around $1000. In July 2004, Magistrate Michael Smith found that Clohesy was entitled to long service leave despite being a casual worker. He held that the category of 'casual' employee did not have a precise legal meaning, after referring to a number of precedents, and recognised that a part-time or casual employee might fall within the qualifying requirements of long service leave established by the Act. Further, he found that Clohesy gave 15 years of continuous service to the MCC, with the result that he was entitled to long service leave.

The MCC appealed this decision based on the definition of 'continuous employment' under the *Long Service Leave Act*, arguing that, as a casual employee, Clohesy did not have continuous employment. In the appeal case, before the Supreme Court in February 2005, Justice Julie Dodds-Streeton agreed with the MCC and ruled that the MCC did not have a continuous contract that imposed this obligation on the club, thereby allowing the appeal.

ASSESSMENT TASK STRUCTURED QUESTIONS

1 Outline the original and appellate jurisdiction of one court in the Victorian hierarchy. *(4 marks)*
2 Explain two reasons for the existence of a court hierarchy. *(4 marks)*
3 Explain the role that VCAT plays in the Victorian legal system. *(4 marks)*
4 Compare the processes of mediation and arbitration. *(4 marks)*
5 Describe two types of dispute resolution methods used in the Magistrates' Court when hearing civil cases. *(4 marks)*
6 Describe the mediation programs used by VCAT and the Supreme Court. *(6 marks)*
7 Evaluate the effectiveness of one dispute resolution method. *(6 marks)*
8 Evaluate the strengths and weaknesses of courts as dispute resolution bodies. *(8 marks)*

(Total 40 marks)

ASSESSMENT TASK REPORT IN MULTIMEDIA FORMAT

You should undertake research and collect information from hard copy and electronic sources such as the Internet, television and radio programs. Write a report of your investigation. In your report you should include the answers to the following questions. The presentation of the report should be in multimedia format, accompanied by a set of explanatory notes. For example:

- a series of overhead transparencies
- a web page
- a PowerPoint presentation
- a computer presentation.

1 Describe the role of the Victorian Civil and Administrative Tribunal. *(4 marks)*
2 Show the links to courts for the appeal process. *(4 marks)*
3 Justify two reasons for the existence of a hierarchy of courts. *(4 marks)*
4 Explain the processes of mediation, conciliation and arbitration. *(6 marks)*
5 Explain how two of these methods of dispute resolution are used by VCAT. *(4 marks)*
6 Assess the effectiveness of mediation, conciliation and arbitration as alternative methods of dispute resolution. *(6 marks)*
7 Explain the meaning of judicial determination, and where it is used in the legal system. *(4 marks)*
8 Compare and evaluate the way courts and VCAT operate to resolve disputes. *(8 marks)*

(Total 40 marks)

Summary

Reasons for a court hierarchy

- doctrine of precedent and consistency
- appeals
- administrative convenience
- specialisation

Problems of a court hierarchy

- courts could be hard to locate and a person may not know which court to go to
- could be too many appeals
- could be duplication of administrative personnel
- a precedent from a higher court may be binding on a lower court, which could lead to an unjust outcome
- parties in lower courts might not receive the same high level of expertise as in higher courts

Magistrates' Court

- criminal – summary offences and indictable offences heard summarily, committal proceedings, warrants issued, bail applications
- civil up to $100 000 (up to $10 000 to arbitration)
- no appeals heard in Magistrates' Court
- appeals from decision of Magistrates' Court:
  - to County Court against conviction and/or sentence in criminal matter
  - to Supreme Court on a point of law (both criminal and civil)
- specialist courts and lists
  - Drug Court
  - Koori Court Division
  - Family Violence Division
  - Neighbourhood Justice Centre
  - Assessment and Referral Court List
  - Sexual Offences List

County Court

- criminal – indictable offences except murder, attempted murder, certain conspiracies and corporate offences
- civil – unlimited
- criminal appeals from Magistrates' Court against conviction and/or sentence
- no civil appeals
- appeals from County Court are heard in the Court of Appeal (all grounds)

- specialist courts and lists
  - Koori Court Division
  - Sexual Offences List

Supreme Court

- criminal – serious indictable offences
- civil – unlimited
- criminal appeals from Magistrates' Court on points of law
- civil appeals from Magistrates' Court on points of law and from VCAT
- appeals from Supreme Court proceed to the Court of Appeal (all grounds)
- specialist courts
  - Costs Court
  - Commercial Court

Court of Appeal

- appeal division of the Supreme Court – no original jurisdiction
- criminal appeals from County Court or Supreme Court
- civil appeals from County Court and Supreme Court and from VCAT (if presided over by president or vice-president)
- appeals from Court of Appeal heard by the High Court

Victorian Civil and Administrative Tribunal (VCAT)

- made up of three divisions, with a number of specialised lists in each
- role of VCAT – provide low-cost, timely, accessible, expert decisions to Victorians involved in a civil dispute
- disputes may be resolved by mediation or at a hearing
- questions of law may be referred to the Supreme Court or the Court of Appeal
- some reviews, e.g. decisions of the Victims of Crime Assistance Tribunal (VOCAT) or the Public Transport Corporation

Dispute resolution methods

- mediation
- conciliation
- arbitration
- judicial determination

Strengths of mediation, conciliation and arbitration

- less formal
- more suitable venue
- cheaper
- confidential
- voluntary
- flexible
- better able to address needs of the parties
- more likely to reach decisions that will be followed
- not adversarial
- identifies the issues

Weaknesses of mediation, conciliation and arbitration

- not binding (except arbitration)
- one party may compromise
- one party may be stronger
- both parties may not agree to attend
- matter may still have to go to court

Strengths of judicial determination

- binding decision
- experienced, respected legal professionals
- formality of proceedings fair
- all types of disputes heard
- strict rules of evidence and procedure would have applied to the trial or hearing
- it gives parties certainty in the outcome

Weaknesses of judicial determination

- expensive
- could be too formal and intimidating
- party dissatisfaction with result

Evaluation of the operation of courts and VCAT

Strengths of courts in resolving disputes

- courts able to hear all disputes
- parties are equally represented
- courts use independent experts
- rules of evidence and procedure ensure fair and unbiased hearing
- trial by peers possible
- binding decision
- courts able to refer matters to ADR
- courts enable parties to appeal

Weaknesses of courts in resolving disputes

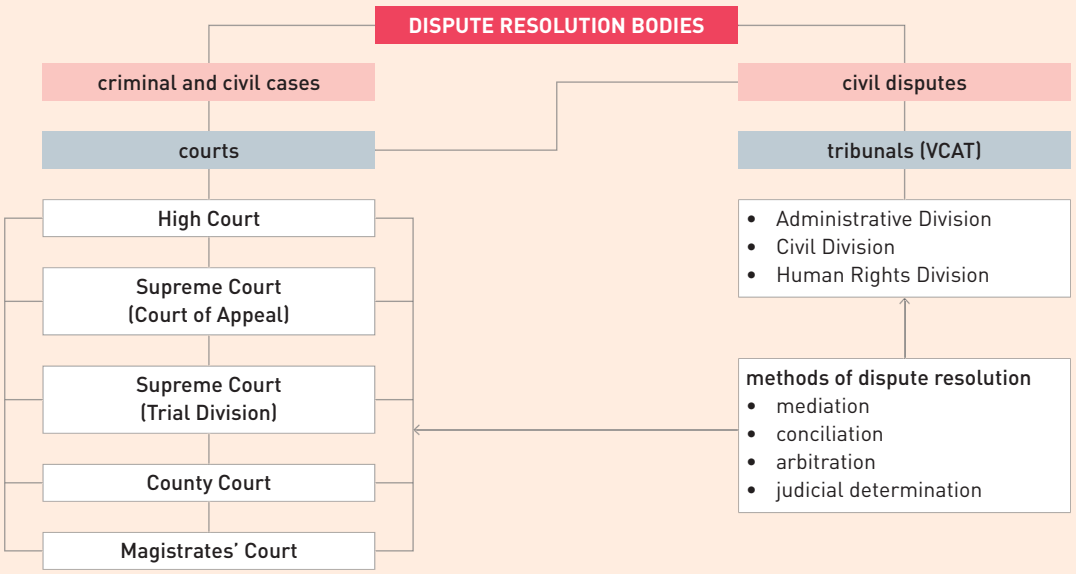
- expensive
- delays – time-consuming
- formal
- adversarial nature could cause tension between parties
- impact of unequal legal representation could be unfair

Strengths of VCAT in resolving disputes

- low cost
- timely resolution of disputes
- informal atmosphere
- each list specialised
- parties encourages to resolve issues between themselves
- binding decision

Weaknesses of VCAT in resolving disputes

- limited to civil cases
- escalating costs
- too informal
- not appropriate for large complex cases
- VCAT members non-judicial other than president and vice-president
- delays





CHAPTER 7

THE ADVERSARY SYSTEM

OUTCOME

This chapter is relevant to learning outcome 2 in Unit 4. You should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, and evaluate their operation and application, and evaluate the effectiveness of the legal system.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- the elements of an effective legal system: entitlement to a fair and unbiased hearing, effective access to the legal system and timely resolution of disputes
- major features of the adversary system of trial, including the role of the parties, the role of the judge, the need for the rules of evidence and procedure, standard and burden of proof and the need for legal representation
- strengths and weaknesses of the adversary system of trial
- major features of the inquisitorial system of trial
- possible reforms to the adversary system of trial.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- critically evaluate the adversary system of trial
- compare the operation and features of the adversary system with the inquisitorial system
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

KEY LEGAL TERMINOLOGY

adversary system The system of trial used in Australia in which two opposing sides try to win the case. Set rules of evidence and procedure must be followed and the judge is an impartial arbitrator.

affidavit Evidence in the form of a written statement of facts, made under oath or affirmation.

burden of proof The responsibility of proving who is in the wrong – this usually lies with the person who initiates the action.

circumstantial evidence Evidence which takes the form of a set of circumstances or facts indicating that a certain event has happened, rather than proving a fact directly.

inquisitorial system System of trial in European and some Asian countries in which the arbitrator of a dispute, the judge, plays an active role in examining and investigating the case in order to determine the truth of the matter in question.

oral evidence Evidence given by witnesses in a case in the form of answers to questions from legal representation.

propensity evidence Evidence which demonstrates that the accused has a tendency to commit the type of crime they are accused of. This evidence can include prior convictions.

standard of proof The degree or extent to which a case must be proven. This is beyond reasonable doubt for criminal cases, and on the balance of probabilities for civil cases.

INTRODUCTION TO AN EFFECTIVE LEGAL SYSTEM

In order for society to operate effectively, it is necessary to recognise that disputes between members of society will arise and will need to be dealt with effectively. Crimes may be committed and the people who commit them will need to be punished. Without a formal means of resolving such disputes or dealing with crimes committed, individuals may take the law into their own hands.

Individuals in society must be aware that there is some retribution against those who overstep acceptable limits of behaviour and offend against society. There should also be some form of compensation for those whose rights have been infringed.

The law therefore needs to provide **enforcement procedures** and **avenues of dispute resolution**. Laws will not be effective if they cannot be enforced. The law should provide a peaceful means for resolving civil disputes or criminal cases. For society to be satisfied with the outcomes of criminal and civil cases the outcomes must be fair and appropriate.

ACHIEVING JUSTICE

The purpose of the law is commonly seen as the achievement of justice for all. Justice can be seen differently according to different values in society. An effective legal system could differ from one society to the next according to the values of each society. When assessing the effectiveness of a legal outcome, process, or system, it is suggested that the following three elements be considered:

- entitlement to a fair and unbiased hearing
- effective access to the legal system
- timely resolution of disputes.

If these three essential elements have been met, then it could objectively be concluded that a just outcome has been achieved. These elements will be continually revisited during the investigation of the processes and procedures of dispute resolution that are the main focus of Unit 4, Area of Study 2.

THE ELEMENTS OF AN EFFECTIVE LEGAL SYSTEM

Entitlement to a fair and unbiased hearing

Fairness and justice are important concepts in our society. An effective legal system provides **structures and procedures that facilitate a fair hearing or trial, free from bias**. People should not be discriminated against when appearing before dispute resolution bodies, and should have an equal opportunity to present their case. The court processes, including rules of evidence and procedure, the adversary system and the jury system, should operate so as not to disadvantage either party.

It is expected that the **judge and jury will be impartial**, both sides of the case will be listened to and the evidence will be considered. However, this ideal might not always be achieved because of the problems associated with court procedures. For example:

- a judge when summing up to the jury could show personal bias
- jury members might have prejudices or biases that affect their judgment
- one party to a case might not be legally represented and might not present their evidence in a very convincing way
- people could be treated differently by the legal system because of their cultural background or social standing in the community.

Effective access to the legal system

All people should be aware of their right to take a matter to a court, a tribunal or other dispute resolution body, and have equal access to these legal bodies. The existence of a hierarchy of courts for both criminal and civil disputes, and the availability of a range of dispute resolution processes for civil disputes with each offering specialised services, help to achieve effective access.

The government also provides assistance in the form of legal aid to eligible individuals through Victoria Legal Aid, in order to assist people who might not otherwise be able to afford access to the legal system. However, access might not be achieved because of a general lack of knowledge and understanding of legal rights, especially in some sections of the community, such as migrants. It might also not be achieved because of the high costs associated with taking a matter to court and some other dispute resolution methods, the limited funding received by Victoria Legal Aid and the fact that not all individuals qualify for legal aid.



Figure 7.1 Ian Michaelson, managing lawyer at Victoria Legal Aid, Shepparton, Goulburn regional office

The **National Partnership Agreement on Legal Assistance Services** came into effect on 1 July 2010. It provides Commonwealth funding to state and territory legal aid commissions for the delivery of legal assistance programs such as representation in criminal and family law matters, and assistance in dispute resolution. The Agreement aims to provide an integrated, efficient, cost-effective and accessible national system of legal assistance, particularly aimed at increasing the effective delivery of legal services to disadvantaged Australians and the wider community.

Timely resolution of disputes

All people should be able to achieve a resolution to a civil case in a timely manner so that any compensation can be paid as swiftly as possible, and the stress caused by taking a matter to a court or tribunal can be as short as possible. Similarly, criminal cases should be resolved in a timely fashion to reduce costs and the distress of not knowing the outcomes. Justice delayed is justice denied.

On the other hand, there should be sufficient time to allow parties to prepare appropriate cases and for all evidence to be considered. **Cases should therefore be resolved in a reasonable time**. Despite this aim, delays in dispute resolution do occur, and remain a significant problem in our legal system. These delays may be due to processes and procedures used in dispute resolution, including pre-trial, trial and post-trial procedures (both criminal and civil).

LEARNING ACTIVITY 7.1

An effective legal system

1. Why is it necessary for the law to recognise that disputes will arise between individuals and crimes may be committed?
2. How can the provision of enforcement procedures and avenues of dispute resolution contribute towards an effective legal system?
3. Discuss an advantage and a challenge associated with achieving a fair and unbiased hearing in a court.
4. To what extent do you think people are provided with effective access to the legal system?
5. Why is the timely resolution of disputes important in achieving justice? Discuss. In your explanation discuss a possible advantage and a possible disadvantage of a speedy trial.

THE ADVERSARY SYSTEM OF TRIAL

When a person is accused of a crime, or when a dispute arises between two parties, it might be necessary to resolve the matter in court. The system used in the Victorian courts is known as the **adversary system** and, as the name implies, it is based on two parties battling to win their legal battle, each party acting as the adversary of the other. The trial is presided over by an independent and impartial umpire, and is conducted according to rules of evidence and procedure.

BACKGROUND INFORMATION

The historical development of the adversary system of trial

In medieval days a dispute over land between two barons was resolved by holding a jousting tournament, presided over by the king. The tournament was run in accordance with strict

traditional rules of conduct. A knight represented each baron. The aim of the contest was for one knight to knock the other knight off his horse. The baron whose knight won the contest was declared the owner of the land in dispute. These knights were adversaries or opponents.

Countries such as Australia, the United States and the United Kingdom, which use the common law system (in which laws evolve through judges' decisions in the courts), follow the adversarial method of trial.

Our legal system, like that of other countries that were once part of the British Empire, was inherited from Britain as a consequence of colonisation.



Figure 7.2 Jousting in medieval times

The role of the adversary system of trial

The **role of the adversary system** is to provide a procedure for the parties to present and resolve their case, in as fair a manner as possible. The adversary system operates in both civil and criminal cases. In a criminal case the state is trying to prove the guilt of the accused, and the accused is fighting to be found not guilty. In a civil case the party bringing the case is trying to prove that the other party was in the wrong and the person who is defending the case is trying to show that he or she was not in the wrong.

The adversary system does not involve an informal process where the two parties negotiate a settlement. It is adversarial – the two sides to the battle are clearly drawn and the parties try to win their case in the best way they can, at the expense of the other side. This differs from other methods of dispute resolution for civil cases, where the emphasis is on helping the disputing parties to reach a resolution between themselves in an informal atmosphere.

LEARNING ACTIVITY 7.2

The adversary system

1 A friend has asked you how the adversary system of trial began. Explain some of the history that led to this method of trial.

2 Why do you think our system of trial is referred to as the adversary system? Explain.
3 How does the adversary system of trial differ from other methods of dispute resolution for civil cases?

MAJOR FEATURES OF THE ADVERSARY SYSTEM OF TRIAL

The adversary system is used in most Australian courts. It operates whether a jury is present or not. For example, the procedure used in the Magistrates' Court is adversarial, and so is the procedure in the County Court. A jury is part of the system of trial in some cases, but is not a feature of the adversary system.

Table 7.1 Major features of the adversary system

The role of the parties	Party control means each party is in control of their own case and how evidence is presented.
The role of the judge	The judge must act as an independent and impartial umpire and not favour either side.
Standard and burden of proof	The burden of proof indicates who must prove the battle. The standard of proof indicates the level of proof required in deciding who should win the case.
The need for rules of evidence and procedure	Each court hearing is governed by rules of evidence and procedure that aim to ensure fair and equal treatment.
The need for legal representation	For the adversary system to work effectively both parties need to be legally represented and should have an equal opportunity to present their cases.

The role of the parties

In the adversary system of trial each party controls their own case and has complete control over decisions about how the case will be run as long as the rules of evidence and procedure are followed. This is known as 'party control'. The parties are responsible for various aspects of a trial using the adversary system as shown below.

- **instigating the proceedings** – In a civil case the person whose rights have been infringed decides to bring a case against the other party, and the defendant decides whether to defend the case or accept what the plaintiff is proposing. In a criminal case the state brings the proceedings. The accused does not have a say in whether a matter is taken to court but does decide whether to plead guilty or not guilty.
- **investigating the facts** – The parties choose the methods they will use to investigate the facts and bring the facts before the court.
- **deciding which facts should be brought before the court** – Each side will decide which evidence it thinks will best suit its case and, although not all evidence will be brought out (adduced) by either side, the truth should emerge through cross-examination. However, the prosecution in a criminal case must bring out all evidence known to it, whether or not that evidence is beneficial to the prosecution case. This, to some extent, reduces the adversarial nature of the criminal trial.

- **investigating the law** – Each party is responsible for finding out the law that is relevant to their case.
- **deciding whether to have a jury in a civil case** – A jury is optional in a civil case (usually at the choice of the person bringing the case).
- **choosing whether to have legal representation** – The parties in a civil case and the accused in a criminal case may decide to represent themselves in court. This is rarely advisable, and the parties often choose to use a solicitor or barrister to represent them in court.

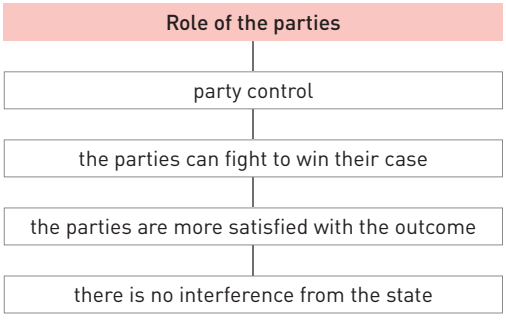




Figure 7.3 Two parties to a dispute (adversaries)

Application to the adversary system

Party control allows the parties to feel that they are in control of the situation and responsible for the outcome. It also **satisfies the competitive, or combative, spirit**. Someone who is given the **opportunity to fight to win** is more likely to feel satisfied with the outcome. The courts allow the 'battle' to take place legally within specified rules of evidence and procedure.

Party control also means that, without the interference of the state, the parties to a civil dispute are able to take action to try to resolve their dispute, and people accused of a crime are able to defend themselves if a prosecution is brought against them. However, this process is expensive, and the high cost of legal proceedings can contribute to the decision not to carry on with a civil claim, or can lead to an unfair result in a criminal case if the accused is not represented.

The role of the judge

The judge or magistrate has the role of ensuring that the court processes and procedures are carried out according to the strict rules of evidence and procedure and each of the parties is treated fairly. The judge must act as an **impartial umpire** and not favour either side.

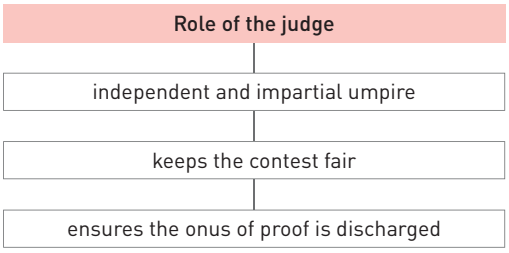
The judge or magistrate has the following responsibilities:

- **ensuring the rules of evidence and procedure are followed** – The judge is responsible for deciding the admissibility of evidence, and can exclude inadmissible evidence from the trial; they also ensure that correct court procedure is followed so that both parties have an equal opportunity to present their case.
- **deciding questions of law** – The judge or magistrate determines the relevant law to be applied to the case before them.
- **clarifying issues** – The judge may ask questions, recall a witness for a matter to be cleared up, or call a new witness with the permission of both sides. However, they cannot be seen to favour one side, and any intervention will mainly be directed towards clearing up ambiguities in points that have already been made rather than trying to make up for a barrister who is not doing an adequate job.

- **directing the jury if there is one** – At any stage of a trial the judge may address the jury on issues that are expected to arise or have arisen in the trial, the relevance of any admissions or directions made before the trial, or any other matter relevant to the jury in the performance of its functions and understanding of the trial process.
- **deciding questions of fact when there is no jury** – For all cases in the Magistrates' Court and those civil cases where a jury has not been empanelled, the judge or magistrate decides questions of fact, such as which account of the evidence they believe to be accurate, as well as reaching a verdict. Where a jury is present, it is the role of the jury to decide questions of fact.
- **deciding the sanction or remedy** – In criminal cases where the accused has been found guilty, the judge decides the sanction. In civil cases without a jury, the judge will decide the remedy if the plaintiff proves their case.



Figure 7.4 Chief Justice Marilyn Warren, Victorian Supreme Court



Application to the adversary system

For the adversary system to operate effectively, it is essential that the judge or magistrate acts **impartially**. If the judge or magistrate favoured one side, then the contest would not be fair.

It is also essential that the decision-maker in the trial (the judge, when there is no jury, the magistrate or the jury) is **independent**. The magistrate, judge or jury makes the decision on the facts brought before the court. They have no previous knowledge of the accused or the parties in civil cases. For example, in criminal cases they are not given any information on prior convictions until after a verdict has been reached (except when **propensity evidence** is introduced).

Each party is responsible for presenting their case in the best possible light. The magistrate, judge or jury should not have had an opportunity to form any preconceived ideas before the trial/hearing and must put aside any personal biases.

If the decision-maker is not independent, and has preconceived ideas or biases about the case or the parties to the case, then the adversary system cannot operate effectively. It would be like the referee in a boxing match being a friend of one of the contestants. It would be difficult to make a clear and independent decision.

LEARNING ACTIVITY 7.3

The role of the parties and the role of the judge

1 What is the meaning of 'party control'?
2 How are the parties in control of their own case?
3 In what way is party control an essential element of the adversary system of trial?
4 What is the role of a judge in the adversary system of trial?
5 How does the judge try to ensure a fair and unbiased hearing?

6 Why is it essential to the adversary system that the judge be independent and impartial?
7 What problems could you envisage if a judge intervenes in a trial and assists one of the parties?

The burden of proof and the standard of proof

The **burden of proof** (also known as the onus of proof) relates to the question of which party has to prove the facts of the case. It lies with the person or party who is bringing the case. In a criminal case, it lies with the prosecution; in a civil case the plaintiff carries the burden of proof (the person whose rights have been infringed). This means that the person who brings the case has to prove that their view of the facts is correct – and not the other party's view.

This follows the concept of control by the parties within the adversary system; someone who thinks they have been wronged brings the matter to court to prove the case or, in a criminal case, if society has been wronged the prosecution brings the case. The other party then has the opportunity to show that the evidence does not support the facts alleged.

There are instances where the burden of proof can be reversed. For example, if the accused is pleading a defence such as self-defence, or insanity, the burden of proof is reversed. The accused has the onus of proving the defence on the balance of probabilities. In a civil claim, if a defendant brings a counterclaim against the plaintiff – that is, makes a new claim against the plaintiff in the proceeding – then the defendant has the burden of proving the counterclaim.

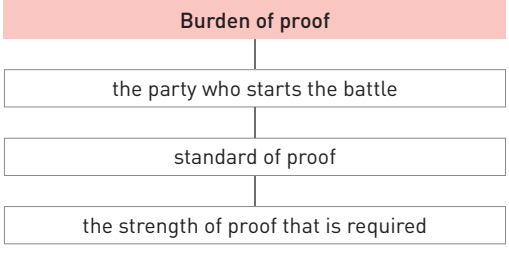
The **standard of proof** refers to the strength of evidence needed to prove the case. In a criminal case the prosecution must prove the case **beyond reasonable doubt**; that is, that there must be no reasonable doubt for an accused to be found guilty. Reasonable in this instance is what the average person in the street would believe to be the case, when the evidence is looked at in a logical and practical manner. The magistrate or members of the jury were not actually there at the time of the crime so they cannot be absolutely positive about what occurred, but they can feel as sure as rationally possible.

If the magistrate in the Magistrates' Court, or the jury in higher courts, is not able to find that the accused is guilty beyond reasonable doubt then the accused must be found not guilty.

For civil disputes, the plaintiff must prove the case on the **balance of probabilities**. This means that plaintiffs in civil cases must prove that they are most probably in the right and the defendant is most probably in the wrong. This is a less stringent standard of proof than 'beyond reasonable doubt' in criminal cases.

Application to the adversary system

Both the burden of proof and the standard of proof are essential elements of the adversary system. The burden of proof indicates who has the responsibility of proving their case. The standard of proof indicates the strength of proof required to decide who is successful.



The need for rules of evidence and procedure

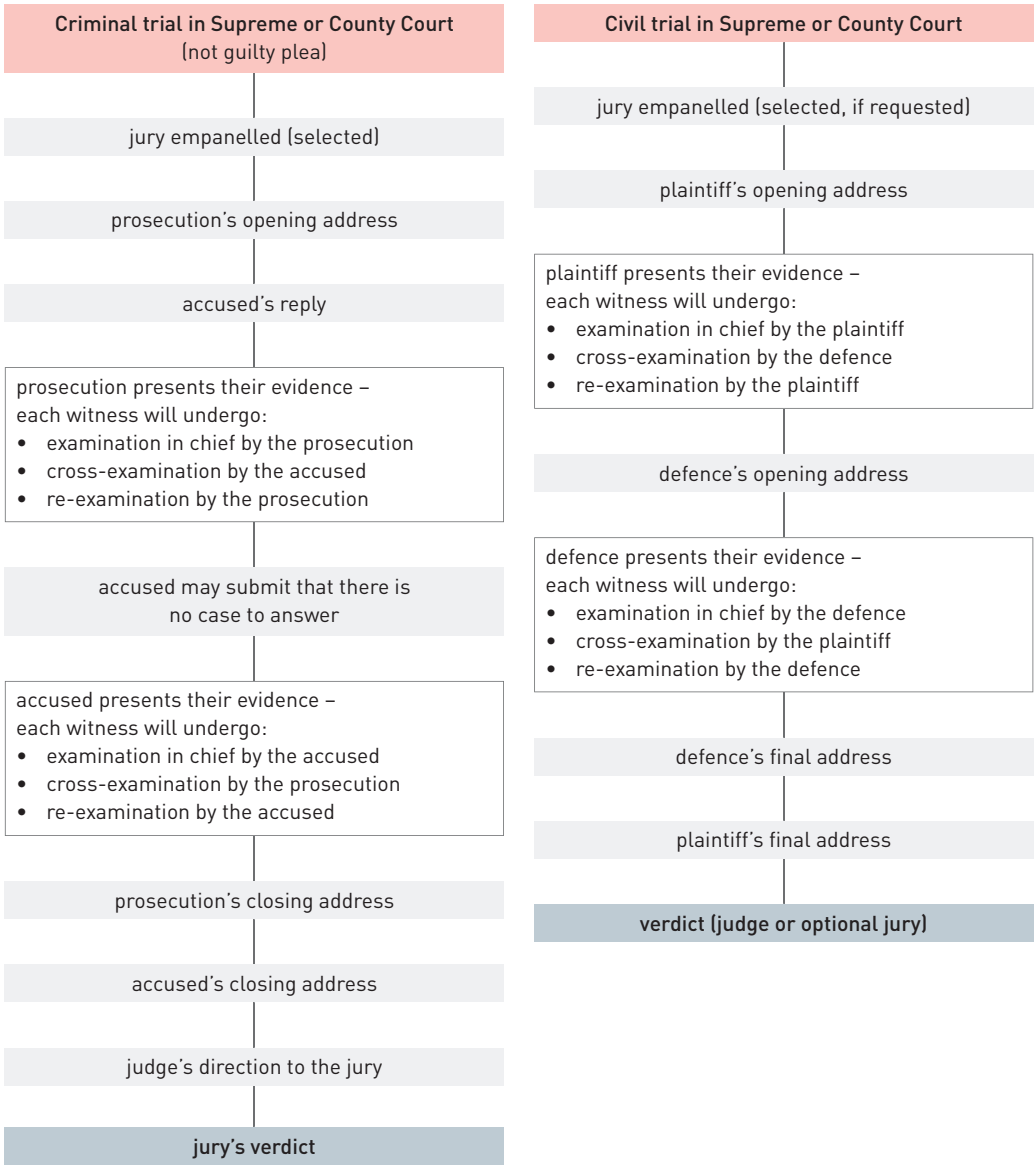
Each court in the adversary system is governed by rules of evidence and procedure that aim to ensure that there is fair and equal treatment for both parties.

Rules of procedure

The **rules of procedure** provide the framework in which court cases can take place and through which the court will try to bring about a resolution to the case. The hearing/trial procedure establishes the steps for bringing out the evidence. The truth should emerge from the evidence presented. Each party will present an opening address to the court, and then present their witnesses who are subject to three stages of questioning, before presenting their closing summary to the court. The party who calls the witness will question him or her first (called examination in chief). The other party then has the opportunity to question the witness (called cross-examination). The first party follows up by questioning the witness again to clear up any issues that have been raised during questions from the other party (called re-examination).

The procedures in court are aimed at treating both sides equally and fairly and creating an atmosphere of respect so that the parties will follow the decision of the court.

>>GOING FURTHER



Rules of evidence

Each court hearing or trial is governed by rules of evidence that facilitate the fact-finding task of the courts and aim to ensure fair and equal treatment. Evidence is concerned with the proving of facts. This proof can take a variety of forms. Evidence can be:

- **oral evidence** given by the witnesses in the form of answers to questions from the barristers
- given in the form of a sworn statement, called an **affidavit**
- in the form of an **object** such as the murder weapon, stolen goods, photos, diagrams or tape recordings
- audio or audiovisual material
- a set of circumstances or facts indicating that a certain event has happened (**circumstantial evidence**).

CIRCUMSTANTIAL EVIDENCE

If a woman is seen running from a building holding a knife dripping with blood, and a body with a stab wound is found in the building, it is very likely that the woman with the knife was the person who did the killing. It is not known for certain because she was not seen committing the killing. However, an inference could be drawn that she did do it. This is circumstantial evidence, which is allowed in court.

The adversary system of trial places a greater reliance on oral evidence, given by witnesses, rather than documentary evidence.

Rules of evidence are primarily for the protection of the parties, to ensure that:

- the parties are treated fairly
- the jury is not distracted by irrelevant material
- unreliable or illegally obtained evidence is not heard by the court
- evidence is not unduly prejudicial to the accused (for example, evidence of bad character should not be given)
- in a criminal case the court hears evidence only about the case before the court, not prior convictions of the accused, which could influence the court, although prior convictions may be heard if propensity evidence is allowed.

CASE STUDY

Judge tells court of prior convictions in Dupas case

Peter Dupas was twice found guilty of the murder of Mersina Halvagis at the Fawkner Cemetery. At the beginning of the first trial in 2007 the judge told the jury that Dupas had already been convicted in 2000 for the murder of Nicole Patterson and in 2004 for the murder of Margaret Maher. This indicated the propensity of Dupas to commit murder in a particular way. The judge then told the jury that Dupas must be judged only on the evidence before them in this case.

Following a successful appeal by Dupas in 2009, a retrial was ordered. On 19 November 2010, Dupas was again convicted of the murder of Mersina Halvagis and subsequently sentenced to life imprisonment.

Following the passage of the *Evidence Act 2008* (Vic.), there are now uniform evidence laws in New South Wales, Tasmania, Victoria and the Commonwealth.

Application to the adversary system

The **rules of evidence** keep the contest fair. Irrelevant material that would confuse the issue cannot be introduced, and unreliable evidence such as hearsay evidence cannot be used.

The **truth should emerge** through the use of the **rules of procedure**. The witnesses give their evidence through examination-in-chief, cross-examination and re-examination, and the court should be able to pick out the truth and see where there are flaws in the story. However, this can depend on other factors, such as whether both sides have legal representation, how well each case is presented (whether there is equal representation) and how well the witnesses respond to questions.

Rules of evidence
keep the contest fair

Rules of procedure
truth should emerge



Figure 7.5 Oral evidence is given by witnesses in the form of responses to questions from legal representatives.

>>GOING FURTHER

Rules of evidence

In order to fulfil the aims of the rules of evidence as outlined above, some types of evidence are inadmissible, meaning that they cannot be heard in court. The judge must decide on the admissibility of evidence if there is doubt as to whether a piece of evidence can be heard by the jury. In such a situation the jury is asked to leave the courtroom and the barristers argue their points of view about whether the evidence should be admitted. In some instances, a witness might be questioned to ascertain what might be said when giving evidence.

The *Evidence Act 2008* (Vic.) provides Victoria with similar evidence laws as New South Wales, Tasmania and the Commonwealth. It states that a more stringent approach to the admissibility of evidence against an accused person should be taken in a criminal case. A less detailed and more flexible approach should be taken to the admissibility of evidence in civil proceedings. In cases of family violence a court can now hear any reliable and probative evidence that it sees fit, but not admit evidence it considers unfairly prejudicial. (Probative evidence is material that tends logically to prove the existence or non-existence of a fact.)

Inadmissible evidence

The following categories of evidence are generally inadmissible.

- **hearsay evidence** – Evidence might be relevant to the case but unreliable because the witness did not actually see or hear what occurred. Hearsay evidence is when a witness relies on something someone else said about a situation. Hearsay evidence is not allowed because there is no possibility of testing the evidence because the person who made the allegation is not in court to be cross-examined. To some extent the exclusion of hearsay evidence protects the court from relying on evidence that has been made up or changed in the telling.

CASE STUDY

Hearsay evidence ruled inadmissible in murder case

Marea Yann was found dead in September 2003. Her son-in-law, Joseph Unumadu, was charged with her murder. Unumadu was acquitted in February 2008. Evidence from a friend of Mrs Yann that the victim had told her that Unumadu had stated during a phone call that he would kill her was ruled inadmissible on the grounds that it was hearsay. Also banned was a claim by Mrs Yann's son Jeff that his mother had told him that Unumadu had assaulted her by grabbing her around the throat. This evidence could not be admitted in the trial because it could not be tested by questioning the person who had made the statements (in this case, Mrs Yann).

- **irrelevant evidence** – Evidence is not allowed if it does not help to establish the important facts of the case. Such evidence would be time-wasting and could also mislead or confuse a jury.
- **opinion evidence** – A witness in court cannot give an opinion about a situation unless the witness is an expert in the field. For example, a mother cannot say that her son's behaviour is 'unusual for a child of his age' unless she is an expert on the behaviour of children. She could, however, say that her son's behaviour had changed since the accident. She would then be reporting what she had seen, not giving an opinion. A child psychologist could give evidence about the usual behaviour of a child.

CASE STUDY

R v. Zakaria (heard in the County Court before Judge Howse, 9 October 1991)

A woman was apprehended when going through Customs. She was carrying a bag containing sheets that had been impregnated with heroin. A forensic analyst who was giving evidence relating to drugs was asked what he noticed about the sheets. He said they looked 'stiff and old'. He was an expert witness giving evidence relating to heroin that had been found in the sheets; however, he was not an expert on the appearance of sheets.

The jury was asked to leave the court while it was decided whether his response 'stiff and old' should be permitted or struck out. He admitted under questioning, in the absence of the jury, that he had never seen new sheets in a package. He was therefore allowed to give evidence before the jury relating to the sheets being stiff and irregularly folded (observation) but not that they looked old (opinion, not relating to his expertise).

- **evidence of bad character** – A party is generally not permitted to bring evidence of the bad character of the other party because this could unduly prejudice the court against the other party. If, however, a party brings evidence regarding their own good character, the other party may bring evidence to the contrary.
- **prior convictions** – Evidence relating to the past record or prior convictions of the accused is not admissible in the trial. A person should be tried on the circumstances of the present case only. However, in some circumstances propensity evidence is allowed if it can demonstrate that the accused has a tendency to commit the type of crime they are accused of. This evidence can include prior convictions.
- **privileged information** – Communications between a solicitor and client are privileged unless the client gives permission for evidence of the communications to be disclosed. Correspondence between the solicitors of the parties is also privileged if they are attempting to reach a settlement. This correspondence usually carries the words **without prejudice**, which is a way of stopping any statements made during settlement negotiations being used in court.
- **evidence obtained illegally** – Evidence may be excluded if it has been obtained illegally, or if it is not in the public interest.

The need for legal representation

The role of preparing and conducting a case is usually undertaken by legal representatives on behalf of the parties. Such representation is necessary in the adversary system; the legal representatives are experts who are familiar with the strict rules of evidence and procedure that are essential elements of the adversary system. These experts help to ensure that the parties are able to present their best possible case, and to assist in achieving a just outcome.

Application to the adversary system

For the adversary system to work effectively there should be **equal representation**. Each party has control of their case; both parties should have an equal opportunity to present their cases and, depending on which party is in the right, win the case. It is extremely difficult for a person to present

Need for legal representation

- to present the case in the best light
- equal representation required to bring out the truth



Figure 7.6 Barristers leaving the Supreme Court of Victoria

their own case in either a criminal or civil matter without legal representation, and this can result in an unjust outcome. For example, a party may not know how to present their evidence in the most effective way, or may not know how to cross-examine a witness.

Bringing out the truth and showing your case in the best light depends on your being legally represented, with the best lawyer possible. The truth should emerge through each party presenting their own case to the best of their ability and the other side showing the flaws in the evidence being presented through cross-examination of the witnesses.

If one party is better represented than the other, this could lead to an unfair advantage and possibly an incorrect outcome. It is likely that a person who is represented by a competent senior barrister has a better chance of winning than a person whose barrister is less experienced. A competent senior barrister has greater skill at preparing a case and bringing out the desired evidence.

>>GOING FURTHER

Legal requirements for legal representation

Some pieces of Victorian legislation state that parties to a case must be legally represented. For example, the *Children, Youth and Families Act 2005* (Vic.) states that if a child in a proceeding in the Family Division or Criminal Division of the Children's Court, or the child's parents or guardian in the Family Division, are not legally represented, then the court may adjourn the hearing to enable the child or the child's parents to obtain legal representation.

The County Court or the Supreme Court can order Victoria Legal Aid to provide legal aid to an accused person in a criminal trial if the court finds that:

- it will not be able to ensure that the accused person will get a fair trial without legal representation, and
- the accused person is not able to afford the full cost of legal representation from a private lawyer.

LEARNING ACTIVITY 7.4

Proof, legal representation, rules of evidence and procedure

1 In what way are the burden of proof and the standard of proof essential elements of the adversary system?
2 Why are the rules of evidence necessary for the adversary system to operate?
3 How do the rules of procedure operate to bring out the truth in the adversary system of trial?
4 Why is equal legal representation an essential element of the adversary system?
5 Describe two types of inadmissible evidence and explain why the evidence is inadmissible.
6 Why are some types of evidence privileged?
7 What is circumstantial evidence?
8 Look back at the case study 'Judge tells court of prior convictions in Dupas case'. What is propensity evidence? Explain how propensity evidence was used in the Dupas case.
9 Choose a courtroom drama on television or a DVD. Pick out and note the major features of the adversary system from the courtroom scenes. Write a report on your findings.
10 Read the case of *R v. Farquharson* and answer the questions.
   a Explain the rules of evidence that operate in this case.
   b What is the role of expert witnesses, and how can their evidence be tested?
   c Explain the rule regarding prosecution disclosure of evidence in criminal cases.
   d Explain why there are strict rules of evidence in the adversary system.

CASE STUDY

R v. Farquharson

In the case of *R v. Farquharson* (2009) VSCA 307 (heard in the Court of Appeal, 19 December 2009), Robert Farquharson was convicted in the Victorian Supreme Court in 2007 of the murder of his three children, and was sentenced to life imprisonment with no minimum term. The jury found him guilty of driving his car into a dam near Winchelsea on Fathers' Day 2005, drowning his three sons. Farquharson had argued at trial that he had passed out following a coughing fit when the car left the road. He appealed against his conviction and sentence on 24 grounds of appeal, many of these on evidentiary grounds. Following are some of the findings of the Court of Appeal.



Figure 7.7 Robert Farquharson attending court

- Evidence of expert medical witnesses regarding Farquharson's likelihood of blacking out following a coughing fit was correctly allowed by the trial court. The court ruled that the opinions of these doctors had a probative value (could be used logically to prove the existence or non-existence of a fact), and there was no potential unfair prejudicial effect.
- The trial judge was correct in allowing evidence regarding computer simulations of the accident, despite Farquharson challenging this evidence as irrelevant and containing assumptions that were prejudicial.
- Finding that the prosecution should have disclosed, before the verdict, that one of their key witnesses, Greg King, had charges pending for indictable offences, and that the police were prepared to supply a letter of support upon his plea and sentence. This was evidence that the prosecution should have disclosed, and it went to the credibility of the witness. This ground for appeal was successful.

Farquharson was successful on a number of grounds, so the appeal was allowed and a retrial was ordered. At the retrial in 2010, the second jury found Farquharson guilty of three counts of murder; he was sentenced to life imprisonment with a minimum of 33 years. Farquharson sought to appeal the second murder conviction. The Court of Appeal dismissed his appeal in December 2012. In August 2013 the High Court refused to grant him leave to appeal.

STRENGTHS OF THE ADVERSARY SYSTEM OF TRIAL

The adversary system was inherited by Australia from the British system and has been accepted as an appropriate method of trial. The advantages of the adversary system should be seen in terms of the ways it can contribute towards achieving an effective legal system. Some of its advantages are shown below.

The role of the parties

Party control is an important feature of the adversary system. The parties are more likely to feel satisfied with the result if they have been able to control the conduct of their case. It allows the parties to **fight their own battles**. Having parties striving to win also reflects our combative nature. Party control is particularly important in criminal cases in that a person is being prosecuted by the state but does not have to depend on the state for their defence. In civil cases, the parties are able to settle their differences with little interference from the state.

The role of the judge

The judge operates as an **impartial umpire** within the adversary system. This ensures that the rules of evidence and procedure are followed and the parties are treated fairly during the trial or hearing.

The accused (in a criminal case) and the parties (in a civil case) should receive a fair and unbiased decision because judges, magistrates and juries make their decisions on the facts before them and have, as far as possible, no preconceived ideas about the parties to a case.

In a criminal case, the judge is independent of the state (not connected to the prosecutor) and therefore people can feel that the decision is fair and impartial.

The public is more likely to feel **confident** in the decision of an independent decision-maker.

Burden of proof and standard of proof

In a criminal case the accused is presumed innocent until proven guilty, and the prosecution must prove the case against the accused beyond reasonable doubt. In a civil case the plaintiff must prove the case against the defendant on the balance of probabilities. This means that under the adversary system, the party who is making the allegations is **responsible for proving the facts**. This would seem to be a fairer system than having a third party, the judge or magistrate, solely responsible for finding out the facts and deciding who is in the wrong.



Figure 7.8 A case being heard in the Court of Appeal using the adversary system of trial

Rules of evidence and procedure

The rules of evidence and procedure, which have been developed over the years, and which aim to treat the parties fairly, also promote **consistency** in that all parties are to be treated alike.

The use of oral evidence in the adversary system provides both sides of the dispute (in both criminal and civil cases) the opportunity to **assess the sincerity of the witnesses** by watching them give evidence rather than reading written evidence. The process of cross-examination is also likely to show up false evidence and **bring out the truth**.

The rules of evidence provide guidelines to ensure that the evidence heard can be tested and that it is not irrelevant or confusing. The court hears evidence relevant to the facts of the particular case, and not what has happened in the past, except for **propensity evidence**, which is evidence indicating that the accused has previously acted in a certain way.

Need for legal representation

The ability to be represented by legal personnel provides those accused of a crime or parties to a civil case with the opportunity **to present their side of the facts** in the best light possible. The parties can choose the best legal representation (that they can afford) to bring out the evidence in an objective and logical manner that will best benefit their case. The parties are not given the same opportunities in the inquisitorial system.

WEAKNESSES OF THE ADVERSARY SYSTEM OF TRIAL

The problems associated with the adversary system should be seen in terms of the extent to which they might limit the effective operation of the legal system.

The role of the parties

Although there are many advantages to the parties having control of the running of their case, in a civil matter particularly it can lead to further **animosity** between the parties instead of settling their differences in a more amicable manner.

Party control can also disadvantage the parties in some instances, because it relies on the parties bringing out all the evidence that is favourable to their case. Some **vital evidence may be missed** and the court may reach an unfair decision.

Delays

Delays can result from the parties being in control of their own case. Delays can also be caused by the lack of court personnel and court facilities.

Both sides want to win the case, so a criminal case can be held up for many months while the prosecution is gathering evidence against the accused to try to ensure a conviction. If the prosecution brings the case with insufficient evidence, and the court finds the accused not guilty, that person cannot usually be tried again for that offence. (There are exceptions to this rule, such as where

compelling new evidence, for example DNA evidence, comes to light.) While waiting for the case to come to trial, the accused could be held on remand in prison (despite being innocent until proven guilty) or could be released on bail. If on remand, the accused has to endure being in prison, even though they could later be found not guilty. If on bail, the accused has the trauma of having a court case hanging over their head.

Civil cases can take many years to be brought before the courts because other avenues can be explored first rather than taking the matter to court. When the case is to go to court, the parties need time to prepare their case to give them the best chance of winning. This can cause the parties a great deal of hardship. The plaintiff is waiting for a settlement and both parties have the worry of not knowing what the outcome will be. Delays arise for many reasons, such as one party not complying with court orders to complete certain procedures, or a failure to gather evidence for the trial, therefore adjourning the trial date.

Delays can have a negative impact on individuals. However, the problem of delays in both criminal and civil cases has diminished through the use of directions hearings and case flow management, which aims to encourage the parties to reach an early resolution of disputes and reduce trial time. The increased use of mediation for civil disputes also aims to assist parties to reach a resolution themselves.

The case list management system can bring about a cheaper and speedier resolution of cases. It involves transferring some of the case preparation from the parties to the court. At a pre-trial case conference, the judge can explore the case and provide guidance to the parties, as well as ensuring that time limits are adhered to in criminal trials.

High cost of proceedings

The high cost of criminal and civil proceedings is primarily caused by the parties being responsible for their own case and having to pay highly for legal representation in order to win the case.

The **expense can deter people from seeking to enforce their rights in civil cases**, particularly if the claim is small. Quite often the plaintiff may be successful in the case, but have little money remaining after paying their legal costs. The successful party might have costs awarded in their favour, but they do not usually cover all solicitor–client costs. These costs are usually unrecoverable.

The role of the judge

The judge or magistrate is responsible for ensuring that the case before them is run fairly and according to the law. As mentioned earlier, the judge or magistrate acts as an independent umpire or referee. They do not involve themselves in the running of the case. Even though judges and magistrates have a great deal of experience in court processes, **this expertise is often not fully utilised**. They cannot help if a party's legal representative is not doing a good job, or assist unrepresented parties with their case. Judges are not responsible for how much evidence is collected and how many arguments are put to the court. They cannot suggest that other issues or evidence should be explored.

Their role is to decide on questions of law (and fact in the absence of a jury), and ensure that the rules of evidence and procedure are followed – not to help discover the truth or help the parties to settle their dispute. A judge can ask questions in court but this is usually just to clear up points that have been made. A judge cannot be a seeker of the truth. As is the situation with an umpire in a case, they observe, and have to stand by, even while watching a poor presentation of a case.

Directions hearings have given judges more control in criminal and civil matters in managing any issue that can be decided before trial and speeding up the trial process.

Burden of proof and standard of proof

The main emphasis of the adversary system is on the parties **striving to win** their case rather than finding the truth. The parties who are bringing the action must be able to prove their case (the burden of proof). The degree to which the case needs to be proven is the standard of proof. Parties need to prove their case in order to win.

Both sides are trying to show the facts that are beneficial to their side and **some facts may not be brought forward** by a barrister, or party to a case, because they are not favourable to their side of the case. This is particularly relevant if one party is not represented, or not equally represented. If the court does not hear all the facts, the party in the right may not win the case. The prosecution is, however, obliged to present all the evidence they are aware of.

Rules of evidence

The adversary system relies on complex rules of evidence to ensure the evidence is presented in a fair way and the parties are treated equally. The outcome of a case in the adversary system can rely on the impression the adjudicator or jury gained in court from the witnesses. If wrong impressions are gained, an unfair outcome could be the result. Expert evidence can, for example, be very influential in a court and yet may not be free from bias.

Oral evidence

Giving oral evidence is an essential part of the adversary system. Evidence can be tested through cross-examination and the court can better gauge the truth of what is being said. However, a witness might say something during cross-examination that gives the wrong impression and leads the jury, judge or magistrate to doubt the evidence.

> A devout Methodist client was very concerned about the sanctity of the oath. He therefore deliberated before each answer and gave his answers in the form of a complete sentence, rather than a mere yes or no. As a consequence of this, the magistrate hearing the case came to the conclusion that the witness was fabricating his answers and disbelieved him.
>
> Source: *Evidence, Proof and Probability*, Richard Eggleston, London, 1978

Inexperienced witnesses, through limited knowledge and understanding of what the court is trying to do, can fail to convey points that they are trying to make. Further, the experience of attending court as a witness is very intimidating and can cause mistakes to be made, which can have an effect on the outcome of the case. In addition, witnesses are limited in giving evidence because they can **only answer those questions asked** of them by barristers. There may be other evidence that could come out if witnesses were allowed to tell their stories, rather than their responses being limited.



Figure 7.9 A witness giving evidence in court

Oral evidence relies on the memory of the witness. The case might take a few years to reach court and memories usually fade. It is easy for witnesses to become confused or to remember certain main factors and, in trying to reconstruct the situation in their minds, make up what they think must have happened.

The court has attempted to overcome many of these problems by allowing witnesses to present their evidence that would be given in examination-in-chief through a written witness statement. This means that a witness will adopt that pre-approved written statement as their evidence, and will then be cross-examined and re-examined on their evidence.

Inadmissible evidence

There may be instances where evidence that would help to establish the truth of a case is ruled inadmissible by the court, due to it being improperly obtained. While the main purpose of this rule is to ensure that the police do not infringe the rights of citizens when investigating crimes, it has resulted in some useful evidence not being heard in cases.

CASE STUDY

Police evidence ruled inadmissible

In June 2013, a Melbourne magistrate ruled that police cannot pull over a vehicle without a legitimate reason. Section 59 of the *Road Safety Act 1986* gives Victoria Police the right to stop a car and ask the driver to give them his or her name and address and produce their driver's licence. The magistrate ruled that S59 did not give the police the right to stop people without a reason.

The evidence of the police officers was ruled inadmissible because they had stopped the car unlawfully.

Expert evidence

The prosecution in a criminal case has access to greater facilities for the collection of evidence, which could place the accused at a distinct disadvantage in the battle to win the case. The prosecution has also had the opportunity to investigate the matter from the time the crime was committed. The accused might not have been charged until some years later and, therefore, evidence that the accused needs to investigate is old, and accurate results from any testing might be difficult to achieve.

A forensic scientist could be tempted to present the evidence in a manner that makes it sound favourable to the prosecution's case in order to assist the prosecution in obtaining a conviction.

Expert witnesses, such as psychologists and doctors, might be reluctant to appear in court. The time taken by a court appearance cannot be predicted, and any attendance in court necessitates leaving their practices (which leads to a loss of income).

Expert evidence, such as forensic DNA evidence, can be very influential on a jury. This can be a problem if there have been any mistakes in the testing process and the evidence is inaccurate or misleading.

CONTAMINATED DNA

An error in the interpretation of DNA by police forensic laboratories caused a ban on its use in criminal cases in Victoria. The ban came two days after a rape conviction was overturned because of a contaminated DNA sample. The ban was placed on 9 December 2009 and not lifted until 12 January 2010. It affected at least six criminal cases. This incident resulted in the adoption of a national standard in forensic laboratories throughout Australia.

Rules of procedure

The processes of examination-in-chief, cross-examination and re-examination aim to bring out all the facts of a case through both sides asking questions. In this way the truth should be reached. However, sometimes important evidence may not be brought out. Witnesses can be nervous and say the wrong things. Barristers may be ill-prepared and not ask the correct questions. Therefore, the truth may not come out.

The witnesses can only respond to questions and are not able to tell their whole story in a narrative form that would be easier for the jury and judiciary to understand. It would also be less intimidating for the witnesses to give their side of the story without having to answer what are sometimes difficult questions.

The court therefore has to piece together all the evidence from the witnesses and any other evidence to work out exactly what happened. It may be difficult for a jury to remember all the evidence when it is given in a piecemeal fashion, especially in lengthy trials.

The need for legal representation

Parties in a civil or criminal case can be greatly disadvantaged by inexperienced or poorly prepared legal representatives, or representation that is not the same standard as their opponent's legal representation (unequal representation).

The parties need someone who has the skills to bring out the evidence that will be advantageous to their client. The client gives instructions to their legal representative, but is totally reliant on their legal representative's skills and knowledge. A person who is not legally represented usually does not know the rules of evidence and procedure and does not know how to bring out the evidence in their favour. The rules of evidence and procedure are there to ensure that all parties are treated equally before the law, although the parties might not have an equal opportunity to win the case.

Some barristers will use tactics to win the case such as grandstanding, which could involve playing tactical games and arguing every point regardless of merit. The adversary system provides no disincentive for this type of courtroom behaviour that can lead to higher costs and longer trials.

Table 7.2 Summary of the strengths and weaknesses of the adversary system of trial

	STRENGTHS	WEAKNESSES
The role of the parties	The parties are able to: • fight their own battle • engage legal representation to present their case in the best possible light • decide what facts are to be brought before the court.	Party control can lead to: • further animosity • high cost of legal representation • delays that cause hardship.
The role of the judge	The judge is impartial and: • makes sure the parties are treated fairly • creates more confidence because he or she is an independent decision-maker • is independent of the prosecution in criminal cases or the parties in civil cases.	The judge cannot offer the parties assistance. This could be a waste of the judge's experience if some parties are poorly represented.

Burden and standard of proof	The party bringing the case has to prove the facts to the standard of proof required.	The adversary system is more concerned with winning, with each party bringing out the facts to benefit their side, rather than finding out the truth.
Rules of evidence and procedure	Rules of evidence and procedure make the process fair: • Oral evidence helps reveal if the witness is sincere. • The process of examination-in-chief and cross-examination allows both parties to present their cases and test the evidence of the other party. • All parties are treated alike. • Some types of evidence are not permitted; this is to protect the parties and in the interests of justice.	Problems could arise from the following: • Witnesses may be intimidated and say something misleading. • Witnesses can only respond to questions and cannot tell their own stories in their own words. • Expert evidence could be unduly relied on. • Not all evidence may be brought out. • The truth may not be reached.
Legal representation	Each party has a right to choose a legal representative. In this way they can choose someone they believe will present their case in the best light.	The adversary system relies on both sides being equally represented so the truth can come out. One party to a case may not be able to afford legal representation, or may have inferior legal representation.

LEARNING ACTIVITY 7.5

Strengths and weaknesses of the adversary system of trial

1 How is the need for legal representation both a strength and a weakness of the adversary system? Discuss.
2 Explain the role of the judge in a criminal trial. To what extent does the judge or magistrate enhance the effective operation of the legal system?
3 Party control is an important element of the adversary system. Discuss the strengths and weaknesses of this.
4 How can the rules of evidence and procedure be a strength and a weakness of the adversary system of trial?
5 Why might the truth not be found in the adversary system of trial? Explain.
6 Explain the difference between winning a case and establishing the truth of a case. Why might one be achieved in a trial without the other?
7 Look back at the case study 'Police evidence ruled inadmissible' and answer the questions.
   a What is inadmissible evidence and why are some types of evidence inadmissible?
   b Why was the evidence ruled inadmissible in this case?
8 Read the following case study 'Conviction quashed because of contaminated DNA' and answer the questions.
   a Why was Jama's conviction quashed?
   b How does this case illustrate a problem with the adversary system? Discuss.

CASE STUDY



Figure 7.10 Farah Jama leaves the Court of Appeal.

Conviction quashed because of contaminated DNA

Farah Jama spent 15 months in jail before being acquitted of rape by the Court of Appeal. The Court of Appeal found that the DNA taken from a woman who was believed to have been sexually assaulted had been contaminated by the DNA of Jama. There were two other swabs from the woman that did not contain DNA from Jama. The Court of Appeal quashed the conviction of Jama, and admitted that there had been a 'substantial miscarriage of justice'. It is thought that Jama's DNA was mistakenly transferred to one of the swabs taken from the woman. The case followed concerns about methods used at the Victoria Police Forensic Services Centre at Macleod, which conducts DNA testing.

The Law Institute of Victoria has warned of the dangers of convicting on DNA evidence alone. During his trial Jama had given evidence that he had never been to the club or met the woman, and was at home with his family in Preston on the night of the incident. There were no fingerprints, witnesses, or any physical or biological evidence that a rape had occurred; the single piece of contaminated DNA was the only evidence.

Farah Jama has been awarded $525 000 by the state government in compensation.

An enquiry into the circumstances of Jama's case was commissioned by the Department of Justice, and conducted by retired Victorian Supreme Court judge Frank Vincent. In his report, delivered in May 2010, His Honour concluded, 'It is almost incredible that, in consequence of a minute particle … being released into the environment and then by some mechanism settling on a swab, slide or trolley surface, a chain of events could be started that culminated in the conviction of an individual for a crime that had never been committed by him or anyone else …'. His Honour made 10 recommendations relating to the collection, handling and testing of samples, as well as increased education among the legal profession about DNA evidence.

9 Read the case study 'Brett Kuzimski found guilty' and answer the questions.
   a Why do you think evidence from the podiatrist was called in this case?
   b Did this particular evidence have to be given by a podiatrist? Explain.

CASE STUDY

Brett Kuzimski found guilty

Brett Nicholas Richard Kuzimski, 37, was found guilty of the murders of 26-year-old Melanie Carle and 32-year-old Kellie Maree Guyler. Their bodies were found in a burnt-out car.

The jury heard evidence from a podiatrist who examined a footprint found at the crime scene at the request of police. The podiatrist said a right footprint found at the scene matched an inked impression of Mr Kuzimski's right foot, and only between 0.6 per cent and 2.44 per cent of the population would have the same foot length and the same length of the second and third metatarsal bones.

10 Read the article 'Our courts are for the people' and answer the questions.
- a What features of the adversary system of trial contribute to the high cost of legal proceedings?
- b Briefly explain former attorney-general Rob Hulls' point of view about the problems that exist with the adversary system of trial.
- c What is Rob Hulls suggesting as a way of improving the system?

EXTRACT

Our courts are for the people

Rob Hulls, former attorney-general of Victoria, *The Age*, 11 June 2008

It is time for a major cultural shift in our legal system. To make this shift we need to move away from the current adversarial system, which often leads to lengthy and costly court cases as a result of grandstanding, the playing of tactical games and the arguing of every point regardless of merit.

We need a system focused on resolving disputes rather than one that has no disincentive for the chest-beating, table-thumping antics of highly paid barristers that can lead to blow-outs in both costs and time.

We need a system where the courts become a last resort rather than a first resort. We should be diverting disputes away from the courts through a range of alternative dispute-resolution techniques or what I prefer to call, appropriate dispute-resolution techniques.

This is particularly relevant for the 250 000 Victorians every year who find themselves involved in civil disputes, including neighbourhood fence disputes, consumer complaints, personal injuries claims, disputes about wills and large contractual claims between businesses.

The cost of justice, particularly when you have some barristers charging up to $14 000 a day, is prohibitive for the average person. We don't want our courts to become a fiefdom for large corporate entities to take action against each other in the full knowledge that their legal fees are tax-deductible.

Well-resourced litigants can afford to keep their cases running through the courts even when the cost of doing so begins to rapidly approach the amount they are arguing about.

This approach is simply not sustainable. It also places the process at risk of ridicule if the original goal of settling the dispute becomes nothing more than a cost-recovery exercise.

It is time for the parties involved in litigation and the legal profession to adopt a more responsible use of the civil justice system.

We need to move away from the idea that court time is endless and that justice means giving the parties as much time as they can afford to slug it out in court.

It is time to acknowledge that the courts are a public resource paid for by taxpayers and should be used responsibly, efficiently and effectively. They are not a forum for highly paid barristers to display their thespian attributes or to use as a vehicle to increase their bank balances, or for corporations to put off the need to sit down and resolve matters appropriately.

Resolving disputes outside the adversarial process gives parties ownership of the outcomes and inevitably results in long-term sustainable solutions.

The Victorian Government has provided $17.8 million over four years in this year's state budget to improve access to alternative dispute-resolution services.

Under these changes, Victoria will become the first jurisdiction in Australia to trial judge-led mediation. The trial is based on a Canadian model where an intractable dispute is sent off

to a 'mediation list', where a judge who has previously had nothing to do with the case attempts to resolve it. Judge-led mediation has been an overwhelming success in Canada, with the vast majority of these cases being resolved quickly and effectively.

The recently released report on the reform of civil justice by the Victorian Law Reform Commission details the key issues that we need to confront to deliver greater access to justice.

The Victorian Government supports the major themes identified in the report and will release an updated justice statement in the next few months, which will include major reform initiatives for our legal system with a particular emphasis on alternative dispute resolution and civil justice reform.

The cultural shift required cannot be achieved alone. Everyone – the government, courts, the legal fraternity and litigants – has an important role to play. Judges need to take greater control over their courtrooms, barristers must take the most direct route to resolving the dispute, and litigants need better ways to resolve disputes.

It is what more and more people are demanding: a justice system that is accessible and affordable. It is time to make the change.

MAJOR FEATURES OF THE INQUISITORIAL SYSTEM OF TRIAL

The **inquisitorial system** (also called the investigatory system) is a system of trial where the court is actively involved in determining the facts and conduct of a trial. It has its origins in 2000-year-old Roman law, and variations of this system are used in many European, Asian and South American countries. Its main role is to find out the truth of an issue.

The differences between the adversary system and the inquisitorial system are less evident in civil disputes than in criminal cases.

Role of the parties
- greatly reduced

The role of the parties

Due to the judge having control of the case in the inquisitorial system, the parties have a greatly reduced role. They are required to respond to the directions of the court. While this may reduce the effects of some inequities between parties, it places control of their case in the hands of a third party.

Role of the judge
- judge takes more active role
- the objective is to find the truth
- judge is involved in investigating cases
- judge calls and questions witnesses

The role of the judge

One essential feature of the inquisitorial system is that the **judge takes a more active role** in the case. This includes:

- investigating cases
- defining the issues to be resolved
- gathering evidence (together with the police).

In France the ***juge d'instruction*** (translated as 'investigating magistrate') conducts the investigations, supervises the work of the police, finds and questions witnesses and suspects, orders searches and finds evidence. **The objective is to find the truth of the matter**, so the judge's role is to find both incriminating and exonerating evidence. The judge's focus is on the compilation of a documentary record establishing the facts of the case (a **dossier**).

At trial, the judge is actively involved in calling and questioning witnesses. Further, judges are not restricted to the issues at question in the trial. The judge may raise other matters of law or fact, even those that have been conceded by the parties, or ones the parties could perceive as not relevant to their case.

The justification for the inquisitorial system is that the effective operation of the legal system is of benefit to society as a whole. Therefore, it is the responsibility of the state to ensure that the relevant information is brought out and the truth is reached.

Burden of proof and standard of proof

No formal burden of proof or standard of proof is set on any party, as **the judge is the person responsible** for bringing evidence and finding out the truth. The pursuit of truth is the main objective in this system of trial.

Burden and standard of proof

- no formal rules of evidence and procedure
- the objective is to find the truth
- the judge is responsible for bringing evidence and finding the truth

Rules of evidence and procedure

The emphasis in the inquisitorial system is on finding the truth. There is **less reliance on strict rules of evidence and procedure** in the inquisitorial system. Many of the evidentiary rules of the adversary system, such as the exclusionary rule (where the judge can exclude evidence that is improperly obtained, considered hearsay and so on) do not apply in the inquisitorial system. There is extensive use of written evidence, and **witnesses are able to tell their stories**, uninterrupted and in a logical form, rather than responding to specific questions. Evidence led could also include character evidence (either good or bad) and information related to prior convictions. Judges are free to hear all evidence, then to determine which evidence they feel is relevant and reliable.

Evidence and procedure

- no strict rules
- witnesses able to tell their stories

The role of legal representatives

Due to the judge's active role in relation to investigation and questioning, the legal representatives have a lesser role to play in the inquisitorial system. They assist the judge with finding out the truth. This can include further questioning of witnesses.

Role of legal representatives

- much lesser role
- assist the judge to find the truth



Figure 7.11 Judges in a French inquisitorial court

Table 7.3 Strengths and weaknesses of the inquisitorial system of trial

STRENGTHS	WEAKNESSES
The decision-maker takes a more active role in investigating to find the truth. Rather than leaving it to the parties to bring out evidence that is favourable to themselves, all available evidence is weighed up by the judge, who will decide which evidence he or she believes to be valid.	**The judge is less impartial than in the adversary system**. In the adversary system the judge does not enter the 'fray of the battle'. The decision-maker in the inquisitorial system gets involved with all aspects of the dispute and could be influenced by outside issues. The professional ethics of the decision-maker in the inquisitorial system would, however, require him or her to be impartial.
Witnesses are mostly called by the decision-maker rather than by the parties, and are therefore likely to be less biased. For example, the decision-maker in the inquisitorial system may call an expert witness to report to him or her. In the adversary system, both parties will look for expert witnesses who can show the evidence in a way that is most favourable to their arguments (known as 'expert shopping'). This can result in two expert witnesses with different opinions. Some experts could be tempted to favour one side so their services may be called upon again. The chief justice of the Federal Court has stated that expert witnesses in the future have a paramount duty to the court rather than an obligation to one of the parties.	**There is greater reliance on written evidence**. This denies the parties the same opportunity to test the evidence that is possible in the adversary system. In the adversary system of trial each party is able to cross-examine the evidence of witnesses and show any flaws in the statements made.
There is less reliance on legal representation. This is particularly important if one party is not well represented.	**The legal representatives may be less effective in influencing the outcome.**
The decision-maker controls the production of evidence and it is more likely that all the relevant evidence is brought out. In the adversary system, the parties may use 'tactical games' to withhold evidence until the appropriate moment to gain the advantage of surprise.	**Parties are not able to call their own expert witnesses**. An expert witness acting on behalf of the decision-maker may get it wrong and the parties should be able to call their own experts. **There is too much power in the hands of one individual (the judge).** Separation of the roles of judge, investigator (police) and lawyers could lead to a fairer outcome.
The cost of an inquisitorial system of trial is mainly borne by the state, in criminal cases. The advantage of this is that the accused is more able to defend a matter in court and is not as reliant on funding. In the adversary system of trial, in criminal cases, the state brings the prosecution and the cost of defending a case is borne by the accused, unless he or she has legal aid.	**The parties may feel at the mercy of the investigating judge** rather than being in control of their own cases and therefore likely to 'own' the outcome. They are also less likely to have legal representatives acting on their behalf. Legal representatives play a greater role in the adversary system.
The use of mainly written statements reduces the cost of the proceedings because it is quicker, but the parties may prefer to see the witnesses being cross-examined as in the adversary system. The use of mostly written statements has now been adopted in committal proceedings in the adversary system.	**The investigating judge is aware of all reports of the character, personality and past record of the accused**. This could mean that biases are formed against the accused that could be outdated or inaccurate.

LEARNING ACTIVITY 7.6

Features of the inquisitorial system of trial

1 Describe the role of the judge in the inquisitorial system of trial.
2 Why do you think you may not need legal representation in an inquisitorial trial? Describe two other major features of the inquisitorial system of trial.
3 Which features of the inquisitorial system of trial do you think would help the adversarial system of trial in reaching a fair outcome? Discuss.
4 Discuss three strengths and three weaknesses of the inquisitorial system.
5 **Investigation**
Using the Internet, investigate the use of the inquisitorial system in France or Germany. Write a 300-word report on your findings.

COMPARISON OF ADVERSARY AND INQUISITORIAL SYSTEMS OF TRIAL

Role of the judge

One of the main differences between the inquisitorial system and the adversary system is the **role of the decision-maker**. In the adversary system the judge or magistrate is an independent umpire, making sure that the 'battle' is fair and the parties follow the rules. The decision-maker does not enter the arena, but leaves it entirely up to the parties. The role of the decision-maker in the inquisitorial system is quite different. In this system the decision-maker's role is more active. He or she will investigate the facts, question the parties and relevant witnesses, examine the law, apply the law to the facts, and reach a decision. The decision-maker is not restricted to considering only those facts that are deemed relevant by the parties, but can take the investigation further to get at the truth.

Rules of evidence and procedure

In the adversary system, the court is bound by **strict rules of evidence and procedure**. The parties are restricted in the timing and method of producing new material, and there are restrictions on the type of evidence that can be produced. In the inquisitorial system the decision-makers have the discretion to bring out any new material at any time in the process, in their attempt to reach the truth.

Furthermore, the inquisitorial system of trial does not insist on strict rules of evidence and procedure. Any evidence that will help to find out the truth is examined.

Need for legal representation

Due to the complex rules of evidence and procedure, each party in the adversary system **needs to be represented** by an expert legal representative who understands these rules. The legal representative for each party will prepare their case, find and present evidence and argue their case to the court. In contrast, there is less need for legal representatives in the inquisitorial system, where their role is mainly to assist the judge in finding the truth.

Role of the parties

The emphasis in the adversary system is on **party control**, with the parties determining whether the case will go to court, which court, the mode of trial, and the evidence to be presented at trial. The parties in the inquisitorial system have less control over their case. This control is predominantly with the judge.

Burden and standard of proof

The overriding objective of the adversarial system of trial is to settle a dispute between two opposing parties, by declaring one of them to have won their case. In doing so, parties need to provide proof of their case. The **burden of proof** is on the party bringing the court action (the prosecution for criminal cases and the plaintiff in civil cases), and they need to prove their case according to the required **standard of proof** (beyond reasonable doubt for criminal and on the balance of probabilities for civil). While it is expected that the truth will emerge during the course of a trial in the adversary system, finding the truth of the matter before the court is the primary objective of the inquisitorial system. The burden of proof and the standard of proof are not as relevant because the case is conducted by the judge from investigation through to the outcome.

Table 7.4 Summary of the comparison between inquisitorial and adversary systems of trial

	ADVERSARY SYSTEM	INQUISITORIAL SYSTEM
Role of the parties	**Party control** – Parties initiate proceedings, investigate relevant law and evidence for their case, decide on the evidence and facts to be brought before the court, and conduct their case (with the help of legal representatives).	**Parties do not control their case**, but respond to the directions of the court.
The role of the judge	**The judge leaves the conduct of the case to the parties.** In a criminal case, the police and the Office of Public Prosecutions are responsible for investigating and gathering evidence for use by the prosecution in a criminal trial. The accused in a criminal case and the parties in a civil case investigate their own cases. The judge's main involvement is when the matter is brought to court, but the judge will conduct directions hearings before trial to try to get the matter to trial quicker and see whether any matters can be resolved before going to trial. During the hearing/trial, the judge or magistrate does not lead the evidence and as a general rule only asks questions and calls witnesses to clear up points made by the parties.	**The judge takes an active role**. The judge defines the issues of the case and controls the investigation of the case and the examination of witnesses at the trial.
The role of legal representatives	**The legal representatives play a vital role** in investigating the case for their clients and bringing the evidence into court through examination-in-chief, cross-examination and re-examination. It is most important to have legal representation.	**Legal representation is not essential**. The legal representatives help the judge to find the truth. They might ask the witnesses questions after the judge has completed the examination but must obtain permission from the judge.

The role of evidence and procedure	**Collection of evidence**	**Evidence is collected by the parties**. All evidence gathered in a committal proceeding in a criminal case is collected in depositions before the trial. In a civil case, information is collected by both sides during the pleadings and discovery stage, but witnesses' statements are not collected.	**Evidence is collected by the examining judge**. A dossier, which contains all statements made and evidence collected, is kept by the examining judge.
	Type of evidence	**The system relies mainly on oral evidence**, although use of written evidence is increasing. There are strict rules of **evidence and procedure**.	**The system relies mainly on written statements,** although some witnesses are interrogated at the trial. There are **no strict rules of evidence and procedure.**
	Character evidence and past record	**Character evidence and past record are NOT usually available**. Evidence of bad character is inadmissible in a criminal trial, except where the prosecution may be refuting previous evidence of good character. Past record is inadmissible in the trial as it could be seen as unduly influencing the case against the accused, but propensity evidence may be allowed in some cases.	**Character evidence and past record are available**. Reports of the character, personality and past record of the accused in a criminal case are included in the dossier, and the investigating judge would generally have a thorough knowledge of the background of the accused.
	Witnesses	**Witnesses respond to questions**. Witnesses are generally only allowed to respond to questions and are often cut off if they try to elaborate on a point. This can be very frustrating for witnesses, and important information might not be brought to light.	**Witnesses tell their story uninterrupted by questions**. Witnesses are allowed to give their own version of the facts without interruption by questions.
Burden and standard of proof		**Burden of proof is on the party bringing the action**. The prosecution (criminal) or plaintiff (civil). **Standard of proof** is beyond reasonable doubt (criminal) or on the balance of probabilities (civil). Emphasis is on proving the case.	**No formal burden and standard of proof**, as the judge is responsible for finding and presenting evidence. Emphasis is on finding the truth.
Primary objective		**The adversary system is designed to allow the parties to control their own case** and to give both parties equal opportunity to win the case. In the process, however, the truth might not always come out.	**The inquisitorial system is designed to get at the truth**. The judge investigates the case to find out the truth. This might not be the outcome, however, because the judge might not uncover all the evidence. The judge possesses such information as past records and past associations that could influence the judge's view of the accused.

THE USE OF INQUISITORIAL PROCEDURES IN AUSTRALIA

The adversary system and the inquisitorial system are two extremes on a continuum of trial procedure, with no purely adversarial or purely inquisitorial system existing in practice. While the

Australian legal system adopts a predominantly adversarial approach, there are also some elements of inquisitorial procedures in our legal system.

For example, **coronial inquests**, which aim to determine the cause of reportable or reviewable deaths or fires, exhibit features of the inquisitorial system. These are not contests between two parties but investigations aimed at finding out the truth – the cause of the death or fire. The coroner takes an active role in investigating the circumstances surrounding the death or fire, which includes questioning witnesses and visiting the scene of the incident. The *Coroner's Act 2008* (Vic.) (which replaced the previous Acts) established the Coroner's Court of Victoria as a specialist inquisitorial court.

Changes to the *Family Law Act 1975* (Cth), which took effect in July 2006, included a move to support a less adversarial approach to cases involving children. Child-related proceedings must be:

- focused on the children and their future
- flexible to meet the needs of particular situations
- less costly and more time efficient than traditional trials
- less adversarial and less formal.

Some elements of the inquisitorial system are included in the changes to the **Family Court procedures**. Under these changes, the judge, rather than the parties or their legal representatives, decides how the trial will be run, as he or she controls the hearing and inquiry process. Their focus is on gathering the best information possible about the children involved and their needs. An expert adviser to the judge and parties, called a **family consultant** (previously known as a mediator), is incourt to assist. With the consent of the parties, rules of evidence and procedure can be dispensed with. Further, parties are able to speak directly to the judge about their case and their children, and tell their story in their own words, and children are able to speak with the judge without their parents.

Independent evaluations have found that the less-adversarial approach avoids some of the harm to relationships often suffered in the adversarial process. Further, parties are generally more satisfied with the process than parties whose disputes were determined using a traditional adversarial approach.

Alternative dispute resolution processes are also more inquisitorial in that the parties and the referee work together to reach an acceptable decision between the parties. A mediator or conciliator helps the parties to reach a decision between themselves. Claims made in the Magistrates' Court of less than $10 000 are heard by arbitration. An arbitrator listens to both sides, asks questions and makes a decision. (Some magistrates' courts use mediation for these small claims.) The Supreme Court and County Court also refer matters to mediation. While the referee does not get involved in investigating the facts, dispute resolution is conducted without strict rules of evidence and procedure, and with the referee playing a more active role. Consideration is given to preserving the relationship of the parties.

Some **tribunals** have been given investigatory powers, such as the Commonwealth Administrative Appeals Tribunal, which is 'not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate'. While the **Victorian Civil and Administrative Tribunal** is mainly adversarial in its approach to hearings, with the tribunal member hearing the case and leaving the investigation and questioning up to the parties, they have relaxed the strict rules of evidence and procedure to encourage a less formal atmosphere.

Changes to the role of the judge through the processes of **case management** and **directions hearings** have introduced some aspects of the inquisitorial system into our legal system, as the judge is more actively involved in the case before and during the trial. **Committal proceedings** are now more inquisitorial in the way evidence is produced. Most of the evidence is produced in writing, via the hand-up brief method, rather than through examination of witnesses. The hand-up brief method refers to a process of most evidence from witnesses being given in writing rather than orally.

LEARNING ACTIVITY 7.7

Comparison of adversary and inquisitorial systems of trial

1 Compare the role of the judge in the adversarial system of trial with their role in the inquisitorial system.
2 Outline the major differences between the adversary and the inquisitorial systems of trial.
3 'The inquisitorial system is more likely than the adversary system to reach the truth.' Discuss.
4 Describe some of the inquisitorial features that exist within Australia's legal system.
5 To what extent are the processes used in the Victorian Civil and Administrative Tribunal inquisitorial in nature? Discuss.
6 'The adversarial system of trial is more likely to reach a verdict that is acceptable to the parties and the people than the inquisitorial system of trial.' Discuss.

POSSIBLE REFORMS TO THE ADVERSARY SYSTEM OF TRIAL

The inquisitorial system appears to have some useful aspects that could be incorporated into our system. Already some parts of our system are more inquisitorial in nature than others. Possible reforms that could be made to the adversary system are discussed next.

Greater investigative role for the judge or magistrate

The judge or magistrate in the adversary system can ask questions and call witnesses, but this is usually done to clear up points made in the proceedings. For example, a judge might call a medical witness to clarify evidence given about someone's health. This power could be increased to allow a judge to ask questions and call witnesses to ensure that cases are decided correctly – in the interests of fairness and finding the truth.

The judge could, however, be seen as being biased towards one side or the other by bringing out evidence that would benefit one side, and a judge who 'descends into the arena' loses the advantage of being an uninvolved observer.

The use of directions hearings and judge-led mediation in the County Court and Supreme Court means that, to some extent, the judge is taking a greater role in that he or she tries to get the parties to make admissions and settle disagreements before the matter going to trial. This assists in speeding up the process and could also help in the process of determining the truth.

Greater use of written statements

Court time and money could be saved with the use of written statements where possible during the trial. Medical evidence, for example, could in many cases be tendered in written documents without the medical expert having to attend in person to prove the accuracy of the statements. The use of oral evidence, however, does allow cross-examination of the witnesses to bring out any falsehoods and gives the court the opportunity to see whether the witness is sincere. The move to the use of written statements could also lead to increased legal fees because the solicitor would need to draw them up and the barrister would have to examine them. If anything within the statements was disputed, witnesses would still have to be called to be cross-examined.

Sometimes to reduce costs, if the client is conscious of costs, they are encouraged to write the first draft of the statement and then lawyers make the stylistic changes to make it comply with the rules. The writing up of a witness statement is far less costly than having to do examination-in-chief. During examination-in-chief, the client has daily fees of at least one barrister and one lawyer (say $7000–$12 000), plus preparation of the witness, in comparison to drafting a statement in-house.

Written statements are being used in committal proceedings, rather than oral evidence, as the hand-up brief method of committal proceeding is now used almost exclusively.

More informal conduct of the trial

Under the adversary system, the court follows strict rules of evidence and procedure. This is intimidating for the parties involved and can be confusing for a jury if present in the court (juries are optional in civil cases). However, rules of evidence and procedure are there to protect the parties and help achieve a fair outcome.

Tribunals

Tribunals offer an alternative to the strict adversarial system within a trial for civil disputes, in that they first encourage the parties to settle the dispute between themselves. Greater use of tribunals could lead to more parties in civil cases reaching a resolution more quickly and cheaply and in a more informal atmosphere. The jurisdiction of tribunals could increase to cover more types of disputes. For example, the Law Reform Committee suggested that an extra list dealing with disputes relating to fences should be added to VCAT so as to avoid some of the problems experienced by hearing these disputes in the Magistrates' Court. This has not yet been implemented.

Witnesses

Perhaps witnesses could be allowed to tell their own story without the interruption of questions. The judge or magistrate could redirect them if they were straying off the point. The judge could question the witnesses to clear up any ambiguities and any concern about the reliability of the witness. Both parties could then cross-examine the witness, with the judge checking that the cross-examination was not too lengthy in proportion to the importance of the case. This would help the parties to give their evidence in a more relaxed manner. The jury (if present) would be able to follow the sequence of events, instead of hearing all the evidence in a question and answer form. The truth may be more likely to be reached.

People who are unfamiliar with legal processes in Australia, such as some Indigenous people or migrants, may feel more comfortable if they are able to give their evidence in their own way, rather than in response to questions. The question-and-answer format can be intimidating and confusing for someone from another culture.

Reduce delays

In civil cases particularly, the parties could be made to follow the time limitations for the submission of documents more carefully. A court officer could be appointed to investigate the causes of delays, requiring the lawyers to appear before the appropriate court to explain the reasons for delays. However, more court personnel would be needed to deal with the increased number of cases being brought before the courts. This could lead to injustices occurring. Adhering strictly to deadlines could result in the court not being able to get at the truth.

Courts should be further encouraged to make indemnity costs orders against parties who fail to comply with submission dates. The party who was in default would have to pay compensation to the other party.

Some of the formal pre-trial procedures could be changed to a more informal approach to reduce delays, such as the discovery stage. The Supreme Court has already recognised that some of these processes contribute to delays.

Directions hearings are used in civil matters to speed up the process of getting a matter to court and the trial process.

In criminal cases, delays can result in considerable hardship both for the accused and the victim while waiting for the outcome of a prosecution. The introduction of directions hearings was designed to reduce the length of time taken to bring a criminal matter to court. There are also restrictions on the time that can elapse between the commencement of proceedings for an offence and the committal proceedings taking place (within three months for a sexual offence and within six months for other offences). A longer period can be fixed if this is required in the interests of justice because of exceptional circumstances.

Greater availability of legal aid

For the legal system to be effective, legal representation is very important and can help to get at the truth. Parties are likely to be disadvantaged without legal representation, especially if one side has legal representation and the other does not. However, legal representation is very expensive. Someone who has a low income could be entitled to legal aid. Legal aid applicants are, however, tested for means and reasonableness. If an applicant's earnings or assets (their means) are too high they might not be entitled to legal aid, although some cases are accepted because the case is particularly important. Reasonableness testing refers to assessing whether the case has a reasonable chance of success. Cases unlikely to succeed are rejected.

Victoria Legal Aid (VLA) funding is limited, thus limiting the number of individuals who can receive legal aid.

In March 2014, VLA announced that it planned to review cuts to its family services made in 2013. Nicole Rich, director of VLA said, 'We do want to increase the accessibility to legal aid services but we also want to make sure that that's done in a way that's sustainable longer term, that we can fund it'.

VICTORIA LEGAL AID ASSISTANCE

There are scheduled fees payable by VLA for legal assistance. Assistance may be granted for a case that involves:

- a legal issue that affects or is of broad concern to a significant number of disadvantaged people; or
- an untested or unsettled point of law that affects a significant number of disadvantaged people.

Subject to the certain guidelines, VLA may grant assistance in civil law cases if the amount of the claim is $5000 or more. VLA may grant assistance to an applicant seeking a family violence intervention order if the applicant is likely to succeed.

Assistance may be provided for criminal prosecutions in the Magistrates' Court only if:

- the applicant has a reasonable prospect of acquittal on the most serious charge or charges arising out of the one set of facts
- the likely penalty, if the applicant was convicted on all or any charges, would be a term of imprisonment.

Assistance will be provided for committal proceedings in murder cases.

Assistance will only be provided for traffic offences if the applicant has a psychiatric or intellectual disability or an acquired brain injury, and if conviction is likely to result in imprisonment or a suspended term of imprisonment.

A grant of legal assistance to a person for representation at a criminal trial in the County Court or Supreme Court will be considered only if:

- the charges cannot be heard or disposed of in the Magistrates' Court, and
- it is desirable in the interests of justice to provide a grant of assistance.



Figure 7.12 A lawyer helping a young client

LEARNING ACTIVITY 7.8

Possible reforms to the adversary system of trial

1. Suggest one advantage of having a judge in an adversarial trial take a more active role. What problems could this present?
2. How would the greater use of written statements be an advantage in the adversary system of trial?
3. Discuss the advantages and disadvantages of a witness being able to give their evidence in their own way, rather than answering questions.
4. How could a more informal system in the court improve the ability of the adversary system to achieve a fair outcome?
5. What difficulties might be caused by reduced adherence to the rules of evidence and procedure? Discuss.
6. How could the greater availability of legal aid improve the adversary system?
7. How adversarial do you think our system of trial is in Australia? Give reasons for your opinion.

8 'The adversary system is more likely to obtain a fair outcome than the inquisitorial system.' Discuss.
9 What features of the inquisitorial system could be used to improve the adversary system?
10 What other suggestions can you give for improving the adversary system?
11 'The adversary system can be defined as a system controlled by lawyers, not judges.' Discuss.

EFFECTIVENESS OF THE ADVERSARY SYSTEM OF TRIAL

When assessing the effective operation of the adversary system you should consider the extent to which each of the three elements of an effective legal system is achieved. For each element, you should consider:

- the processes and procedures that help the achievement of each element
- the processes and procedures that hinder the achievement of each element.

Entitlement to a fair and unbiased hearing

To comply with the principles of natural justice (that is, procedural fairness), each party to a dispute should have equal right to have their say and should be fully informed of the nature of the dispute. The adversary system provides each party to a case with equal opportunity to present their case and receive a fair and unbiased hearing.

Processes and procedures that contribute to a fair and unbiased hearing

The features of the adversary system that help to ensure a fair hearing are:

- **party control** – allows the parties to be in control of the progress of their case
- **independent arbitrators** – ensures that both parties are treated fairly, that the rules of evidence and procedure are followed, decide all questions of law and can make a decision on the facts brought before them
- **rules of evidence** – ensures that certain types of evidence that might inappropriately influence the magistrate, judge or jury, such as hearsay evidence, irrelevant evidence, opinion evidence other than that of an expert, and bad character evidence, are inadmissible, although propensity evidence is allowed
- **rules of procedure** – helps to ensure that the truth will come out through the parties to a case being given equal opportunity to bring out the evidence relevant to their case; the truth should emerge from the evidence given
- **right to silence** – allows people accused of a crime to say nothing so as not to incriminate themselves; although the right to silence can be limited in cases involving organised crime, and the abolition of the right to silence is being considered under other circumstances because of its detrimental effect on investigations
- **legal aid** – is provided to those parties unable to afford legal representation, although the availability of legal aid is limited
- **burden of proof** – is placed on the party bringing the action, so they have the responsibility of proving the case, according to the relevant standard of proof.

Problems relating to entitlement to a fair and unbiased hearing

The parties to a case that comes before the courts in the adversary system have control of their own cases and therefore equal opportunity to exercise their rights and responsibilities. Both parties might not, however, be on an equal footing because of limitations such as:

- vital evidence that might be inadmissible
- witnesses or the accused who might have difficulties with the language and might therefore be disadvantaged
- interpreters being provided, but some of the evidence possibly being misinterpreted
- legal representation costing too much – someone who is not legally represented is likely to be disadvantaged because a fair and unbiased hearing depends on the parties being equally represented
- legal aid possibly not being available
- one of the parties experiencing difficulty in giving evidence because of being nervous or uncertain in the strange surroundings, or having difficulty in understanding, or there being cultural differences that could affect the outcome of the case
- a magistrate or judge may have personal biases; in theory, this should not affect the outcome of the case because they are trained to disregard any personal biases
- the jury may have biases that affect the outcome of the trial.

Recent changes

The following recent changes further assist in achieving a fair and unbiased hearing in the adversary system of trial.

- **changes to evidence laws** – Amendments to the rules of evidence and their admissibility were made by the *Evidence Act 2008* (Vic.), in an attempt to relax the strict rules of evidence, and allow relevant evidence to be heard in court. Significant changes were made to hearsay evidence. For example, an unintended implied assertion is not hearsay (e.g. when a child says 'hello, Daddy' when answering the telephone, it can now be implied that it is the child's father on the telephone). An exception to the hearsay rule is provided for Aboriginal and Torres Strait Islander traditional laws and customs, and their content. In addition, while, under the Act, there is a strict approach to the admissibility of evidence against an accused person in a criminal case, there is a more flexible approach taken to the admissibility of evidence in civil proceedings. However, evidence that the court considers to be unfairly prejudicial is still not admissible.
- **consistency in criminal procedure** – The *Criminal Procedure Act 2009* (Vic.) consolidated existing criminal procedure laws, making procedure consistent across different jurisdictions. The Act also provided a comprehensive review of appeals, and simplified the grounds for appeal and related tests. These changes helped to ensure a fairer trial for accused persons, regardless of the court in which their case is being heard. Amendments to the Act in 2012 expanded the types of crimes for which the use of recorded evidence-in-chief of children and cognitively impaired witnesses can be used. They also allowed evidence that has been recorded to be used in other proceedings in another Victorian court or tribunal. This change helps to further protect the rights of these victims.
- **exceptions to the double jeopardy rule** – Under the *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic.), in limited instances, such as where there is fresh or compelling new evidence, a person who has been found not guilty of an offence could be retried, in order to achieve a fair outcome.

Recommendation for change

The following recommendation for change could further assist in achieving a fair and unbiased hearing.

- **making it easier for witnesses to tell their story** – Under the adversary system, witnesses are questioned by both sides in order to uncover the truth. However, it can be confusing for a witness, and it would be much easier if they could just tell their story rather than having to respond to questioning. In this way it may be more likely that the truth will be found.

Effective access to the legal system

The adversary system provides the means by which disputing parties in a civil case can have their case heard by an impartial, unbiased court that runs according to strict rules of evidence and procedure. In criminal cases, the adversary system provides the means by which the prosecution, on behalf of society, can bring suspected criminals to account. If a party is dissatisfied with the outcome of their case, and if they can establish grounds, they may be able to appeal to a higher court for their outcome to be reconsidered.

Processes and procedures that contribute to effective access to the legal system

The parties to a dispute:

- can get assistance to take a matter to court through legal aid, if it is available in the circumstances
- have an opportunity to take a matter to court
- have access to legal representation
- can use alternative methods of dispute resolution in civil cases
- can be ordered to participate in mediation, which can assist the parties
- can take some civil matters to a tribunal, which is less expensive and more accessible
- have rights during police investigations to protect them from unfair treatment
- are presumed innocent until proven guilty in a criminal case.

Problems relating to effective access to the legal system

There are a number of problems in obtaining effective access to the legal system.

- The need for legal representation in the adversary system may lead to some parties not pursuing their civil claim, due to the costs involved – particularly if they are unable to obtain funding through legal aid.
- A person accused of a crime may not be able to afford suitable legal representation.
- A person who represents him- or herself is disadvantaged.
- Effective access may be reduced because of difficulties with language and understanding legal processes.
- People may not be aware of avenues of access to the legal system.

Recent changes

The following recent changes further assist in achieving effective access to the adversary system of trial.

- **simplifying criminal procedure** – One of the objectives of the *Criminal Procedure Act 2009* (Vic.) is for criminal procedure laws to be as clear, simple and accessible as possible. The Act makes changes such as abolishing redundant provisions, and using plain English and clear and consistent terminology. It consolidated a number of existing Acts on criminal procedure into the one Act to simplify these procedural laws.
- **disclosure of costs in civil cases** – Under the *Civil Procedure Amendment Act 2012* (Vic.), a court can order a legal practitioner acting for a party in a civil action to disclose to the party and/or the court the costs associated with their representation in the case. Lawyers may be directed to prepare a memorandum setting out the estimated length of the trial, the actual or estimated costs and disbursements relating to the trial, and costs that the party would have to pay to the other party if they were unsuccessful at trial. The purpose of this reform is to reduce the cost and time associated with costs disputes by increasing parties' access to information about litigation costs, to encourage the settlement of suitable cases, and to promote flexibility in making cost orders.
- **expert evidence** – Concerns about the overuse of expert evidence causing increased expense to the parties and the court, increased complexities and delays in civil cases led to changes under the *Civil Procedure Amendment Act 2012* (Vic.). Under the Act, courts can limit expert evidence to specific issues, limit the number of experts giving evidence on an issue, direct that two or more experts confer with one another and prepare a joint report setting out the key areas of agreement and disagreement between them, direct experts to give evidence concurrently and ask each other questions, and appoint their own expert to assist the court. This change is aimed at producing savings in costs and time by enabling the real issues in dispute between expert witnesses to be identified and confined at an early stage.
- **National Partnership Agreement on Legal Assistance Services** – This agreement provides Commonwealth funding to state and territory legal aid commissions for the delivery of legal assistance programs such as representation in criminal and family law matters, and assistance in dispute resolution. The agreement established the National Legal Assistance Advisory Body to advise the attorney-general on issues affecting the legal assistance system. The agreement aims to provide an integrated, efficient, cost-effective and accessible national system of legal assistance, particularly aimed at increasing the effective delivery of legal services to disadvantaged Australians and the wider community.
- **more multi-jurisdictional courts** in regional and some urban localities, which have a number of courts under one roof.

Recommendations for change

The following recommendations for change could further assist access to justice.

- **increasing the hours of courts and tribunals** – If the hours of courts and tribunals were increased to have more evening sessions, it would give the parties greater access because they could attend after work and would not have to take time off work.
- **increased legal aid** – The lack of funds is a real barrier to access to justice, and the use of the adversary system can lead to long trials, with both sides fighting to win the case. An increase in the availability of legal aid could assist the parties to defend a criminal or civil case or bring a civil case to court.

Timely resolution of disputes

Each trial within the adversary system is heard as a single, continuous event. At the conclusion of the pre-trial procedures, a date for trial will usually be set. Once the trial begins, it will continue for the

hours, days or weeks needed until its completion. There are no stops in the procedure to allow for gathering more evidence or for further investigation (as can happen in the inquisitorial system).

Processes and procedures that contribute to timely resolution of disputes

The legal system helps to:

- minimise delays during the trial, so that it can be heard in a timely manner, thereby enhancing effective operation of the legal system
- reduce delays in the pre-trial processes through the directions hearings
- cut out the committal hearings in a criminal case when it is a clear-cut case
- provide systems such as mediation in civil cases to speed up the process and assist in achieving a resolution.

Problems relating to timely resolution of disputes

Although the legal system endeavours to achieve a timely resolution of disputes, there are some problems.

- Some parties in a civil case may not meet deadlines for pre-trial procedures.
- Pre-trial procedures in a civil case are long and time-consuming.
- The need for interpreters can delay a criminal case coming to court.
- Extra evidence can come to light after the case has been decided.

Recent changes

The following recent changes further assist in achieving a timely resolution of disputes in the adversary system of trial.

- **time limits on criminal procedure** – The *Criminal Procedure Act 2009* (Vic.) sets time limits for different stages of criminal procedure, to help ensure a timely resolution for the parties in the case, as well as the legal system. For example, a committal mention hearing must be held within six months for most cases; for most offences a trial must commence within 12 months of a person being committed for trial.
- **simplifying criminal procedure** – The *Criminal Procedure Act* also introduced changes designed to streamline criminal procedure and save time for the courts and the parties. For example, one court will hear all related charges for an incident together, whether the charges are summary or indictable offences. Also, joint committal proceedings for a child over 15 and an adult co-accused can be held if the charge is one of murder, manslaughter, arson causing death or culpable driving, and if the Children's Court and the Magistrates' Court agree. This saves time by reducing the need to hear two separate committal proceedings in different courts.
- **Court of Appeal criminal reforms** – In early 2011, the Court of Appeal introduced reforms designed to increase the clearance rate of criminal appeals and reduce delays. A specialist Registrar of Criminal Appeals and four specialist criminal lawyers were appointed to manage appeals and prepare them for hearing, with the aim of more of the work being done through case management to enable shorter court hearings. The reforms also required more precise identification of appeal grounds and supporting arguments upon the filing of criminal appeals. Further, leave to appeal against sentence is refused where there is no reasonable prospect that the sentence will be reduced. In one year, these reforms saw the number of pending appeals fall from 532 to 268. The Victorian Parliament took these reforms further in the *Criminal Procedure Amendment Act 2012* (Vic.), legislating that the Court of Appeal can refuse an application for leave

to appeal in relation to any ground of appeal if there is no reasonable prospect that a less severe sentence would be imposed by the court, even despite there being an error in the original sentence or a reasonably arguable ground for appeal. If leave to appeal is refused, the court has a limited power to correct an individual sentence.

- **timely resolution of civil proceedings** – The overarching purpose of the *Civil Procedure Act 2010* (Vic.) and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. This Act imposes obligations on the parties to act honestly and cooperate with each other, and allowing the court to make any direction or make any order it considers appropriate in the interests of the administration of justice or in the public interest. Further changes brought about by the 2012 amendments to the Act (see earlier in this chapter) are aimed at saving time in civil proceedings. One of the effects of courts being able to order legal practitioners to disclose the costs associated with their representation in advance is to increase the parties' access to information and encourage the settlement of cases, where appropriate. Also, allowing the court to place restrictions on the number of expert witnesses and to direct expert witnesses to confer and deliver a joint report is aimed at saving time during civil trials.

Recommendation for change

The following recommendation for change could further assist in achieving a timely resolution of disputes in the adversary system of trial.

- **greater use of written statements** – During the trial, witnesses could give a written statement that could be read by the judge and jury. This would save time because cross-examination is very time-consuming and can be confusing.

LEARNING ACTIVITY 7.9

Effectiveness of the adversary system of trial

1. Identify problems that limit the achievement of a fair and unbiased hearing in the adversary system.
2. To what extent does the adversary system bring about a fair and unbiased hearing?
3. High costs and delays have been cited as two of the biggest problems facing the civil justice system. How does the adversary system contribute to these problems?
4. How have the *Criminal Procedure Act 2009* and the 2012 amendments to the Act helped to improve the effective operation of the adversary system of trial?
5. Describe one suggested and one actual change that could assist in improving the effectiveness of the adversary system of trial.
6. You have been asked to write an article for a newspaper explaining the extent to which the adversary system is effective and evaluating possible reforms. Write a 250-word article.
7. **Investigation and role play**

   Find a criminal (or civil) case to investigate. You can use the Internet, check the newspapers or use a case referred to in the chapter. Complete the following.
   - Investigate details of the case.
   - Form groups in the class.
   - Allocate roles to each group member including:
     - prosecutor (or plaintiff)
     - accused (or defendant)

  - legal representative for the accused/defendant (in a civil case, also a legal representative for the plaintiff)
  - at least one witness for each side.
- Familiarise yourselves with the details of the case and make notes about questions to be asked.
- Appoint a judge (the rest of the class can be the jury).
- Conduct the role play (following the trial procedure shown earlier in this chapter).
- Write notes on how effective you think the adversary system is in achieving justice.

PRACTICE EXAM QUESTIONS

1 a Explain what is meant by the adversary system of trial. *(4 marks)*

b Choose three key features of the adversary system of trial and explain how these features are essential for the operation of the adversary system. *(6 marks)*

c Compare the operation of the adversary system with the operation of the inquisitorial system. *(10 marks)*

2 a Identify four features of the inquisitorial system. *(4 marks)*

b Critically examine the role of the judge in the adversary system of trial for a criminal case. *(6 marks)*

c Discuss three features of the adversary system of trial that aim to provide a fair and unbiased hearing. In your discussion explain whether you think these features are successful in contributing to a fair and unbiased hearing or whether these features limit the achievement of a fair and unbiased hearing. *(10 marks)*

3 'The inquisitorial system is more likely than the adversary system to get at the truth.' Discuss this statement. In your response include an explanation and a comparison of the features of both trial systems, and an evaluation of the adversary system. *(20 marks)*

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK ESSAY

The adversary system

'The adversary system of trial is an effective method of dispute resolution.' Discuss this statement. In your response include an explanation of the features of the adversary system, a critical evaluation of the effectiveness of the adversary system and comparison with the inquisitorial system. *(20 marks)*

ASSESSMENT TASK STRUCTURED QUESTIONS

Movement towards inquisitorial

Read the article 'Movement towards inquisitorial' and answer the questions.

1 Explain the major features of the adversary system of trial. *(5 marks)*

2 The article states former Chief Justice Barwick's basic assumption about the role of the judge. What arguments are presented to support the author's contention that this role is being compromised? *(3 marks)*

3 Explain what is meant by party control in the adversary system, including a discussion of factors that promote and hinder this feature. *(4 marks)*

4 To what extent do you believe our system of trial to be purely adversarial? *(4 marks)*

5 Describe three strengths and three weaknesses of the adversary system. *(6 marks)*

6 To what extent does the adversary system currently help to achieve the elements of an effective legal system? Discuss. *(8 marks)*

(Total 30 marks)

Movement towards inquisitorial

While Australia's system of trial has traditionally been an adversarial one, inherited from Britain, it could be argued that it is no longer purely adversarial due to a number of changes that have been made in the legal system. These changes have seen the inclusion of various features of the inquisitorial system of trial, so that now Australia's trial system is somewhat of a hybrid.

The adversarial system of trial describes the dispute resolution process whereby two opposing parties advance differing legal and factual arguments in the process of battling out their case in order to determine a winner. The parties are responsible for collecting and bringing their own evidence to court, following strict rules of the contest and being presided over by an independent judge or adjudicator. However, a number of fundamental principles upon which the adversary system is based no longer hold true, so that a purely adversarial system no longer exists in Australia.

One of the fundamental features of the adversarial system is the independence of the judge, who traditionally presides over the case from a distant and neutral position, entering into the arguments between parties only when it is necessary to decide questions of law. The judge also ensures that the strict rules of evidence and procedure (another feature of the adversary system of trial) are adhered to. This results in the parties upholding their rights to a fair, unbiased and objective trial. Former Chief Justice of the High Court Sir Garfield Barwick described the basic assumption that 'the judge is to take no part in the contest, having his [or her] role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law'.[1]

However, movements towards judges adopting a more active role in the pre-trial and trial stages of cases compromise this element of independence and objectivity. The increasing reliance on directions hearings and case list management necessitate judges taking an active role in pre-trial procedures. Consider also specific programs operating in courts, such as the Family Court's Children's Cases Program and the Child Responsive Dispute Resolution Program, which see judges actively involved in deciding evidence to be led, and directly questioning witnesses. The justification for these judicial interventions in pre-trial and trial procedures is the promotion of efficiency and cost cutting, but at what price?

In the adversary system opposing parties prepare their own case, with the assistance of legal representatives. This is based on the presumption that the parties have equal access to resources and legal counsel. While the availability of legal aid assists in promoting equality of legal representation, other factors have negated this, particularly in relation to criminal matters. While the imbalance of increased resources available to the police compared with the accused has always existed (hence the requirement for the presumption of innocence, and the burden of proof resting on the prosecution), there are now further enticements to the accused to have their case dealt with in a manner that is cheaper and more efficient for the legal system.

Legislation has been passed to allow even more indictable offences to be heard summarily,[2] encouraging the accused to give up their right to trial before a judge and jury in order to have their

case heard more expediently before the Magistrates' Court. Further practices such as charge negotiation, as well as sentencing indication schemes currently being suggested by the Sentencing Advisory Council, may be encouraging accused to enter guilty pleas. In these circumstances, it needs to be considered whether the accused is making a truly voluntary, informed choice, without being influenced unduly by the legal system.

The overall objective of the adversarial system is to determine a winner of the contest, with the truth coming out through the evidence that is brought out in court. 'Great truths are arrived at through powerful argument.'[3] However, some of the fundamental features of the adversary system are being eroded, with notions from the inquisitorial system of trial finding their place in elements of our legal system.

While such changes may promote increased efficiency in the courtroom, what our system should be more concerned with is the pursuit of justice.

1 Barwick CJ in *R v. Ratten* (1974) 131 CLR 510

2 *Courts Legislation (Jurisdiction) Act 2006* (Vic.)

3 Wells, WAN 1988, *Evidence and Advocacy*, Butterworths, Sydney

ASSESSMENT TASK STRUCTURED QUESTIONS

Recognising the failure of our adversarial system to deliver access to justice

Read the article 'Recognising the failure of our adversarial system to deliver access to justice' and answer the questions.

1 Discuss why the adversary system might be referred to as the 'Rolls Royce' system and comment on the problems with this description of the adversary system. *(6 marks)*

2 How have governments tried to overcome some of the problems with the adversary system? *(4 marks)*

3 How can the formal procedures in a court disadvantage some individuals? *(4 marks)*

4 If you were the attorney-general, how would you reshape the adversary system to improve access to justice for all? *(6 marks)*

(Total 20 marks)

Recognising the failure of our adversarial system to deliver access to justice

Joanna Shulman, Human Rights Law Centre, 3 September 2011

Fundamental to our system of justice is the idea that parties to a dispute are adversaries, and that their dispute must be decided by an impartial judge who is not permitted to take into account any evidence other than that presented by the parties.

The traditional adversarial system relies on the parties using their own resources to find and present evidence to the decision-maker. It has a proud history and has long been put forward as an ideal model for resolving legal issues. Indeed, it is often referred to as the 'Rolls Royce' model of justice. However, when individuals disadvantaged by reason of their socioeconomic status, disability, race or other attribute, try to utilise the Rolls Royce model; they often are unable to even open the door. Ironically, it is these individuals who have the highest rates of interaction with the justice system, and yet are the worst served by it. Without adequate access to legal representation, or funds to secure the evidence required to prosecute their case, many of these people do not have real access to justice. In fact, in many areas of law, community legal centre

lawyers advise their clients against bringing a case in a formal adversarial system, regardless of the merit of the matter, simply because the client does not have the funds or stamina to fund and organise protracted litigation within the adversarial system.

To some extent, governments have attempted to respond to this problem, by incorporating elements of alternative justice systems into mainstream models, such as inquisitorial systems and state prosecutorial bodies. The introduction of the Fair Work Ombudsman, who has prosecutorial and enforcement powers, is one of the most recent examples of this, and has been heralded as a powerful tool in addressing systemic breaches of the *Fair Work Act 2009*.

However, in most areas, Australian law still relies predominantly on the adversarial system. It is on these areas that the social justice sector focuses much of its energy, by lobbying for increased access to justice through the incorporation of mechanisms from alternative legal systems, such as low-cost tribunals and through increased state intervention.

For example, in the federal discrimination law system, matters can only be heard in the very formal Federal Court or the Federal Magistrates Court [now known as the Federal Circuit Court], both of which rely on the adversarial system of dispute resolution. This requires an already disadvantaged individual to fund the gathering and arguing of evidence, and to withstand personal and public attacks on their character during cross-examination. If they are successful, the average award is $20 000, far less than their legal costs. It is frequently the case in discrimination matters that the applicant bringing the complaint is not the only person to have experienced the discrimination in question. The discrimination may be in the form of a broader policy or process that has a discriminatory effect on people with certain characteristics, the satisfactory resolution of which may be a matter of significant public benefit. Yet, we require the individual applicant to risk their assets and reputation to pursue these matters for the public good through a formal adversarial system, often with far fewer resources than their opponents. It truly is a system that pitches David against Goliath. Unfortunately, in our system David rarely wins, because he does not have the resources to get to the battle.

The introduction of elements from alternative systems would go some way to facilitating access to justice in the discrimination jurisdiction. No-cost tribunals or state-based enforcement mechanisms such as agency complaints, for those who systematically breach discrimination laws, are just some of the options that could be considered.

Another group systematically disadvantaged by a lack of access to justice are individuals living in boarding and lodging accommodation, who are often among the most vulnerable people in our community. In NSW, boarders and lodgers fall outside the protection offered by the laws governing residential tenancies. This means that when faced with problems such as eviction without notice, a rental increase, stolen bond or even a leaky tap, their only option is to proceed to the NSW Supreme Court, and to argue their case in the traditional adversarial system. The cost of doing this is currently $894 in filing fees, and $1786 for the allocation for a day of hearing. That does not include legal costs. Redfern Legal Centre has been arguing for many years that boarders and lodgers should be given easy access to a low-cost tribunal, like the Consumer Traders and Tenancy Tribunal.

In Redfern Legal Centre's other specialty areas of legal practice, we have been arguing for increased enforcement powers for the Telecommunications Ombudsman (in relation to complaints about mobile phone contracts) and the Police Complaints Ombudsman, again with the aim of moving our clients out of a pure adversarial system of justice to a more effective model.

If I were attorney-general, I would promote the idea that the philosophical purity of the adversarial system is not the only or even the best answer to the problems of injustice in our society. We also need to admit that the adversarial system is not necessarily the best model in all situations, and that many of our modern court systems incorporate elements of alternative justice models, with the worthy aim of increasing access to justice for all parties involved.

To take a bigger step towards the goal of achieving access to justice, I would promote a multi-faceted approach to the design of our legal systems, whereby multiple and parallel models of dispute resolution are considered as a starting point. We need to consider alternative models of justice, including the inquisitorial system, without the smug prejudice that has usually characterised discussions of access to justice. Perhaps a Fiat is not a Rolls Royce, but in the narrow cobbled byways of justice it may be a more efficient means of getting to our destination.

Joanna Shulman is CEO of Redfern Legal Centre, a community legal centre in NSW specialising in discrimination, employment, housing, domestic violence, credit/debt, consumer, policing and administrative law.

ASSESSMENT TASK STRUCTURED QUESTIONS

Why the French are growing envious

Look up the article 'Why the French are growing envious of Britain's justice system' by John Lichfield (*The Independent*, 15 March 2002) on the Internet and answer the questions.

1 Explain what the writer means by saying that the adversarial system of trial 'gives too much advantage to the defence'. Suggest how and why this might be the case. *(4 marks)*

2 Compare the role of the parties in the adversarial and inquisitorial systems of trial. *(4 marks)*

3 Discuss the relative strengths and weaknesses of the judge's role in the adversary system. How does the judge's role in the adversary system compare with the judge's role in the inquisitorial system? *(6 marks)*

4 Compare the rules of evidence and procedure operating in the two systems, including a discussion of the role of pre-trial procedures. *(4 marks)*

5 Both legal systems have the presumption of innocence as an important principle. However, the writer suggests that this presumption is not as strong in the French legal system. Explain. *(4 marks)*

6 Which system appears to best achieve the elements of an effective legal system? Explain fully. *(8 marks)*

(Total 30 marks)

Summary

Major features of the adversary system of trial

- role of the parties
- role of the judge
- burden of proof and standard of proof
- need for rules of evidence and procedure
- need for legal representation

Strengths of the adversary system of trial

- parties are able to fight their own battle
- each party can choose their legal representative to present their case in the best light
- the party bringing the case has to prove the facts to the standard of proof required
- the judge is impartial, makes sure the parties are treated fairly, and is independent of the state and the parties
- rules of evidence and procedure make the process fair
- oral evidence helps to reveal if a witness is sincere
- cross-examination helps to bring out the truth

Weaknesses of the adversary system of trial

- party control potentially leading to animosity between the parties, high cost of legal representation, delays which cause hardship
- is more concerned with winning than getting at the truth
- the judge cannot help the parties to get the right result
- relies on both sides being equally represented

- oral evidence may not be ideal because witnesses could be intimidated, witnesses can only respond to questions, expert evidence could be too heavily relied on
- not all evidence may be brought out
- the truth may not be reached

Major features of the inquisitorial system

- role of the judge
- role of legal representatives and parties
- trial evidence and procedure
- burden of proof and standard of proof

Comparison of adversary and inquisitorial systems

- role of the decision-maker
- party control
- objective – get at truth or win the case
- rules of evidence and procedure

Use of inquisitorial procedures in Australia

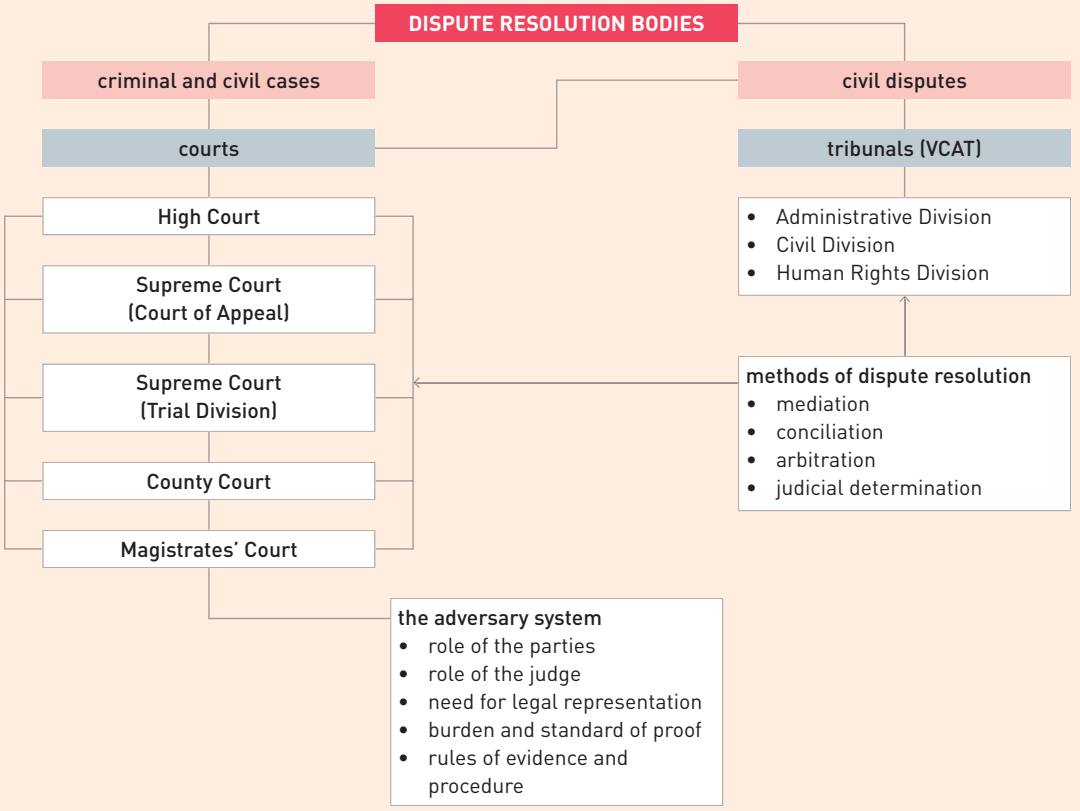
- coronial inquests
- Family Court programs with more-active judges
- alternative dispute resolution
- tribunals
- case management and directions hearings

Possible reforms to the adversary system

- greater role of the judge or magistrate
- more use of written statements
- greater informality, witnesses telling their story, rules of evidence and procedure less strict (more tribunals)
- reduce delays
- greater availability of legal aid

Effectiveness of the legal system

- everyone is entitled to a fair and unbiased hearing
- effective access to mechanisms for the resolution of disputes
- timely resolution of disputes





CHAPTER 8

CRIMINAL PROCEDURE

OUTCOME

This chapter is relevant to Learning Outcome 2 in Unit 4. You should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, and evaluate their operation and application and evaluate the effectiveness of the legal system.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- the elements of an effective legal system: entitlement to a fair and unbiased hearing, effective access to the legal system and timely resolution of disputes
- criminal pre-trial procedures and their purposes, including bail and remand and committal hearings
- general purposes of criminal sanctions
- an overview of three types of sanctions and their specific purposes.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- describe the pre-trial procedures for the resolution of criminal cases and civil disputes, and compare their relative purposes
- discuss the ability of criminal sanctions and civil remedies to achieve their purpose
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

Matthew Johnson leaves the Supreme Court to serve a minimum 32 years in prison for killing Carl Williams.

KEY LEGAL TERMINOLOGY

accused The party who has been charged with a criminal offence.

bail The release from custody of a person accused of a crime and awaiting a hearing or trial, on an undertaking that the person will attend the hearing or trial.

beyond reasonable doubt The standard of proof in a criminal case. It is not possible for a juror or magistrate to be absolutely certain because he or she was not there when the crime was committed, but they must be as sure as rationally possible. Reasonable in this instance is what the average person in the street would believe to be the case; that is, when the evidence is looked at in a logical and practical manner.

committal proceedings A term given for the hearings that take place in the Magistrates' Court for indictable offences. One of the hearings is a committal hearing.

committal hearing A hearing held in the Magistrates' Court for an indictable offence to assess whether a prima facie case exists; that is, whether the evidence is of sufficient weight to support a conviction by a jury at trial. This hearing forms part of the committal proceedings.

crime An act or omission that is against the law, harmful to an individual or society as a whole and punishable by law.

hearing A judicial examination of a case reaching a decision in a court of summary jurisdiction (the Magistrates' Court) presided over by a magistrate.

indictable offence A serious offence that can be heard before a judge and jury.

indictable offence heard summarily A serious offence which can be heard and determined as a summary offence in a court of summary jurisdiction.

recidivist A person who continually commits crimes despite being punished for them.

remand When a person is held in custody awaiting a trial, during a trial or awaiting sentence.

sanction A legal punishment given to a person who has been found guilty of an offence.

summary offence A minor offence heard in the Magistrates' Court.

summons A document issued by a court directing a person to appear before that court.

trial An examination and determination of a legal dispute in a higher court (normally the County Court or Supreme Court of Victoria) but not in a court of summary jurisdiction.

INTRODUCTION TO CRIMINAL LAW

A crime can be described as **an act or omission that is against the law, harmful to an individual or society as a whole and punishable by law**. Society sets guidelines for acceptable behaviour, and if those guidelines are broken, society expects that the offenders will be punished. Another term for a crime is an offence.

Elements of a crime

For a crime to be committed there needs to be a guilty act (**actus reus**) and a guilty mind (**mens rea**). A person has a guilty mind when he or she intends to commit the offence.

Some crimes are **strict liability crimes**. These are crimes where the prosecution does not have to prove that the offender intended to commit the crime, such as underage drinking in a public house.

The age of criminal responsibility

A child under the age of 10 years cannot be charged with a crime because it is presumed that he or she cannot commit an offence. It is also presumed that a child between the ages of 10 and 14 years is

mentally incapable of committing a crime, because they are not able to form the intention to commit the offence. This is known as **doli incapax**.

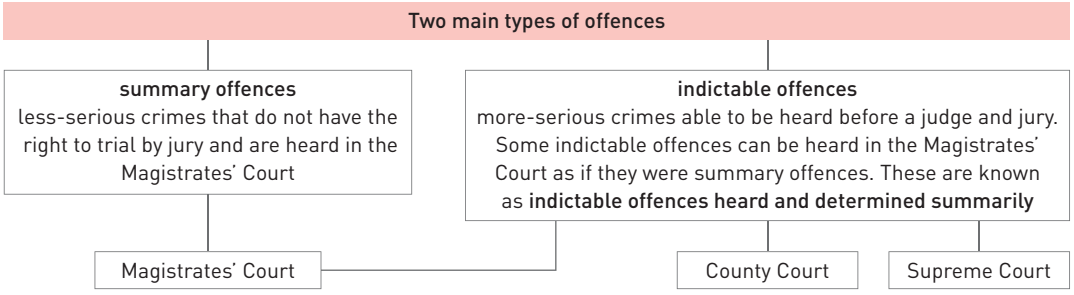
This principle can be overturned if it can be shown that the child understood that what he or she was doing was wrong.

Types of crimes

There are two main types of crimes or offences: summary offences and indictable offences.

Summary offences are minor crimes that are heard in the Magistrates' Court and before a magistrate, but not before a jury. Many summary offences are found in the *Summary Offences Act 1966* (Vic.) and include crimes such as drinking in a public place and aggravated assault. States also have further legislation that create other summary offences, such as the *Drugs, Poisons and Controlled Substances Act 1981* (Vic.) and the *Road Safety Act 1986* (Vic.).

Indictable offences are serious crimes that are heard before a judge and jury. The most serious indictable offences are heard in the Supreme Court and include offences such as murder, manslaughter, treason and culpable driving. Other indictable offences are heard in the County Court. Some indictable offences are able to be heard in the Magistrates' Court as if they were summary offences. These are known as **indictable offences heard summarily**.



Parties involved

The **prosecution** (also known as the Crown) commences and pursues criminal cases on behalf of the State of Victoria.

The person who faces court charged with an offence is called the **accused**. The accused was formerly called the defendant until changes were introduced by the *Criminal Procedure Act 2009* (Vic.). The accused is normally an individual, but in some circumstances can be a corporation, such as a corporation running a food business that is charged for offences related to food safety.

Prosecutions of indictable offences

The Office of Public Prosecutions (OPP), together with the Director of Public Prosecutions (DPP) and Crown Prosecutors, is responsible for prosecuting serious crimes in Victoria. Most of the prosecutions are referred by Victoria Police.

The matters referred to the OPP for prosecution in the courts generally involve:

- murder
- manslaughter
- culpable driving
- serious assaults, including sex offences

- aggravated burglaries
- armed robberies
- assistance in coroner's inquests.

The OPP is also responsible for preparing and conducting appeals in the County Court and Supreme Court.

Matters are sometimes referred to the OPP from other agencies such as WorkSafe, relating to deaths or serious injury in workplaces, and the Department of Primary Industries, relating to poaching and other fisheries crimes.

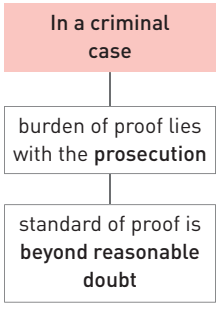
The Specialist Sex Offences Unit provides specialists to assist in the prosecutions of sex offences in Victoria and to ensure that sexual assault matters progress through the court process as quickly as possible.

Prosecutions in the Magistrates' Court

Prosecutions in the Magistrates' Court are conducted by Victoria Police and by other agencies, such as VicRoads, local councils and Corrections Victoria, who have the authority to prosecute summary offences.

The OPP is responsible for presenting all relevant evidence at a **committal hearing** in the Magistrates' Court for indictable offences.

Burden of proof and standard of proof



In a criminal case, the **prosecution** has the burden of proving the case **beyond reasonable doubt** (the standard of proof in a criminal case). Reasonable is what the average person in the street would believe to be the case; that is, when the evidence is looked at in a logical and practical manner.

In some instances, the burden of proof is reversed, such as with strict liability crimes. In these types of offences the burden of proof is reversed and the accused must prove that he or she did not commit the crime.

BURDEN OF PROOF REVERSED FOR YOUTHS CARRYING KNIVES

The Victorian Parliament passed the *Summary Offences and Control of Weapons Acts Amendment Act 2009* (Vic.), which introduced on-the-spot fines for youths found carrying illegal knives and extended search and seizure powers to enable police to conduct random weapons searches in designated public areas.

The burden of proof has been reversed to allow the fines to be issued as soon as police sight a knife. If alleged offenders wish to plead that they are innocent of the alleged offence, they will have to prove that they did not intend to use the knife as a weapon (the reversal of the onus of proof).

The difference between criminal and civil law

The main difference between civil and criminal law, lies in the **aims** of the cases brought before the courts. A criminal case is aimed at punishing the offender, whereas a civil case is aimed at achieving a civil remedy (usually compensation) for the person whose rights have been infringed.

In a criminal case, the accused pleads guilty or not guilty. If he or she is found guilty, he or she is given a sanction (punishment) such as a fine. In a civil case, the person or group who has suffered injury or loss tries to obtain a civil remedy from the person determined to be in the wrong.

Criminal cases are usually investigated by the police and a state prosecutor and are between the state and an individual. Civil cases are usually between two individuals or groups and are instigated by the person or group that has been wronged.

The state can be part of a civil case if the state is suing an individual or group, or if an individual or group is suing the state.

HINT

See the Introduction to Unit 4, preceding chapter 6, for a summary of the differences between criminal cases and civil disputes.

LEARNING ACTIVITY 8.1

Introduction to criminal law

1 What are the elements of a crime?
2 What is the role of the Office of Public Prosecutions?
3 Who is responsible for prosecuting serious crime in the County Court or Supreme Court?
4 Who conducts prosecutions in the Magistrates' Court?
5 Who has the burden of proof in a criminal case? What is the standard of proof?
6 When can the standard of proof be reversed?
7 Read the case study '13-year-old boy charged with murder' and answer the questions.
   a How old must a child be before he or she can be charged with a crime?
   b Why do you think this boy was able to be charged with murder?

CASE STUDY

13-year-old boy charged with murder

A 13-year-old Brisbane boy was charged with the murder of Elliott Fletcher, a 12-year-old boy. Elliott was allegedly stabbed to death shortly after arriving at school.

8 Read the case studies of *Police v. JV* and *Veridaka Pty Ltd v. Starick Agricultural Consulting Pty Ltd* and answer the questions.
   a Which case is a criminal case? Explain the circumstances and the outcome of this case.
   b Which case is a civil case? Explain the circumstances and the outcome of this case.
   c Identify the differences between the two cases.
   d Conduct an Internet or newspaper search and identify two other cases – one civil case and one criminal case. Highlight the keywords that signify which one is which. Depict those words in a visual way using either a concept map, a table or sticky notes.

CASE STUDY

Police v. JV (15 March 2013)

The accused was charged with 21 individual counts of stalking in contravention of S21A of the *Crimes Act 1958* (Vic.). Victoria Police alleged that between January 2010 and 25 December 2011 the accused covertly filmed family members and friends in the bathroom and lounge areas of three premises. In addition, the accused was found to have a photograph of a minor (someone under the age of 18 years) in an indecent sexual pose and he was consequently charged with making child pornography on 25 December 2010, contrary to S68(1) of the *Crimes Act*.

The main issue during the hearing, heard by Magistrate Garnett on 18 February 2013, was whether or not the conduct of the accused amounted to stalking under the *Crimes Act*, and whether the image of the child depicted her in an indecent sexual manner.

The magistrate stated that in order to be guilty of the offence of stalking, the prosecution must establish that the accused intentionally engaged in a 'course of conduct', and that the accused knew that this course of conduct would be likely to cause harm or arouse apprehension or fear. After considering the case law on the meaning of 'course of conduct', Magistrate Garnett found that the accused did not engage in a course of conduct as the filming was not protracted, and did not focus on one particular individual. The magistrate further found that it was not established that the accused knew that his conduct would likely cause such harm or arouse such apprehension or fear.

The magistrate also found that the image did not fall within the definition of 'child pornography'. The magistrate dismissed the case.

CASE STUDY

Veridaka Pty Ltd v. Starick Agricultural Consulting Pty Ltd (22 May 2013)

The plaintiff, a company, operated a farm through two individuals. The company sued the defendant by filing a complaint on 25 October 2012 claiming $14 715.52 in damages, being the diference between the cost and services provided by the plaintiff to the defendant, and an amount the plaintiff conceded it owed to the defendant. The claim was based on work done and materials provided to the defendant.

The defendant defended the claim and also counterclaimed for alleged breaches of contract. The magistrate was not satisfied that either the claim or the counterclaim had been made and dismissed both cases.

9 Read the case study 'Mordialloc café charged' and answer the questions.

- a Pick out the words in this case study that tell you that the case is a criminal case and not a civil case.
- b Who was the prosecutor in this case, and who were the accused?
- c If someone had become ill as a direct result of eating at this café, he or she would have had the right to sue for negligence. How might the outcome of a civil case differ from the outcome of this criminal case?

CASE STUDY

Mordialloc café charged

The accused ran a café in Mordialloc, which was inspected by the Kingston City Council. The inspector found improper storage of food, improper refrigeration and temperature control, mouldy food, a lack of separation of raw and cooked food, an abundance of cockroaches and evidence of pest infestation.

The accused pleaded guilty to charges relating to the findings of the Council and submitted that a moderate fine should be imposed without conviction. The Kingston City Council submitted that a significant fine with conviction should be imposed having regards to the number and seriousness of the breaches and the period during which they occurred.

The magistrate fined the accused $50 000. He ordered that a conviction be imposed on the accused and that the prosecution costs of $7990 be paid by the accused.

COMMENCING A CRIMINAL CASE

When a crime has been committed, the state usually prosecutes the offender for the offence committed. A prosecution can, however, be brought by a private citizen, although this is rare, often because it is very expensive.

A criminal case can only be tried through the court system. Tribunals such as the Victorian Civil and Administrative Tribunal (VCAT) are not available to hear and determine criminal cases. Before a criminal case is commenced through the courts, a significant amount of time and effort will go into investigating the crime and gathering evidence.

CASE STUDY

Individual commences private criminal prosecution against ex-wife

A man was cleared by the courts of claims of sexually abusing his children. He commenced a private criminal prosecution against his ex-wife, because the Director of Public Prosecutions decided not to pursue a prosecution against the ex-wife.

The husband claims that his ex-wife knowingly and wilfully made 10 pages of false statements to police in September 2005 and perjured herself by repeating the allegations in a sworn affidavit during a Family Court hearing in 2008. He has also accused her of threatening to kill him in 2004 and of assaulting him with chopsticks and fingernails in 2000.

The man will have to prove his case in court in the same way the state prosecutor would.

Police investigation

Once the police receive information about the commission of a crime they are required to investigate the offence and surrounding circumstances. The purpose of police investigation is to determine who did and did not commit the criminal act reported, charge the suspect and gather evidence for the prosecution to use in their court case against the accused.



Figure 8.1 Police gathering evidence

The accused is **presumed innocent until proven guilty**, and in order to protect suspects from unfair treatment, a suspect has certain rights during police investigation. However, so that society can keep functioning in an orderly way, a person who has offended has to be apprehended and convicted. There is therefore a need to balance the rights of the individual, who needs to be protected from unfair and unduly harsh treatment, with the rights of the police who have to investigate a crime. The community has the right to expect that someone who has committed a crime against the community will be apprehended and punished.

During questioning, the individual has the right to be informed by the police of the charge and of their rights. The suspect also has the right to ask police officers for their name, rank, identification and station.

The police have the right to ask a person's name and address in certain circumstances, ask a suspect to accompany them to the police station, question a suspect for a reasonable time and apply for a coercive questioning order from the Supreme Court.

Right to remain silent

The accused is presumed **innocent until proven guilty** and has the right to remain silent both during the investigation of the crime and during the court proceedings. Suspects are entitled to remain silent when being questioned by the police – other than giving their names and addresses when required. Suspects also have the right to stay silent when being questioned, or cross-examined, during their trial. At the trial a judge must inform the jury that they must not conclude that the accused is guilty because he or she has chosen not to speak, although the jury might ignore this advice. The prosecution or trial judge must not make any inference about the fact that the accused has chosen to remain silent.

The right to silence is a common-law right designed to protect an accused from saying something that might be incriminating. The right not to be compelled to testify against oneself or to confess to guilt is protected by S25(k) of the Victorian *Charter of Human Rights and Responsibilities*.

In Victoria, a person must be cautioned about their right to remain silent before questioning begins. This requirement is contained in S464A(3) of the *Crimes Act 1958* (Vic.).

CASE STUDY

Weissensteiner v. The Queen (1993) 178 CLR 217

Weissensteiner was charged with murdering his two companions while travelling on a boat. His companions disappeared and were never found. The accused remained silent during the investigations and throughout the trial. Upon instructing the jury, the trial judge stated that an inference of guilt 'may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts that can be easily perceived must be within his knowledge'. This was because Weissensteiner was the only person able to give evidence about what happened to the two people. The jury convicted Weissensteiner, who later appealed to the High Court. The High Court upheld the conviction.

LEARNING ACTIVITY 8.2

Commencing a criminal case

1. Why do you think that it is important that the accused is presumed innocent until proven guilty?
2. Compare the rights of the police with the rights of the individual during the arrest process.
3. Look back at the case study 'Individual commences private criminal prosecution against ex-wife' and explain why a private criminal prosecution was brought in this case. Why do you think a private prosecution is rare?
4. Explain the right to silence. At what stages during the criminal process does someone have the right to silence?
5. How is the right to silence protected under the Victorian *Charter of Human Rights and Responsibilities*?
6. Look back at the case study *Weissensteiner v. The Queen*. Do you agree with the decision based on the facts provided? Justify your answer.

CRIMINAL PRE-TRIAL PROCEDURES

Pre-trial procedures are the processes and procedures that occur before a trial commences in a criminal case in the County Court or Supreme Court.

When a crime has been committed and reported to the police, the police will investigate the crime to identify the offender. Criminal pre-trial procedures commence once a suspect has been found.

The purposes of criminal pre-trial procedures

The main purposes of criminal pre-trial procedures are to:

- **assist the police** in identifying evidence for the prosecution of the person or persons suspected of committing the crime under investigation
- **protect the rights of the accused** and ensure that he or she is treated as innocent until proven guilty
- **provide rights to the police** to facilitate police investigation
- **provide an opportunity for the accused to be released pending trial**, although this right may be denied in certain circumstances
- **clarify issues** – some pre-trial procedures are designed to narrow the issues that need to be determined at the trial, for example determining what facts the accused admits and does not admit
- **determine whether a trial should proceed** – that is, if the evidence is of sufficient weight to support a conviction by a jury at trial
- **determine if the accused wishes to plead guilty or not guilty** – provide the accused with the opportunity to plead guilty at an early stage and thereby receive a lighter sanction. An early plea is also a benefit to the legal system, because it can reduce the number of trials and speed up the whole process.

Many of these purposes are specific to certain pre-trial procedures, which are discussed in this chapter.

HINT

For each pre-trial procedure, you should be familiar with its purpose, the nature of the procedure and the extent to which it achieves the elements of an effective legal system.

Alternative outcomes for a person brought into custody

Once a person has been brought into custody, the alternatives for future dealings are that the person is:

- **released** – the police can release a person without charging him or her with a crime
- **given a cautioning notice** on the condition that they will be of good behaviour for the next five years – for first-time offenders involved in minor offences. The offender must admit to the crime, co-offenders must be identified and the crime should involve no more than five incidents. If a further crime is committed within five years, the offender goes to court and the caution note is treated as a prior conviction
- **released pending summons** – the suspect can be released pending the charge and summons being served on the suspect at a later date, telling him or her which court to attend and the time of the hearing

- **charged and released on bail**
- **remanded** – charged and brought before the Magistrates' Court for a remand application. The court will decide if the suspect is to be remanded or given bail, alternatively, a bail justice can be called. The bail justice will conduct a hearing and decide if the suspect should be remanded or allowed bail.

Bail

Bail is when the accused is released from custody after being charged on condition that they appear in court at a later date. A person charged with an offence has the right to apply to be released on bail until their trial. If bail is refused, then they will be held on remand (in jail awaiting trial).

Bail may be granted at various stages of the criminal process – at the time of arrest, during the trial and while awaiting sentencing or an appeal. These procedures are the same regardless of which court an accused person will be tried in.

Most accused are granted bail and released on their own undertaking (a promise to appear in court when required). Alternatively the accused may be released if a surety promises to pay a sum of money if the accused fails to attend court. A **surety** is another person over the age of 18 who is prepared to guarantee that the accused person will attend court.

Bail can be granted by:

- a **police officer** at the police station when a person is charged
- a **magistrate** at a bail hearing in the Magistrates' Court – court registrars also have the power to fix bail in some criminal cases (the Supreme Court hears bail applications for murder charges)
- a **bail justice** – a bail justice is appointed by the attorney-general to decide whether an accused person is eligible for bail.

  Under the *Honorary Justices Act 2014* (Vic.), justices of the peace and bail justices will be known as **honorary justices**.

The police deal with the majority of cases, but a bail justice will be called in more serious cases where police oppose bail, or believe the matter should be heard by someone else. This could be, and often is, in the middle of the night.

CASE STUDY

Bail denied in fatal car crash incident



Figure 8.2
The scene of the accident in Oakleigh

Magistrate Charlie Rozencwajg has denied bail to a man who has been charged following the deaths of three people in a fatal car crash in Oakleigh.

On 15 January 2014, the magistrate refused bail to Nei Lima Da Costa, 29, a Brazilian national. Mr Lima Da Costa was driving in Oakleigh and hit and killed a pedestrian. He then hit a car and killed a husband and wife, who were passengers in the car. Police alleged that Mr Lima Da Costa was speeding at 120 km/h in an 80 km/h zone and drove through a traffic signal that had been red for 20 seconds when he hit the victims. Police also allege he had traces of the drug commonly known as ice in his system.

Magistrate Rozencwajg said that Mr Lima Da Costa would be an unacceptable risk to the public if he was granted bail, and said he was also concerned that his ties to Brazil meant that he was a potential flight risk.

Conditions of bail

Before a person is granted bail they may be asked to:

- provide their own undertaking that they will appear in court on a later date, without the imposition of any other conditions
- provide their own undertaking that they will appear in court, with the imposition of conditions
- provide a surety who will guarantee that they will attend court, with or without the imposition of conditions.

Money deposited with the court by the accused, or a surety, will be forfeited if the accused does not attend court, although there may be circumstances when this forfeiture can be opposed.

The *Bail Act* was amended in 2013. Under the *Bail Amendment Act 2013* (Vic.), it is now necessary to make it clear what conditions may be imposed on a person who has been granted bail. The conditions include:

- reporting to a police station
- residing at a particular address
- submitting to a curfew
- that the accused not contact specified persons or classes of persons
- that the accused surrenders his or her passport
- that the accused not drive a motor vehicle or carry passengers when driving a motor vehicle
- specifying locations or zones that the accused must not visit or may only visit at specified times.

If bail is not granted, an accused can lodge an appeal with a higher court for a bail hearing.

An arrest warrant is issued if these bail undertakings or conditions are not met or if the person does not appear for their court date.

CASE STUDY

Tony Mokbel's sister-in-law ordered to forfeit $1m bail

Melbourne underworld figure Tony Mokbel was sentenced to 12 years in prison for cocaine importation. He was out on bail during his trial. His sister-in-law Renate Mokbel had acted as a surety for Mokbel and put up $1 million. The sister-in-law used her home as security for the bail money.

Mokbel did not appear in court to hear his sentence for the cocaine importation because a few days before the trial ended he disappeared.



Figure 8.3 Tony Mokbel

The bail was therefore forfeited and the sister-in-law was ordered to pay the $1 million or spend two years in jail. It was later found that the house did not belong to her but was part of a Mokbel family trust. Renate Mokbel was arrested and charged with perjury.

After some time at large, Tony Mokbel was apprehended in Greece and brought back to Australia. On 30 July 2012, Tony Mokbel was sentenced in the Supreme Court to 30 years' imprisonment with a minimum parole term of 22 years. **Parole** is the early release of a prisoner granted by the Adult Parole Board.

Purpose of bail

The *Bail Act 1977* (Vic.) lays down the major rules relating to the granting of bail. The main aim of granting bail is to **allow an accused person to go free until the hearing or trial**, as a person is presumed innocent until proven guilty. Granting bail also allows the accused person time out of custody to prepare their case.

Someone who is not granted bail will be kept in **remand** until the trial; that is, kept in the remand section of prison. Under the *Bail Act* it is assumed that bail will be granted unless there is a specific reason to refuse bail (that is, if there are exceptional circumstances).

CASE STUDY

Bail granted pending appeal

The Melbourne Magistrates' Court has granted bail to a man who has appealed a sentence after pleading guilty to unlawful assault.

Ben Ng was charged after punching Daryl Harrison, a blind mute man, to the ground on 5 March 2013 after Mr Harrison's walking stick struck Mr Ng's hand in Melbourne.

Mr Harrison did not sustain physical injuries but felt numbness and soreness and was left shocked, distressed and suffered panic attacks. Ng pleaded guilty to the assault and was sentenced to one month in prison. Ng has appealed the sentence and has applied for bail pending the appeal.

Magistrate Doherty granted Ng bail with conditions that he report to police three times a week, surrender his passport, not attend international points of departure and not leave Victoria or Australia.

Considerations when granting bail

There is a general presumption that any person held in custody will be granted bail; the onus is on the prosecution to show why the accused should not be granted bail. The *Bail Act*, as amended by the *Criminal Procedure Act 2009* (Vic.), states the situations in which bail may be refused.

Bail may be refused if a person is:

- charged with murder or treason (although bail is given in some exceptional circumstances)
- charged with drug trafficking under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic.) or the *Customs Act 1901* (Cth) (unless there are exceptional circumstances or the amount of the drug is less than the proscribed amount)

- already in custody for another crime (although the person can be released on bail after the expiration of the sentence)
- considered to pose an unacceptable risk to society or is likely to:
  - abscond
  - commit an offence while on bail
  - endanger the safety or welfare of members of the public
  - interfere with witnesses or otherwise obstruct the course of justice in relation to themselves or to others.

In addition, a court will refuse bail if the accused is charged with the following crimes, unless the accused can show a reason why their detention in custody is not justified:

- an indictable offence that is alleged to have been committed while he or she was at large awaiting trial for another indictable offence
- a stalking or family violence offence and the accused has been convicted of a similar offence in the previous 10 years or the court is satisfied that the accused used or threatened to use violence against the victim in the current case
- aggravated burglary, or another indictable offence in which it is alleged that the accused used a firearm, offensive weapon or explosive
- arson causing death
- drug offences.

If the court grants bail to a person accused of any of these crimes, the court must provide a statement of reasons.

Changes to the *Bail Act* in 2010, which took effect in 2011, require a court, when making a determination under the Act in relation to an Indigenous person, to take into account any issues that arise due to the person's Aboriginality, including the person's cultural background, their ties to extended family or place, and any other relevant cultural issue or obligation.

The accused's past history, character, home environment, possible hardships that might be caused, the seriousness of the crime, and the strength of evidence against the accused are examined when considering whether granting bail to a person is an unacceptable risk to society.

The Victorian *Charter of Human Rights and Responsibilities* states that people accused of a crime are entitled to have their cases heard without delay. This seems to have strengthened bail claims in cases where there is likely to be a delay until the trial.

BAIL STATISTICS

- Police figures showed that 7070 accused failed to appear in court after being given bail in 2012–13. This represented a 3 per cent decrease over the previous two-year period.
- More than 90 per cent of bail decisions are made by police, 5 per cent by courts and less than 5 per cent by bail justices.
- Of people accused of committing an offence, about half received a summons to appear in court and about half were charged and then bailed or remanded.
- In 2013, the Australian Bureau of Statistics found that Australia had 7375 remand prisoners (there were 6871 in 2012), representing 24 per cent of all prisoners in Australia, an increase of 1 per cent on the previous year.
- In 2013, Victoria had a prison population of 5340 with 954 prisoners (18 per cent) on remand. On average, prisoners in Victoria spend 2.7 months on remand compared to 2.8 months Australia-wide.

Source: Victoria Police, Australian Bureau of Statistics and the Victorian Law Reform Commission

Remand

Someone who is refused bail will be held on **remand** until the case comes to trial, or until bail is granted in the future. This means they are held in custody. Men who are remanded in custody are generally sent to **HM Melbourne Assessment Prison**. Women are usually sent to the **Dame Phyllis Frost Centre**.

Children on remand may be sent to a youth justice centre, but they cannot be held on remand for longer than 21 days before they must go to court. This means that a child on remand must be brought before the court every 21 days.

If a person who has been held on remand is later found guilty, the time in remand will be deducted from any prison sentence given. Someone who is found not guilty is not usually entitled to compensation for the time in prison. Bail is therefore usually granted and is refused reluctantly.



Figure 8.4 HM Melbourne Assessment Prison



Figure 8.5 Dame Phyllis Frost Centre

CASE STUDY

Boy remanded in custody

A 14-year-old boy has been refused bail and remanded to appear in court at a later date after being accused of having set fire to a room with the intention of killing a teenage girl. The boy is facing three charges, including attempted murder.

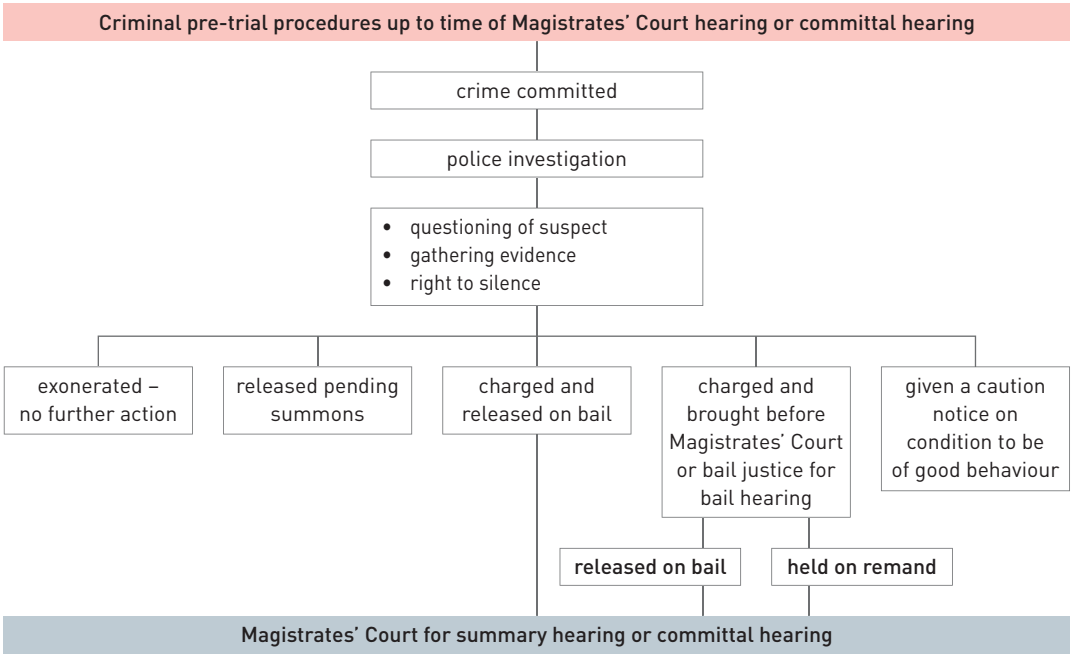
The detective arguing against the application for bail stating that the boy had continued to threaten to kill the girl while he was in remand. He said he feared the boy would commit further offences if released on bail. Despite the boy's mother pleading to the court to release her son on bail, bail was refused. The case was heard in the Children's Court.

Purpose of remand

The purpose of remand is to protect the community against the actions of an accused person. The community is protected as the accused is prevented from reoffending, inflicting harm or committing any further offences while awaiting trial.

The purpose of remand is also to ensure the court that the accused will appear at the next hearing (whether it be a hearing as part of the committal process or the trial) so that the accused is tried for the offences with which he or she has been charged.

Remand also prevents an accused from interfering with witnesses or obstructing the course of justice. This will ensure a fair hearing by allowing witnesses the freedom to tell their story.



LEARNING ACTIVITY 8.3

Bail and remand

1 Why must a suspect be released unconditionally, released on bail, or brought before a bail justice or Magistrates' Court within a reasonable time?
2 Explain what is meant by bail. Contrast this with remand.
3 How does bail help to uphold the presumption of innocence? What other purpose does bail serve?
4 What is the role of a bail justice?
5 Look back at the case study 'Bail denied in fatal car crash incident' and explain why bail was denied in this case.
6 Look back at the case study 'Tony Mokbel's sister-in-law ordered to forfeit $1m bail' and answer the questions.
   a What is a surety?
   b Who was the surety in this case?
   c Why was she ordered to pay $1 million or spend two years in jail?
7 Look back at the case study 'Bail granted pending appeal'. What were the conditions attached to the bail that was granted?
8 Look back at the case study 'Boy remanded in custody' and answer the questions.
   a Why do you think the boy was remanded in custody?
   b Where would he be held on remand?
   c How long can a child be held on remand?
   d Do you think he was treated as innocent until proven guilty? Discuss.
9 Read the following case study 'Bail for babysitter' and answer the questions.
   a What offence was the accused charged with?
   b Other than a bail justice, who can grant bail?
   c Why do you think the accused was allowed bail?
   d What is a surety? How much was promised to be paid in this case?

CASE STUDY

Bail for babysitter

A mother of two sons, who was accused of killing an infant she was babysitting by shaking her to death, has been charged with manslaughter. The cause of death of baby Chloe was head injuries, and three fractures were found in the baby's left arm. The Magistrates' Court heard that on a previous occasion, when the accused was babysitting, the parents returned to find an adhesive plaster on one of her thumbs. The accused alleged she had been cutting the baby's fingernails and accidentally cut her thumb.

The prosecution did not oppose bail. A surety promised to pay $20 000 to guarantee the accused's return to court.

The accused was ordered to return to court for a committal mention.

10 Read the case study 'Egg pelter granted bail' and answer the questions.

- **a** Who is able to hear bail applications?
- **b** Explain why bail was not opposed in this case.
- **c** Why do you think the court was satisfied that bail is more appropriate in this instance?
- **d** What sort of conditions could have been imposed in this instance?
- **e** Discuss arguments for and against accused people being granted bail.

CASE STUDY

Egg pelter granted bail

A 14-year-old boy was granted bail after he was charged with manslaughter in relation to the stabbing death of a woman in St Albans in July 2011.

Rosa Mercuri was knifed in front of her young daughter just after her home was pelted with eggs on a Sunday night. The accused was involved in the egging of the house. Afterwards, Ms Mercuri, Pat Mercuri (her husband) and her daughter pursued the alleged pranksters on foot when Ms Mercuri was stabbed. She was unable to be revived.

The detective told the court that the boy had made admissions about being involved in a fight with Ms Mercuri. Police did not oppose bail because the accused had no convictions and they did not believe he posed a risk of reoffending. He was young and came from a stable family.

The teenager pleaded guilty to manslaughter in the Supreme Court in May 2012. In October 2012, he was sentenced to five and a half years in prison, with a minimum of three years to serve before he would be eligible for parole.

>>GOING FURTHER

Charge negotiation

Charge negotiation (also known as charge bargaining or plea bargaining) involves agreements being made between the accused and the prosecutor, on an informal basis, about the charges to be laid. This may lead to some charges being dropped in exchange for the accused pleading guilty to the main charges, or charges being dropped in exchange for evidence being given.

Plea bargaining can reduce delays and court time, but may lead to innocent people being pressured into pleading guilty to get a lighter sentence. If they had gone to trial, they may have been acquitted.

Diversion program

The police hold some discretionary powers in relation to whether they should proceed with a prosecution. Some first-time offenders who admit to minor offences are offered the opportunity to take part in a **diversion program** rather than appear in court. See chapter 6 for more information.

Restorative justice

Restorative justice is an alternative way of dealing with crime and conflict. It is described as a 'model of voluntary settlement between victims, offenders and communities'. It brings together people affected by crime in order to repair harm done by one person or group to another. Victorian legislation provides for young offenders (under 18) to participate in a **restorative conference**, rather than going to a trial.

Restorative justice is central to the work of the **Neighbourhood Justice Centre** in Collingwood (the City of Yarra), which is a multi-jurisdictional court.

Committal proceedings

Indictable offences are more serious criminal offences, such as rape and murder, which can be tried before a judge and jury. One of the steps to take place before a criminal case is tried in the County Court, or Supreme Court, is a committal proceeding, which involves different types of hearings in the Magistrates' Court to determine whether a case is ready for trial.

The purposes of a committal proceeding are to:

- determine whether the evidence is of **sufficient weight to support a conviction by a jury at trial**, often known as establishing whether a **prima facie** case exists (prima facie means at first sight)
- **ensure a fair trial** (if the matter proceeds to trial), for instance by ensuring that the prosecution's case against the accused is adequately disclosed, enabling the accused to hear or read evidence and cross-examine prosecution witnesses, put forward a case at an early stage if the accused wishes to do so, and adequately prepare and present a case
- **clarify the issues** before attending trial and thereby avoid taking a matter to trial when the evidence is flimsy, saving the time and resources of higher courts
- **determine how the accused proposes to plead** to the charge or charges.

HINT

The term 'committal proceedings' is used to describe all the procedures that take place within the Magistrates' Court as part of the committal stage. The committal hearing is the last stage of that process. While you only need to know the committal hearing, it is useful to know all the other steps in the committal proceedings.



Figure 8.6 Former St Kilda football player Stephen Milne was committed to stand trial on rape charges in the County Court after a committal hearing took place in the Magistrates' Court.

USEFUL WEBSITES

Department of Justice www.justice.vic.gov.au
Office of Public Prosecutions
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Commencing committal proceedings

The committal process begins with a **filing hearing**. The Magistrates' Court will set down a date for the filing hearing once a charge sheet containing a charge for an indictable offence that is not able to be heard summarily is filed by the police informant. Further details of the filing hearing are listed below.

Hand-up brief

Committal proceedings are generally conducted with the use of written statements. Using written statements speeds up the process of committal proceedings and means the witnesses and the accused only need to explain the events once, in open court at the trial. The written statements are contained in a **hand-up brief**.

The use of a hand-up brief in a committal proceeding has largely eliminated the need for oral evidence. Instead, written statements are taken from witnesses unless the parties request that a witness gives oral evidence. A hand-up brief contains a copy of the charge sheet, copies of documents the prosecution intends to produce as evidence, copies of witness statements, interview transcripts, photographs and a list of exhibits gathered together in a legal brief, which is handed to the magistrate at the Magistrates' Court. The hand-up brief also informs the accused of future hearing dates and their purposes. The accused is entitled to the hand-up brief at least 42 days before the **committal mention hearing** (explained below) unless the court states otherwise or the accused consents to alternative arrangements.

At any time before the hand-up brief, if the accused decides to plead guilty, the informant (the member of the police force who is bringing the charge against the person accused of the crime) may serve a **plea brief** on the accused. The plea brief outlines the charge, states the material facts of the case and includes a statement by the victim.

Hearings in committal proceedings before the committal hearing

The following hearings may be held in committal proceedings before the final hearing, which is known as the committal hearing.

- a **filing hearing** – At this hearing, the Magistrates' Court may fix a date for a **committal mention hearing** (explained below) and a time for the service of a hand-up brief. The court can also make any order or give any direction as it considers appropriate. If the accused has been arrested and is on bail or remand, the filing hearing must be done within seven days of a charge sheet being filed; if the accused has been charged on summons then the time period for the hearing is **28 days**.
- a **compulsory examination hearing** – The informant may apply to the Magistrates' Court for this hearing to examine a relevant person, or to require that person to produce a document or other item, to assist their investigation of the offence. This must occur after the charge sheet has been filed and before the committal hearing commences. This step is optional.
- a **special mention hearing** – This may be held on the application of a party or the court. It is mainly a case management procedure. The Magistrates' Court may set a timetable for quick and efficient progress of the committal hearings. If the accused is pleading guilty to all charges, or they request it, the magistrate can immediately commit him or her to sentencing or a trial in the County Court or Supreme Court without continuing with the committal proceedings. A committal mention hearing is optional.

  At the special mention hearing, the court may hold a committal mention hearing immediately and either determine the matter or direct the informant to serve a hand-up brief.

- **committal mention hearing** – The informant and the accused must attend this hearing, unless excused. At a committal mention hearing, the Magistrates' Court may take the following courses of action.
  - The committal hearing may be conducted immediately. See below for an explanation of the committal hearing.
  - The court may determine whether the matter should be dealt with summarily.
  - The court may hear an application for leave to cross-examine a witness. If the court allows particular witnesses to give oral evidence and be cross-examined, the matter will proceed to a contested committal mention hearing where the witness will appear and give oral evidence. If the application is not successful the matter will proceed using the hand-up brief.
  - The court may fix a date for a committal hearing, and hear and determine any objection to disclosure of material.

  The court must ask the accused how he or she pleads. If the **accused pleads guilty** and the court is satisfied that the evidence is of sufficient weight to support a conviction at trial, the court must commit him or her for sentencing and inform the accused that the sentencing court may take into account a plea of guilty.
- **committal case conference** – This is a case management tool that provides a more informal opportunity for the prosecution, the accused and the court to discuss the case and attempt to identify the key issues to be resolved. Where practicable, the committal case conference should be held on the same day as the committal mention hearing. Any statements or actions made are not admissible in any later proceedings, with the aim of promoting open discussion of the case. Committal case conferences are not compulsory.

Committal hearing

This is the final stage of the committal proceedings and the most important of the hearings in the committal process. At the committal hearing, the magistrate must determine whether there is evidence of sufficient weight to support a conviction.

The hearing is conducted in accordance with rules of evidence and procedure. The prosecution will first present the case, followed by the accused.

The prosecution will present the evidence in written form, which is normally by way of the hand-up brief. If the accused has sought leave of the court to cross-examine witnesses, then those witnesses must attend court for examination. The prosecution is unable to examine the witnesses under examination-in-chief given the witnesses have already given statements, which will be included in the hand-up brief (and will be deemed to be the examination-in-chief of those witnesses). However, the prosecution can ask the witnesses to attest to the truthfulness of their statements and give supplementary evidence-in-chief if it is in the interests of justice to do so.

The accused is able to cross-examine the prosecution's witnesses. The accused (or his or her legal representative) will ask the witnesses questions about their evidence or about any other matter they think is relevant. The court is able to disallow any question if it is not justified or there is no relevance to the question.

After the evidence for the prosecution is concluded, the Magistrates' Court must enquire whether the accused intends to call any of his or her own witnesses or make any submission. The accused has a right to call witnesses to give sworn evidence. If he or she chooses to do so, the witnesses are examined-in-chief (by the accused), cross-examined (by the prosecution) and re-examined (by the accused). The accused is also entitled to make submissions about the charges. If the accused does not wish to call any witnesses or make any submissions, he or she can say nothing in answer to the charge.

At the conclusion of all the evidence and submissions, if any, the magistrate must make a determination about whether or not there is evidence of sufficient weight to support a conviction at trial.

If the magistrate finds there is **evidence of a sufficient weight to support a conviction at trial**, the accused is committed to stand trial and released on bail awaiting the trial or held in remand. The evidence collected during the committal proceeding forms the **depositions**. This is a collection of all the evidence given by the witnesses under oath that can be used in court at a later date. The depositions are then sent to the **Office of Public Prosecutions** (OPP) for the trial to be prepared.

If the magistrate decides that there is **insufficient evidence**, and a prima facie case has not been established, the **accused is discharged** and is allowed to go free; that is, he or she is not committed for trial. If further evidence is found in the future, the accused can once again be brought before the court as the committal proceedings are not a trial and the accused has not been found guilty or not guilty.

CASE STUDY

Committal hearing for Wangaratta man

With a 'heavy heart', on 17 February 2012, Magistrate Stella Stuthridge committed Stuart Smith of Wangaratta to stand trial for manslaughter.

On 25 July 2010, Stuart Smith was deer hunting with his university friend, Jake Welch, and Jake's twin brother, Nick Welch, in thick bush near Tallangatta. After allegedly looking through the binoculars and then the rifle scope, thinking it was a young stag, Jake told Stuart to take a shot. Instead, Stuart Smith shot and killed Nick Welch.

Stuart Smith pleaded not guilty to manslaughter. Magistrate Stuthridge found there was sufficient evidence for the matter to go before a jury and said, 'It is with a heavy heart that I have made a decision to commit Mr Smith to trial', also adding, 'This has been nothing other than a tragedy for both families'.

On 9 July 2012, Justice Bongiorno of the Supreme Court convicted Stuart Smith of manslaughter. Because of the circumstances of the case, and in particular his youth, background and 'genuine contrition and remorse', the Court adjourned the sentencing proceeding for a period of five years and Mr Smith was released on him giving an undertaking to the court. One of the conditions of



Figure 8.7 Stuart Smith leaving court with his family

undertaking was that he be of good behaviour and not own, be in possession of, or use, any firearm during the period of the adjournment. The judge noted that 'Stuart Smith has been and will continue to be punished by his own realisation of what he has done'.

Procedure after committal proceedings

On committing an accused person for trial, the Magistrates' Court must transfer all related summary offences to the court that will deal with the indictable offences, so that both summary and indictable offences can be dealt with at the same time. This change was brought in by the *Criminal Procedure Act 2009* (Vic.) to bring about a more flexible and efficient process, and to treat the criminal justice system as one integrated system.

Once an accused has been ordered to stand trial, an indictment is drawn up. This is a written statement containing the details of the charge or charges against the accused. The indictment (formerly called a presentment) is usually filed in court at the commencement of the trial.

A case conference may be conducted before the indictment is signed.

Direct indictment

It is possible to ask the Office of Public Prosecutions to omit the committal proceedings stage. This is known as a **direct indictment**. This would only be done if the prosecution had a strong case and was trying to avoid the trauma, expense and time involved in committal proceedings. A direct indictment rarely occurs.

CASE STUDY

Direct indictment

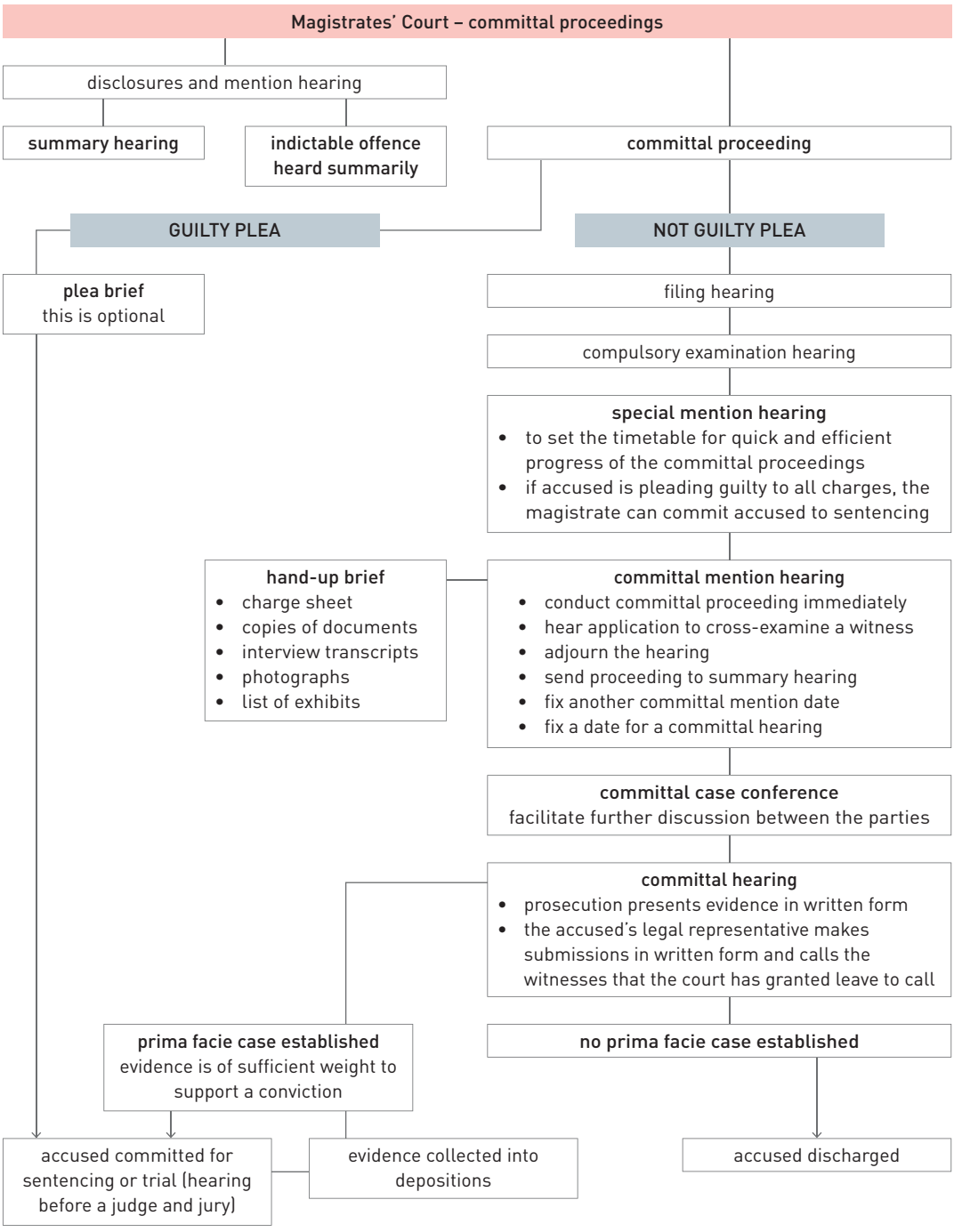
A direct indictment occurred in the case of the murder of Margaret Maher by Peter Dupas. At the committal hearing in 2003, Magistrate Phillip Goldberg concluded that although there was 'substantial suspicion' regarding Dupas, there was not sufficient evidence to commit him for trial. The DPP intervened and sent Dupas to trial in the Supreme Court. In August 2004, the jury in the trial found him guilty of the murder of Margaret Maher.

In September 2006, the DPP presented Peter Dupas directly for trial for the murder of Mersina Halvagis – a decision which the Supreme Court upheld as being in the interests of the Halvagis family. A jury found him guilty. However, a successful appeal in September 2009 saw the conviction overturned by the Court of Appeal, and a retrial ordered. In February 2010, the High Court granted him the right to appeal for a permanent stay on his retrial. It was thought that his high profile could affect the outcome of the trial. The High Court disagreed and ordered a retrial.

On 19 November 2010, Dupas was again convicted of the murder of Mersina Halvagis after three and half days of deliberations by the jury. On 26 November 2010, Dupas was sentenced to life in prison, without the possibility of parole.

Discontinuing a prosecution

The DPP also has the power to suspend a prosecution if they believe that the evidence is not strong enough for a conviction or there is the possibility of a not guilty verdict. This procedure, called **discontinuing a prosecution** (previously called nolle prosequi), can be done any time before judgment, and has the effect of suspending the case without acquitting the accused. It does not prevent a new indictment for the same offence at a later date. The perjury trial of former Police Association boss Paul Mullett in the Supreme Court in June 2009 was suspended when the then DPP, Jeremy Rapke QC, deemed that on review of the evidence there was insufficient prospect of a conviction.



LEARNING ACTIVITY 8.4

Committal proceedings

1 What are committal proceedings?
2 Explain two purposes of committal proceedings.
3 How do committal proceedings help to achieve a fair and unbiased hearing? Consider the purposes of committal proceedings in your answer.
4 Explain the purpose of the special mention hearing.
5 Why is a hand-up brief used?

6 What is the most important of the hearings in committal proceedings? Why is that so?

7 Look back at the case study 'Committal hearing for Wangaratta man' and answer the questions.
   a Why do you think the magistrate had a 'heavy heart' in making her decision?
   b Distinguish between a special mention hearing and a committal mention hearing.
   c Explain the role of the witnesses and victims in the committal hearing process. What options could there be for giving evidence?
   d What was the outcome of the committal hearing in this case? Explain.
   e What was the outcome of the sentencing hearing? Explain.

8 Look back at the case study 'Direct indictment'. What is a direct indictment? Give an example of this occurring.

9 Read the case study 'Trial for Ross Creek man' and answer the questions.
   a Suggest the types of evidence that the magistrate may have to take into account when deciding whether Spark should stand trial.
   b Explain why a committal hearing would not have been needed if Spark had pleaded guilty.
   c The lab was found in January 2010. The committal hearing was in February 2012 and the matter has been listed for a directions hearing in May 2012. Explain why this is a weakness.

CASE STUDY

Trial for Ross Creek man

A 49-year-old man from Ross Creek has been committed to stand trial in relation to 18 charges, including possession of unregistered firearms and cultivating a narcotic plant.

It is alleged that Phillip Spark operated a drug lab in a trailer near Beaufort. One of the witnesses in the committal, Ralph Reid, stated that he was asked by a mutual friend in 2009 whether Spark could leave a trailer at his property. A police raid on the trailer in January 2010 found firearms, chemicals and a clandestine drug lab. Spark pleaded not guilty and his lawyer stated, 'we say someone else placed the trailer at the property'.

Spark ultimately pleaded guilty to one charge of cultivating a narcotic plant, seven charges of possessing a precursor chemical and one charge of possession of a drug of dependence. On 7 November 2013, he was convicted and ordered to serve a community correction order for a period of two years. Some of the conditions of the order were that he perform 100 hours of unpaid community work, undergo assessment and treatment including testing for drug abuse or dependency, and undergo any mental health assessment and treatment.

10 Prepare a flow chart, PowerPoint or podcast presentation describing the pre-trial procedures for an indictable offence to be heard in the Supreme Court. Explain the purpose of each procedure. Present it to the class.

EVALUATION OF PRE-TRIAL PROCEDURES

The strengths and weaknesses of criminal pre-trial procedures should be seen in terms of the extent to which they might limit the effective operation of the legal system.

Strengths of pre-trial procedures

Bail

Some of the strengths of bail are as follows.

- Procedures such as bail help to **uphold the rights** of accused persons by treating them as innocent until they are proven guilty. This is by allowing them to go free and continue to work and be involved in the community, as well as allowing them to prepare their case, while they await the next court date.
- The *Bail Act 1977* (Vic.) **presumes that an accused person is entitled to bail**. That is, the onus is on the prosecution or the police to argue that the accused should not be bailed.
- Bail can be granted **with conditions**, therefore the court (or the bail justice) can create a balance between the rights of the accused and the protection of society (and the need for justice) by imposing certain conditions such as requiring the accused to surrender his or her passport.
- Research suggests that once a person goes to prison they are more likely to go back. Allowing accused persons to be bailed prevents those people from being exposed to **negative influences in prison** and decreases the likelihood they will offend again.
- Remand is **expensive** for the state government – the Department of Justice has found that the cost is approximately $204 per day per prisoner. Bail helps to prevent this cost from being incurred.
- Remand can have **negative effects on society** because of its impact on the individual – it can result in unemployment, homelessness, drug abuse, exacerbation of mental illness and an increase in poverty for the accused person. Bail helps to prevent these negative effects.

Remand

Some of the strengths of remand are as follows.

- Remand ensures that **justice can be done** by keeping the accused in custody, which guarantees that the accused will appear in court at the next hearing and will be tried on the charges.
- Remand can **protect society** by removing the accused from the community and preventing him or her from reoffending or causing harm. This is particularly important for those accused where there is a real risk that they will reoffend.
- Remand can ensure that **witnesses are protected and evidence is not impeded** by the accused being allowed to go free. This again will ensure that natural justice can take place at trial.

Committal hearings

Some of the strengths of committal hearings are as follows.

- Committal proceedings and the committal hearing help **to save the time and resources** of higher courts by filtering out the cases that are unlikely to succeed due to insufficient prosecution evidence.
- The committal process allows the accused to be **informed of the prosecution's case** against them, which could assist them in deciding how to plead a case, and also assist them in preparing their case.
- The onus is on the prosecution to establish to the court that there is enough evidence of sufficient weight to support conviction at trial. If this is not established, the accused is discharged. This supports the notion that the accused is **innocent until proven guilty** and needs not prove anything at this stage.
- The prosecution is provided with the opportunity to **withdraw some charges or combine charges** into one after having considered the evidence, particularly at the committal mention stage. This will help achieve a fairer trial and save the time of the higher court.

- The accused is given the opportunity to **test the strength of the prosecution's case**. This can lead to the accused pleading guilty or agreeing on some facts or issues with the prosecution, again saving the time and resources of the courts.



Figure 8.8 Olivia Walton (left), sister of Gerard Baden-Clay, and his legal team barrister Peter Davis and Darren Mahony leave the Brisbane Magistrates Court on 18 March 2013. Mrs Walton was attending the committal hearing of her brother who is accused of murdering his wife Allison in April 2012.

Weaknesses of pre-trial procedures

Bail

Many of the weaknesses of bail can be seen in the light of the strengths of remand. The weaknesses include the following.

- As the accused is free in society, there can be a risk that the **accused absconds** or does not appear at the next hearing. This can prevent justice from being done and can come at a cost if the police need to investigate where the accused is.
- There is a risk that the accused will **reoffend or cause harm to the community**, thus risking society as a whole.
- The accused person may seek to talk to prosecution witnesses, damage evidence or **obstruct justice** by impeding the prosecution's continuing investigations.
- The bail process is extremely **complicated**. The processes are not well understood and it normally requires the involvement of a legal practitioner who can make arguments on behalf of the accused person.
- Making an application for bail can be **time-consuming and stressful**, particularly if the accused has previously applied for bail but was denied.

Remand

Many of the weaknesses of remand can be seen in the light of the strengths of bail. The weaknesses include the following.

- Remand does not uphold the notion that the accused is innocent until proven guilty. Some accused may ultimately be found not guilty of some or all of their charges, making it **unfair** if they serve time for charges they are found not guilty of.
- Research suggests that once a person goes to prison they are more likely to go back. Exposing a person to jail through remand can **risk them reoffending** and returning to prison.
- Remand is **expensive** for the state government. According to the *Report on Government Services 2013*, the 2011–12 average net cost per prisoner in remand in Victoria was $338 per day. In 2012, there were 996 prisoners on remand in Victoria. That meant a cost of $336 648 per day.

- Remand can have **negative effects on society** because of its impact on the individual – it can result in unemployment, homelessness, drug abuse, exacerbation of mental illness and an increase in poverty for the accused person.
- Remand can affect an accused person's ability to **prepare for trial**, relying on visits with his or her legal practitioner and other people such as family and friends to be able to adequately prepare. It also prevents the accused from being able to work, restricting his or her ability to be able to pay for costs such as lawyer fees.

Committal hearings

Some of the weaknesses of committal hearings are as follows.

- Committal hearings are extraordinarily **complicated**. They can involve cross-examination of witnesses, rules of evidence and procedure, and the making of submissions. The committal hearing is also one of many hearings that take place in the committal proceedings. Without experience in those processes, and without the aid of a legal representative, the accused can find it hard to understand.
- Requiring the services of a legal representative can be **expensive**. This will add to the cost for the accused, who may not be working if he or she is in remand.
- Committal proceedings can add to the **delays** of getting a case to trial. This has resulted in some calls for cases to proceed directly to trial and bypass the committal stage.
- Committal proceedings often contribute to the **stress and inconvenience** experienced by the accused, the victim and their families.
- For stronger cases, the committal hearing could be considered **unnecessary** and burdensome, adding extra stress and inconvenience to the parties and to the victims and family members.

LEARNING ACTIVITY 8.5

Evaluation of pre-trial procedures

1. In your view, should there be a presumption that bail ought be granted? Consider, with regard to different types of offences.
2. 'The direct indictment process prevents natural justice and will only clog up the higher courts'. Discuss the extent to which you agree with this statement.
3. Consider the financial cost of remand. Do you think the cost is justified? Justify your answer.
4. 'Committal hearings are complicated. It's impossible for an accused to work out what to do without the use of a legal practitioner.' Do you agree with this statement? Discuss.
5. Examine the extent to which bail, remand and committal hearings achieve a fair and unbiased hearing.

>>GOING FURTHER

Further pre-trial procedures

Directions hearings

Directions hearings are hearings that are held before the full trial so that the court can give directions to the parties about how the case should proceed. They can be heard from time to time at the instigation of the court, or on the application of a party. The purpose of a directions hearing is to make the whole process quicker, and therefore less expensive, and to reduce pressure on the court system.

Summary of prosecution opening and notice of pre-trial admissions

A summary of the prosecution opening and a notice of pre-trial admissions must be served on the court not less than 28 days before the trial commences. The purpose of this is to outline the case against the accused and provide copies of witness statements.

Accused response

The accused must respond to the summary of the prosecution opening outlining the facts and circumstances they do not agree with and explaining why they do not agree.

Expert evidence

If the accused intends to call an expert witness, they must file in court a statement from the expert witness at least 14 days before the trial.

Questions of law

A party who intends to raise a question of law in the trial must, at least 14 days before the commencement of the trial, notify the court that a question of law has arisen that requires determination. If agreement cannot be reached on the question of law, a directions hearing can be conducted to determine the issue.

Sentence indication

Sentence indication refers to the process of the magistrate or judge reviewing summaries and material on a case, after an indictment has been filed, but before the hearing or trial commences, and advising the accused of whether they are likely to be sentenced to a term of imprisonment should they plead guilty to the offence at the first available opportunity.

An indication can only be given on the application of the accused and it may only be given once unless the prosecution otherwise consents. If an indication is given and the accused pleads guilty, the court may not impose a more severe sentence. To ensure that people who are accused of an offence are not disadvantaged by a sentence indication, if they do not plead guilty after an indication is given, the trial must be conducted before a different judge, unless the parties consent otherwise.

Sentence indication is designed to place the accused, who might ultimately plead guilty, in a better position to make this decision early in the proceedings. Earlier guilty pleas are seen as desirable because they help to bring an earlier closure for the victims and their families, signify an accused's willingness to accept responsibility for his or her actions, reduce the need for lengthy trials and free up the resources of the justice system for other matters. The offender benefits from an early guilty plea because he or she is likely to receive a shorter sentence.

CRIMINAL TRIALS

The cases brought before the County Court or Supreme Court are known as trials. A **trial** is an examination and determination of a legal case in a court, other than the Magistrates' Court (which conducts hearings). Indictable offences are heard in the County Court or Supreme Court.

A **hearing** is a judicial examination and determination of a case in the court of summary jurisdiction (the Magistrates' Court). The Magistrates' Court hears summary offences and some of the less serious indictable offences. An accused charged with an indictable offence may consent to having the case heard summarily. Most do consent because the maximum sentence is likely to be less, and the case is heard in a more timely and cost-effective manner.

Most criminal cases therefore originate in the Magistrates' Court either as a hearing or a committal hearing of a case that is to be heard in a higher court. How a trial is conducted depends on whether the accused pleads guilty or not guilty.

GUILTY PLEA

If the accused is pleading guilty, the matter will go straight to sentencing. The prosecution presents a summary of the evidence that the accused agrees with and any prior convictions are read out. Victim impact statements may also be read out.

Character witnesses may be called to give evidence on the accused's behalf. Character references may also be submitted.

The accused, or their legal representatives, will usually make a plea for leniency. The judge or magistrate announces the sanction and makes any relevant orders. Alternatively, the judge or magistrate may consider the information presented before handing down the sanction on a later date.

(See the next section on criminal sanctions.)

NOT GUILTY PLEA

If the accused is pleading not guilty, the trial or hearing begins and the prosecution must prove its case **beyond reasonable doubt**.

The system of trial used is the **adversary system of trial**. This system of trial and its features, including burden of proof, standard of proof and rules of evidence and procedure, are discussed in chapter 7.

Legal representatives

Accused persons may engage legal representatives to represent them, or elect to represent themselves. If they are unable to afford legal representation, they may be eligible for **legal aid**. In Victoria a court may order Victoria Legal Aid to fund legal representation in cases where the court believes an unjust result would occur if the accused did not have legal representation.

VICTORIA LEGAL AID

In late 2012, Victoria Legal Aid (VLA) changed its funding guidelines to ensure it could remain financially sustainable in the face of record demand for legal assistance and without an increase in government funding. One of its changes was that it would not fund the attendance at court of instructing lawyers to support barristers in criminal trials for more than two half days of trials.

The guidelines resulted in the adjournment of criminal trials. On 15 February 2013, Justice Lasry of the Supreme Court in the Chaouk Case stayed the trial on the basis that the accused would not receive a fair trial if he was deprived of his right to have his instructing solicitor present.

On 18 February 2013, Justice Forrest of the Supreme Court stayed a major criminal trial following an urgent application by the Law Institute of Victoria on the basis that there needed to be an instructing solicitor and a barrister for the accused to receive a fair trial.

In May 2013, VLA announced it had introduced interim eligibility guidelines to allow more flexibility in the funding of lawyers in criminal trials. It has said that discussions with the courts and lawyers will take place in the future about the funding of jury trials in the longer term.

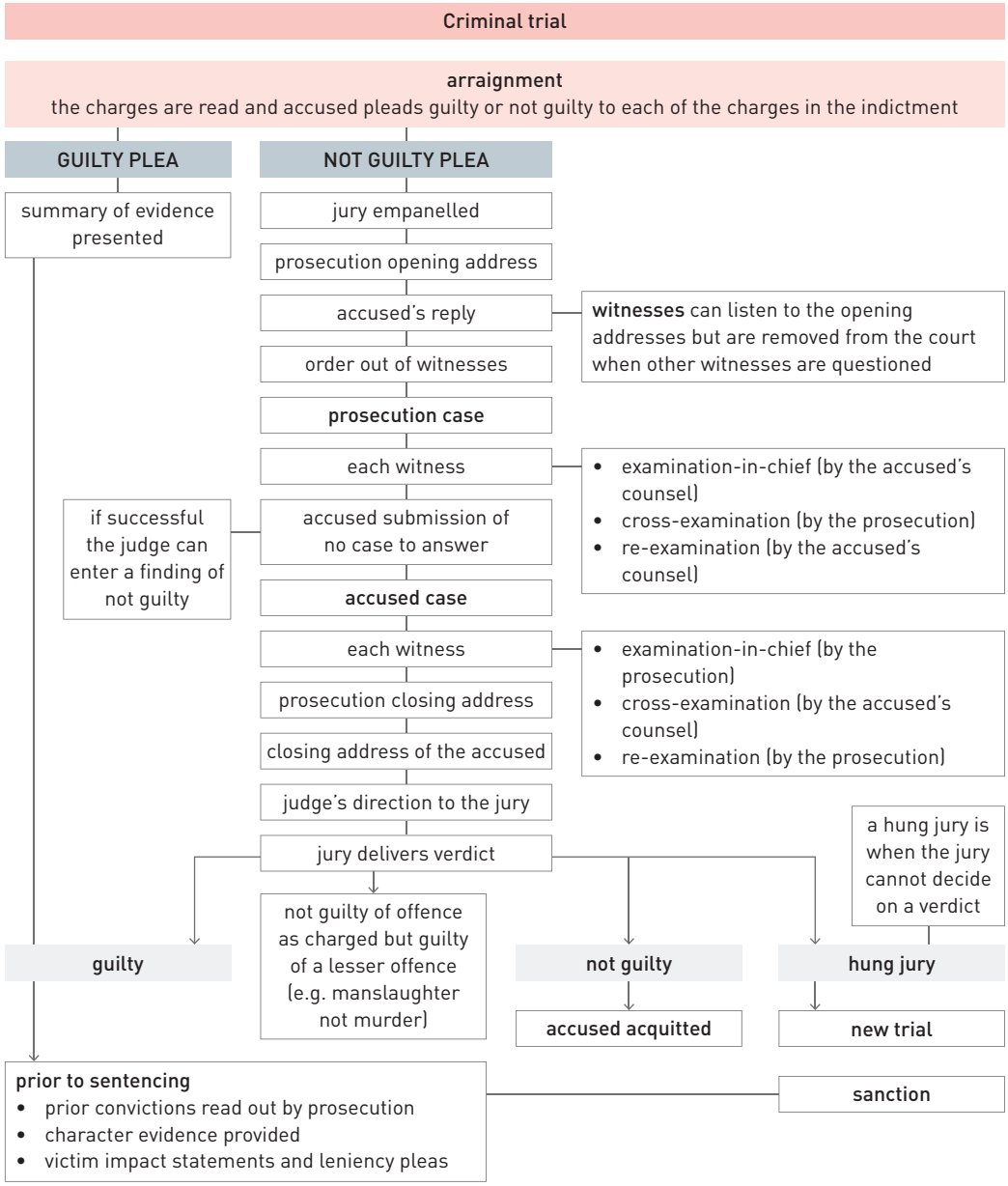
>>GOING FURTHER

Criminal trials

The *Criminal Procedure Act 2009* (Vic.) defines a trial as commencing at the arraignment in the presence of the jury panel. The **arraignment** is when the accused pleads guilty or not guilty at the beginning of a criminal trial. The charges are contained in the indictment. An **indictment** is a formal written document which accuses a person of a serious crime and orders them to stand trial.

- At any stage throughout the trial, the judge may address the jury on appropriate matters of law.
- Since the *Criminal Procedure Act 2009* (Vic.) was passed, the person charged with an offence is referred to as the accused, hence the terminology 'accused's case' etc.

The *Criminal Procedure Act* sets out the procedure to be followed for a criminal trial in Victoria. The following diagram provides a summary of this trial procedure.



HINT

The criminal and civil trial processes are not examinable but you will need to understand how a trial is conducted to fully understand the workings of the adversary system and the jury system.

Double jeopardy rule

The double jeopardy rule states that no person should be tried twice for the same offence. Under this rule, a person acquitted of a crime cannot be tried again if new evidence comes up. On 21 December 2011, the *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic.) created exceptions to this rule.

The Act inserts a new Chapter 7A into the *Criminal Procedure Act 2009* that allows the DPP to apply to the Court of Appeal for an order to set aside a previous acquittal and authorise the continuation of the prosecution of the charge. This can only be done in certain circumstances; for example, there is **fresh and compelling evidence** such as DNA evidence, the accused later **confesses** to the crime, it emerges that key witnesses gave **false evidence**, or where the trial has been tainted (such as if it were found that a juror was intimidated or bribed).

Police are believed to be preparing preliminary material for the Office of Public Prosecutions in relation to the Walsh Street murders, for the retrial of the men cleared of killing constables Steven Tynan and Damian Eyre in 1988. The OPP has not yet begun any actions in relation to these murders since the commencement of the new laws.



Figure 8.9 The scene of the Walsh Street murders

LEARNING ACTIVITY 8.6

Criminal trials and double jeopardy

1. Distinguish between a trial and a hearing.
2. Why do most cases originate in the Magistrates' Court?
3. What occurs if an accused pleads guilty?
4. Explain the purpose of cross-examination.
5. Explain the rule of double jeopardy.
6. To what extent has the double jeopardy rule been abolished? Under what circumstances could an acquitted person be ordered to stand trial again?

7 Explain one strength and one weakness of the double jeopardy rule.
8 How can committal hearings help to avoid double jeopardy? Explain.

CRIMINAL SANCTIONS

If the accused is found guilty, or if they have pleaded guilty to the charge(s) before them, then the judge or magistrate will decide on the appropriate sanction to be imposed. **Sanctions** are the punishments imposed by courts. The *Sentencing Act 1991* (Vic.) deals with the powers of the court to pass sentences and sets out the various types of sanctions. It was passed to provide greater consistency in sentencing and to promote respect for the law.

Purposes of criminal sanctions

The nature of criminal sanctions has changed over time from harsh, inhumane punishments aimed at deterring others and seeking revenge for society to a greater realisation of the needs of offenders and the desirability of reforming and rehabilitating offenders.

Section 5(1) of the *Sentencing Act 1991* (Vic.) sets out the aims of criminal sanctions, which are:

- **punishment**
- **deterrence**
- **rehabilitation**
- **denunciation**
- **protection**.

These are discussed below. A sentencing judge must take all these aims and purposes into consideration when imposing a sentence, but must not impose a sentence that is more severe than necessary to achieve the purposes for which the sentence is imposed (called the principle of **parsimony**). Often the aims overlap and more than one aim is sought to be achieved.

Punishment

The offender should be punished to an extent and in such a manner that is just in all the circumstances and so that society can feel there has been **retribution**.

It is necessary for society to feel that there has been some **revenge** against the offender. If a person has done something totally unacceptable to society, and especially if someone has been harmed in the process, the offender must be punished in some way so that the victim of the crime and society as a whole feel avenged.

This process of punishment through the courts avoids the need for the victim of a crime to take the matter into their own hands and seek revenge. Such action would cause disruption to society. The punishment given must therefore be appropriate to the offence committed.

CASE STUDY

The Queen v. Hinch (No 2) [2013] VSC 554

On 2 October 2013, Derryn Hinch was found guilty of one charge of contempt of court. In September 2012, Hinch uploaded to his website an article about the case in defiance of a suppression order made in the Supreme Court, prohibiting the publication of any information relating to previous



Figure 8.10
Derryn Hinch

convictions of an accused. The court found that Hinch did this with the knowledge and understanding of the orders made by the court.

On 18 October 2013, Hinch was sentenced by Justice Kaye of the Supreme Court and was ordered to pay a fine of $100 000 or, if he failed to pay, to serve 50 days' imprisonment. The court noted the fundamental function of punishment was to uphold and preserve the undisturbed and orderly administration of justice in the courts. The court found the sentence was a suitable punishment with regard to the factors in the case.

In January 2014, after refusing to pay the fine, Hinch began serving his jail sentence.

Deterrence

The sanction should be such that it will deter the offender or other people from committing the same or similar offences. If people could commit crimes freely without the threat of punishment, law and order would be virtually impossible to maintain.

Sanctions are therefore aimed at discouraging other people from committing similar crimes. This is known as **general deterrence** because it is aimed at deterring the general public.

Sanctions can also be a **specific deterrence** in that they can deter the offender from committing the same offence again.

CASE STUDY

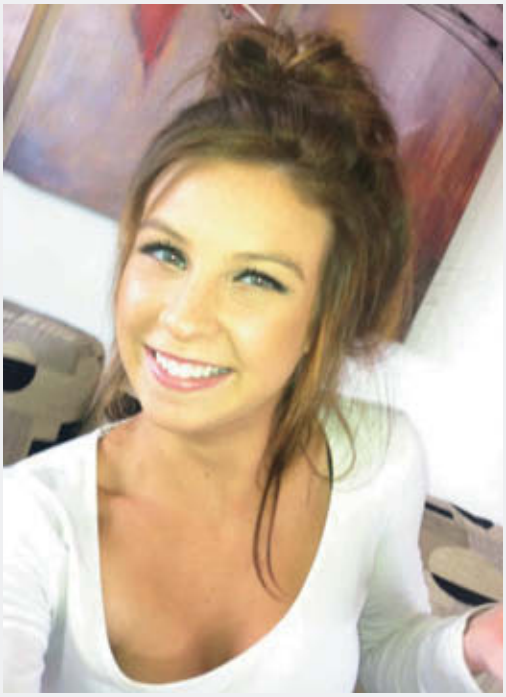


Figure 8.11
Sarah Cafferkey

Specific and general deterrence important

Steven James Hunter pleaded guilty to the charge of murdering Sarah Louise Cafferkey at Bacchus Marsh on 10 November 2012.

Steven Hunter met Sarah Cafferkey through a network of friends. On 10 November 2012, at Hunter's premises in Bacchus Marsh, Sarah and Steven argued and, after a physical altercation, Steven brutally murdered Sarah with a hammer and a knife.

After considering various factors, including Hunter's very bad criminal record dating from 1983, victim impact statements and the early guilty plea, Hunter was sentenced to life imprisonment without a minimum term. Justice Bell noted that general and specific deterrence were important sentencing considerations in the case, given the nature of the offending.

Rehabilitation

A court will consider sanctions that could help the accused to rehabilitate. One aim of sanctions is to assist offenders to change their attitudes and be ready to take their place in society. This could be by giving a bond or a community correction order to encourage rehabilitation rather than sending offenders to prison. A community correction order can also assist by requiring offenders to participate in training in a variety of skills.

Although prison is the sanction of last resort (because the offender is then forced to mix with known criminals), there are also programs carried out within prisons, such as trade training, aimed at assisting prisoners.

CASE STUDY

The Queen v. Huynh [2014] VSC 53

Kieu Thi Huynh pleaded guilty to one charge of attempting to obtain a financial advantage by deception and 27 charges of obtaining a financial advantage by deception.

As a result of her offences, the court was informed that the local community had shunned Huynh. Her husband described Huynh's remorse, shame and embarrassment following discovery of her crimes. Justice Dixon of the Supreme Court accepted that Huynh felt remorseful and shameful, as it was consistent with her early plea of guilty and offer to assist in the prosecution of co-offenders. Justice Dixon noted that 'it bodes well for your prospects of rehabilitation as a law-abiding member of the community'.

In sentencing her to four years' imprisonment, Justice Dixon ordered that Huynh serve two years before being eligible for parole. He noted that a shorter than usual non-parole period was imposed to reflect Huynh's good prospects of rehabilitation.

Denunciation

Denunciation refers to the disapproval of the court. A particular punishment may be given to show the community that the court disapproves of the offender's conduct. For example, the judge may give a harsher sentence for a particularly violent rape and make comment about how the court is showing disapproval of this type of behaviour.

CASE STUDY

Court shows disapproval of unacceptable behaviour

A man pleaded guilty to one charge of recklessly causing serious injury after striking and hitting a person unknown to him with a wooden bat. The victim suffered significant injuries and underwent surgery.

Judge Pullen of the County Court, after considering the need for protection of members of the community as well as general deterrence, was of the opinion that he needed to manifest the community's denunciation of the conduct and impose a just punishment. Given the man's age (18 at the time of offending and at the time of sentence), he was sentenced to be detained in a youth justice centre for three years.

Protection

In some instances it is necessary to **protect the community** from the offender. In such cases the offender needs to be removed from society (put in prison) to be physically prevented from reoffending.

Non-custodial sentences such as community correction orders can also be seen as protecting the community from offenders because they keep offenders busy when they might otherwise be engaged in criminal activity. However, offenders may abuse community correction orders and offend while carrying out community work.

Under Part 2A, S6D of the *Sentencing Act 1991* (Vic.), a court can give a serious offender a longer sentence than is appropriate to the gravity of the offence, in order to protect the community from the offender. A serious offender is an arsonist or a drug, sexual or violent offender who has previously been convicted of a similar offence and served time in prison. The aim of the longer sentence is to protect members of society. Judges and magistrates are encouraged to express their reasons for imposing a particular sentence and the aims they are seeking to achieve.

If the courts are to consider the protection of the community when identifying a reason for a jail sentence, it could be argued that an individual is not being treated justly in terms of the particular set of circumstances, as previous wrongdoings are taken into consideration. The provisions in the *Sentencing Act* encourage a wider view and consideration of what might happen in the future.

CASE STUDY

Protection of the community the prime concern

Tjay Tunja was convicted by a jury of the murder of Rowan Biram. Justice Beach sentenced Tunja to 24 years' imprisonment, with a minimum sentence of 19 years. He noted that the wound inflicted on Mr Biram which caused his death was a deep, long slit of the throat. Justice Beach took into account section 6D of the *Sentencing Act* and noted that Tunja posed a significant continuing risk to the community, and that protection of the community was the principal purpose for the sentence he imposed.

Guidelines for sentencing

In deciding on an appropriate sentence to be imposed on the offender, the judge is obliged by the *Sentencing Act 1991* (Vic.) and its amendments to consider:

- the maximum penalty prescribed for the offence
- current sentencing practices
- the nature and gravity of the offence
- the offender's culpability and degree of responsibility for the offence
- whether the offence was motivated (wholly or partly) by hatred or prejudice against a group of people with characteristics in common with the victim
- the impact of the offence on any victim of the offence
- the personal circumstances of any victim of the offence
- any injury, loss or damage resulting directly from the offence
- whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so, or indicated an intention to do so
- the offender's previous character, including the number, seriousness, relevance and nature of any previous convictions, the general reputation of the offender and any significant contributions made by the offender to the community
- the presence of any aggravating or mitigating factors concerning the offender or of any other relevant circumstances – that is, if there was anything about the offence or the offender that made the offence worse or if there was anything about the offence or the offender that lessened the gravity of the offence.

When sentencing an offender who has pleaded guilty, if the court imposes a less severe sentence due to this guilty plea (**sentence discount**), then it must also state the sentence that would otherwise be imposed if the offender did not plead guilty. This applies to discounts given for a plea of guilty where the sentence is of a custodial nature or involves a fine of over 10 penalty units, or an aggregate fine of more than 20 penalty units. For less severe sentences, the court is not required to identify the amount of a discount, but may wish to do so.

In April 2014, the Victorian Government introduced the *Sentencing Amendment (Baseline Sentences) Bill*. This reform will introduce baseline sentences for six serious crimes. Baseline sentences are intended to provide guidelines to the court about median sentences that should apply. This Bill has not been passed.

CASE STUDY

Bugmy v. The Queen [2013] HCA 37

William David Bugmy is an Aboriginal Australian who grew up in circumstances of social deprivation. He was sentenced to imprisonment for intentionally causing grievous bodily harm by the District Court of New South Wales. The DPP appealed to the Court of Criminal Appeal in the NSW Supreme Court, which increased Mr Bugmy's term of imprisonment.

Mr Bugmy appealed to the High Court. One of his grounds of appeal was that the Court of Criminal Appeal erred in holding that the extent to which his deprived background as an Indigenous Australian could be taken into account when sentencing him diminished with time and with his repeat offending.

In October 2013, the High Court unanimously allowed Mr Bugmy's appeal. As part of its reasons, the High Court held that the same sentencing principles apply irrespective of who the offender is or his or her ethnicity. However, it held that the effects of profound deprivation on an offender do not diminish over time and with repeat offending, and should be given full weight when sentencing the person.

USEFUL WEBSITE

Sentencing Advisory Council www.sentencingcouncil.vic.gov.au

GUIDELINE JUDGMENTS

The Court of Appeal has the ability to give guideline judgments, providing guidelines for other courts to consider when sentencing offenders. Its purpose is to provide guidance for judges passing sentence and possibly achieve some consistency.

>>GOING FURTHER

Victim impact statements

A victim may make a **victim impact statement** to the court if a person pleads guilty to an offence, or if a court finds the accused guilty. The purpose of a victim impact statement is to assist the court in determining the sentence.

The victim impact statement contains particulars of any injury, loss or damage suffered by the victim as a direct result of the offence. It is written in the form of a statutory declaration. A copy of the victim impact statement must be filed with the court a reasonable time before sentencing is to take place. Victims are able to provide the court with medical and psychological reports, which can be attached to their victim impact statements.

A victim may request that their victim impact statement be read aloud in open court. In such circumstances the court must ensure that any admissible parts of the statement that are appropriate and relevant to sentencing are read aloud by the prosecutor, judge or magistrate.

Victim impact statements are used widely by the courts to allow the victims to have their say in the sentencing process.

CASE STUDY

Victim impact statement given by daughter

A victim impact statement was given by the daughter of a deceased man killed by Ella Christine Copeland, who was sentenced to eight years' imprisonment for the charge of defensive homicide by Justice Maxwell of the Supreme Court.

Coralin Davey, the daughter of the deceased, described in her victim impact statement how she has lost 'the biggest part of my life, my best friend and my father'. She described her anger, hurt and sadness that he will not be there for the significant events in her life. She wrote, 'It breaks my heart to know my best friend won't be there for me to open up to the way I used to'.

NOTE

In June 2014, the Victorian Government stated it will abolish the defensive homicide law because some people who kill have got off too lightly. Luke Middendorp, who killed his girlfriend by stabbing her four times, was found guilty of defensive homicide. He was sentenced to 12 years in jail, with a minimum of eight years.

LEARNING ACTIVITY 8.7

Purposes of criminal sanctions and guidelines

1 Identify and describe the five purposes of criminal sanctions, according to the *Sentencing Act 1991*. Provide an example of when each of the purposes might be a relevant consideration when sentencing an offender.
2 Suggest why society feels that there is a need to punish an offender.
3 Look back at the case study *The Queen v. Hinch (No 2)*. How do the punishments given in this case fulfil the aims of criminal sanctions?
4 Look back at the case study 'Specific and general deterrence important'. Distinguish between general and specific deterrence. Explain why they are both important in the case of the murder of Sarah Louise Cafferkey.
5 Look back at the case study *The Queen v. Huynh*. Explain how rehabilitating an offender works to assist both the individual and society. Why did the court think rehabilitation was important in this case?
6 Look back at the case study 'Court shows disapproval of unacceptable behaviour'. How do courts show their disapproval of an offender's actions?
7 Explain how both custodial and non-custodial sentences could be seen as helping to protect the community.
8 Which of the purposes of criminal sanctions do you think is the most important? Give your reasons.
9 Look back at the case study *Bugmy v. The Queen* and answer the questions.
   a Who appealed to the Court of Criminal Appeal?
   b Who appealed to the High Court, and what was one of the grounds for appeal?

c Was the offender's ethnicity of any relevance in sentencing? If not, what did the High Court consider to be relevant in sentencing?

d Imagine a child who is born in a home where he or she is significantly deprived of education and access to basic care because of abusive and alcoholic parents. The child ultimately offends as an adult. How would this case apply in that situation?

10 Look back at the case study 'Victim impact statement given by daughter'. What are victim impact statements? How useful do you think they are?

11 Read the case study '20-year-old sentenced to detention in a youth justice centre' and answer the questions.

a In his judgment, Magistrate Garnett mentioned a number of aims of criminal sanctions. Explain those that he considered here, and those he gave more weight to.

b What other factors did His Honour take into account when sentencing?

c Suggest why young offenders are treated differently by the court than adult offenders when determining an appropriate sanction.

d Explain how sentencing discounts worked in this case.

CASE STUDY

20-year-old sentenced to detention in a youth justice centre

Wilson Vong, aged 20 years, appeared before the Melbourne Magistrates' Court on a number of charges, including intentionally causing injury, common law affray, criminal damage, theft and assault. The charges arose out of three separate incidents in late 2008 and early 2009.

When sentencing Vong in September 2009, Magistrate Simon Garnett considered Vong's prior criminal history of similar offences, including a breach of an undertaking of good behaviour from late 2008, the seriousness of the offences, Vong's background and that Vong pleaded guilty. Magistrate Garnett described Vong's actions as 'calculated and callous', and stated that 'the community and this court do not tolerate this type of behaviour especially when it occurs in public places. This type of behaviour results in serious injuries and tragically on occasions, death'.

In explaining the reasons for imposing a custodial sentence on Vong, Magistrate Garnett stated, 'In my opinion the seriousness of the offending demands a custodial sentence. I will impose a period of detention in a youth justice centre for a period of 18 months. If it were not for his early plea, I would have imposed a period of detention of 24 months'. His Honour stated that he thought Vong would have a reasonable prospect for rehabilitation in a youth justice centre, in preference to an adult prison, on account of his age.



Figure 8.12 The Melbourne Youth Justice Centre in Parkville, Victoria

TYPES OF SANCTIONS

The sanctions available to courts are listed in the *Sentencing Act 1991* (Vic.), which provides the sanctions in a hierarchy according to the severity of the sanction. The most severe sanction, and the sanction of last resort, is imprisonment.

HINT

The *VCE Legal Studies Study Design* states that you only need to study three types of sanctions and their specific purpose. The following diagram summarises the hierarchy of sentencing orders, and details follow.

Table 8.1 Summary of the hierarchy of sentencing orders

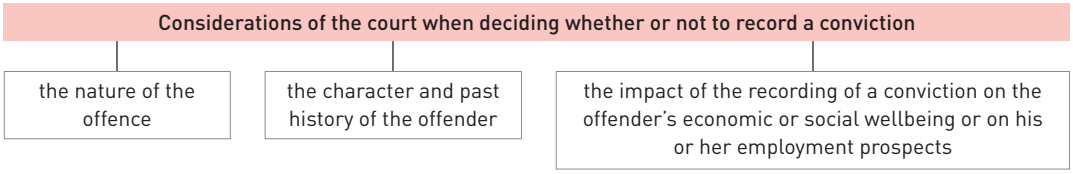
IMPRISONMENT with conviction	Record a conviction and order that the offender serve a term of imprisonment.
DRUG TREATMENT ORDER	Order that the offender undertakes a judicially supervised drug or alcohol treatment program. Only available from the Drug Court in the Magistrates' Court if a person pleads guilty and the Drug Court is satisfied that the offender is dependent on drugs or alcohol.
YOUTH JUSTICE CENTRE ORDER with conviction YOUTH RESIDENTIAL CENTRE ORDER with conviction	In the case of an offender aged 15 or older, record a conviction and order that the young offender be detained in a youth justice centre; or in the case of an offender under 15 years, record a conviction and order that the young offender be detained in a youth residential centre.
COMMUNITY CORRECTION ORDER with or without conviction	With or without recording a conviction, make a community correction order in respect of the offender. The order may be made with conditions such as a requirement that the offender remain at a specific place between particular hours (known as a curfew condition).
FINE, with or without conviction	With or without recording a conviction, order the offender to pay a fine, which is a sum of money payable to the court.
ADJOURNMENT with or without conviction	Record a conviction and order the release of the offender with conditions attached; or without recording a conviction, order the release of the offender on the adjournment of the hearing, with conditions attached.
DISCHARGE with conviction	Record a conviction and order the discharge of the offender.
DISMISSAL without conviction	Without recording a conviction, order the dismissal of the charge for the offence.

Criminal conviction

It is extremely serious for a person to have a conviction recorded against their name, as they then have a criminal record, which can have long-term consequences. For example, it could affect future employment opportunities. Some employers ask if a person has a criminal record in job applications, and may be deterred from employing someone who has. People with a criminal conviction are restricted from working in some professions (for example, a person who has been convicted of a sexual offence cannot be a teacher in Victoria and in some situations a convicted person will be banned from registering as an accountant). The courts therefore endeavour, where appropriate, to

provide a sentence without a conviction recorded, especially for young people. However, the court keeps records of any guilty finding, which can be referred to by the police in the future and should be disclosed when applying for a job.

An offender who reoffends in any way during the specified time could receive a more severe sanction for the original offence together with a sanction for the second offence.



Dismissal, discharge and adjournment

Some sanctions are designed to help the offender not to reoffend. The offender may be found guilty (or may have pleaded guilty), and the court may dismiss, discharge or release the offender. Such a sanctioning order may be made to:

- provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised
- take account of the trivial, technical or minor nature of the offence committed
- allow for the offender to demonstrate his or her remorse in a manner agreed to by the court
- allow for circumstances in which it is inappropriate to record a conviction
- allow for circumstances in which it is inappropriate to inflict any punishment other than a nominal punishment
- allow for the existence of other extenuating or exceptional circumstances that justify the court showing mercy to an offender.

Adjournment with or without a conviction

On finding a person guilty of an offence, a court may decide to **release the offender with a conviction** recorded against the offender. The case can then be **adjourned** for a period of up to **five years** during which the offender observes conditions such as:

- appearing in court if required to do so
- being of good behaviour during the period of the adjournment
- complying with any special conditions imposed by the court, for example attendance at drug and alcohol education programs or driver education.

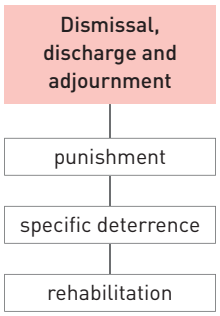
A court, on being satisfied that a person is guilty of an offence, may choose to **release the offender with a conviction** on the same conditions as listed above. The case can then be adjourned for a period of up to **five years**.

Discharge or unconditional dismissal

An offender who is found guilty may be **discharged with a conviction** recorded against him or her, and no further action. Alternatively, an offender may be given an **unconditional dismissal without a conviction** and no further action.

Sentencing aims of dismissal, discharge and adjournment

Although these sanctions do not take the offender out of society, they aim to provide the offender with the opportunity to **rehabilitate**. Depending on the seriousness of the case and the conditions that are



imposed, these sanctions may be adequate for the **punishment** of the offender and may **deter** the offender from committing offences in future. However, they would not be adequate for more serious offences.

LEARNING ACTIVITY 8.8

Dismissal, discharge and release on adjournment

1 Describe the advantages of being released without conviction rather than being released on conviction.
2 Read the case study 'Good behaviour for two years for killing her husband' and answer the questions.
   a In which court was this case heard, and why?
   b Explain the sanction that the offender was given in this case.
   c Explain which aims of criminal sanctions are reflected in the sanction given.
   d Do you think the sanction given in this case was appropriate? Discuss.

CASE STUDY

Good behaviour for two years for killing her husband

A 69-year-old woman who killed her husband after almost 50 years of physical and emotional abuse pleaded guilty to manslaughter. She killed her husband after he became angry and threatened her with an axe when she suggested that 8 am was too early to eat lunch. She picked up a saucepan and walking stick and fought back.

The Supreme Court heard that she had been the 'slave' of her husband. The beatings began three days into their marriage and he often threatened to kill her. The woman was released on adjournment on an undertaking to be of good behaviour for a period of two years. Justice Teague said that the woman had initially acted in self-defence.

Fine

A fine is a monetary penalty paid by the offender to the court. There is often a prescribed fine for a particular offence mentioned in the Act that establishes the offence. Under the *Sentencing Act 1991* (Vic.), fines are usually expressed in levels (1–12) as shown in table 8.2. Each level refers to a number of penalty units. A penalty unit in the 2013–14 financial year was equal to $144.36. The use of 'penalty units' instead of fixed monetary fines enables the government to increase all fines by increasing the value of a penalty unit without changing all the Acts. For example, under the *Summary Offences Act* a level nine fine of 60 penalty units can be imposed for performing any tattooing or other like process on any person under the age of 18.

If a fine is not paid the offender can be imprisoned or ordered to do community work under a fine default unpaid community work order. The current terms for unpaid fines are one day of imprisonment for each penalty unit or part thereof, to a maximum of 24 months. For unpaid community work the rate is one hour for each 0.2 penalty units, or part thereof, with a minimum of eight and a maximum of 500 hours. An instalment order can also be made to allow the accused to pay the fine in instalments.

Under the *Sentencing Act 1991* (Vic.), when fixing a fine a court must consider the financial circumstances of the offender and the nature of the burden that payment will impose. The court may also consider any loss or destruction of, or damage to, property suffered by a person as a result of the offence and the value of any benefit derived by the offender as a result of the offence.

Sentencing aims of fines

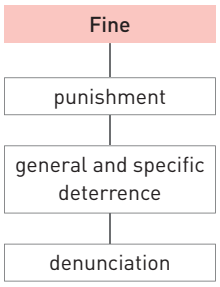
A fine serves to **punish** the offender by requiring them to pay money to court. It may act as a **specific deterrence** in that the offender may be deterred from reoffending. Members of society may also be deterred (**general deterrence**) from offending because of the possibility of having to pay a fine.

A court could give an extremely high fine as a way of **denouncing** the particular crime. This is showing disapproval of the crime committed. However, a fine is unlikely to help in the **rehabilitation** of an offender. It also does not take the offender out of society by way of **protection**.

Table 8.2 Penalty units

LEVEL	MAXIMUM FINE
	Fine
1	–
2	3000 penalty units
3	2400 penalty units
4	1800 penalty units
5	1200 penalty units
6	600 penalty units
7	240 penalty units
8	120 penalty units
9	60 penalty units
10	10 penalty units
11	5 penalty units
12	1 penalty unit

Source: *Sentencing Act 1991* (Vic.)



LEARNING ACTIVITY 8.9

Fine

1 What is a fine?
2 What is the role of penalty units, and how do they translate into fines?
3 Describe the possible consequences if an offender cannot or does not pay a fine.
4 Read the case study 'Man received fine for assault' and answer the following questions.
   a Explain the sanction that the offender received in this case.
   b Which aims of criminal sanctions are addressed by this sanction? Which ones are not?
   c What considerations, other than the impact on the victim, might the magistrate have taken into account in determining the sanction?
   d Do you agree with the outcome of this case? Explain. In your explanation, consider whether you think the accused should have been given a conviction.

CASE STUDY

Man received fine for assault

A man who assaulted another patron at a Ballarat nightclub for trying to 'crack on to his girlfriend' was fined in the Ballarat Magistrates' Court. The man, 24, pleaded guilty to one charge of unlawful assault from an altercation that took place at the Depot nightclub in Lydiard Street. The victim sustained a blood nose from the attack. No other permanent damage was done.

'This is a serious offence but at the lower end of the scale with regard to violence', the lawyer for the accused said.

Magistrate Kay Robertson said assault matters are very serious both for the victim and the community. 'No one can assault anybody in this community and get away with it', Ms Robertson said. 'I often give prison sentences in assault cases.'

She said that, on the other hand, at 24, the accused was a good prospect for rehabilitation and had the support of his girlfriend and family. 'The community is better off if you learn from this experience, settle down and lead a decent life.'

She fined Pickering $1000 with conviction.

Community correction order

A community correction order (CCO), formerly known as a community-based order, is a supervised sentence served in the community, and includes special conditions such as treatment and unpaid community work for a specified number of hours.

A CCO can be imposed for up to **two years in the Magistrates' Court**, and for between **two years and the statutory maximum term of imprisonment** for that offence in the **County Court and Supreme Court**. A conviction may or may not be recorded.

CCOs give offenders the opportunity to put a stop to their criminal behaviour and undergo treatment or take part in educational, vocational or personal development programs. This is known as 'tailor-made' sentencing.

A court can only impose a CCO if the offender has been found guilty of an offence punishable on conviction by imprisonment or a fine of more than five penalty units, the court has received a pre-sentence report and the offender agrees to comply with the order.

The court must also be satisfied that the CCO is appropriate for the particular offender. If the offender does not comply with the order, the order can be cancelled, in which case the offender will be sentenced for the original offence. This could mean a tougher sentence because the offender has failed to comply with the CCO.

A community correction order can be combined with either a fine or up to three months' imprisonment. When combined with a term of imprisonment, the order will commence on the offender's release from jail.

Conditions attached to a CCO

There are basic conditions attached to a CCO. These attach to every CCO made in the court and require that the offender:

- does not commit another offence punishable by imprisonment
- reports to a specified community corrections centre within two working days of the order coming into force
- reports to and receives visits from a community corrections officer
- notifies an officer of a change of address
- does not leave Victoria without permission
- complies with any directions of community corrections officers.

The court is also required to attach at least one special condition. The special conditions are listed in the *Sentencing Act 1991* (Vic.) and are as follows:

- **unpaid community work** – This requires the offender to perform unpaid community work, the purpose of which is to punish the offender. The offender must perform the number of hours of community work specified in the court order, which must not exceed 600 hours. The number of hours must not exceed 20 over a seven-day period unless the offender requests to do more.
- **treatment and rehabilitation** – The offender will be required to undergo treatment and rehabilitation ordered by the court which addresses the underlying causes of the offending.

This could be treatment for drug abuse or dependency, medical assessment and treatment, or vocational or educational treatment.

- **supervision** – This is where the offender is supervised, managed and monitored by a community corrections officer.
- **non-association** – This is an order directing that the offender must not contact or associate with a person, or class of persons, specified in the order.
- **residence restriction or exclusion** – The court may order that the offender reside at a place, or not reside at a place, specified in the order.
- **place or area exclusion** – An order may be made attaching a condition which directs that the offender must not enter or remain in a specified area or place, such as a particular sporting venue, the central business district of Melbourne or a licensed premises. Usually this condition is necessary for people that have a habit of committing crimes in a certain area or venue.
- **curfew** – The offender may be directed to remain at a certain place specified in the order between specified hours of each day, such as at home between 9 pm and 6 am.
- **alcohol exclusion** – The offender may be prevented from entering into or remaining in licensed premises or a major event, or prevented from consuming liquor in any licensed premises.
- **judicial monitoring** – This attaches a condition directing that the offender be monitored by the court.

For intellectually disabled offenders, the court may also attach a 'justice plan', specifying the treatment services recommended to reduce the chances of reoffending.

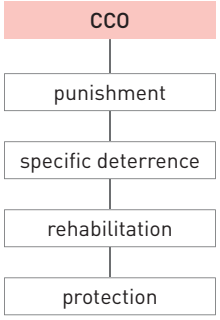
The changes to the *Sentencing Act 1991* in 2011 also abolished what was previously known as the Intensive Correction Order (ICO). Instead, when a court imposes a CCO for a period of six months or longer, the court may fix a period as the **intensive compliance order**. For example, if the court has ordered the CCO to continue for two years, the intensive compliance period may be for eight months. The court may then order that one or more of the conditions imposed as part of the CCO are completed within the intensive compliance period.

Sentencing aims of CCOs

A CCO is a **punishment** because it is a demand on the time of the offender. Conditions such as a curfew or alcohol condition can also assist to punish the offender. This can also serve as a **specific deterrence** in that having to do the work may discourage the offender from reoffending.



Figure 8.13
Community work – cleaning up graffiti



A CCO can **protect** society in that it occupies an offender at times when he or she may otherwise be encouraged to commit a crime. A CCO may also help to **rehabilitate** an offender because programs are provided to assist the offender to move away from criminal behaviour.

The findings of a South Australian study strongly suggested that positive self-image was the single most important factor in predicting lower recidivism (a **recidivist** is a person who repeatedly commits crimes despite being punished for them). This was relevant to the offender's perception of the sanction and the setting in which it was imposed. Specifically, community correction orders, supported by programs designed to assist the offender, emphasised the 'good citizen' aspects of the sanction and helped the offender's self-image. On the other hand, a custodial sanction (e.g. imprisonment) tended to emphasise fear and remorse.

>>GOING FURTHER

Two other types of community orders

In addition to CCOs, there are two types of community orders that relate to the payment of fines. They are:

- Fine Default Unpaid Community Work Orders
- Fine Conversion Orders.

Both these types of orders only have one condition attached, which is to perform unpaid community work. These two orders have replaced the previous order known as the 'Community-Based Orders in Default of Payment of a Fine' (CBO/FD).

LEARNING ACTIVITY 8.10

Community correction order (CCO)

1 What is a community correction order? What was it previously called?
2 List three of the conditions that could be imposed as part of a CCO.
3 Explain the aims of criminal sanctions that could be achieved through the use of CCOs.
4 Read the extract 'Community correction order imposed' and answer the questions.
   a Describe the sanction that was imposed on the offender.
   b Describe two basic conditions that may have been attached to this order.
   c What factors were relevant in ordering a CCO in this case and not a term of imprisonment?
   d Conduct some Internet research and find a recent case in which a community correction order was imposed. Provide the rest of your class with an overview of the case, giving details of the offence and any conditions that were imposed with the order.

EXTRACT

Community correction order imposed

Emily Portelli, *Herald Sun*, 28 February 2014

A man who flew into a jealous rage when he found his girlfriend in the bedroom of another man and assaulted them both has avoided jail.

Christopher Dudman's actions were 'fuelled by jealousy and anger' when he forced his way into the Cranbourne home of a man he suspected his girlfriend was having an affair with, County Court Judge Mark Gamble said.

Dudman pleaded guilty to aggravated burglary, intentionally causing injury and unlawful assault.

Judge Gamble said the court was naturally concerned by people resolving their relationship issues and feelings of jealousy by forcing their way into homes and resorting to violence, but accepted that Dudman was genuinely remorseful.

Judge Gamble said the appalling attack was 'largely designed to punish them for what you considered to be their disloyal ... conduct'.

He sentenced Dudman to a three-year community correction order, which requires him to perform 300 hours of community work and undergo alcohol and behaviour programs.



Figure 8.14
Christopher Dudman

Youth orders

There are two types of orders that can be imposed on a young offender: a youth justice centre order or a youth residential centre order.

A **youth justice centre order** (YJC order) sentences the offender to a period of time in custody at a youth justice centre, for no longer than three years (two years if it is a Magistrates' Court order). YJC orders are given to offenders who have been found guilty of a serious offence, who are repeat offenders and aged over 15 years at the time of being sentenced.

Younger offenders (10–14 years old) may be given a **youth residential centre order**, which requires them to spend time at a youth residential centre (up to 12 months). These centres are for younger offenders.

The Youth Parole Board can give permission for an offender to be released early to serve the rest of their sentence in the community. A young person who behaves extremely badly under a youth justice centre order could be transferred to an adult prison. A youth justice centre order is used as a last resort after other sentencing options have been unsuccessful in rehabilitating the offender.

When deciding on YJC orders, the court must consider the nature and circumstances of the offence and the age, character and past history of the accused. The court can sentence a young adult offender to a YJC rather than an adult prison, if it believes that there are reasonable prospects for rehabilitation of the young offender, or the young offender is particularly impressionable, immature, or likely to be subjected to undesirable influences in an adult prison.

At the youth justice centre, a key worker will help the offender to develop a client service plan to assist the offender, which will include participating in a range of activities such as:

- drug and alcohol counselling or anger management counselling to help the offender deal with their offending behaviour
- TAFE courses
- sports activities
- YMCA programs
- work release.

>>GOING FURTHER

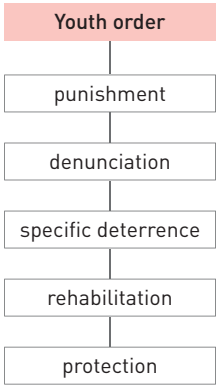
Children's Court orders

Youth attendance orders

Young people aged between 15 and 18 can also be sentenced to a **youth attendance order**, which requires the young person to report to a youth justice unit for up to 10 hours a week. The offender must attend education programs and other activities, including completing up to four hours a week of community work. A youth attendance order is seen as a very serious punishment.

Youth supervision orders

Young people between the ages of 10 and 18 can be placed on a **youth supervision order** for a period of up to 12 months (in some cases 18 months). This requires the young person to report to a youth justice unit and comply with special conditions such as attending special programs designed to help the young offender or do some community work.



Sentencing aims of youth orders

A youth justice centre order is a **punishment** because the young offender suffers a loss of freedom and liberties. It sends a clear message to society about the court's disapproval of the offender's actions (**denunciation**). YJC orders also act as **specific deterrence** by giving the offender an insight into likely consequences of further unlawful actions, and they should act to deter others in a general sense. There is a strong focus on **rehabilitation** in justice centres, in the hope that these young offenders will not reoffend as adults. The **community is protected** from any further actions of the offender while they are serving a YJC order.

LEARNING ACTIVITY 8.11

Youth orders

1 What age group is a youth justice centre order appropriate for?
2 Which body is responsible for the early release of youth held under a youth justice centre order?
3 Explain the difference between a youth justice centre order and a youth residential centre order.
4 Read the case study 'Almost three years in a youth justice centre for offender' and answer the questions.
   a What crime was the accused convicted of?
   b What factors did Judge Duckett take into account when sentencing the offender to a youth justice centre?
   c Which of the aims of criminal sanctions do youth justice centre orders best fulfil? Explain.
   d Do you think nearly three years in a youth justice centre for this crime is appropriate? Discuss.

CASE STUDY

Almost three years in a youth justice centre for offender

Twenty-year-old Jarrad William Brewer, a volunteer firefighter from Darraweit Guim, pleaded guilty in the County Court to three charges of intentionally causing a bushfire, and 16 charges of

making false emergency 000 calls. The three fires – two in Mt Disappointment State Forest and one in Wallan – were lit during the 2008–09 summer season, just weeks before the Black Saturday fires. In the false emergency calls that Brewer made he reported house fires, forest fires and road accidents. Brewer claimed that the calls were designed to help train the new recruits.

In sentencing Brewer, Judge Tony Duckett stated that each offence presented a serious threat to the community. He said that the accused had a low IQ and some borderline intellectual disability; a psychologist stated that Duckett offended to draw attention to himself. Judge Duckett ordered that Brewer serve two years and 48 weeks in a youth justice centre.

Suspended sentence of imprisonment

On sentencing an offender to a term of imprisonment, a court may have the option of suspending a sentence for a period specified by the court, the whole or a part of the sentence if it is satisfied that it is desirable to do so.

There has been considerable discussion about suspended sentences; that is, whether they are an option that is too lenient. Others think they are a good option to have when a custodial sentence is clearly not appropriate, and a community correction order seems too onerous for the crime committed.

Suspended sentences have already been abolished for offences heard in the Supreme Court and County Court, committed on or after 1 May 2011. In September 2014, suspended sentences are expected to be abolished altogether, with all suspended sentences abolished in the Magistrates' Court.

Sentencing aims of suspended sentences

Suspended sentences can act as **punishment** for an offender who has a recorded prison sentence. They also allow offenders the opportunity to undergo treatment for the underlying cause of their offending behaviour, and serve to **rehabilitate** them. It can, however, be argued that they do not act as a deterrence or act to protect the public from an offender who may reoffend.

LEARNING ACTIVITY 8.12

Suspended sentence of imprisonment

1 What are suspended sentences?
2 Why do you think they are being abolished?
3 Present arguments for and against suspended sentences. Do you think they should be abolished? Give reasons.

Drug treatment order

A drug treatment order can be ordered by the Drug Court in the Magistrates' Court if a person pleads guilty and the Drug Court is satisfied that the offender is dependent on drugs or alcohol, and that this dependency contributed to the commission of the offence. This sanction is not available when the offence involves the infliction of actual bodily harm, or for sexual offences. This sanction is only available to the Drug Court.

The purpose of a drug treatment order is to help rehabilitate the offender by providing a judicially supervised drug or alcohol treatment program. The aim is to reduce the level of criminal activity associated with drug and alcohol dependency and reduce the offender's health risks associated with drug or alcohol dependency.

A Drug Court can only impose a drug treatment order if it considers that the purpose for which the sentence is imposed cannot be achieved by an intensive correction order.

A drug treatment order consists of two parts, a treatment and supervision part and a custodial part. The treatment and supervision part operates for two years or until the order is cancelled. The custodial part of the sentence is suspended to allow treatment. The conditions of a treatment and supervision order include that the offender must:

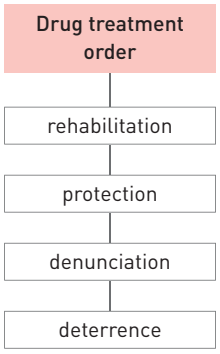
- not commit another offence punishable by imprisonment
- attend the Drug Court when required
- report to a specified community corrections centre
- undergo treatment for drug or alcohol dependency
- report to, and accept visits from, a community corrections officer
- give notice of a change of address
- not leave Victoria without permission
- obey all lawful instructions and directions of the Drug Court, community corrections officers and Drug Court officers.

The Drug Court can order that the offender submit to drug or alcohol testing, and detoxification or other treatment. The offender can also be ordered to attend vocational, educational, employment or other programs, and be ordered not to associate with specified persons.

EVALUATION OF THE DRUG COURT

An evaluation of the Drug Court by the Department of Justice in 2007 found that after six months in the Drug Court program:

- participants were 23 per cent less likely to reoffend than offenders released from jail
- the number who had used heroin in the past week fell by one-third
- full-time employment had more than doubled, from 11 per cent to 25 per cent
- none were homeless, and the proportion living with and relying on their parents halved from 38 to 18 per cent
- many offenders said that the court was fair and just, and had helped them.



Sentencing aims of drug treatment orders

A drug treatment order's particular purpose is to facilitate the **rehabilitation** of the offender through the supervised treatment program. This helps to **protect the community** by reducing the likelihood of the offender engaging in criminal activity. As it is accompanied by a prison sentence, which is suspended to enable treatment, a Drug Court order also shows the court's disapproval (**denunciation**) of the accused's actions, and **deters** him or her from reoffending because that would lead to certain imprisonment.

LEARNING ACTIVITY 8.13

Drug treatment order

1 Explain the purpose of a drug treatment order.
2 Why are these orders made only by the Drug Court in the Magistrates' Court?
3 How successful have these orders been in assisting with restorative justice?
4 Read the case study 'The Drug Court a problem-solving court' and answer the questions.

a In what way would you say the Drug Court is a problem-solving court? Explain in relation to this case.
b Explain the conditions likely to be attached to a drug treatment order. How do you think these conditions will help Sarah?
c Some people have criticised drug treatment orders as 'soft options', stating that criminals should be put away. To what extent do you agree with this statement? Discuss. In your discussion provide an evaluation of the operations of the Drug Court.

CASE STUDY

The Drug Court a problem-solving court

Sarah has a serious history of convictions for street prostitution. She also has schizophrenia, for which she has long medicated herself with heroin or any other street drugs within her reach. And she is homeless. She has no confidence and sits with her head down.

Sarah is in the Drug Court, which is a problem-solving court that tries to focus as much on the people and their needs as it does on laws and the breaking of them.

Sarah is sentenced to a drug treatment order, taking into consideration directions of her support worker and the people who are treating her drug problem and her mental illness.

Critics might call it crime without punishment; a soft option for the offender. The aim of this type of court is to reduce the incidence of crime and help the offender to rehabilitate.

Imprisonment

People who have been convicted of a crime can be sentenced to be detained in jail for a period of time, which means a loss of their freedom and liberty.

Prison terms are expressed in levels from one to nine, one being the most serious (imprisonment for life) and nine being for six months. These levels are shown in table 8.3.

If a court sentences an offender to be imprisoned for a term of two years or more, it must also state a minimum, non-parole period. If the sentence is between one and two years, then the court has the option of stating a non-parole period. After this minimum period, the prisoner's suitability for parole is reviewed by the Parole Board. Parole is a term used to describe the release of a prisoner after the minimum period of imprisonment has been served. Conditions can be attached to a period of parole. Otherwise, prison sentences are to be served in full.

The Magistrates' Court is limited in the length of sentence it may impose. The maximum sentence for a single offence is up to two years (three years for a drug offence) and up to five years for two or more offences. The maximum term of imprisonment (life) can only be imposed by the Supreme Court. A term of life imprisonment means for the term of the prisoner's natural life, although the court may set a minimum term.

If an offender has been held in custody (for example, on remand) before sentencing, any time spent in prison will be taken as part of the sentence to be served.

Although it seems that a large number of offenders end up in jail, statistics indicate that for every 1000 crimes committed, only one of the convicted offenders in relation to those 1000 crimes actually ends up in jail. The majority of crimes are minor crimes that are dealt with in the Magistrates' Court and lead to minor punishments such as fines or community correction orders.

Imprisonment
- punishment
- denunciation
- deterrence
- rehabilitation
- protection

Sentencing aims of imprisonment

Imprisonment is seen as the **sanction of last resort**, as it results in a loss of liberty and freedom. It removes the offender from society as a **punishment** for offending against society and as **protection** for society. Having a prison system leads to a safer society because serious criminals are kept out of society. Some would argue that more offenders should be kept in jail and that sentences should be harsher. Others argue that the most significant aim of criminal sanctions should be to rehabilitate offenders so that they are more likely to lead a useful and productive life within the boundaries accepted by society.

Table 8.3 Imprisonment levels

LEVEL	MAXIMUM TERM OF IMPRISONMENT
1	Life
2	25 years
3	20 years
4	15 years
5	10 years
6	5 years
7	2 years
8	1 year
9	6 months

Source: *Sentencing Act 1991* (Vic.)

Imprisonment may lead to **rehabilitation** because of the various programs offered to prisoners, but it is more likely to lead to further crimes because of the influence of other prisoners and the difficulty of getting back into a normal life after having spent time in prison. Courts can also impose long sentences on offenders by way of showing disapproval of the acts committed (**denunciation**).

Imprisonment is likely to act as a **general deterrence** in that most people would be deterred from committing a crime by the possibility of going to prison. It may also act as a specific deterrence in that the offender will not want to go to prison again. However, because they mix with serious criminals while in prison, it may not be very effective as a **specific deterrence**.



Figure 8.15 The Melaleuca unit – HM Barwon Prison, Victoria

Concurrent and cumulative sentences

Terms of imprisonment can be served concurrently or cumulatively. A **concurrent sentence** runs at the same time as another sentence. For example, someone who has been found guilty of theft and assault and sentenced to six months for theft and two years for assault 'to be served concurrently' will be detained for only two years because the two sentences are served at the same time. Sentences are usually ordered to be served concurrently.

A **cumulative sentence** will be served after another sentence. In the above example, the offender would serve two years and six months. A cumulative sentence must be given for:

- serious offenders
- default of payment of a fine or sum of money
- an offence by a prisoner or an escape offence
- an offence committed by a person released on parole or on bail.

CASE STUDY

Cumulative sentences ordered for Adrian Ernest Bayley

At about 1.30 am on 21 September 2012, Jillian Meagher, 29, set off for home along Sydney Road from a bar in Brunswick, at which point she was sighted by Adrian Ernest Bayley.

CCTV footage obtained from shops along Sydney Road showed Bayley walking past Meagher at around 1.35 am, at which point she was only about 550 metres from home. Bayley attacked her, dragged her into the laneway and raped her. He then strangled her to death. Bayley left her body in the laneway and returned home. He went back to the laneway to pick up her body, drove out to the country to Gisborne South and dug a shallow grave at the side of the road, where he buried Meagher.

Bayley pleaded guilty to the murder and rape of Meagher. He was sentenced to life imprisonment for murder (usually 20 years), and 15 years' imprisonment for rape. He is to serve the sentences cumulatively. A non-parole period of 35 years was to be served. Justice Nettle during the sentencing hearing commented that Bayley had very poor prospects of rehabilitation and the level of penalty was necessitated by the need for specific deterrence and protection of the community.

Justice Nettle noted that Bayley had pleaded guilty to offences in the past and then offended again.

In October 2013, Bayley's appeal against the severity of the sentences was rejected by the Court of Appeal.

Bayley was on parole at the time of the murder. Following this and other cases, new legislation has been passed to better provide for the safety and protection of the community in parole decisions. The *Corrections Amendment (Further Parole Reform) Act 2014* (Vic.) creates a two-tier approach for granting parole for serious violent or sexual offenders.



Figure 8.16 Adrian Ernest Bayley

Aggregate sentences

In instances where an offender has been convicted of multiple, related offences, the court has the option of imposing an aggregate sentence that applies to more than one offence, rather than separate sentences for each offence. This enables the court to impose a sentence that reflects all of the offender's conduct, and provides a clearer explanation of the total sentence. An aggregate sentence cannot exceed the total effective sentence that would have been imposed if a separate sentence was imposed for each offence. However, aggregate sentences are not available for serious offences where there is a presumption that sentences will be served cumulatively.

SERIOUS OFFENDERS

Harsher sentences have been introduced for serious sexual, arson, drug and violent offenders. When considering if an offender is a serious offender, the court must look at the number and nature of previous convictions. When deciding on a sentence for a serious offender, the court must consider the need to **protect the community**. In order to protect the community, the court can impose a longer sentence than is appropriate to the gravity of the offence for which the offender is currently being sentenced.

Indefinite sentences

If a person (other than a young person) is convicted by the Supreme Court or the County Court of a serious offence, the court may sentence him or her to an indefinite term of imprisonment. A serious offence includes murder, manslaughter, defensive homicide, rape, kidnapping, armed robbery and sexual offences with children under 16. It has been suggested that defensive homicide will be abolished.

The court must set a **nominal sentence** of the same length that the court would have set as a minimum sentence under normal circumstances. The indefinite sentence must be reviewed by the court as soon as the offender has served the nominal sentence and, on the application of the offender, every three years after the initial review. Unless the court is satisfied, to a high degree of probability, that the offender is still a danger to the community, the indefinite sentence must be discharged and the offender must undertake a five-year reintegration program administered by the Adult Parole Board. The offender or the Office of Public Prosecutions may appeal against a decision to discharge or not discharge an indefinite sentence.

The court can only impose an indefinite sentence on an offender if it is satisfied, to a high degree of probability, that the offender is a serious danger to the community because of:

- his or her character, past history, health, age or mental condition
- the nature and gravity of the serious offence
- any special circumstances.

CASE STUDY

Julian Knight

The Victorian Parliament passed a new law to keep mass murderer Julian Knight behind bars indefinitely.

Julian Knight was sentenced to life imprisonment for killing seven people and injuring 19 others on 9 August 1987 in what is now known as the 'Hoddle Street massacre'. He is one of Australia's most well-known criminals.

Knight is eligible for parole in May 2014 and has served a minimum 27-year sentence.

Under the *Corrections Amendment (Parole) Act 2014* (Vic.) the Adult Parole Board must not make a parole order for Julian Knight unless it is satisfied that he is in imminent danger of death or is seriously incapacitated and does not pose a risk to the community.

LEARNING ACTIVITY 8.14

Imprisonment

1 What is the meaning of a non-parole period?
2 To what extent does imprisonment fulfil the aims of criminal sanctions?
3 Look back at the case study 'Cumulative sentences ordered for Adrian Ernest Bayley' and answer the questions.
   a Why do you think Justice Nettle placed little weight on the fact that Bayley pleaded guilty?
   b Explain the aims of criminal sanctions that could be achieved through the use of the sanction of imprisonment.
   c Distinguish between cumulative and concurrent sentences. What impact did the fact that Bayley's sentences have to be served cumulatively have on the length of Bayley's overall sentence?
   d What was the final decision of the Court of Appeal in this case? Do you agree with their decision? Explain.
4 Look back at the case study 'Julian Knight'. What is being suggested by Premier Denis Napthine?
5 Read the case study 'Indefinite sentence for Kevin John Carr' and answer the questions.
   a What was Kevin John Carr found guilty of?
   b Why do you think he might have been seen as a prime candidate for an indefinite sentence?
   c Discuss the arguments for and against indefinite sentences.
   d Do you think Carr has been treated differently because of his previous record? Explain.
   e Explain the process by which Carr can have his indefinite sentence reviewed.
   f Suggest the relevance of Carr's reluctance to take part in a sex offenders program.
   g What was the final decision of the Court of Appeal in this case?

CASE STUDY

Indefinite sentence for Kevin John Carr

In 1995, Kevin John Carr, 37, was the first offender to get an indefinite sentence under the *Sentencing (Amendment) Act*. He was convicted of the rape of a 77-year-old woman at Spencer Street Station. He pleaded guilty to one charge each of false imprisonment, one charge of robbery, one charge of attempted rape and two charges of rape. Judge Lewis said Carr had shown an impulsive desire for sexual gratification with little regard for the consequences. The 77-year-old woman was forced into a toilet cubicle in the Spencer Street Station at around 9 pm and sexually assaulted.

After the attack, the victim was experiencing constant fears that she would be attacked by Carr again, and still had moments of panic and revulsion.

Carr had an extensive criminal history including five prior convictions for sexual assault and rape. Judge Lewis said that Carr had difficulty learning from experience and modifying his behaviour. It was alleged that Carr had been sexually abused as a child, but there were no signs of mental illness. He was fully aware that his conduct was disgraceful, and had apologised during a police interview.

In June 2009, Victorian County Court Chief Judge Michael Rozenes continued Carr's indefinite sentence, stating that 'I am satisfied to a high degree of probability that he is still a serious danger to the community'.

In 2010, Carr appealed the decision of the County Court to the Supreme Court (Court of Appeal). Fresh evidence was adduced (cited as a means of proof), which showed a significant and material change in Carr's medical condition in the time since the decision of the County Court (including that Carr was terminally ill).

The Court of Appeal allowed the appeal. It considered that Carr was no longer a serious danger to the community and ordered that the indefinite sentence be discharged and Carr be subject to a five-year reintegration program administered by the Adult Parole Board.

Deferred sentencing

This is only available if the Magistrates' Court or County Court finds a person guilty of an offence. A magistrate or County Court judge can defer the sentencing of an offender for a period of up to 12 months if it is in the interests of the offender and if the offender agrees. This allows the offender to assess prospects of rehabilitation and participate in programs addressing the underlying causes of offending. At the end of the deferral period, the court will sentence the person, having regard to the offender's behaviour during the period of deferral.

Recidivism

Over half (58 per cent) of the people in prison in 2013 had been imprisoned before. Younger prisoners were more likely than older prisoners to be reimprisoned following release. In 2010, it was found that within 10 years of being released, the reimprisonment rate for the teenager group (those aged 17–19 years when released) was 61 per cent, compared with 23 per cent for those aged 35 years and over.

PRISONERS IN AUSTRALIA

Statistics maintained by the International Centre for Prison Studies and the Australian Bureau of Statistics revealed the following statistics about the prison population as at 30 June 2013:

- There were 30 775 prisoners in adult jails in Australia, representing 170 prisoners per 100 000 adult population. This is the first time the number of prisoners in Australia has exceeded 30 000.
- 92 per cent of the prison population were male.
- 58 per cent of prisoners had served a sentence in an adult prison before their current sentence.
- The rate of Indigenous imprisonment was 15 times that of non-Indigenous prisoners in Victoria.
- Victoria imprisons a smaller proportion of its population than any other state. In 2013, there were 5340 prisoners in Victoria.
- The largest offender group was those who intended to cause injury (20 per cent) followed by illicit drug offences (12 per cent).
- 25 per cent of Victorian prisoners were born overseas, with the biggest group being from Vietnam (5 per cent).
- The median length of a prison sentence (excluding those on indefinite and life sentences) was 22 months.

Source: ABS cat. no. 4517.0 and International Centre for Prison Studies

Court orders in addition to sentences

The courts are able to impose other orders in addition to sentences given. Some of these are:

- **order for restitution** – A court can order the return of stolen goods. The value of the goods may also be taken from any money found on the accused at the time of apprehension.
- **order for compensation** – In some instances, when the accused has been found guilty of a crime, a criminal court can order that the accused pay compensation to a victim, as recompense for the injury, damage or loss suffered by the victim.
- **cancellation of driver's licence** – Cancel or suspend the driving licence of an offender convicted of driving offences for a certain period of time and disqualify them from obtaining a licence for a further set period.
- **forfeiture order** – Allow 'tainted property', which is property used or intended to be used by the accused in commission of the offence, or derived wholly or partly from the commission of the offence, to be forfeited to the state.
- **hospital security order** – Order a mentally ill offender to be admitted for treatment and detention in an approved mental health service, as an involuntary security patient for up to two years. Involuntary treatment orders are not available for offenders who have been found guilty of a 'serious offence', such as murder, manslaughter, defensive homicide, rape or armed robbery.
- **superannuation orders** – A court can order the superannuation of a public sector employee who has been convicted of an indictable offence involving the abuse of their office, corruption or perversion of the course of justice to be used for monetary restitution.

THE ABILITY OF SANCTIONS TO ACHIEVE THEIR PURPOSES

The purposes of sanctions are summarised in table 8.4.

Table 8.4 Purposes of sanctions

SANCTION	TO PUNISH THE ACCUSED FOR THE CRIME THAT HE OR SHE HAS COMMITTED AND TO:
Discharge, dismissal, adjournment	• specifically deter the accused from committing another crime • provide the accused with an opportunity to rehabilitate
Fine	• deter the individual and the community from offending • where a large fine has been imposed, to denunciate – show the disapproval of the court
Community correction order	• specifically deter the individual by requiring him or her to undertake community work or imposing some other condition • protect the community by occupying the time of the offender • rehabilitate the offender by attaching conditions such as alcohol exclusion or treatment for drug abuse
Youth order	• denunciate by sending a clear message about the court's disapproval of the offender's actions • deter the offender by providing an insight into the likely consequences of further unlawful actions, and deter others by showing the punishment that can be imposed • rehabilitate the offender in the justice centres • protect the community while the youth order is being served

SANCTION	TO PUNISH THE DEFENDANT FOR THE CRIME THAT HE OR SHE HAS COMMITTED AND TO:
Drug treatment order	• facilitate the rehabilitation of the offender through a supervised treatment program • protect the community by reducing the likelihood of the offender engaging in criminal activity • deter the offender from reoffending • show the court's disapproval of the accused's actions
Imprisonment	• denunciate by sending a clear message about the court's disapproval of the offender's actions • deter both the offender and the community from committing the same or other crimes • rehabilitate the offender • protect the community

The purposes of sanctions can differ from case to case, as it will depend on the circumstances of the case and what is considered by the court to be the most important purpose to achieve.

The extent to which sanctions achieve their purposes

While sanctions are intended to achieve a particular purpose, in many situations they do not, or they do not achieve all the purposes of sanctions. For example, a fine does not protect the community, whereas imprisonment does. Similarly, imprisonment may not deter youths who understand that they cannot be tried as adults.

Table 8.5 shows the considerations to be taken into account to determine whether a sanction can achieve its purposes.

Table 8.5 To what extent sanctions achieve their purposes

SANCTION	FACTORS TO CONSIDER WHEN DETERMINING TO WHAT EXTENT THE SANCTION ACHIEVES ITS PURPOSES
Discharge, dismissal, adjournment	• Without a conviction and without any conditions imposed, how can this punish the offender? • In what ways is this deterring somebody? • Will the offender take the opportunity to rehabilitate? • Is there another sanction that may better achieve the purposes?
Fine	• Does the offender have the ability to make a payment? • Will the court's disapproval be known if the case is not reported? • Will this punish an offender who has a large amount of money available? • What particular crimes is this a more appropriate sanction for?
Community correction order	• Which conditions may achieve a particular purpose? For example, is a curfew more appropriate for an alcohol condition? • Will the offender comply with the conditions? • Is it better if the offender is 'off the streets' as opposed to remaining in the community on a CCO? • Is there another, more appropriate sanction?
Youth order	• Will this act as a deterrent? • Will the offender take the opportunity to rehabilitate? • Will this damage the offender or expose him or her to negative influences?

Drug treatment order	• How successful are drug treatment orders in rehabilitating offenders? • To what extent is this order achieving its purposes when it is only available in limited circumstances?
Imprisonment	• Is this exposing offenders to negative influences? • Will the offender take advantage of the opportunities to rehabilitate? • Given the recidivism rate, is this an appropriate sanction?

LEARNING ACTIVITY 8.15

Sentencing

1 How many prisoners in Australia are in adult prisons?
2 Which is the largest offender group in Victoria's prisons?
3 Explain the term 'recidivism'. Which age group is most likely to be recidivist?
4 What is the approximate percentage of male prisoners compared to female prisoners? Why do you think this is the case?
5 Read the case study 'Robert Farquharson to pay ex-wife compensation' and answer the questions.
   a Explain the order of the court in this case.
   b Why is the compensation referred to in this case a criminal matter?
   c In which Act can this right to compensation be found?
   d Do you agree with a criminal court's right to order compensation? Discuss.

CASE STUDY

Robert Farquharson to pay ex-wife compensation

Robert Farquharson, who killed his three sons by driving them into a dam, has been ordered to pay his ex-wife compensation.

Cindy Gambino sought compensation in the Victorian Supreme Court, criminal jurisdiction, for pain and suffering in May 2009. The court ordered Farquharson to pay $225 000 in compensation ($75 000 for each child). Ms Gambino's claim for compensation is under the *Sentencing Act*, which allows a court to order an offender pay compensation 'of such amount as the court thinks fit'.

Robert Donald Farquharson, 39, is serving three life sentences for the drowning murders of Jai, 10, Tyler, 7, and Bailey, 2, on Father's Day in 2005.

The state restrained Farquharson's $66 000 in assets to satisfy compensation orders.

The court heard that Ms Gambino had already reached a confidential settlement in a separate civil claim for damages. The agreement was reached with the Transport Accident Commission, which was representing Farquharson.

6 **Investigation**
Investigate three types of sanctions and prepare a multimedia report explaining each sanction and the extent to which you think each sanction fulfils the purposes of criminal sanctions.
7 Apply sentencing principles to a case reported in the media or one of the case studies you can find in 'You be the Judge' at the Sentencing Advisory Council website under 'Education'.

8 **Internet investigation**
Using the Internet, investigate an aspect of criminal procedure, such as criminal sanctions or victims of crime. Write a short report of 300 words summarising your findings. Give a bibliography of the material used as the basis of your report.

9 Choose two possible sanctions that may be imposed on a youth. To what extent would these sanctions deter an adult? Justify your answer.

EFFECTIVENESS OF CRIMINAL PROCEDURE

There are a number of features of criminal procedures that work to achieve a just outcome. Someone who takes a matter to court has their case heard before an unbiased judge and jury or a magistrate. There are rules of evidence and procedure to protect the parties to the case. In recent years the issues of law and order and the social problems of the disadvantaged have gained a higher profile in society and consequently with government as well. Improvements have therefore been made to assist the police in maintaining law and order and to assist those accused of a crime (who are presumed innocent until proven guilty).

When assessing the effective operation of criminal procedure you should consider the extent to which each of the three elements of an effective legal system is achieved. For each element, you should consider:

- the processes and procedures that help the achievement of each element
- the processes and procedures that hinder the achievement of each element
- recent changes and recommendations for change that could help achieve each element.

Entitlement to a fair and unbiased hearing

For a fair and unbiased hearing to be achieved in a criminal case, it is essential that all those accused of a crime receive equal treatment during the pre-trial, trial and post-trial stages of their trial or hearing.

Processes that may achieve a fair and unbiased hearing

The following processes attempt to achieve the element of a fair and unbiased hearing in a criminal case.

- **bail** – Upholds the presumption of innocence, as an accused person is generally released from custody until their hearing or trial. Being released on bail also gives the accused and their legal representation the best chance to prepare their case, thereby having the same opportunity to do so as the prosecution.
- **committal proceedings** – This process enables the accused to learn of the prosecution's case against them, thereby helping them to prepare their defence, and putting them on an equal footing with the prosecution.
- **police investigation** – Police powers of questioning, arrest, searches and so on are balanced against individual rights, such as the right to silence, questioning for only a reasonable period of time, and the right to contact a legal representative, friend or relative. This is done in an attempt to balance rights, and to make sure that people are treated equally and fairly by the police.
- **role of the judge** – The judge acts as an independent and impartial arbitrator at the hearing. This ensures that the matter is heard before someone who is not biased and can adjudicate on the matter, if there is no jury, in an impartial way.

- **rules of evidence and procedure** – These apply to both parties to a case and help to protect the accused. The parties are able to examine their witnesses – each side has equal opportunity to cross-examine witnesses brought by their opponents, and each side is able to re-examine their own witnesses. The rules of evidence are designed to ensure that both sides are treated equally before the law and to enable the smooth and efficient running of a case. The rules of procedure help to ensure the reliability of the witnesses and to get at the truth of the matter so that the court can make a decision.
- **consistency in sentencing** – The judiciary aims to be seen as totally independent of all prejudices and therefore able to treat everyone who comes before it according to the facts of the case only, and not according to any preconceived ideas. The *Sentencing Act 1991* (Vic.) aims to provide consistency in sentencing (although there is the possibility that a member of the judiciary could have personal biases that could affect the outcome of a case).
- **the Koori Court** – This court hears guilty pleas with the assistance of Indigenous elders or respected people in an attempt to provide a fairer, more culturally sensitive, outcome.

Problems and difficulties that may hinder a fair and unbiased hearing

The following factors may hinder the ability of a party to receive a fair and unbiased hearing in a criminal trial.

- **bail** – An accused person may not be granted bail and instead be placed on remand, which is being imprisoned, even though they have not been found guilty of a crime. Because of the possibility of keeping an innocent person in prison, bail justices, magistrates and police are very reluctant to refuse bail. However, if bail is given too freely, it could lead to an accused person absconding and causing extra work for the police and potential danger to the community.
- **resources** – Prosecution evidence for a case is gathered by the police, who are experts in this area, with time and resources devoted to this purpose. An accused person will probably have far more limited resources and expertise in gathering their own evidence for their defence, thereby putting the parties on an unequal footing. However, it is the prosecution who has the burden of proving the case.
- **trial procedures** – These may be confusing for the accused, particularly if they do not have legal representation. Further, witnesses who appear unreliable in court, or conflicting expert witnesses, may result in an unfair presentation of evidence.
- **bias** – Media coverage of events leading up to a trial in high-profile cases can make it difficult to find jury members who have not already formed an opinion of the guilt or innocence of the accused. Also, some jury members may hold biases for other reasons.
- **direct indictment** – There is considerable debate about whether the OPP should be able to directly indict people without going through the committal proceedings process, as it may seem unfair if the accused is not entitled to the committal process.
- **changes to the *Sentencing Act 1991*** – Tougher sentencing laws put in place in 2011, and continued in 2013, create a substantial amount of changes to the sentences that can be imposed by courts. Home detention and intensive correction orders have been abolished, and suspended sentences are no longer available for many offences as of 2014. This has caused concern among some members of the judiciary, believing that the sentencing regime is 'too rigid' and does not adequately take into account the individual circumstances of each offender, thus potentially resulting in an unfair outcome.
- **tighter guidelines for legal aid** – Under tight new guidelines introduced in 2012, Victoria Legal Aid (VLA) only paid for an instructing solicitor for two half days. This was criticised in 2012 and 2013 by judges of the Supreme Court in separate trials, which were stayed because the lack of representation was seen to be risking fair trials being heard. VLA has since relaxed its guidelines



Figure 8.17
Justice Betty King of the Supreme Court commented on the issue of Legal Aid funding in 2013. She noted: 'The most important thing is that we don't want all of this delay. We want this to proceed. We want it to proceed fairly.'

but they still remain tight given a lack of funding. The Court of Appeal has said that 'When it comes to legal representation, a decision to stay a trial reflects the court's assessment of what is necessary to ensure that justice is done'.

Recent changes

The following recent changes further assist in achieving a fair and unbiased hearing.

- **the Assessment and Referral Court List of the Magistrates' Court** – This list is designed to help accused persons whose offending behaviour is related to their mental illness or cognitive impairment. The court takes a case management approach to their case, focusing on health and welfare issues as well as their criminal behaviour. The list assists in providing fair treatment to offenders who suffer mental health issues. It began operations in 2010.
- **County Koori Court** – This is a sentencing court for Indigenous offenders who have pleaded guilty to a crime within the jurisdiction of the County Court (other than sexual offences or family violence matters). The aim of this specialist court is to provide more culturally relevant and appropriate justice to Indigenous offenders through the involvement of an Indigenous elder or respected person. This four-year pilot program began operations in the Latrobe Valley Law Courts in 2009 and has been extended in 2013 following the introduction of the Melbourne County Koori Court. It follows the success of Koori Court divisions of the Magistrates' Court and Children's Court, which have succeeded in reducing the recidivism rate of Indigenous offenders.
- **jury directions** – The *Jury Directions Act 2013* (Vic.) made changes to how the judge addresses the jury at the end of a trial to avoid a miscarriage of justice resulting from the jury not correctly assessing the information received and the relevant laws as applicable to the case before them.
- **community correction order** – A community correction replaces the community-based order and intensive corrections order. It is a sentencing option that allows the offender to remain in the community so that they can remain in employment and draw on the assistance of family or friends. Its aim is to reduce recidivism. A community correction order can be combined with either a fine or up to three months' imprisonment. When combined with a term of imprisonment, the order will commence on the offender's release from jail.
- **double jeopardy rule** – Under the *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic.) a person is able to be retried in limited circumstances, if he or she has been acquitted, in the interest of justice and it will result in a fair retrial. This can occur if the offence is a serious offence and there is compelling new evidence, such as DNA evidence.
- **changes to bail laws** – The *Bail Amendment Act 2013* (Vic.) changed the *Bail Act 1977* (Vic.) so that it was clear what conditions could be imposed as part of bail. This allows for a fairer and more consistent approach to bail and more consistency in the application of appropriate conditions for different accused persons.
- **weekend court** – The Melbourne Magistrates' Court has introduced weekend sittings to help improve its operations and reduce the pressure of cases listed on Monday mornings. It will also make it easier for people to attend the court out of work hours.

Recommendations for change

The following recommendations for change could further assist in achieving a fair and unbiased hearing.

- **increased resources for trials involving persons suffering from mental impairment** – The Victorian Law Reform Commission (VLRC) is currently reviewing the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic.). One of the issues being considered is whether there need to be increased resources to improve the fairness of criminal trials involving persons suffering from

mental impairment. Submissions to the VLRC, including those from the Criminal Bar Association, have suggested that some cases require more resources to assist an accused person so that they are fit to be tried. Liberty Victoria has submitted that there needs to be a tailored approach for children suffering from a mental impairment as opposed to adults.

- **increased funding for Victoria Legal Aid (VLA)** – Following various unsuccessful applications for legal aid in criminal trials in 2012 and 2013, which led to trials being stayed, there has been a greater call for more funding. VLA has announced it is in talks with the courts and lawyers to determine how jury trials can be funded in the future. An increase in funding will help achieve a fair and unbiased hearing and effective access to the legal system.
- **further simplification of jury directions** – After the introduction of the *Jury Directions Act 2013* (Vic.), the Victorian Government has announced that it plans to make further improvements to law governing the directions given to jurors. The *Jury Directions Amendment Bill* will seek to clarify directions given about what must be proved beyond reasonable doubt and about other terms such as unreliable evidence and identification evidence. It is hoped that this will lead to a fairer outcome in jury trials.
- **expansion of the Koori Court system** – The Koori Court has been a successful addition to both the Magistrates' Court and the County Court. There has been a call to expand funding for the Koori Court into other locations of the Magistrates' Court and Supreme Court, with many stating that it allows for a fairer hearing for Indigenous Australians who remain over-represented in the criminal justice system.

LEARNING ACTIVITY 8.16

Fair and unbiased hearing

1 Explain three ways in which the legal system endeavours to achieve a fair and unbiased hearing for the accused and the victim.
2 Describe two problems that can hinder the achievement of a fair and unbiased hearing.
3 Suggest and explain two recent changes in the law that are aimed at ensuring that parties to a case receive a fair and unbiased hearing.
4 Read the case study '15 months' jail a miscarriage of justice'. To what extent did the accused in this case receive a fair and unbiased hearing? Discuss. In your discussion consider the trial and the appeal.

CASE STUDY

15 months' jail a miscarriage of justice

A mix-up of DNA evidence led to a Melbourne man being wrongly convicted and jailed for rape. A sample of his DNA had contaminated a DNA sample from a woman believed to have been sexually assaulted in the toilet of a Doncaster nightclub.

A County Court jury rejected the accused's claim that he had been at home with his family on the night of the offence. The victim had little memory of the night.

During the appeal against the conviction, the prosecutor admitted that the same forensic scientist had taken a DNA sample from the victim and from the accused, and that contamination could have occurred.

The Law Institute of Victoria's co-chairman, Michael McNamara, said that jurors treat DNA evidence as the be-all and end-all, but a prosecution should not be run on that alone, particularly where there is room for human error in the collection and analysis of DNA samples.

Effective access to the legal system

While a person charged with a criminal offence does not have a choice as to whether to appear in court or not, it is important for them to have adequate access to the legal system to allow their case to be presented effectively, including courts, legal representation, other avenues of legal assistance and advice, and legal aid.

Processes that may achieve effective access to the legal system

The following processes attempt to achieve effective access to the legal system in a criminal case.

- **courts** – Courts are available for all to use in criminal matters, with courts in both **metropolitan and regional areas**. Courts are **specialised** in terms of the types of cases that they hear. For example, the Magistrates' Court hears summary or minor criminal cases, while the Supreme Court hears only the most serious criminal offences. Accused persons are able to get assistance in a court hearing from legal representatives.
- **appeals** – The system of appeals means that if an incorrect or unfair decision does appear to have been made in a case, then either party is able to appeal the decision or sentence, provided that they can establish grounds for appeal.
- **legal aid and community centres** – Bodies such as Victoria Legal Aid (VLA) and community legal centres can offer legal advice and representation to people charged with criminal offences.

Problems and difficulties that may hinder effective access to the legal system

The following factors may hinder the ability of a party to access the legal system in criminal matters.

- **geography** – Distance and transport can affect the ability of people in rural areas to gain access to face-to-face legal services. In some instances people have to look outside their local community or closest large town for legal assistance because of conflicts of interest or lack of available expertise.
- **awareness of legal rights** – People in the community need to know their legal rights to gain effective access to the legal system. Some people charged with criminal offences are unaware of their rights; they may not know that they have the right to remain silent, the right not to submit to an unlawful police search and so on. Others may be unaware of the legal bodies available to provide advice, including community legal centres, the Fitzroy Legal Service and Victoria Legal Aid. This problem can be compounded if the person has problems with the English language, or there are cultural differences that limit their understanding of the legal process.
- **financial constraints** – An accused person faces the high cost of engaging legal representation to assist them in preparing their defence and to represent them in court. It might be possible for them to obtain legal assistance through Victoria Legal Aid (VLA), although this is means-tested and subject to assessment for merit and reasonableness. Further, VLA has limited funds, so there are many people who do not receive assistance. (See chapter 11 for further discussion of Victoria Legal Aid.)

Recent changes

The following recent changes further assist in more effective access to the legal system.

- **simplifying criminal procedure** – The *Criminal Procedure Act 2009* (Vic.) aims to harmonise, simplify and modernise criminal procedure through: consolidating existing criminal procedure laws, having consistent procedure laws in different jurisdictions, abolishing redundant and obsolete provisions, and using plain English and clear and consistent terminology. An objective of the Act is for criminal procedure laws to be as clear, simple and accessible as possible.

- **establishment of Justice Connect** – Justice Connect was formed when the Public Interest Law Clearing House (PILCH) in Victoria and New South Wales merged on 1 July 2013. Justice Connect works with 50 law firms and thousands of lawyers to provide pro bono legal services to those in need. Justice Connect is financially supported by its members (which are various law firms and other legal bodies in New South Wales and Victoria), the government and by donations. Justice Connect aims to connect people who are in need of legal support by referring them to their member lawyers.
- **Koori Court Division** – The *County Court Amendment (Koori Court) Act 2008* established the Koori Court Division of the County Court and provides for the jurisdiction and procedure of that division. A Koori Court has now been established in Melbourne.
- **multi-jurisdictional courts and justice centres** – The Collingwood Neighbourhood Justice Centre is a multi-jurisdictional court, which includes the Magistrates' Court, Children's Court, Victorian Civil and Administrative Tribunal (VCAT) and Victims of Crime Assistance Tribunal (VOCAT) together with an array of special services to help people accused of a crime, such as restorative justice. There are 12 regional courts with a number of courts under one roof making it a centralised place to attend for everyone involved in criminal cases and therefore rendering access to the legal system easier and less stressful.
- **weekend court** – The Melbourne Magistrates' Court has introduced weekend sittings to help improve its operations and reduce the pressure of cases listed on Monday mornings. It will also make it easier for people to attend the court out of work hours.

Recommendations for change

The following recommendations for change could further assist in providing more effective access to the legal system.

- **better support for victims** – The *New Directions for the Magistrates' Court of Victoria 2008–11* has made a number of proposals, including providing better support for the vulnerable and victims of crime, and more court services available online.
- **access in rural areas** – The Law Institute of Victoria (LIV) is calling for the federal government to provide urgent financial support to encourage the recruitment and retention of lawyers in rural, regional and remote areas of Victoria. Suggested recommendations include providing monetary allowances to lawyers for relocation, bonus or cash incentives, or providing HECS-HELP relief for lawyers who relocate.
- **funding for community legal education** – Victoria Legal Aid (VLA) in its submission to the Australian Law Reform Commission (ALRC) about equality, capacity and disability in Commonwealth laws has noted that community legal education is a core preventative legal service of VLA and people with a disability are a priority audience. The VLA has also noted that funding is important for this legal education, as is flexibility in court procedures to assist disabled persons.
- **Court Integrated Services Program (CISP)** – CISP works with people on bail at the Latrobe Valley, Melbourne and Sunshine Magistrates' Court. The program provides people accused of a crime with access to services and support, including the case management of the accused's criminal trial for up to four months. There has been a push to expand the CISP into other geographical areas given its success.

Timely resolution of disputes

It is important that once the suspect of a crime has been identified, they are not kept waiting for their case to be heard. Delays in criminal cases could result in emotional strain for the accused and his or

her family, the stigma of being charged with a crime, possible loss of job, and disruption of family life. If the accused is being held on remand, there are the physical and mental effects of spending time in prison, and it may be difficult to prepare a case adequately. Delays could also mean that witnesses may be unavailable, or their memories may become cloudy.

It is essential that cases be resolved in a timely manner, not just for the benefit of the accused but also for the benefit of the victim, society and the legal system as a whole, so that the courts can hear other cases and disputes within a reasonable time. However, it is equally important that cases are not resolved too quickly, so that there has been time to fully consider the facts of the case, to make sure that a fair outcome is achieved.

Processes that may achieve timely resolution of disputes

The following processes attempt to achieve the timely resolution of disputes.

- **committal proceedings** – These ensure that people who have been accused of a crime do not have to wait a long time for a trial when there is insufficient evidence to support a conviction by a jury at trial. This also results in the superior courts not being clogged up with cases that are unlikely to succeed, thereby saving time for the legal system as well. The hand-up brief method of committal hearing has resulted in fewer traumas for the accused and victim, because they do not have to go through an open court hearing for the committal; it has also led to more court time being available for other matters.
- **time limits** – The *Criminal Procedure Act 2009* (Vic.) sets time limits at various stages of the criminal process. For example, a filing hearing must be held within seven days of a charge sheet being filed if the accused has been arrested, or within 28 days if a summons is issued. A hearing for a summary offence, or an indictable offence heard summarily, must be commenced within 12 months (unless the accused and the DPP consent to an extension of time). Committal proceedings must be determined within two months after the committal mention hearing for sexual offences, although the Magistrates' Court may fix a longer period.
- **directions hearings** – These are designed to speed up the process of getting an accused person to trial and to reduce the length of the trial by having some issues resolved before the trial begins.

LENGTHY CASES

Despite these procedures, delays do occur. Boris Beljajev, Leslaw Kunz and Larry Lambert had an 11-year battle with the justice system and were eventually found not guilty of trafficking in heroin. The estimated total cost of the courts, lawyers and police investigations was about $25 million.

Edwin Lewis went through three trials before he was eventually found guilty (see next case study 'After delays and high costs, Lewis found guilty' for more information on this case).

Problems and difficulties that may hinder timely resolution of disputes

The following factors may cause delays that hinder the timely resolution of disputes.

- **collection of evidence** – Police may experience difficulties collecting evidence or locating witnesses, or suspects may refuse to cooperate with them.
- **committal proceedings** – These can add to the delays experienced in some cases. This has resulted in people such as former DPP Jeremy Rapke and Victorian Ombudsman George Brouwer calling for committals to be abolished.
- **lack of sufficient court resources** – Resources have not kept pace with the growth in the number of cases in the courts, causing problems such as cases dismissed from the Melbourne Magistrates' Court due to a lack of available police prosecutors to prosecute cases.

- **changes in sentencing laws** – Victoria's top County Court judge, Chief Judge Michael Rozenes, has warned that the new sentencing regime put in place in 2011 could trigger an increase in trial delays and stretch court resources. He said the new sentencing legislation will complicate the process and 'may seriously test the court and its resources', and would have the potential to undo any reduction in delay already achieved.
- **court workload** – The median time taken to finalise criminal appeals against sentence is six months. The Magistrates' Court has a huge workload, but the percentage of cases finalised within six months has remained steady (see table 8.6). All courts have a backlog of cases which have been continuing for more than 24 months (see table 8.7).

Table 8.6 Magistrates' Court of Victoria – year in review

CRIMINAL	2010–11	2011–12	2012–13
Cases initiated	166 791	172 323	175 345
Cases finalised	180 337	180 754	188 537
Cases finalised within 6 months	88.8%	88.9%	88.1%
Cases pending as at 30 June	30 345	32 149	36 686
Criminal cases pending for more than 12 months as at 30 June	7.7%	8.7%	7.6%
Cases finalised at contest mention	4 101	4 375	4 431
Committal proceedings finalised	2 953	2 785	3 265
Cases finalised at ex parte hearings	4 193	3 410	2 476
Appeals lodged against conviction or sentence	2 511	2 378	2 804
Licence restoration applications	12 870	11 700	10 894
Interlock removal applications	6 026	6 190	5 685
Infringement Court enforcement orders made	1 599 261	1 565 585	1 848 784

Source: Magistrates' Court of Victoria *Annual Report 2012–13*

Table 8.7 Court backlog for criminal cases in Victoria at 30 June 2013

COURT	PENDING CASELOAD	CASES GREATER THAN 12 MONTHS (%)*	CASES GREATER THAN 24 MONTHS (%)**
Court of Appeal	1 282	7.6	1.6
Supreme Court – Trial Division	99	8.1	2.0
County Court – Appeals	1 080	6.4	1.7
County Court – Trials	1 637	18.1	3.2
Magistrates' Court	36 686	23.7	7.6

* The national standard is no more than 10 per cent of lodgements pending should be more than 12 months old in superior courts and no lodgements pending should be more than 24 months old.
** The national standard is no lodgements pending should be more than 24 months old.

Source: Productivity Commission *Report on Government Services 2014*

Recent changes

The following recent changes further assist in achieving more timely resolution of disputes.

- **time limits on criminal procedure** – The *Criminal Procedure Act 2009* (Vic.) sets time limits for different stages of criminal procedure, as outlined earlier. The *Jury Directions Act 2013* (Vic.)

also sets down a time by which evidentiary notices are to be filed. These help to ensure a timely resolution for the parties in the case, as well as the legal system.

- **simplifying criminal procedure** – A number of changes in the way cases are heard were brought in by the *Criminal Procedure Act*; these changes have acted to reduce delays in criminal cases. For example, the committal proceeding process has been streamlined. Upon committing an accused for trial at a committal hearing for an indictable offence, the court must transfer all related summary offences to the same court that will deal with the indictable offence so that these can be heard together (before this change in the law, summary charges would have been adjourned to be dealt with later). Further changes were made due to the passing of the *Criminal Procedure Amendment Act 2012* (Vic.), which allowed a single judge of the Court of Appeal to refuse leave to appeal against a sentence. This and other reforms, including the Court of Appeal setting down strict guidelines in relation to appeals, have seen a **dramatic reduction in the backlog** of cases in the Court of Appeal.
- **sentence indication** – This scheme was formalised and extended by the *Criminal Procedure Legislation Amendment Act 2008* (Vic.) and the *Criminal Procedure Act 2009* (Vic.). It refers to the process of the magistrate or judge reviewing summaries of a case after an indictment has been filed, but before the trial or hearing commences, and advising the accused of whether they are likely to be sentenced to a term of imprisonment should they plead guilty to the offence at the first available opportunity. The aim of the scheme is to encourage guilty pleas earlier in the proceedings, thereby reducing the time taken up by the trial or hearing, and freeing up legal resources for other matters.
- **e-filing** – The Supreme Court has continued to develop its electronic filing system, which includes an e-filing portal for the filing of documents. This has assisted in minimising delay.
- **weekend bail and remand court** – The Magistrates' Court has introduced a pilot program which involves hearing bail and remand applications on the weekends in the Melbourne Magistrates' Court. The weekend sittings are intended to reduce the backlog of cases during the week and allow the accused to be brought before the court at the earliest possible time.
- **introduction of Court Services Victoria (CSV)** – The CSV began operations in 2014. It is an independent entity that provides administrative services to the Victorian courts and the Victorian Civil and Administrative Tribunal (VCAT). Chief Justice Warren has stated that this is a positive development and it will 'enhance the capacity of the courts and VCAT to innovate and respond to emerging issues based on firsthand knowledge of the court system'.

Recommendations for change

The following recommendations for change could further assist in achieving more timely resolution of disputes.

- **expansion of the weekend pilot program** – The operation of the Magistrates' Court's weekend bail and remand pilot program could be further extended to other locations to enable greater speed in dealing with these applications.
- **continuation of the 24 Hour Initial Directions Hearings Pilot in the County Court** – In January 2013, the County Court introduced a pilot program to address delays. The aim of the program was to reduce the 10 to 12-week delay between the committal hearing and the initial directions hearing by scheduling the first directions hearing the day after the committal hearing. The County Court in its annual report has proposed to expand the pilot program.
- **reduction of outstanding criminal trials in the County Court** – In February 2013, the County Court introduced a strategy in Bendigo whereby the 30 oldest trials were selected for an intensive

period of 'special mentions'. This resulted in seven plea hearings and two trials heard immediately. An adaptation of the strategy has been planned for Shepparton and will be considered in future as a useful tool to reduce delays in criminal trials.

LEARNING ACTIVITY 8.17

Access and timely resolution of disputes

1 Explain three ways of achieving effective access to the legal system.
2 Describe two problems that might be faced when attempting to achieve effective access to the legal system.
3 Read the case study 'After delays and high costs, Lewis found guilty' and answer the questions.
   a How does the Edwin Lewis case illustrate some of the problems experienced in criminal trial processes?
   b What benefits of the operation of the legal system can you identify from this case?

CASE STUDY

After delays and high costs, Lewis found guilty

Paul and Carmel Higgins were stabbed to death and buried at their Forest Hill home on 21 April 1995. Their bodies were found on 25 April 1995. Edwin Lewis was the former boyfriend of Amanda Higgins, the daughter of the deceased couple. Lewis was committed to stand trial in the Supreme Court for two charges of murder on 7 February 1996. He was also charged with stealing property from the Higgins home. Lewis pleaded guilty to stealing Mrs Higgins's Porsche.

After delays and high costs, Lewis was found guilty.

22 October 1996 Trial started.
3 January 1997 Trial ended with a hung jury after deliberating for almost six days.
12 August 1997 Second full trial started.
30 October 1997 The second trial ended after the jury was unable to reach a verdict after seven days – hung jury.
8 May 1998 Third full trial started.
14 July 1998 Third jury reached a verdict.

Lewis was found not guilty of the murder of Mr Higgins, but guilty of his manslaughter. He was found guilty of the murder of Mrs Higgins and stealing property, including Mr Higgins's credit cards, spectacles, a cigarette lighter, a business card holder and car.

4 The delay between being charged with a criminal offence and attending trial can be traumatic for the accused and others. To what extent can bail alleviate this trauma?
5 Explain two processes or procedures that are being used by the courts to help minimise delays in criminal cases.
6 Describe how the changes made by the *Criminal Procedure Act* have helped to increase access to the legal system as well as reduce delays for parties involved in a criminal case.
7 **Investigation**
   Investigate a recent case reported in the media. Identify problems with the criminal pre-trial procedures and sanctions. Suggest two recent changes in the law that aim to improve the effective operation of the legal system.

PRACTICE EXAM QUESTIONS

1 Choose two criminal sanctions. Discuss the extent to which each sanction fulfils the five aims of criminal sanctions provided under the *Sentencing Act 1991* (Vic.). *(10 marks)*

2 Distinguish between bail and remand as pre-trial procedures, and outline the purpose of each. *(4 marks)*

3 Describe the purpose of a committal hearing. Examine the extent to which a committal hearing enhances or limits the effective operation of the legal system. *(6 marks)*

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK CASE STUDY

Dupas given a third life term

Read the case study 'Murderer Dupas given a third life term' and answer the questions.

1 Explain the purpose of a committal hearing. Suggest why this pre-trial procedure was bypassed in this case. *(4 marks)*

2 Do committal hearings contribute to an effective legal system? Discuss. *(5 marks)*

3 Describe one other pre-trial procedure that would have occurred in this case, and outline its purpose. *(3 marks)*

4 At the commencement of the trial, the accused unsuccessfully applied for a permanent stay of proceedings on two grounds: a suggested incapacity to receive a fair jury trial because of the accused's notoriety, and a suggested lack of utility because the accused was already serving two life sentences.

   a Comment on the extent to which you think Dupas was able to receive a fair trial. *(4 marks)*

   b Comment on why you think the court would pursue this murder case, despite the fact that Dupas was already serving two life sentences. *(4 marks)*

5 Identify and explain the sanction given to Dupas. What factors would Justice Cummins have taken into account when sentencing Dupas? *(4 marks)*

6 Evaluate how effective this sanction is likely to be in fulfilling the aims of criminal sanctions. *(6 marks)*

(Total 30 marks)

Murderer Dupas given a third life term

Peter Dupas was sentenced in August 2007 to life imprisonment, with no minimum term, for the 1997 murder of Mersina Halvagis at the Fawkner Cemetery. Ms Halvagis, 25, had been tending her grandmother's grave when Dupas inflicted multiple stab wounds causing death.

In late 2005, a coronial inquest into Ms Halvagis's death named Peter Dupas as the prime suspect in her murder, for which he was later charged. The DPP sent the case directly for trial, bypassing the committal hearing – a decision that was upheld by the Supreme Court. Dupas pleaded not guilty.

At the beginning of the trial in mid 2007, His Honour Justice Cummins made an unprecedented move in telling the jury that Dupas had already been convicted in 2000 for the murder of Nicole

Patterson, and in 2004 for the murder of Margaret Maher. His Honour then told the jury that Dupas must be judged only on the evidence in the case before them, despite their prior knowledge of the accused.

During the four-week trial the jury heard evidence from the prosecution, whose case relied on the evidence of two key witnesses – a lady who had seen someone who looked like Dupas in Fawkner Cemetery the day Ms Halvagis was killed, and Dupas's former cellmate at Port Phillip Prison to whom Dupas had confessed the murder and demonstrated the stabbing action that he used. At the completion of the cases the jury deliberated for nine hours before returning a verdict of guilty of murder.

In sentencing, Justice Cummins referred to Dupas's prior convictions for rape and murder and stated that 'you have no remorse for the terrible crime of the murder of Ms Halvagis: none. You have no prospect of rehabilitation: none. You do not suffer from any mental illness. Rather, you are a psychopath driven by a hatred of women. For the murder of Mersina Halvagis, I sentence you to life imprisonment. I refuse to set any minimum term. Life means life.'

Peter Dupas appealed the conviction and was granted a retrial by the Court of Appeal in September 2009. In February 2010, the High Court granted him the right to appeal for a permanent stay on his retrial because it is thought that his high profile could affect the outcome of a trial. On 15 April 2010, the High Court threw out his attempt to have the case permanently stayed.

The retrial commenced on 26 October 2010. On 19 November 2010, Dupas was convicted of the murder of Mersina Halvagis after the jury deliberated for more than three days. He was sentenced seven days later to life in prison.

Dupas now intends to appeal the conviction for the murder, to the Court of Appeal, for the second time.

Source: Comments extracted from *DPP v. Dupas* (2007) VSC 305

ASSESSMENT TASK REPORT IN WRITTEN FORMAT

Using electronic sources such as the Internet, and print materials such as newspapers and journals, research and investigate a recent criminal case where the accused has been found guilty of the crime committed. Your chosen case should be one that is complete (meaning that the sanction has been determined) as you are required to follow the case from the pre-trial stage through the trial and then the sanction determined by the court. After completing your research, construct a written report that incorporates the following:

- a discussion of the pre-trial procedures used in the case, including specific examples from your chosen case – as part of the discussion, consideration should also be given to the purpose and value of these pre-trial procedures
- an explanation of the final outcome of the case, such as the sanction given to the accused, any sentencing comments made by the judge, and the likelihood of an appeal
- a discussion of the extent to which the sanction given fulfils the five aims of criminal sanctions
- consideration of any problems with the operation of criminal procedure, and suggestions as to how these could be overcome, or changes that have recently taken place to improve the operation of criminal procedure
- an evaluation of whether you feel that a just outcome was achieved in your chosen case. In your evaluation, you should consider the elements of an effective legal system
- a bibliography of the material you consulted for your report.

(Total 30 marks)

Summary

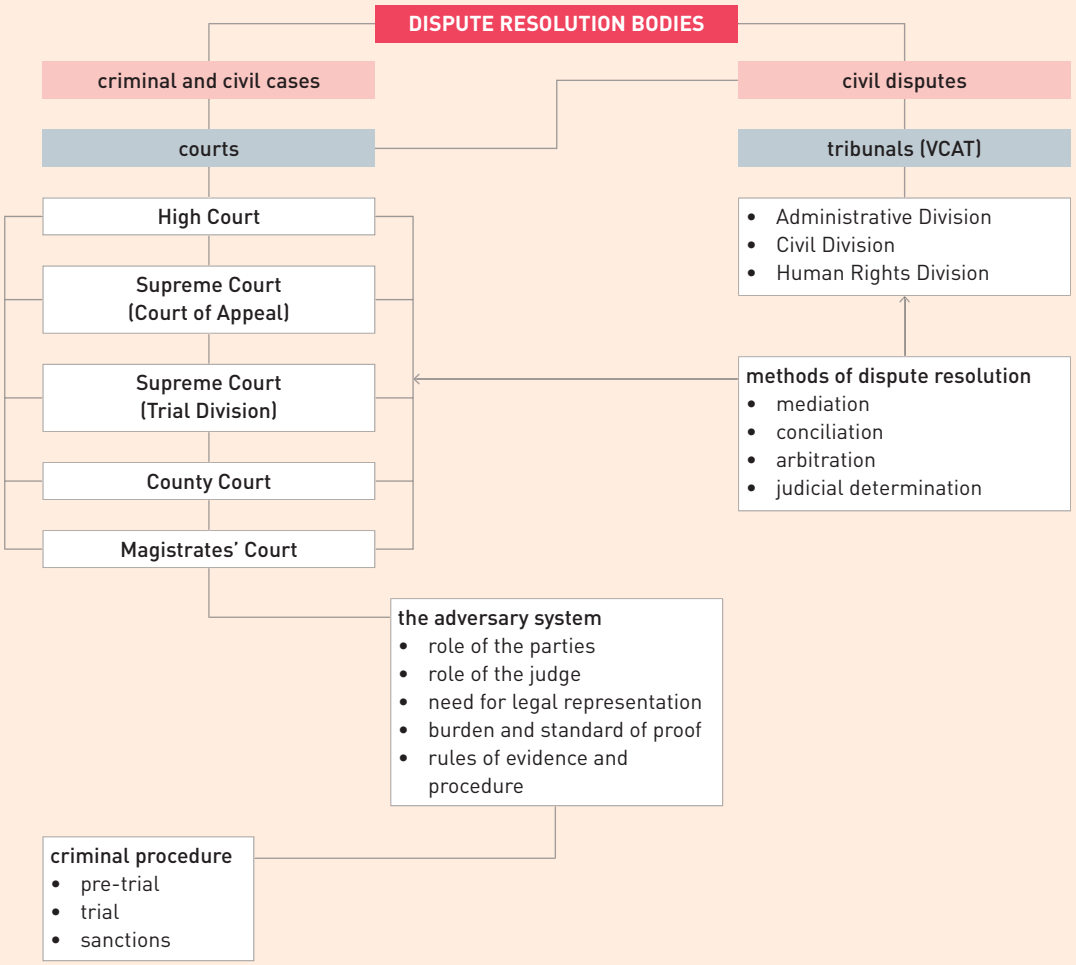
Criminal law
- definition of a crime
- difference between criminal and civil law

Criminal pre-trial procedures
- bail
- remand
- committal hearings
- evaluation of pre-trial procedures

Aims of criminal sanctions
- punishment
- deterrence – general deterrence and specific deterrence
- rehabilitation
- denunciation
- protection

Types of sanctions
- dismissal
- discharge with conviction
- adjournment with or without conviction
- fine
- community correction order
- youth justice centre order or youth residential centre order
- imprisonment

Evaluation of the legal system
- fair and unbiased hearing
- effective access to the legal system
- timely resolution of disputes





CHAPTER 9

CIVIL PROCEDURE

OUTCOME

This chapter is relevant to learning outcome 2 in Unit 4. You should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, and evaluate their operation and application, and evaluate the effectiveness of the legal system.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- elements of an effective legal system: entitlement to a fair and unbiased hearing, effective access to the legal system and timely resolution of disputes
- Supreme Court civil pre-trial procedures, including pleadings, discovery and directions hearings, and the purposes of these procedures
- the purpose of civil remedies
- types of civil remedies, including damages and injunctions
- problems and difficulties faced by individuals in using the legal system
- recent changes and recommendations for change in the legal system designed to enhance its effective operation.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- describe the pre-trial procedures for the resolution of criminal cases and civil disputes, and compare their relative purposes
- discuss the ability of civil remedies to achieve their purposes
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

KEY LEGAL TERMINOLOGY

civil action An action taken by an individual or group who claims his, her or its rights have been infringed. It is aimed at obtaining a remedy to return the wronged party to the position he or she was in before the wrong occurred.

civil law The law that governs disputes between individuals and groups.

damages A type of remedy, being a sum of money awarded to a plaintiff by the court in a civil case, paid by the defendant in settlement of a claim for any loss or injury caused to the plaintiff as a result of a civil wrong.

defence A document exchanged as part of pleadings which sets out a response to each of the allegations contained in the plaintiff's statement of claim.

defendant Party who is alleged to have carried out the wrongful act.

directions hearing A pre-trial procedure where the court may give any direction to the parties about the conduct of the civil proceeding, such as requiring the parties to attend mediation before trial.

discovery A pre-trial procedure which allows the parties to obtain further information about the dispute from the other party, including inspecting documents in the possession of the other party and examining a witness through interrogatories.

injunction A type of remedy, being a court order that stops someone from doing something or compels someone to do something.

interrogatories Part of the discovery process, interrogatories are written questions sent by one party in a civil case to the other party before the trial.

notice of appearance A document exchanged as part of pleadings which informs the court and the plaintiff that the defendant wishes to defend the claim.

plaintiff Party who is wronged and who commences the civil action.

pleadings Documents exchanged between the plaintiff and the defendant in a civil case, normally through their solicitors, to establish the reason for the claim and which facts are in dispute. Pleadings include a writ, a statement of claim, a notice of appearance and a defence.

remedy A way in which a court will enforce a right, impose a penalty or make another court order for the benefit of the plaintiff. It is aimed at restoring the plaintiff back to the position he or she was in before the wrongful act occurred. The most common remedy is damages.

statement of claim A document exchanged as part of pleadings which notifies the defendant of the nature of the claim, the cause of the claim and the remedy or relief sought.

writ A document exchanged as part of pleadings, issued by the plaintiff in a civil proceeding (or his or her legal representatives), explaining the action being taken against the defendant by the plaintiff and informing the defendant of the place and mode of trial.

ELEMENTS OF AN EFFECTIVE LEGAL SYSTEM

Throughout this chapter you should consider the extent to which the processes and procedures used in resolving civil disputes achieve the three elements of an effective legal system. The three elements are:

- entitlement to a fair and unbiased hearing
- effective access to the legal system
- timely resolution of disputes.

INTRODUCTION TO CIVIL LAW

Civil law governs disputes between two or more individuals, groups, companies or government bodies. Often in a dispute, a person's rights have been infringed, and that person brings a **civil action**

against the person who has infringed their rights. Common examples of civil disputes include when an individual or group has breached a contract, when someone has been negligent or when damage has been caused to property. The persons who are involved in a dispute are known as the 'parties' to a dispute.

The aim of a civil action is to restore the party whose rights have been infringed back to the position they were in before the act or omission occurred. In most instances this cannot be achieved physically; for example, a finger that has been cut off cannot be replaced. It is therefore achieved through **compensating** the person whose rights have been infringed, and who has suffered loss or injury as a result, by paying a sum of money. This is a **civil remedy** known as **damages**.

The party whose rights have been infringed and who brings a civil action is called the **plaintiff**. Commencing a civil proceeding is also known as **suing**. The party who is alleged to have infringed the rights – the alleged wrongdoer – is called the **defendant**. Sometimes there can be multiple parties. For example, if two people both own a property that has been damaged, they can both be plaintiffs. Similarly, if two people have damaged the property, they can both be defendants in the one proceeding.

When a plaintiff decides to sue the defendant, it is the plaintiff who has to prove that the defendant was in the wrong (the **burden of proof**). The court must decide which version of the facts is most probably correct; that is, the **standard of proof** is **on the balance of probabilities**.

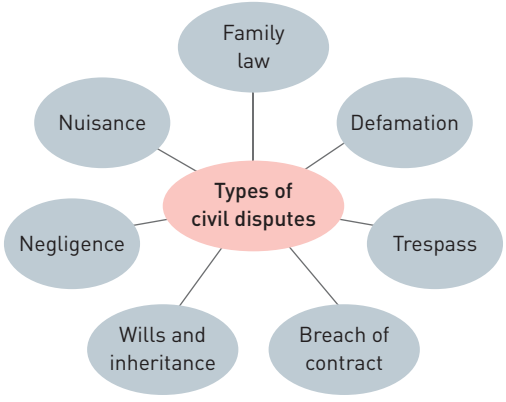
The burden and standard of proof in a civil proceeding

burden of proof lies with the **plaintiff**	standard of proof is **on the balance of probabilities**; that is, which party's version of facts is most probably correct

Types of civil disputes

There are many areas of the law that deal with civil disputes. Some of the more common types of disputes involve claims for negligence, trespass, defamation, nuisance, family law, wills and inheritance, and breach of contract. These are explained briefly below.

- **Negligence** relates to doing something or not doing something that a reasonable person would do or not do in the circumstances, which causes harm or loss to another person; for example, a negligence claim may relate to something that has gone wrong during a medical procedure.
- **Trespass** might involve damage to land, damage to a person (assault) or damage to goods; for example, if a person poured hot coffee over another person it could cause damage to the person and the injured person could sue for assault.
- **Defamation** relates to written or verbal statements that lower a person's good reputation in the eyes of the community; for example, a claim involving someone who has published a false statement (such as in a newspaper article) about another person which is harmful to that person's reputation.



- **Nuisance** claims are made by people that have lost the enjoyment or use of their property, such as when their neighbours have constantly played loud music.
- **Family law** deals with disputes between family members and which are of a family nature, such as custody of children.

- **Wills and inheritance** involve disputes between individuals about the decisions made by a will-maker, or whether or not a will is valid.
- **Breach of contract** is a type of civil action where someone has failed to do something, or has done something contrary to what they have agreed to do.

Parties involved

A party to a civil action can be one of the following:

- an **individual** suing or being sued in their own name, or a group of individuals
- a **corporation**, otherwise known as a company – in Australia, a corporation is a separate legal entity to the directors or individuals who run the company and can sue and be sued
- a **government body**, for example the Victorian Government, a local council or a statutory authority such as the Victoria Police.

Children

A child under the age of 18 can sue another person or group through a 'next friend'. This is usually a parent or guardian. Children can also be sued. The extent of their legal liability depends on the child's level of maturity and the behaviour expected of a child of that age.

Employers

If an employee infringes a person's rights while acting in the course of his or her employment, the injured party or plaintiff will normally sue the employer. This is because of the principle of **vicarious liability**. Vicarious liability is when somebody becomes responsible for the actions of another. The reasoning behind the employer being liable instead of the employee is that the employer has a right, ability or duty to control the activities of the wrongdoer. For example, if an employee is negligent in the preparation of food, which then causes injury to someone, the employer is likely to be sued, not the employee. The important factor is whether the employee was acting 'in the course of employment'.

Group proceedings

If one individual or group has similarly injured a group of people, they can join together to bring a civil action known as a **class action**. In Australia, **class actions** (or **group proceedings** as they are formally known) can be commenced by one person (known as the **lead plaintiff**) making a claim in circumstances where seven or more people have claims which arise out of the same or related circumstances.

The person who commences a group proceeding is required to describe the class of people who are being represented. Once the class is described, every person in that class is assumed to be part of the class unless they decide to 'opt out' of the action by filing a notice with the court in a specified form. The lead plaintiff does not need the consent of the class members and does not even need to know who they are or where they live.

The benefit of group proceedings is that the plaintiffs can share the cost of the proceedings. It is also a more efficient way of dealing with a number of claims, saving court time and the time of court personnel. Group proceedings also enable people to pursue civil actions that they may not otherwise have been able to afford had they pursued individual cases.

Australia's first successful group proceeding occurred in 1995 when a firm of solicitors, Slater & Gordon, represented more than 1000 people who had suffered salmonella poisoning as a result of eating contaminated peanut butter. Since then, group proceedings have increased in use among groups of people who have suffered common harm due to the actions of a common defendant. Other well-known group proceedings include business owners suing Esso as a result of the Esso Longford

gas explosion in 1998; a claim against Powercor Australia Limited in relation to a February 2009 bushfire in Horsham that was settled in late 2011; and a claim made by children of mothers who had consumed the drug thalidomide, which caused deformities in those children.

EXTRACT

Abalone licence holders lose virus class action case against Victorian Government

Rachel Baxendale, *The Australian*, 7 November 2013



Figure 9.1 In 2006, the ganglioneuritis virus killed the wild abalone population across the south-west coast of Victoria.

A group of abalone licence holders and divers has had its multi-million-dollar class action against the Victorian Government over a deadly virus dismissed.

Law firm Maurice Blackburn acted on behalf of 44 licence holders, 40 divers and four abalone processing plants, arguing the Department of Primary Industries did not take sufficient action to prevent the ganglioneuritis virus from spreading after an outbreak on an abalone farm near Port Fairy, on Victoria's south-west coast, in March 2006.

The plaintiffs argued the state government continued to allow the farm, Southern Ocean Mariculture, to pump infected water directly onto a wild abalone habitat, after being notified of the virus by the farm and despite being aware of how dangerous the virus was.

They argued they had seen the values of their licences plummet after the disease killed up to 95 per cent of abalone on the south-west coast, with the disease spreading more than 100 kilometres along the coast from Port Fairy to Cape Otway between March and May 2006.

Before the outbreak, the Victorian abalone industry was worth around $100 million annually, supplying about 10 per cent of the world's abalone.

Supreme Court Justice David Beach this morning found the state government had not been negligent.

He said it was impossible to determine how the disease had come to the area, and the plaintiff had not proven that the state had failed in its duty of care.

The group is deciding whether or not to appeal the decision.

LEARNING ACTIVITY 9.1

Civil disputes

1 What is a civil action?

2 What is the aim of bringing a civil action?

3 **Internet investigation**

Look at the list of different types of civil law. Conduct an Internet investigation and find one recent dispute that has occurred between individuals or groups relating to three separate types of civil law.

4 Explain how a child might bring a civil action.

5 Your neighbour was involved in a motor vehicle accident caused by the negligence of a driver who was transporting goods for the company he works for. Your neighbour is suing the company. Explain why she would sue the company instead of the driver.

6 Your neighbour later finds out that the driver was not actually transporting goods for the company but was actually delivering flowers to his girlfriend. Does this change any advice you would give to your neighbour about who should be sued?

7 Andrew has recently had his house built by Dodgy Constructions Pty Ltd. Two weeks after moving in, he has noticed large cracks appearing in the walls and water leaking from the roof. He has engaged a building expert who has told him that the builder has been negligent in his work. Andrew is now suing Dodgy Constructions, seeking damages.
   a Identify the words in the above scenario that indicate the case is a civil one.
   b What does 'suing' mean?
   c What remedy is Andrew seeking? What would he get if he was awarded this remedy?

8 Look back at the extract 'Abalone licence holders lose virus class action case against Victorian Government' and answer the questions.
   a Explain what happened in this case.
   b What is a class action (group proceeding)? Is this case a group proceeding? Explain.
   c What was the outcome of this case?

9 Read the case study 'Class action brought in hepatitis C case' and answer the questions.
   a Is this a class action? Provide two reasons to justify your answer.
   b Who are the plaintiffs in this case? Who are the defendants?
   c What sort of remedy may be sought in this type of case? Explain why you think this might be the best remedy to restore the plaintiffs back to their original position if a wrong is found to have occurred.

CASE STUDY

Class action brought in Hepatitis C case

Slater & Gordon launched a class action on behalf of up to 60 women against a drug-addicted anaesthetist who allegedly infected those women with Hepatitis C at a Croydon abortion clinic. The class action was filed in the Supreme Court of Victoria in May 2012 and listed Dr James Latham Peters, an anaesthetist, Dr Mark Schulberg, director of the former Croydon Day Surgery and the Australian Health Practitioner Regulation Authority as defendants.

After attending the Croydon Day Surgery between January 2008 and December 2009, all the women in the class action were diagnosed with the Hepatitis C virus or were found to be carrying the Hepatitis C antibody. Dr Peters was the anaesthetist for all the women when they attended the clinic. In April 2014, the victims agreed to a payout for damages for pain and suffering, economic loss and medical expenses of $13.75 million to be shared between them.

In a separate criminal case in May 2013, Dr Peters was jailed for a maximum of 14 years for his conduct, with a non-parole period of 10 years. His appeal against the sentence was rejected in August 2013.

DIFFERENCES BETWEEN CRIMINAL AND CIVIL CASES

Civil disputes are distinct from criminal cases in many ways. One of the main differences is the desired consequence of each case. In a civil dispute the plaintiff normally seeks a remedy, such as damages. In a criminal case, the prosecutor normally seeks to punish the offender on behalf of the state.

Overlap between criminal and civil law

In some instances, one action can give rise to both a criminal and a civil action. For example, if a person has been sexually assaulted, the police are likely to charge the accused with relevant sexual offences. The person who was assaulted may then also decide to sue the wrongdoer for trespass to person.

The two cases – the criminal action and the civil action – will be heard separately and may be heard in different courts. The outcome of one does not affect the outcome of the other, but a guilty verdict in the criminal action may provide a stronger basis for the plaintiff to succeed in the civil action.

It is possible for an accused to be found not guilty in a criminal case, but found liable in a civil case relating to the same wrong. This could be because the **standard of proof** in a criminal case is much higher than that in a civil case. The jury (or magistrate if it was a summary offence or an indictable offence heard summarily) may not have found **beyond reasonable doubt** that the accused was guilty. However, in the civil case, the judge or the jury of six people may believe that the plaintiff's version of facts is more believable than the defendant's version, and may therefore find the defendant liable. That is, the judge or the jury may form the view that, **on the balance of probabilities**, the plaintiff has been wronged.

HINT

Look back at the introduction to Unit 4 for a comprehensive table showing the differences between civil disputes and criminal cases.

CASE STUDY

Death of Darcey Freeman

It is also possible for a victim (whether it be the primary victim or someone else who has been affected by the crime) to sue someone other than the accused who they believe was responsible for what occurred.

In January 2012, Peta Barnes, the mother of four-year-old Darcey Freeman, issued civil proceedings against VicRoads in the Supreme Court of Victoria. Darcey Freeman died in 2009 when her father, Arthur Freeman, threw her off Melbourne's Westgate Bridge.

In the criminal case that followed in April 2011, Arthur Freeman was found guilty and given a minimum sentence of 32 years' imprisonment.

In the civil action, Peta Barnes has issued proceedings against VicRoads for negligence, alleging that the crime may have been prevented had there been safety barriers on the bridge.



Figure 9.2
Darcey Freeman

LEARNING ACTIVITY 9.2

Differences between criminal and civil cases

1 Outline two differences between criminal and civil cases.
2 Sophie was physically assaulted by Daniel, who has been charged with intentionally causing injury (a criminal charge). Is Sophie able to sue Daniel? Explain.
3 How does the standard of proof in a civil dispute differ from the standard of proof in a criminal case?
4 Look back at the case study 'Death of Darcey Freeman' and explain how the set of circumstances in this case resulted in a criminal case and a civil case.
5 Explain how a person can be found not guilty of a crime, but found liable for a civil action for the same incident that gave rise to the crime.
6 The following scenario contains some errors. Identify at least two of these errors. Rewrite the scenario to correct the errors.

BRANCH FELL ON BLAIR

Blair was hurt while rollerblading in the local park. The injury was caused by a branch of a tree falling on Blair. The local council had failed to remove the tree, which had dropped branches previously. Blair has decided to charge the local council with negligence. The local council has to prove beyond reasonable doubt that it was not negligent. The local police are investigating the matter and gathering evidence for Blair, and will represent her at the trial.

COMMENCING A CIVIL PROCEEDING

There are many reasons why a party may decide to sue someone. Usually the main reason is that the party wishes to be compensated for the wrong they have suffered, often by way of receiving a remedy in the form of damages. Other reasons could be:

- a desire to stop the defendant from doing something; for example, a person wishing to stop another person from trespassing on his or her land
- to compel another party to do something, such as perform their obligations under a contract
- to send a message to the defendant, or to society as a whole, about the protection of individuals' rights.

Commencing a civil proceeding is also known as 'issuing proceedings', 'bringing a civil action' or 'suing'.

Deciding whether or not to proceed

Taking a civil case to court is a risk. Someone who does so might not win the case, and the legal fees will often be expensive. It will be time-consuming, can be stressful and might lead to bad publicity. Someone deciding whether to commence a civil proceeding will usually consider:

- the likelihood of success
- the time and inconvenience involved in taking the claim through the courts
- the costs involved
- whether there is enough evidence to establish the claim (including whether there are witnesses or key documents which help prove the claim)

- the continuing relationship between the two parties and the effect a court case may have on this
- whether the party against whom the claim is made would be able to pay the compensation claimed. If this is unlikely, there is often little point in proceeding
- the effects of publicity.

CASE STUDY

Deciding to sue

In November 2013, Shamim entered into a contract with Justine. Under the contract, Shamim agreed to pay Justine $200 000 over a period of three years for providing him with accounting services for his business. One of the services that Justine was to provide was to prepare and lodge business activity statements with the Australian Taxation Office (ATO). Justine also collected all of Shamim's mail and sorted through it.

Shamim got a call from the ATO informing him that the latest business activity statement had not been lodged, and that their warnings to him about this had been ignored. He received a penalty for failing to lodge the business statement on time. Shamim discovered that Justine failed to prepare and lodge the business activity statement, and had destroyed all the warnings from the ATO.

Shamim tried to contact Justine but found out she had fled the state. He also found that she was being investigated herself for tax fraud and owes several thousand dollars to various companies and authorities.

Shamim will have to weigh up various factors in deciding whether to issue any proceedings against Justine to recover any money he has to pay to the ATO.

Obtaining legal advice

If a civil dispute arises, the wronged party should first contact the other party personally to try to resolve the matter. In some circumstances, however, such as those where the identity of the defendant is not known, this may not be appropriate.

The other option is that the wronged party contacts a solicitor.

A **solicitor**, also known as a legal practitioner or lawyer, provides legal advice to clients and assists in commencing and pursuing a civil proceeding if the client decides to proceed. A legal practitioner will advise the party of their legal rights and their chances of winning the case. If a matter has to be taken to court, normally it is necessary to engage a barrister to appear, although in Victoria it is possible for a solicitor to plead a case in the courts.

A **barrister** can be briefed by a solicitor; that is, provided with information about a case (the 'instructions') and asked to act on behalf of the solicitor's client. The barrister will often give further advice to the solicitor and will appear in court to represent the client.

Sending a letter of demand

Before a proceeding is issued and the formal court pre-trial procedures commence, the plaintiff or his or her legal practitioner may send a **letter of demand** to the defendant. The letter of demand informs the defendant of the nature of the claim, and outlines the remedy sought. The letter often demands that the defendant comply with the wishes of the plaintiff within a certain time limit. The letter often states that the plaintiff will issue legal proceedings if the defendant fails to comply. An example of a letter of demand follows.

If the defendant fails to comply with the demand, the plaintiff has the option of abandoning his or her claim, or proceeding with the civil action. The person may decide to use one of the dispute resolution bodies and methods discussed next to resolve the dispute.

AN EXAMPLE OF A LETTER OF DEMAND

Dear Mr Chandler

Our client: Mammoth Timber Pty Ltd
Monies owing pursuant to outstanding invoices

We act for Mammoth Timber Pty Ltd.

Our client has instructed us that in or around November 2014 it provided you with various timber products. We are further instructed that our client issued three invoices to you, totalling $35 111.23, in or around November 2014 for the delivered goods.

We are instructed that despite several requests for payment, and your promises to make payment, you have failed and/or refused to pay.

We hereby demand that you forward to us by way of bank cheque the sum of $35 111.23, for monies owing to our client, within seven days of this letter. Should you fail and/or refuse to pay, we are instructed to issue legal proceedings against you without delay, seeking the full amount plus costs and interest.

Yours faithfully
Manuel Sandler
Lawyer

NOTE
Further information about alternative dispute resolution is given in chapter 6.

DISPUTE RESOLUTION BODIES AND METHODS

The parties usually seek advice from their legal representatives to determine the best method to use to resolve a dispute. There are a variety of methods of dispute resolution available.

Alternative dispute resolution

A civil dispute can be resolved through **alternative dispute resolution** (ADR), also referred to as **appropriate dispute resolution**, without having to take the case to a court or tribunal. Some of these methods are also used by courts and tribunals or by individuals and groups. They include negotiation, mediation, conciliation, arbitration and collaborative law.

Negotiation is when the parties discuss the issues between themselves and try to reach a resolution. There is no third party involved. Often this is a useful method for disputes between neighbours, or between family members, to avoid the matter escalating further.

Mediation is when a third party, known as a mediator, is present to help parties try to resolve the dispute between them. The mediator assists parties to reach a resolution in their negotiations; for example, making sure each party is able to have their say. However, the mediator remains unbiased and will not offer advice about how to resolve the dispute or offer solutions to the parties.

Parties who wish to seek a resolution by way of mediation without issuing proceedings can do so by contacting centres such as the Dispute Settlement Centre of Victoria. Parties are often encouraged by courts to attend mediation, and mediation is often ordered as a compulsory pre-trial procedure in a court proceeding. Further details about mediation as a pre-trial procedure are contained in this chapter.

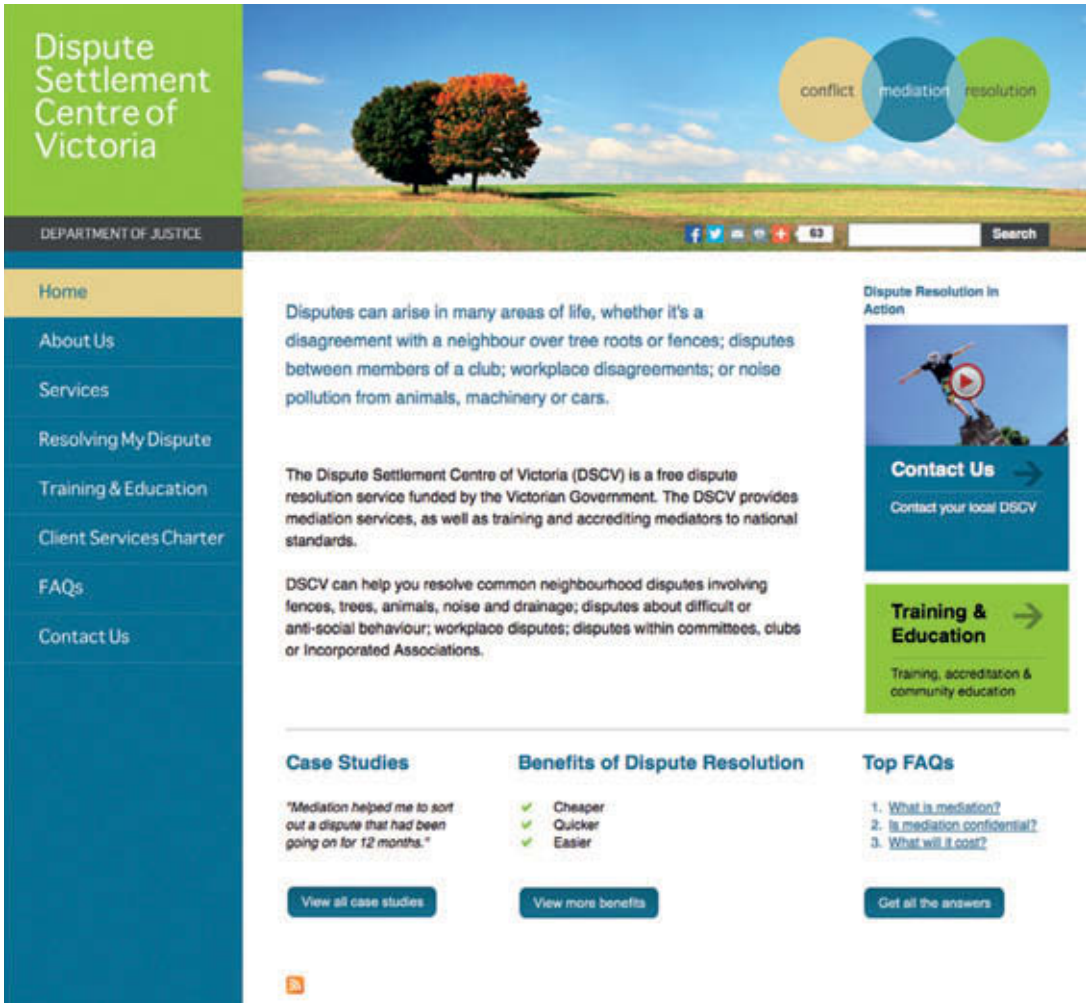


Figure 9.3 The Dispute Settlement Centre of Victoria encourages resolution of disputes through the use of methods such as mediation.

Conciliation is when a third party, known as a conciliator, is present to help parties reach a decision. Often the conciliator will give advice about how to resolve the dispute where required and offer solutions to the parties.

Although decisions made during negotiation, mediation and conciliation are not binding, often the parties enter into an agreement, called 'terms of settlement' after a resolution has been reached, which sets out the terms on which the parties have settled the matter.

Arbitration is when a third party, known as an arbitrator, presides over informal discussions between the parties, giving each party the opportunity to have their say. The arbitrator will then make a binding decision. Arbitration is used by courts, tribunals and other services such as the financial ombudsman.

Collaborative law is another way of resolving civil disputes without taking a matter to court. The parties and their lawyers work together to resolve the dispute with the use of problem-solving techniques. Collaborative law has more recently been used in family law disputes, to avoid the stress and anxiety of going to court.

Dispute resolution through courts and tribunals

Courts and tribunals are a formal method of dispute resolution. These bodies make decisions that are binding on the parties to the dispute. Sometimes the court or tribunal will refer the parties to mediation before hearing the case.

The **Victorian Civil and Administrative Tribunal** (VCAT) offers a low-cost, timely and informal way of resolving certain civil disputes. VCAT is divided into three divisions (human rights, civil and administrative), which are further divided into lists. These lists specialise in the resolution of certain types of cases. The more common and busier lists of VCAT include the civil claims list, residential tenancies list and human rights list.

While VCAT is the main tribunal in Victoria, there are other smaller, specialised tribunals, most of which are federal tribunals (meaning they are not a Victorian-established tribunal but an Australia-wide tribunal, dealing with Commonwealth matters). For example, the Administrative Appeals Tribunal (AAT) reviews administrative decisions made by the Australian government, such as a decision made by the National Disability Insurance Agency about who is eligible to access the National Disability Insurance Scheme, known as the NDIS. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) deals with disputes relating to discrimination, sexual harassment, and racial and religious vilification, and the Fair Work Commission hears workplace disputes.

NOTE

Further information about VCAT and courts is given in chapter 6.

Courts

If a resolution is not available or not possible through any of the above methods, it may be necessary to use the **court system** to reach an outcome.

The three main Victorian courts that have jurisdiction to resolve civil disputes are the Magistrates' Court, County Court and Supreme Court. This chapter focuses on civil proceedings in courts.

Table 9.1 Civil jurisdiction of Victorian courts

MAGISTRATES' COURT	COUNTY COURT	SUPREME COURT
Civil claims of up to $100 000 Claims of less than $10 000 are referred to arbitration (which is conducted within the Magistrates' Court)	unlimited	unlimited

>>GOING FURTHER

Which court to proceed in?

The decision about the best court to issue proceedings in usually depends on a variety of factors, which include the following:

- **the amount of money claimed** – Larger claims, such as those for millions of dollars, are often issued in the Supreme Court.
- **the type of claim** – The more complex the matter, the more inclined the plaintiff may be to issue proceedings in the Supreme Court, where the judges have more expertise in various matters.
- **the costs involved** – Normally the fees charged in a County Court, for example for filing certain documents, are less than those in the Supreme Court.
- **the appeal process** – If a decision on a point of law has to be reached, a legal representative might suggest taking the matter to the Supreme Court, to avoid the need for a later appeal.
- **the doctrine of precedent** – A County Court judge will be bound by a precedent set in a previous case with similar facts in the Supreme Court. If the matter is heard in the Supreme Court, then the judge has the option of not following this precedent as he or she is not bound by the decisions of his or her own court.

LEARNING ACTIVITY 9.3

Commencing a civil proceeding

1 Look back at the case study 'Deciding to sue'. Explain two factors you might consider when deciding whether to proceed with a civil action. Refer to this case in your answer.
2 Your friend has a dispute with a neighbour and they have agreed to try and resolve it through mediation. Go online and find the contact details of the Dispute Settlement Centre of Victoria to assist your friend in arranging the mediation.
3 A colleague of yours is being discriminated against in the workplace. Suggest two possible bodies or methods that are available to your colleague to resolve these issues.
4 If you had a dispute with a neighbour about $3000 worth of damage to your carport resulting from a falling tree, which method of dispute resolution would you choose? Give reasons. Explain another method of dispute resolution. Give reasons why you think the latter method is not as suitable for this particular dispute.
5 Is it compulsory to send a letter of demand to another person before commencing a civil proceeding? Explain.
6 Describe one advantage of sending a letter of demand before commencing court proceedings.
7 Look back at the letter of demand and answer the questions.
   a Who is the plaintiff and who are they represented by?
   b What is the general nature of the claim?
   c What remedy is the plaintiff seeking?
   d If the plaintiff wants to bring this action in court, which court would you recommend? Why?
   e Other than going to court, explain three other options available to the plaintiff should the defendant fail to respond to the letter or make payment.
8 Explain the reasons that may influence in which court a plaintiff issues a civil proceeding.
9 In which court would you initiate a civil claim for $80 000 for breach of contract? Give reasons.
10 Is it possible for a claim for $50 000 to be issued in the Magistrates' Court, County Court or Supreme Court? Explain.
11 Read the case study 'Melbourne man compensated after balcony collapse' and answer the questions.
   a Who is the plaintiff in this case? Why was his name not given?
   b Who is the defendant?
   c The plaintiff in this case issued the proceedings in the County Court. Were any other courts available to him? Justify your answer.
   d Conduct some Internet research. Find one other recent case that has been issued in either the County Court or the Supreme Court of Victoria. Give details about the plaintiff's claim, and what remedy is being sought.

CASE STUDY

Melbourne man compensated after balcony collapse

A Melbourne man who sustained serious injuries when the balustrade of a balcony collapsed at his rental premises in Frankston South, has received a $300 000 compensation payment.

The court-approved settlement occurred two days into a County Court Trial. Three people fell approximately five metres to the ground in November 2007.

All sustained injuries, two have since died, one from complications associated with the severe injuries he sustained after the fall. The other tenant died from causes unrelated to the fall.

The surviving injured person sued the landlord, DT Wade and Associates. The plaintiff cannot be named for legal reasons because he has an intellectual disability and is the subject of an order under the *Guardianship and Administration Act 1986* (Vic.).

Maurice Blackburn senior associate Trang Tran, lawyer for the injured man, said the balcony had not been properly maintained, nor routinely inspected.

SUPREME COURT PRE-TRIAL PROCEDURES

Supreme Court civil pre-trial processes and procedures are specified in the *Supreme Court (General Civil Procedure) Rules 1996* (Vic.), often known as the 'Supreme Court Rules'.

While the Supreme Court Rules set down details about when certain documents should be filed, or when certain steps should be undertaken (such as when a directions hearing is to take place), the judge has the power to make any order or give any direction in relation to pre-trial procedures. That is, the court can often use its powers to give extra time to a party to undertake certain steps, or change the order in which pre-trial procedures take place.

About 65 per cent of civil cases that are issued in courts are settled before going to trial, or during the trial. Most often they are settled at the mediation stage.

HINT

You are only required to learn the pre-trial procedures of the Supreme Court, in particular pleadings, discovery and directions hearings, although it should be noted that most of the civil pre-trial procedures in the County Court are very similar. For each pre-trial procedure, you should be familiar with its purpose, the nature of the procedure and the extent to which it achieves the elements of an effective legal system.

The purposes of Supreme Court pre-trial procedures

If a plaintiff issues a civil proceeding in the Supreme Court, the parties must go through various pre-trial procedures. Some are mandatory, whereas others are optional.

There are various purposes of pre-trial procedures. The main and more general purposes are shown below.

- **They inform both parties** of information relating to the case – the plaintiff will find out information relating to the defence, and the defendant will find out information relating to the claim.
- The **parties determine whether it is worthwhile proceeding** with or defending the case.
- The **parties find out the strengths and weaknesses** of each other's case.
- **They might lead to an out-of-court settlement** negotiated between the parties, meaning the cost, stress and inconvenience of going to court is avoided.
- **They provide the court with information** about the case before it begins, leading to a quicker trial.
- **They might result in some issues being conceded or agreed on** by the parties, therefore only those issues in dispute are heard at trial.

You should become familiar with these purposes and other more specific purposes that are relevant to each pre-trial procedure. The main pre-trial procedures that you should be familiar with are pleadings, directions hearings, discovery and mediation.



Figure 9.4 The Supreme Court of Victoria

LEARNING ACTIVITY 9.4

Supreme Court pre-trial procedures

1. Where will you find the main rules that govern the pre-trial procedures in the Supreme Court?
2. Explain two general purposes of civil pre-trial procedures.
3. Do some of the general purposes of civil pre-trial procedures also benefit the court system? Justify why that would be so.
4. What are some of the reasons why parties may decide to settle the case before going to trial?
5. Access the Supreme Court of Victoria's website. Does it contain any assistance for unrepresented parties in a civil proceeding? If so, what sort of information is provided?
6. Some people may suggest that taking a matter to court should be seen as 'the last resort'. Why do you think that is so?

Pleadings

Pleadings are a series of documents exchanged between the parties. They set out and clarify the claims and the defences of the parties and help to define the issues that are being disputed. The documents include:

- a writ or originating motion with a statement of claim
- a defence (and a counterclaim if filed)
- a reply to a defence (and a counterclaim if there is one)
- further and better particulars.

In general, if claims and defences are not included in the parties' pleadings, they cannot make new claims and raise new defences later in court, except with the permission of the court.

The purposes of pleadings

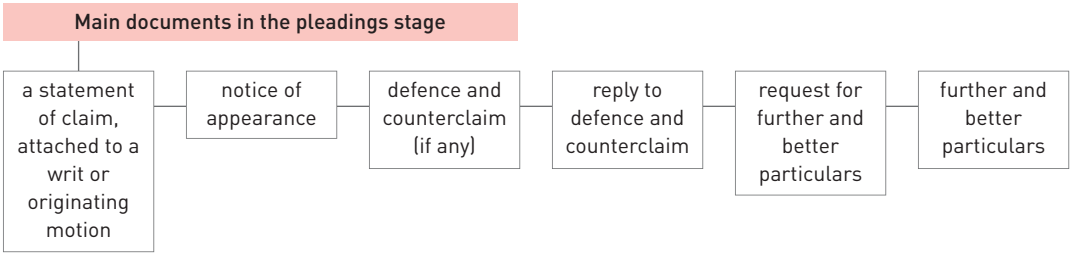
The purposes of pleadings are:

- to require the parties to state the main claims (such as breach of contract) and defences of their case. This allows basic procedural fairness and natural justice by ensuring the other side knows what the claim or the defence is about

- to compel each party to state the material facts and particulars on which they are relying and which form the basis of their claims and defences. This avoids taking an opponent by surprise with facts that a party is relying on to support their claim or defence
- to give the court a written record of the case, which allows the court to understand the issues so it can manage the trial and pre-trial procedures
- to set the limits to the dispute, which enables other procedures such as discovery to be confined to the issues in dispute
- to assist in reaching an out-of-court settlement where appropriate.

The Supreme Court Rules specify a time limit within which pleadings documents are to be filed and served on the other side. If a party fails to file and serve the documents within the specified time, they are considered to be 'in default' and they risk certain consequences, depending on the documents that they did not file.

The following flow chart sets out the main documents in the pleadings stage.



>>GOING FURTHER

The purpose of pleadings

The following paragraph is from the High Court case of *Banque Commerciale SA, En liquidation v. Akhil Holdings Pty Ltd* (1990) 92 ALR 53. In that case, Chief Justice Mason and Justice Gaudron stated as follows about the purpose of pleadings:

> The function of pleadings is to state with sufficient clarity the case that must be met: *Gould and Birbeck and Bacon v. Mount Oxide Mines Ltd* (in liq) (1916) 22 CLR 490 per Isaacs and Rich JJ at 517. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness.

Writ

A writ is the most common method of commencing a proceeding in the Supreme Court. It is a document which:

- explains to the defendant that an action is being taken against him or her
- informs the defendant of where the trial will take place and the mode of trial (that is, in which court, for example Melbourne, and whether it will be heard by a judge alone or by a judge and jury)
- usually has a **statement of claim** attached.

If a statement of claim is not attached to a writ, the writ must contain a **general statement** giving sufficient details of the nature of the claim, the cause of the claim and the relief or remedy sought. If a writ only contains a general statement, then a statement of claim must be filed and served within 30 days of the defendant filing and serving a notice of appearance. Sometimes a plaintiff will file a

general statement as opposed to a statement of claim where they are under significant time limits. Most causes of action have a time limit within which they can be brought. A claim in negligence, for example, can only be brought within six years. If that time is coming up fast, the plaintiff may file a general statement, and then file a statement of claim later (and within the time limits that the court imposes).

Before a writ is served on the defendant, the plaintiff or their legal representative files several copies of the writ with the court's registry, along with the filing fee set by the court.

The plaintiff must then serve an original copy of the writ and statement of claim on the defendant. The plaintiff has one year from the day of the writ being filed to serve it on the defendant.

An alternative to the writ is an **originating motion**. This is a similar form of document, but can only be used when there is little dispute over the facts, or where there is no defendant.

AN EXAMPLE OF A WRIT

WRIT

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
DAMAGES AND COMPENSATION LIST
GENERAL DIVISION No. 0000 of 2015
BETWEEN
ABIGAIL SANDERSON Plaintiff
and
SUMMER CUT MEATS PTY LTD Defendant
TO THE DEFENDANT
TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.
IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.
YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by –
(a) filing a 'Notice of Appearance' in the Prothonotary's office, Level 2, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
(b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.
IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.
THE PROPER TIME TO FILE AN APPEARANCE is as follows –
(a) where you are served with the writ in Victoria, within 10 days after service;
(b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
(c) where you are served with the writ in New Zealand or in Papua New Guinea, within 28 days after service;
(d) where you are served with the writ in any other place, within 42 days after service.
FILED 20 January 2015
PROTHONOTARY
THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

Statement of claim

In most situations, the statement of claim is attached to the writ or originating motion. The statement of claim explains the nature of the claim, the cause of the claim and the remedy or relief sought.

The statement of claim is different to the writ. The writ provides basic details about the court, the parties and what needs to happen next, whereas the statement of claim informs the defendant about what the claim is about. It will also normally provide facts about the claim, such as the date of when the alleged wrong occurred and the remedy being sought.

An example of a basic statement of claim follows. Some statements of claim, particularly for more complex cases, are very large and can contain hundreds of pages.

AN EXAMPLE OF A STATEMENT OF CLAIM

STATEMENT OF CLAIM

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
DAMAGES AND COMPENSATION LIST
GENERAL DIVISION No. 0000 of 2015
STATEMENT OF CLAIM
BETWEEN
ABIGAIL SANDERSON Plaintiff
and
SUMMER CUT MEATS PTY LTD Defendant

1. The Defendant is a company incorporated pursuant to the *Corporations Act 2001* and capable of being sued.
2. From about 1 August 2014 to 30 November 2014 the Plaintiff provided goods to the Defendant.

PARTICULARS

The goods were cured meats and were delivered to the premises of the Defendant in Camberwell.

3. From about 5 August 2014 to 5 December 2014 the Plaintiff rendered invoices to the Defendant.

PARTICULARS

The invoices are in writing, copies of which are in the possession of the plaintiff's solicitors and can be inspected by appointment.

4. Despite several demands, the Plaintiff has failed and/or refused to make payment of the invoices.
5. In the circumstances the Defendant is indebted to the Plaintiff to the value of $400 000 worth of cured meats.

AND THE PLAINTIFF CLAIMS:

A. $400 000 in damages
B. Costs

LEARNING ACTIVITY 9.5

Writ and statement of claim

1 Explain the purpose of a writ.
2 What must a writ be attached to or include?

3 Look back at the example of a writ and answer the following questions.
   a Who is the plaintiff and who is the defendant?
   b Name two other pieces of information that a defendant will find out about the proceeding from the writ.
4 Look back at the example of a statement of claim and answer the following questions.
   a What is the general nature of the claim?
   b What remedy is the plaintiff seeking?
   c Why couldn't this claim be filed in the Magistrates' Court of Victoria?

Notice of appearance

If the defendant wishes to defend the action, the first document he or she must file and serve is a **notice of appearance**. An example of a notice of appearance is shown next.

AN EXAMPLE OF A NOTICE OF APPEARANCE

NOTICE OF APPEARANCE

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
DAMAGES AND COMPENSATION LIST
GENERAL DIVISION No. 0000 of 2015
BETWEEN
ABIGAIL SANDERSON Plaintiff
and
SUMMER CUT MEATS PTY LTD Defendant
FILE an appearance for Summer Cut Meats Pty Ltd the above named defendant.
Dated 30 January 2015
The address of the defendant is 91 Jamie Street, Kingston, Victoria.
The name or firm and the business address within Victoria of the solicitor for the defendant is Manfred Lawyers, 95 Leicester Avenue, Melbourne.

The purpose of the notice of appearance is to inform the court and the plaintiff that the defendant wishes to defend the claim.

The Supreme Court Rules specify a time limit in which a notice of appearance must be filed and served, which depends on where the writ was served on the defendant. If the writ was served on the defendant in Victoria, then the defendant has 10 days from the date of being served to file and serve the notice.

If the defendant fails to adhere to the time limit, the plaintiff has the right to obtain a judgment against the defendant. This is called a 'default judgment', as it is obtained by reason of the defendant defaulting on his or her obligations to file a notice of appearance.

Defence

After the defendant has filed and served a notice of appearance, he or she must prepare a **defence** to the claim. This can be done personally, or through his or her solicitors.

A defence sets out a response to each of the allegations contained in the plaintiff's statement of claim. The defendant normally either admits or denies the allegations.

The purpose of the defence is to inform the court and the plaintiff of the reasons why the defendant is defending the claim. That is, it should explain why the defendant says that he or she (or they) is (are) not responsible or not liable, so that the plaintiff understands why the claim is being denied.

An example of the first page of a defence is shown next.

AN EXAMPLE OF THE FIRST PAGE OF A DEFENCE

DEFENCE

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
DAMAGES AND COMPENSATION LIST
GENERAL DIVISION No. 0000 of 2015
BETWEEN
JOHN NATHAN SMITH Plaintiff
and
WYNDHAM SHIRE COUNCIL Defendant

In answer to the plaintiff's statement of claim dated 12 July 2015, the defendant says as follows:

1. It admits paragraph 1.
2 It admits paragraph 2.
3. It admits paragraph 3.
4. It denies paragraph 4 and says that the Defendant does not owe a duty of care to the Plaintiff.
5. It denies paragraph 5 and says further that if the Defendant owed a duty of care to the Plaintiff, which is denied, it did not breach the duty of care.

>>GOING FURTHER

Certifications

Since the introduction of the *Civil Procedure Act 2010* (Vic), the parties are now required to file two certifications with the court. One certification is the 'overarching obligations certification', which lets the Court and the other party know that they have understood obligations that they owe to the Court. The second certification is known as the 'proper basis certification', which requires the lawyer acting for the party to certify that there is a proper basis for the claim or denial.

Counterclaim

The defendant may also make a claim against the plaintiff. This is called a counterclaim. For example, a plaintiff may be claiming that the defendant owes him $200 000 for services performed but not paid for. The defendant may claim that the plaintiff did not provide services that were of good quality and may seek an order that the plaintiff complete the services to the appropriate standard.

A counterclaim is usually heard at the same time as the original claim. The counterclaim is often attached to the end of a defence.

Not all disputes will give rise to a counterclaim, and therefore this is an optional step in the pleadings process. If a counterclaim is made, the plaintiff (who will then be known as the plaintiff as well as the 'defendant by counterclaim') will need to file a defence, defending the allegations made.

Reply

This is an optional step in the pleadings process. The plaintiff may file and serve a reply to the defence. This may be to clarify a particular fact or to agree with the defendant on a particular issue.

The defendant can also file a reply to a defence to counterclaim, if the defendant has made a counterclaim and the plaintiff has filed a defence to it.

Further and better particulars

This is an optional step in the pleadings process. A party may file and serve a request for further and better particulars of the other party's claim or defence. This is a request for more details of the claim or the defence.

For example, the plaintiff may claim in a general way in the statement of claim that there was a contract between the plaintiff and the defendant. The defendant may request further and better particulars of this 'contract', meaning they may want details of when the contract was made and in what circumstances, whether it was in writing or oral, and any other details such as the terms of the contract.

The party served with the request must file and serve further and better particulars, or risk the court ordering it to do so. The court may also order a party to serve further and better particulars of its pleadings, separate to a party requesting it.

LEARNING ACTIVITY 9.6

Pleadings

1 Define the term 'pleadings'.
2 Explain two purposes of pleadings.
3 Identify one document that is issued by the plaintiff and one document that is issued by the defendant in the pleadings stage, and explain their purpose.
4 What is the possible consequence if a defendant fails to file a notice of appearance within the specified time limit?
5 Your friend Ryan has just been served with a writ and statement of claim. What are the next two steps that he should take?
6 If you were served with the writ in Victoria how long would you have to file a notice of appearance?
7 Identify one document that is a required document to be filed in the pleadings stage and one document that may not need to be filed by a party.
8 Imagine you are a self-represented party who wishes to file a claim in the Supreme Court. Identify two possible sources that could assist you with filing your claim.

Directions hearings

One of the more important pre-trial procedures is called a 'directions hearing'. It is normally a brief hearing before a judge or an associate judge, and is a chance for the judge or the associate judge to discuss with the parties the progress of the case and give 'directions' to the parties.

A directions hearing takes place not less than 35 days after the defendant has filed an appearance, normally after a defence has been filed. At any time, a party may request that the court list the matter for a directions hearing if the party feels it is necessary for the judge or associate judge to give directions.

Almost all cases filed in the Supreme Court of Victoria will have at least one directions hearing. More complex cases can have more than one directions hearing. For example, in the Victorian Supreme Court case of *Yarutzoloto Bank v. Jordan Manor Pty Ltd* (1996), there had been eight directions hearings by the time the matter was set down for trial.

At the directions hearing, the court may give any direction to assist in the determination of the case as quickly and effectively as possible. These directions will often depend on what stage the case is at and the nature of the dispute between the parties. For example, the court could direct that the parties:

- file a particular pleading document or other document (such as an expert report) by a certain time
- file a particular application (such as an application seeking the leave of the court to amend a pleadings document) or a subpoena on a third party to produce documents by a certain time
- disclose a particular class of documents by a certain date, particularly where there has been a dispute between the parties about the relevance of those documents
- exchange written submissions
- organise and attend mediation
- attend a further directions hearing before the matter is set down for trial, to determine that the parties are ready for trial
- prepare for trial by preparing a 'court book' or file witness statements.

CASE STUDY

Unclear statement of claim

Lillian is the plaintiff in civil proceedings issued in the Supreme Court of Victoria against Manis Parsons Pty Ltd. The defendant has filed a notice of appearance but has asked Lillian for more particulars about her statement of claim. Lillian believes that her statement of claim is clear and refuses to provide more particulars.

The court has set the matter down for a directions hearing. Lillian attends the directions hearing to represent herself. The defendant has engaged a barrister. At the directions hearing, the defendant's barrister informs the court that the defendant is unable to file a defence because Lillian's statement of claim is embarrassing and unclear.

The judge asks Lillian what her response is. Lillian stands up and tells the judge that she thinks that her statement of claim is clear. The judge reads the statement of claim and agrees with the defendant's barrister, stating that he believes there are some paragraphs that are unclear. He tells Lillian that she has 14 days from the date of the hearing to provide the defendant with more details about particular paragraphs of her statement of claim. He explains to Lillian that it is important that the claim is particularised and clear, so that the defendant knows what the case is. He tells Lillian that she can give details in a letter if she prefers, so long as the defendant knows what each paragraph means.

The judge orders the defendant, 28 days from the date of receiving the particulars, to file the defence. He also orders that the parties attend another directions hearing in two months' time so that he can give some directions about discovery. The judge tells the parties that he thinks that this sort of case can be resolved at mediation and that, at the next directions hearing, he may be inclined to order the parties to go to mediation.

At the end of the directions hearing, the judge's associate prints out the orders that were made at the hearing. The judge signs them and copies are given to both parties so they understand what needs to happen next.

The purposes of a directions hearing

The purposes of a directions hearing are to:

- give directions in the proceedings to ensure an effective, complete, prompt and economical determination of the case
- set a timetable for future steps in the pre-trial proceedings so that the matter can progress towards trial

- hear any applications made by the parties before going to trial, such as applications regarding discovery or pleadings
- hear any applications for the extension of time to complete particular steps, or for minor amendments of pleadings or other documents
- determine whether the use of technology would be appropriate in this case, such as using an electronic database for documents or allowing witnesses to appear via videoconference
- determine whether it is appropriate for the parties to be referred to mediation or some other alternative dispute resolution method (which can therefore be seen to be encouraging an out-of-court settlement)
- allocate a date for trial.

At the end of a directions hearing, the court will make the appropriate orders and send them to both parties. An example of the type of orders the court makes at a directions hearing follows.

HINT

Make sure not to confuse committal hearings with directions hearings. Committal hearings are only used in criminal cases where a serious indictable offence has occurred. There is no such equivalent hearing in a civil case; that is, there is no hearing where a judge will determine whether or not there is enough evidence to support success at a trial. That decision is up to the parties in a civil case.

AN EXAMPLE OF THE FIRST PAGE OF COURT ORDERS OBTAINED FROM A DIRECTIONS HEARING

GENERAL FORM OF ORDER

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION No. 0000 of 2015
BETWEEN
JOHN NATHAN SMITH Plaintiff
and
BALANCE PROBABILITIES PTY LTD Defendant
Associate Judge: The Honourable Associate Justice Smith
Date Made: 6 May 2015
Originating Process: Writ
How Obtained: By consent
Attendance: Mr A Sergeant, the Solicitor for the Plaintiff
Mr L Porter, the Solicitor for the Defendant
Other Matters: Not Applicable
THE COURT ORDERS THAT:

1. By 4.00 pm on 20 May 2015 the Defendant file and serve any request for further and better particulars of the claim.
2. By 4.00 pm on 3 June 2015 the Plaintiff file and serve any further and better particulars of claim.
3. By 4.00 pm on 3 June 2015 the parties make discovery of documents.
4. By 4.00 pm on 17 June 2015 each party produce to the opposite party for inspection all documents discovered by that party as being in that party's possession, custody or power and for which privilege from production was not claimed.
5. The proceeding is referred to a Mediator for mediation which is to be finished no later than 22 July 2015.

CASE STUDY

Hong Feng Investments claims it was misled

Hong Feng Investments sued Milk Powder Solutions in the Federal Court of Australia claiming it was misled about where Milk Powder Solutions' milk powder was sourced.

Hong Feng Investments alleged that it was told in July 2011 that its milk came from a region in Victoria, but it actually came from New Zealand.

A directions hearing was scheduled for 7 February 2012.

Discovery

The discovery procedures enable parties to gain further information on matters that remain unclear. While the pleadings stage is where parties exchange documents setting out their claims and defences, the discovery stage is where facts and documents are disclosed which form the basis of the claims and defences.

The main stage in discovery is called 'discovery of documents' and involves each party disclosing the existence of, and exchanging, documents that are relevant to the issues in dispute. For example, if the plaintiff claims that there is a written contract, you would expect that the contract will be a document exchanged during discovery.

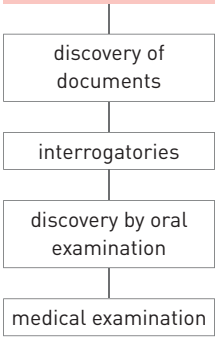
The purposes of discovery

The purposes of the discovery process are to:

- require the parties to disclose all relevant material and documents to the other side
- reduce the element of surprise at trial and avoid a 'trial by ambush'
- ensure all parties have copies of relevant documents
- allow each party to determine the strength of the other side's case and determine their likelihood of success
- ensure that the parties and the court have all the relevant material and documents required to achieve a just outcome (the material and documents then become evidence)
- in proceedings where the medical state of the plaintiff is in dispute (for example, in personal injury claims), give an opportunity to the defendant to have the plaintiff medically examined. This can reduce the time in court to dispute the medical condition of the plaintiff
- assist in reaching an out-of-court settlement where appropriate.

The flow chart sets out the main stages in the discovery process.

Main stages in the discovery process



Discovery of documents

Previously, it was common practice for one party to ask the other party to disclose any relevant documents by serving a **notice for discovery** on the other side.

It is now common practice for the Court to order the parties to make discovery as the first directions hearing, rather than one party serving a notice for discovery.

A party, once required to discover their documents, must then prepare an **affidavit of documents**. The affidavit of documents will list:

- all relevant documents that are, or were, in the possession of the party
- all documents the party refuses to disclose because they are privileged (for example, letters and correspondence between the party and his or her solicitors).

The meaning of the term 'documents' is broad. It means written documents such as letters, emails, handwritten notes and contracts, as well as videotapes, audiotapes, discs, films or other recordings. If it is relevant to the issues in dispute, then it should be disclosed.

Once an affidavit of documents has been filed and served on the other side, the party may request that the documents are sent to them or arrange to inspect them. This is normally done at a solicitor's office and is often done when the amount of documents is large. A party may then take copies of any documents that may be useful to them.

It is now common practice in the Supreme Court to order that the parties file a list of documents rather than an affidavit of documents. The list and affidavit are largely the same, but an affidavit is required to be sworn or affirmed by the relevant person on behalf of the party, whereas a list is not sworn or affirmed. Part of an example of an affidavit of documents follows.

AN EXAMPLE OF PART OF AN AFFIDAVIT OF DOCUMENTS

AFFIDAVIT OF DOCUMENTS

I, LONGFORD CHRISTIE JONES, of 30 Ruskie Avenue, Melbourne, Finance Manager, make oath and say as follows:

1 I have in my possession, custody or power, the documents relating to the questions in this proceeding listed in Schedule 1.

2 The documents listed in Part 2 of Schedule 1 are privileged, and I object to producing them. The documents are privileged on the grounds that they are communications passing between me and my solicitors for the dominant purpose of obtaining and giving legal advice.

3 I have had, but no longer have, in my possession, custody or power, the documents relating to the questions in the proceeding listed in Schedule 2.

4 To the best of my knowledge, information and belief, neither I nor my solicitor nor any other person on my behalf has now, or ever had, in my or his, her or its possession, custody or power, any document relating to any question in the proceeding, other than the documents listed in Schedules 1 and 2.

SCHEDULE 1 Part 1

NUMBER	DATE	DESCRIPTION
1	22.02.2012	Email from Longford Christie Jones to Joan Mosford
2	22.03.2012	Contract of Sale between Longford Christie Jones and Joan Mosford
3	25.03.2012	Letter from Joan Mosford to Longford Christie Jones
4	27.03.2012	Receipts showing payment of materials from Bunnings
5	30.03.2012	Commonwealth Bank of Victoria Bank Statements from March 2005
6	04.10.2013	Letter from Joan Mosford to Longford Christie Jones

>>GOING FURTHER

Vast quantities of documentation

In May 2012, Justice Vickery commented on cases where there had been vast quantities of documentation:

- In the C7 case heard in the Federal Court of Australia between Seven Network Ltd and News Limited, the trial produced 85 654 documents comprising 589 392 pages, of which 12 849 pages were admitted into evidence.
- In one of the largest document cases in Victoria, *Downer EDI Mining Ltd v. Iluka Resources Ltd* [2008] VSC 62, 1.7 million documents were proposed to be discovered.
- In a case involving alleged defective workmanship in two giant autoclave refining systems used in the mining industry, 80 000 documents were discovered.

Justice Vickery gave recommendations in his speech as to how discovery can be better managed.

Interrogatories

Either side may serve interrogatories (searching questions relating to the known facts of the case) on the other party requiring any information that might be useful in evidence. Usually a time period, such as 60 days, is set as the deadline by which written responses to the questions must be received by the other party.

This process saves court time and expense by dealing with matters before going to court and by reducing the element of surprise. It can be useful to refer to answers given in the interrogatories during the trial. A witness who gives a different answer to a question already answered in the interrogatories can appear to be an unreliable witness. For example, if a witness stated in answer to interrogatories that she was driving in third gear before the accident, but changed her mind during cross-examination and said she changed down to second gear before the accident, the judge (or jury if there is one present) may question her credibility and whether to believe anything she said.

The party being interrogated can avoid answering interrogatories that do not relate to any question between the parties, or are unclear, oppressive (that is, a question that places a heavy burden on the person required to answer), require the expression of an opinion the person answering is not qualified to give, or require the disclosure of privileged information.

If one of the parties does not answer interrogatories, a notice of default can be served by the other party.

Discovery by oral examination

As a result of the interrogatories, a party may request that the other party answer some questions. If consented to in writing by the court, these questions are put to the party as if the party were being examined-in-chief (questioned by their barrister).

Medical examination and provision of hospital and medical reports

If the plaintiff is claiming damages for bodily injury, the defendant may ask the plaintiff to submit to appropriate examination by a medical expert or experts at specified times and places. This situation may be reversed if a counterclaim has been made by the defendant.

LEARNING ACTIVITY 9.7

Directions hearings and discovery

1 Look back at the case study 'Unclear statement of claim'. What problems did Lillian experience as a result of representing herself?

2 Look back at the case study 'Hong Feng Investments claims it was misled' and answer the questions.

a Explain the basis for the claim that was made.
b When was the directions hearing to be heard in this case? Who would have been required to attend?
c Who conducts the directions hearing?

3 Look back at the 'General Form of Order' and answer the questions.
a When was the directions hearing held?
b What are the names of the parties?
c Name two procedures that the court has ordered to happen and the time limit within which they are to be completed.

4 What are the main processes in the discovery stage?

5 Imagine you are the plaintiff and your lawyer tells you to bring in all documents in your possession that relate to the dispute so he can review them to determine whether or not they are relevant. You locate eight boxes in your office that contain invoices, emails and letters. What concerns might you have about this?

6 Why are interrogatories used in a civil matter?

7 Why might it be necessary to ask the plaintiff to have a medical examination?

Mediation

The Supreme Court Rules state that, at any time during the pre-trial or trial proceedings, the court may order the matter to be referred to mediation. More often than not, a court will order that the parties attend mediation before trial.

Mediation is when an independent third party assists the parties in an unbiased manner to reach a resolution without having to go to trial.

CASE STUDY

Case settled at mediation

In 2009, Giuseppe Montalto issued proceedings against his parents and two brothers claiming damages. The case involved Giuseppe's parents' cheese-making business in Bundoora. Giuseppe stated that he did most of the hard physical labour for the business and claimed his mother Carmella promised him in 1992 that her three sons would all share equally in the family business. Giuseppe claimed that he did not receive a share of the business and was suing for a share of the business, estimated to have assets of more than $30 million.

The case settled at mediation in November 2009. The terms of the settlement were confidential.



Figure 9.5 Mauro and Carmella Montalto outside the Supreme Court

HINT

Mediation is one of the dispute resolution methods you are required to know as part of Unit 4, Area of Study 1. You should understand how mediation is used as a pre-trial procedure in a court proceeding.

Mediation is held on a 'without prejudice' basis, meaning that if the matter does not settle at mediation, any statements, comments or offers made at the mediation will remain confidential and will not be disclosed to the court. This ensures that the parties can speak freely and openly while at mediation without fear of anything they say being used against them at the later trial if it does not settle.

If the parties reach a resolution at mediation, normally the parties sign **terms of settlement** which bind them to the agreement reached. This ensures that if either party defaults on their obligations, the other party may enforce these terms of settlement to make them comply.

The purposes of mediation

The purposes of mediation before going to trial include:

- giving parties an opportunity to reach an out-of-court settlement
- if the matter settles at mediation, reducing the costs involved in reaching a resolution
- allowing parties to explore options available to them that may not be available in court; that is, if the matter proceeds to court, the plaintiff is limited to the remedies sought in the statement of claim, whereas at mediation the parties are not restricted by those remedies, so a settlement could involve a range of remedies
- ensuring that parties can control, and are certain of, the outcome
- eliminating the risks involved in going to court
- using the experience and expertise of an independent mediator who may assist the parties in exploring solutions.

CASES CAN BE REFERRED TO ALTERNATIVE DISPUTE RESOLUTION

Under the *Civil Procedure Act 2010* (Vic.), the County Court or Supreme Court is allowed to make an order in a civil proceeding referring the matter or part of the matter to mediation, or to other dispute resolution methods such as conciliation or arbitration. The purpose of providing these powers of the court is to further the overarching purpose of the Act, which is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

LEARNING ACTIVITY 9.8

Mediation

1 Is mediation a mandatory step in the pre-trial procedures stage of a civil action? Explain.
2 Look back at the case study 'Case settled at mediation' and answer the questions.
   a What occurred in this case?
   b Explain two advantages of parties attending mediation.
   c The parties decided to keep the terms of settlement confidential. Consider what would have happened if the matter had proceeded to trial. Would the remedy and the decision be made public?

3 What are some problems that might arise for a party at mediation?

4 **Internet investigation**

Go to the Supreme Court website at www.supremecourt.vic.gov.au. Locate the information about mediation under 'support services' and answer the following questions:

a Explain two reasons for mediation as stated by the court.

b Who pays for the mediation?

c Identify two groups or bodies that can provide a mediator.

Other processes

Some of the pre-trial procedures already mentioned are optional, such as the plaintiff's reply, further and better particulars, and counterclaims made by the defendant.

At any time during the proceedings, the parties can reach an out-of-court settlement or the plaintiff can choose to abandon the action. Other processes that can be used during the proceedings are:

- notice of admission of facts (either party)
- either party can call for expert evidence
- the parties can make an offer of compromise
- the parties may be ordered to attend a pre-trial conference
- the parties may be required to file and serve written witness statements
- the parties may have to sign a certificate of readiness for trial.

In practice, the process is streamlined in the interests of speeding up the pre-trial and trial procedures and reducing costs.

>>GOING FURTHER

Notice of admission of facts

Either party can at any time serve on the other party a notice of admission of facts, stating that unless that party disputes the facts stated in the notice within 14 days, it will be assumed that the facts are admitted.

Expert evidence

When parties intend to bring expert evidence at the trial, they should notify the other parties of their intention. The notice should include particulars of the expert's name and qualifications and a summary of the evidence to be given.

Offer of compromise

An offer of compromise may be served at any time before judgment or verdict in respect of the claim to which it relates.

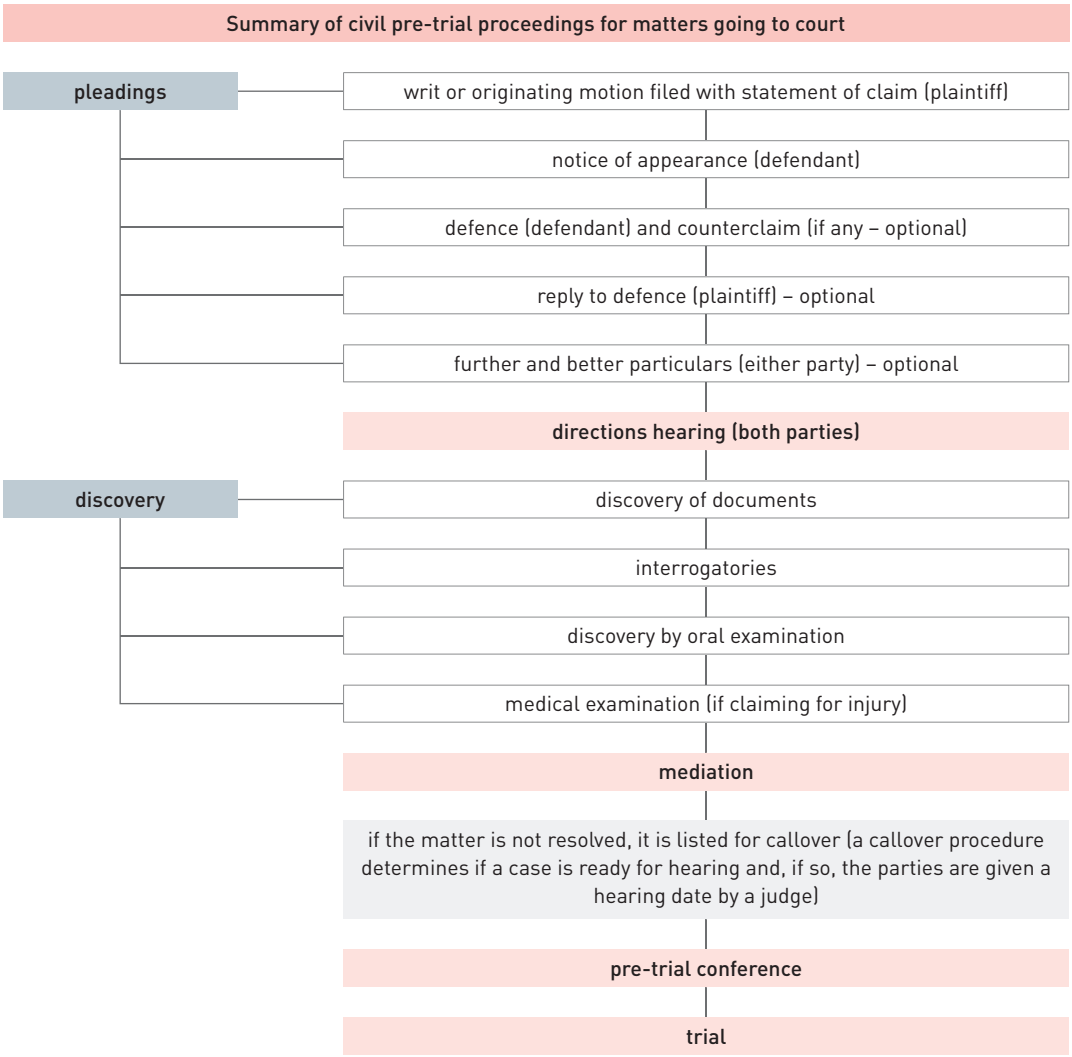
Either the plaintiff or the defendant may serve on one another an offer of compromise. It must be in writing and must be open for not less than 14 days. If an offer is rejected, then the offer is not disclosed to the court, unless the party who made the offer receives a better outcome than the offer.

The purpose of an offer of compromise is to attempt to settle the matter without having to go to trial. It also protects the party who made the offer with respect to their legal costs.

Witness statements

It is now common practice for the Supreme Court to order the parties to file and serve **witness statements**, or an **outline of the evidence to be given**, by each of their witnesses. If it is a witness statement, then this will be taken to be the witness's examination-in-chief. Therefore, on the day the witness gives evidence, they will go into the witness box, confirm it is their witness statement, tell the judge any changes they wish to make, sign the statement and then he or she will be cross-examined. The alternative is an outline of evidence, which is intended to be a summary of the evidence the witness will give at trial so that the other party knows what he or she will say.

Witness statements are intended to speed up the time it takes for the case to be heard at trial.



EVALUATION OF PRE-TRIAL PROCEDURES

The strengths and weaknesses of pleadings, directions hearings, discovery and mediation as pre-trial procedures should be seen in terms of the extent to which they might limit the effective operation of the legal system.

Strengths of pre-trial procedures

Pleadings

There are many advantages of pleadings in the pre-trial procedure in civil proceedings. Some of them are as follows.

- They provide the parties with various opportunities to **reach an out-of-court settlement**, without having to go to trial.
- They **allow the parties to determine the strengths and weaknesses** of each other's case. This helps the parties decide if they should concede certain facts or issues that are in dispute.
- They **allow the parties to determine whether it is worthwhile proceeding** with the case. At the pleadings stage, it may be so obvious to the plaintiff that there is a clear defence, that the plaintiff may decide not to proceed. Similarly, the defendant may find that the case is so strong that it is not worthwhile defending the case.
- Each pre-trial procedure is intended to **provide the court with information** about the case. The court will receive a copy of each of the documents filed in the pleadings stage, giving it a record of the claims and the defences.
- Pleadings **might result in some issues being conceded** during trial, therefore speeding up trial. For example, the defendant may admit certain facts, or the plaintiff may drop certain claims following the filing of the defence.

Directions hearings

Some of the strengths of directions hearings as a pre-trial procedure are as follows.

- Directions hearings can **ensure the timely resolution** of a dispute by setting down a timetable for steps to be undertaken, giving directions to the parties and generally ensuring the parties are completing pre-trial procedures in a timely and efficient manner.
- Directions hearings **inform the judge and the court about the nature of the dispute** and the steps that are to be undertaken.
- The judge or the associate judge overseeing the directions hearing may order that the parties arrange and attend mediation before trial. This can be seen to be **encouraging an out-of-court settlement**.
- For both parties, it is an **opportunity to communicate with the judge who may ultimately hear the matter, or the court generally, about issues** such as non-compliance by one party with pre-trial procedures, or difficulties with extracting information from the other party.

Discovery

There are many strengths of discovery as a pre-trial procedure in civil proceedings. Some of them are as follows.

- Discovery **assists the parties in understanding the strengths and weaknesses of their case** and the other party's case. One party may discover documents that support their case, whereas the other party might discover documents that are adverse to their case.
- It **avoids trial by ambush, or trial by surprise**, by ensuring that both parties have had access to the same relevant documents. The parties are then able to use these documents and the information they found during discovery as the basis for the evidence they intend to lead at trial.
- It can **alleviate a party's concern that the other party is hiding or withholding documents**. The parties normally need to sign an affidavit stating that the documents discovered are the

extent of the documents in their possession – this can help allay concerns that there may be other documents (withholding or destroying documents can have serious consequences).
- It can be an **aid towards an out-of-court settlement** by allowing the parties to assess the documents and make an informed decision about whether mediation may be suitable, or whether they are prepared to accept certain claims or defences.
- In matters involving medical evidence, discovery **gives an opportunity to the defendant to assess the plaintiff's medical condition or test a witness through interrogatories**.

Mediation

There are many strengths of using mediation as a pre-trial procedure in civil proceedings. Some of them are as follows.
- Mediation can **result in a quicker resolution** than if the matter were to proceed to trial, thus ensuring that either the plaintiff achieves a remedy more quickly, or the case is dismissed earlier than if it were to go to trial.
- It can result in **fewer costs** than if the matter were to proceed to trial – the parties can avoid the need to spend money on trial preparation, particularly if mediation takes place well before trial.
- Even if the matter does not settle at mediation, it can **allow the parties to understand the strengths and weaknesses** of their case when each party highlights their strengths during mediation. This may cause one party to go away and reconsider their claims or defences.
- It can **result in settlement of certain claims** but not others, thus reducing the issues in dispute and the amount of time that is needed for a trial of any other claims that remain in dispute.
- Mediation is **flexible, meaning that the parties are able to explore options and remedies** that might not be available to the parties during trial. The court is usually restricted to awarding the plaintiff the remedies sought in the statement of claim.
- Mediation is **conducted in a confidential and private setting**, as opposed to a public court hearing. If the parties settle the claim, the terms of the settlement usually remain confidential. This is a real strength for those parties that are conscious of media attention.
- Mediation is generally **more informal** than a court hearing and usually takes place in private rooms where the parties can speak freely and are not restricted by rules of evidence and procedure.

Weaknesses of pre-trial procedures

Pleadings

Some of the weaknesses of pleadings as a pre-trial procedure are as follows.
- Pleadings often **take a long time to complete**, which adds to the delay in reaching a resolution. There are several documents that need to be exchanged in the pleadings stage, and it can take some time for pleadings to conclude.
- The **cost can be significant**, particularly if a lawyer is used to prepare and finalise the pleadings documents.
- Pleadings can be **complex** and particularly difficult to understand for unrepresented litigants.
- The **process might be abused by certain parties**. For example, the defendant may simply deny the whole claim without any basis for that defence, causing the plaintiff to suffer significant cost, time and stress in having to prove the case. Alternatively, the plaintiff may have a very weak claim, but put in enough detail in the pleadings to make the defendant spend time and money on defending the claim.

Directions hearings

Some of the weaknesses of directions hearings as a pre-trial procedure are as follows.

- Directions hearings can be **difficult to understand**, particularly for a self-represented party. Legal steps such as the making of orders, directions being given and applications to be made by a party may be very confusing without the presence of a lawyer.
- They can be **stressful and inconvenient**. A directions hearing normally requires the attendance of the party or his or her lawyer. If a person is unrepresented, it can be very daunting to appear before a judge or an associate judge, particularly if the other party has engaged a solicitor or barrister.
- Directions hearings may be a **waste of time** if the court has ordered the parties to attend the directions hearing but there are no issues to discuss.

Discovery

Some of the weaknesses of discovery as a pre-trial procedure are as follows.

- There is a **significant cost involved in discovery as a pre-trial procedure**, particularly when the number of documents is large. The cost is associated with collating and reviewing documents, determining their relevance and whether they are privileged, preparing an affidavit of documents, arranging inspection of documents, inspecting the other side's documents and determining any applications relating to discovery.
- It may **take a significant amount of time to complete**. Particularly in cases where there are a large number of documents, discovery could take several months, resulting in a delay of the trial.
- The **rules relating to discovery are confusing and complex**. There are rules about what is relevant and what is not, which documents are privileged, and there can even be rules about confidential or sensitive documents.
- There **can be resistance by one party to discovering all the documents** and that party may withhold relevant documents. This may result in the other party having to seek the intervention of the court to compel that party to produce documents, adding to the time, cost and inconvenience of the parties.

Mediation

Some of the weaknesses of mediation as a pre-trial procedure are as follows.

- The **time and cost involved in preparing for and attending mediation can be significant**. If the parties also engage lawyers or barristers to attend, the costs add up. It can also be a waste of time and money if the other party is not prepared to settle the matter.
- Mediation can be **stressful, particularly if one party is intimidated by the process or by the other side**.
- **One party may be dissatisfied with the outcome** or feel like they have been robbed of 'their day in court', but felt the pressure of having to settle to avoid the costs of going to trial.
- Unless the parties enter into a binding agreement or terms of settlement at the end of mediation, **the decision is not binding**. This is a risk because if one party decides not to fulfil his or her end of the bargain, there will be no settlement and the matter will have to proceed to trial.
- In **some situations, mediation is not suitable**, particularly where there is animosity between the parties or where the parties have tried several times to mediate in a long-running dispute and have been unsuccessful.

Table 9.2 Summary of the strengths and weaknesses of pre-trial procedures

STRENGTHS	WEAKNESSES
Pre-trial procedures provide parties with various opportunities to reach an out-of-court settlement.	Pre-trial procedures are long and complex, adding to the delay of reaching a resolution.
They allow parties to determine the strengths and weaknesses of each other's cases.	The cost of each procedure can often be high, particularly in the discovery stage.
They allow parties to determine whether it is worthwhile proceeding with their case.	They often contribute to the stress and inconvenience experienced by the parties, as they are lengthy and complex.
They provide the court with information about the case before it begins, leading to a quicker trial.	They are complex, and often require the assistance of legal representation, therefore disadvantaging unrepresented parties.
They might result in some issues being conceded by the parties, thereby saving court time at trial.	The time taken means that the remedy is denied for longer. Also, key witnesses might die or disappear, or their memories might become less reliable.

LEARNING ACTIVITY 9.9

Evaluation of Supreme Court civil pre-trial procedures

1 Read the case study 'Civil suit over the death of David Hookes' and answer the questions.
   - **a** Who is the plaintiff in this case?
   - **b** What is the nature of the plaintiff's claim?
   - **c** Suggest why there are three defendants in this case.
   - **d** Explain how this same incident could give rise to both a criminal case and a civil case.
   - **e** The case study refers to two civil pre-trial procedures. Explain the nature and purpose of both of these procedures.
   - **f** What are the general purposes of conducting civil pre-trial procedures? To what extent were these purposes achieved in this case?

CASE STUDY

Civil suit over the death of David Hookes

David Hookes died in January 2004 as a result of head injuries sustained in a physical argument with hotel security guard Zdravko Micevic. Micevic was acquitted of the manslaughter of David Hookes, but the widow of David Hookes, Robyn Hookes, decided to bring a civil action. Mrs Hookes lodged a writ with the Supreme Court in December 2004 seeking damages of at least $175 000 from Micevic, his employer, Peter Clare Agencies, and the owners of the Beaconsfield Hotel, where the incident occurred. The writ stated that 'by reason of the assault the deceased suffered head injuries which caused his death'.

In her statement of claim, Mrs Hookes stated how her husband was 'forcibly removed from the hotel by security staff and was followed and assaulted in and around Cowderoy Street, St Kilda'. She alleged that the hotel staff allowed and encouraged Micevic to assault Hookes. She also alleged that

the hotel employed security staff who were not appropriately trained and were likely to engage in violent acts.

Micevic announced that he would not contest the case, as he had no funds to fight it in court. An out-of-court settlement was reached between Mrs Hookes and the defendants in February 2007, before the case went to trial. The court ordered the former owners of the hotel to pay Mrs Hookes' court costs.

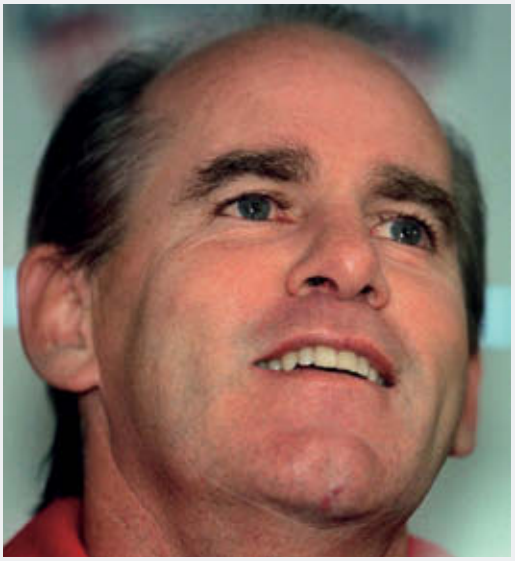


Figure 9.6 David Hookes

2 Evaluate two strengths of civil pre-trial procedures.

3 Is a self-represented litigant at a greater advantage or disadvantage than a party that is represented? Justify your answer, giving specific examples.

4 Consider the three elements of an effective legal system. Which element do you think is most hindered or achieved through the use of pre-trial procedures? Explain your answer.

5 Identify for each scenario below which pre-trial procedure you think will be most critical, and to which party. Justify your answer.

- a Jake sued his former business partner, alleging breach of contract. Jake alleged that the partner forged certain documents in the business, but Jake does not have copies of those documents.
- b Emily is being sued by her employer. Emily's employer has refused so far to give particular facts about the claim, stating that the statement of claim is sufficient for Emily to know what the claim is about.
- c One company sued another for a breach of contract. The defendant has very little funds to go to trial and wishes to settle the claim.
- d Sahar is suing a local company alleging nuisance. She thinks the claim is clear-cut and is keen to know the basis for the local company's defence, given her letters of demand have gone unanswered.
- e A retail company is suing one of its competitors, alleging it stole private and confidential information about its business. The retail company is convinced that there will be emails and other documents that prove its case.

Comparison of purposes of criminal and civil pre-trial procedures

There are some **similarities** in the purposes of criminal and civil pre-trial procedures.

- They attempt to make the trial processes as efficient and fair as possible by ensuring the parties have access to the same information and documents.

- They provide the court with information about the case before it begins.
- They might result in some issues being conceded or some charges being withdrawn before trial.

However, there are also some differences in the purposes of pre-trial procedures in civil and criminal cases.

- In a civil dispute, pre-trial procedures are used to clarify issues and let each party know the other party's evidence. In a criminal case, pre-trial procedures are used to see whether there is sufficient evidence to support a conviction.
- In a civil dispute, the defendant is required to discover relevant documents. In a criminal case, the accused does not have that obligation and may choose not to disclose any documents.
- The accused may not be able to easily inspect documents and attend directions hearings in a criminal case if he or she is remanded in custody. In a civil case, this will not be an issue.

Table 9.3 sets out the other differences in the purposes of criminal and civil pre-trial procedures.

Table 9.3 Comparison of the purposes of criminal and civil pre-trial procedures

CRIMINAL PRE-TRIAL PROCEDURES	CIVIL PRE-TRIAL PROCEDURES
to assist the police in identifying evidence for the prosecution	to inform both parties of information relating to the case
to protect the rights of the accused and ensure that he or she is treated as innocent until proven guilty	to allow the parties to determine whether it is worthwhile proceeding with their case
to provide rights to the police to facilitate police investigation	to find out the strengths and weaknesses of each party's case
to provide an opportunity for the accused to be released pending trial	to encourage an out-of-court settlement
to determine whether a trial should proceed	to provide the court with information about the case before it begins
to determine if the accused wishes to plead guilty or not guilty	to allow for some issues to be conceded by the parties

LEARNING ACTIVITY 9.10

Comparison of the purposes of criminal and civil pre-trial procedures

1 Explain two main pre-trial procedures in a criminal case and two main pre-trial procedures in a civil dispute. Compare the purposes of these procedures.

2 'There are no similarities between the purposes of criminal pre-trial procedures and the purposes of civil pre-trial procedures.' To what extent is this statement true? Discuss, comparing the purposes of each.

TRIAL PROCEDURE IN THE SUPREME COURT

In Australia, trials are conducted using the adversary system of trial. A jury is not used in the Magistrates' Court and is not required in civil trials in higher courts in Victoria (being the County Court and the Supreme Court). However, if either party requests that the matter is heard before a jury in a higher court, then a notice that a jury is required is served on all parties. The party that chooses to have a jury must then pay the fee for having a jury.

>>GOING FURTHER

General procedure of a civil trial in the Supreme Court

case is called and appearances are entered	The judge's associate calls the names of the parties. The legal representatives of each party announce on whose behalf they appear.	
jury empanelment (if there is one)	A jury is optional. If there is a jury, it consists of six people. The court may empanel up to two additional jurors if it is likely to be a long trial. Either side can challenge the jurors. Each side has three peremptory challenges and unlimited challenges for cause. Once a jury is selected, the jurors are sworn in.	
plaintiff's opening address	The plaintiff's barrister gives an opening address, outlining the case for the plaintiff.	
plaintiff's case	After the opening address, the plaintiff or their legal representative presents their case by calling witnesses. Each witness is examined by the plaintiff's barrister and the defendant's barrister.	• examination-in-chief – by the plaintiff • cross-examination – by the defendant • re-examination – by the plaintiff
view	If applicable, the case may be adjourned until the judge and the parties have met at the scene of the civil wrong to investigate evidence ('view').	
submission of 'no case to answer'	The defence counsel may make a submission to the court that there is no case to answer – that is, that the plaintiff has not brought sufficient evidence to the court to prove the case. This is rarely done, because if the submission is rejected, the defence counsel has no right to call any witnesses on the defendant's behalf.	
defendant's opening address	The defence counsel makes an opening address outlining the case for the defendant.	
defendant's case	After the opening address, the defendant or their legal representative presents their case by calling witnesses. Each witness is examined by the plaintiff's barrister and the defendant's barrister. The defence counsel presents the defendant's case.	• examination-in-chief – by the defendant • cross-examination – by the plaintiff • re-examination – by the defendant
defendant's closing address	The defendant's counsel will make a final address, summing up their case and appealing to the judge or jury (if present).	
plaintiff's closing address	The plaintiff then makes the final address. If the defence submitted no evidence, the plaintiff goes first.	
judge's summing up (if jury)	If a jury is present, the judge sums up the case to the jurors, explaining the points of law and how they relate to the case before the court. The jury will then retire to consider its verdict.	
verdict (judge or jury)	The judge will normally reserve judgment and take time to consider the case more fully and then hand down his or her verdict at a later time. If a jury is present, the jury will deliberate and present their verdict and decide on the remedy if the plaintiff is successful.	

NOTE

More detailed information about the adversary system and the jury system is given in chapters 7 and 10.

REMEDIES

A remedy is the plaintiff's desired outcome in a civil trial. It is what the plaintiff claims as a result of the civil wrong that has occurred. If the plaintiff is successful, the court will normally award the plaintiff a remedy, which is the way a court enforces a plaintiff's right, imposes a penalty on the defendant or makes some sort of order for the benefit of the plaintiff.

The general **purpose** of remedies is to restore the plaintiff to the position they were in before the wrong occurred.

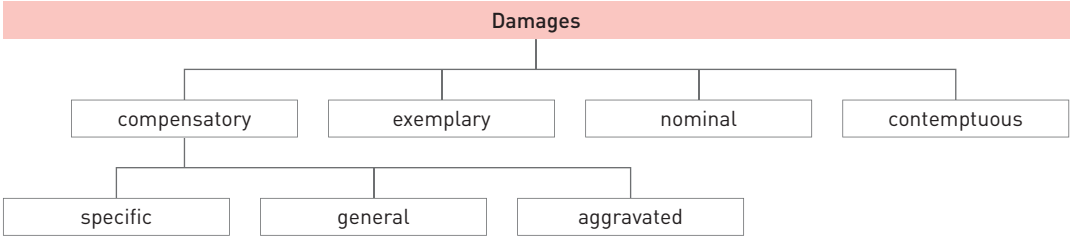
Various remedies are available in civil cases. The most common remedy sought is damages. Another common remedy is an injunction.

Damages

Damages is a sum of money granted to the plaintiff, to be paid by the defendant, in satisfaction of a claim made by the plaintiff. The purpose of damages is to compensate the plaintiff for losses suffered. Different types of damages can be sought, including compensatory, exemplary, nominal and contemptuous damages.

If damages are awarded, the court will sometimes award interest to be paid on the amount of damages from the time the incident occurred. This is to compensate for the fact that if the plaintiff had been paid the money immediately after the incident, he or she would have been able to earn interest from a bank or elsewhere.

The following flow chart sets out the type of damages available.



Compensatory damages

Compensatory damages are the most common damages sought. The aim is to restore the party whose rights have been infringed to the position they were in before the infringement, by compensating them for losses suffered. It may not be possible to do this in the physical sense, for example if a person has been left with a permanent injury, but damages can be given to make up for the fact that the person will suffer in the future.

Compensatory damages can be specific damages (also referred to as special damages), general damages or aggravated damages.

Specific damages	General damages	Aggravated damages
can be given a precise monetary value. These can be listed – such as medical expenses or loss of wages – and are easily quantifiable	will be assessed by the court according to the magnitude of the wrong done and the long-term consequences of the wrong, taking into consideration such matters as future loss of wages, long-term job prospects, and pain and suffering (future and past). They are a general estimate and not readily quantifiable	can be awarded to compensate the plaintiff further if the court believes that the defendant's conduct injured the plaintiff's feelings by causing humiliation and insult

Nominal damages

When nominal damages are awarded, a small amount of money is paid by way of damages. A plaintiff may be seeking to make a point about being legally in the right and to show that their rights had been infringed, but may not be seeking a large sum of money in compensation. Instead, the plaintiff might ask for only nominal damages.

In a case of defamation, nominal damages may be awarded when the plaintiff's character has been maligned, but little damage has been done to the plaintiff's reputation.

Contemptuous damages

A court might feel that the plaintiff has a legal right to damages, but does not have a moral right, that is, the plaintiff did not really deserve to be paid damages. In such a situation, small damages might be awarded to show contempt for the claim that is made, while admitting the plaintiff's right to make the claim.

Exemplary damages

Exemplary damages are the only consequence of a civil action that in some way seeks to punish the defendant for an extreme infringement of rights.

Exemplary damages are also known as punitive damages or vindictive damages (although this term is rarely used). The aim of exemplary damages is to punish and deter where conduct is wanton, malicious, violent, cruel, insolent or in scornful disregard of the plaintiff's rights.

CASE STUDY

Damages ordered in sexual assault and defamation case

In January 2013, the Supreme Court of Victoria ordered damages to be paid to the plaintiff for defamation arising from a number of items uploaded to the Internet by the defendant. The defendant resides in the United States.

Phil Gluyas, the plaintiff, alleged that the defendant, John Best Junior, had created and maintained two websites where he published comments relating to the plaintiff. The plaintiff claimed that the website contained extremely defamatory statements. Justice Kaye of the Supreme Court found that the website comments were defamatory and tended to lower the plaintiff in the estimation of certain members of the community.

The judge stated that he was satisfied that the conduct of the defendant was such as to seriously aggravate the harm caused to the plaintiff's feelings, and the embarrassment and humiliation of the plaintiff. The plaintiff was awarded the sum of $50 000 in damages, which included aggravated damages, as well as interest of $4375. The plaintiff was also awarded his costs of the proceeding.

CASE STUDY

Nominal damages awarded in *Nicholson v. Hilldove & Ors (No 4)* [2013] VSC 578

On 15 December 2011, the plaintiff entered into a binding agreement with the first defendant in relation to the purchase by the plaintiff (Nicholson) of the Crown Hotel in Lilydale from the first defendant (Hilldove).

After issues arose in relation to a lease of the hotel, Hilldove took the view that there was no binding agreement and sold the Crown Hotel to another party on 7 February 2012. Nicholson sued Hilldove for damages for breach or repudiation of the agreement.

The court found that while there was a binding agreement, which Hilldove had repudiated, Nicholson did not suffer any loss or damage, and was only entitled to nominal damages. In October 2013, Justice Sifris ordered that Hilldove pay the plaintiff nominal damages of $100, which was considered appropriate.

CASE STUDY

Bannerman v. Victoria (2009) VSC 438

The plaintiff, Mr Bannerman, sued the State of Victoria and Mr Logan, a police officer, seeking compensatory, aggravated and exemplary damages for, among other things, assault.

In the early hours of 26 November 2005, Mr Bannerman aggressively approached Acting Sergeant Logan in the street in Shepparton. Mr Logan subsequently sprayed Mr Bannerman in the face with 'OC', otherwise known as capsicum spray. Mr Logan then charged Mr Bannerman with a number of offences. Mr Logan admitted he had assaulted Mr Bannerman by spraying him with capsicum spray, but argued it was justifiable as he was acting in self-defence.

The judge awarded a total of $42 635.20 to Mr Bannerman, which consisted of:

- $40 000 in general damages
- $2635.20 in special damages.

The judge did not find that Mr Bannerman was entitled to aggravated damages or exemplary damages.

>>GOING FURTHER

Restrictions on damages

Although large payments are made in some circumstances, the *Wrongs Act 1958* (Vic.) places restrictions on the amounts that may be recovered for loss of earnings or future earning capacity in cases where the death or personal injury is caused by the fault of a person. The amount for each week of earnings is limited to three times the amount of 'average weekly earnings'. Average weekly earnings are estimated by the Australian Bureau of Statistics, and in May 2013 these amounted to $1046.00 per week.

Claims for non-economic loss, which is pain and suffering and loss of quality of life, are limited to $497 780 (on 1 July 2013) and are indexed according to the consumer price index (CPI).

The Wrongs Act also places restrictions on claims for non-economic loss in that a person is not entitled to recover damages for non-economic loss unless the person has suffered significant injury. Significant injury is defined as more than 5 per cent impairment for injuries other than psychiatric injuries and more than 10 per cent for psychiatric injuries.

Volunteers and people who provide assistance or care at emergencies (termed as good samaritans) are protected from civil liability for their actions. Also under this Act, giving an apology or statement of regret is not an admission of civil liability.

LEARNING ACTIVITY 9.11

Damages

1 Read the case study of *Carter v. Walker* and answer the questions.

a Distinguish between specific damages and general damages.

b How would you classify the amount of $883 413 awarded to Walker? How would this have been calculated?

c Why do you think Justice Williams did not order any aggravated or exemplary damages?

d **Internet investigation**

Conduct an Internet investigation to find out more about the case. Do you agree with the original award for damages or the Court of Appeal's decision to reduce the amount? Give reasons.

CASE STUDY

Carter v. Walker (2010) VSCA 340

In August 1993, two police officers, Graeme Carter and Mark Sesin, went to a unit in Surrey Hills where Donald Walker lived. A domestic dispute had occurred between Walker and his girlfriend. A physical altercation involving the police officers, Donald Walker and his mother, Marcia Walker, then took place. Donald Walker alleged he was beaten, held in a headlock and kicked, causing injuries including broken ribs.

Within days of the incident, Donald Walker was charged with criminal offences against his girlfriend, Carter and Sesin.

Donald Walker (plaintiff) sued Carter, Sesin, the State of Victoria (being the employer of Carter and Sesin) and Ruth Hamm, Walker's girlfriend (defendants). Proceedings were also brought against a number of other police officers who attended the scene. Walker alleged assault and battery, as well as an 'unlawful conspiracy' between his girlfriend and the police officers. Marcia Walker also sued for assault and battery against Carter and Sesin.

The trial was heard in 2009 before Justice Smith. Justice Smith held that the allegations had been made out and awarded Donald Walker $1 783 413, comprising:

- $300 000 for general damages
- $883 413 as damages for lost earning capacity, comprising past losses of $360 000 and $523 413 for lost future earning capacity
- $200 000 as aggravated damages
- $400 000 as exemplary damages.

The defendants appealed to the Court of Appeal because of the excessive damages. The Court of Appeal disagreed with some of the trial judge's decision and allowed the appeal by the defendants. The Court of Appeal ordered that the amount of aggravated and exemplary damages be reduced by a total of $400 000.



Figure 9.7 Donald Walker, one of the victims of the police assault

2 Look back at the case study 'Damages ordered in sexual assault and defamation case'. What are aggravated damages? Why were they awarded in this case?
3 Look back at the case study 'Nominal damages awarded in *Nicholson v. Hilldove & Ors*'. Explain what you think was the critical reason why only nominal damages were awarded in this case.
4 Look back at the case study *Bannerman v. Victoria*. Why did the plaintiff also sue the State of Victoria in this instance?
5 Read the following two case studies.
   a For each case study, identify the punitive or exemplary damages.
   b Do you agree with the power of the court to award exemplary damages? Discuss in relation to each of the cases.

CASE STUDY

Jesse Williams is awarded $129 million

Jesse Williams, who died from lung cancer after smoking Marlboro cigarettes for 40 years, was awarded $129 million for injuries sustained through smoking, $79.5 million of which was punitive damages.

CASE STUDY

Award of $100 000 for trespass and assault

In *New South Wales v. Ibbett* (2006) HCA 57, Dorothy Ibbett sued the state of New South Wales for trespass and assault due to the actions of a police officer in her home. Senior Constable Pickavance had Ibbett's son Warren under surveillance and followed him into his mother's garage at 2 am. When the police officer, who was not in uniform and had not identified himself, sought to arrest Warren, an argument broke out. The police officer had drawn his gun and pointed it at Warren. The commotion woke Ibbett, who entered the garage and the police officer pointed the gun at her. She testified that she was petrified, and had no idea who was threatening her and her son.

The case proceeded through the NSW courts, and then on appeal to the High Court on the basis of the amount of damages awarded. One of the questions for the High Court was whether an award of general damages, aggravated damages and exemplary damages meant that there was double punishment of the defendant. The High Court answered this question in the negative, and stated that aggravated damages concern the actions of the defendant, whereas exemplary damages are punitive in nature. It upheld the damages awarded by the NSW Court of Appeal, which comprised $15 000 in general damages, $10 000 in aggravated damages and $25 000 in exemplary damages for the assault; and $10 000 in general damages, $20 000 in aggravated damages and $20 000 in exemplary damages for the trespass to land.

Injunctions

An injunction is a court order directing someone to stop doing something or to do something. The purpose of an injunction is to rectify a situation caused by the person who was found to be in the wrong. It can be either:

- **restrictive/prohibitive** – ordering a person to stop (or refrain from) doing something (such as pulling down a building, or an ex-spouse visiting a child at school)

  or

- **mandatory** – ordering a person to do a particular act, such as performing their part of a contract they have breached.

An injunction (either a restrictive or a mandatory one) can be either **interlocutory** or **perpetual**. An interlocutory injunction is a temporary injunction that is awarded quickly and in circumstances where there is an urgent situation and an injunction is needed as soon as possible.

At the final court hearing, the interlocutory injunction can become a **perpetual** (permanent) injunction, or it can be dismissed (overturned). A perpetual injunction can also be sought in a proceeding where an interlocutory injunction was not sought in the first place by the plaintiff, or was not granted by the court.

LEARNING ACTIVITY 9.12

Injunction

1 What is meant by an injunction?

2 Read the case study 'Injunction halts *Underbelly* series' and answer the questions.

- a Explain why Jeremy Rapke was seeking an injunction to stop the broadcast.
- b Explain the nature of the injunction that the Supreme Court awarded.
- c Distinguish between an interlocutory injunction and a perpetual injunction.
- d What details in this case indicate that an interlocutory injunction was awarded? What was so urgent about the case that an interlocutory injunction was necessary?
- e To what extent do injunctions uphold the overall aim of civil remedies?

CASE STUDY

Injunction halts *Underbelly* series

The much-anticipated screening of *Underbelly*, a drama series focused on crimes in Victoria, was put into jeopardy after last-minute legal proceedings were issued by Jeremy Rapke QC, then Director of Public Prosecutions, seeking an injunction stopping its broadcast in Victoria.



Figure 9.8 Injunction halts *Underbelly*.

The concerns were about whether airing the series could prejudice the jury in the trial of Evangelos Goussis, who had pleaded not guilty to the 2004 gangland killing of Lewis Moran. There were significant concerns as to whether the series could harm his chances of obtaining a fair trial.

The trial took place on 11 February 2008. The Nine Network was ordered by Justice Betty King not to broadcast the series in the state of Victoria, until after Goussis's murder trial was completed. General Television Corporation Limited filed an appeal in the Court of Appeal, but the appeal judges upheld the ruling of Justice King.

The series was eventually shown in Victoria in September 2008 after the conclusion of Goussis's trial, but many of the episodes were specially edited, with one episode not being broadcast at all.

3 Read the case study *McDonald's Australia Ltd v. Watson* and answer the following questions.
   - a Was an interlocutory or perpetual injunction ordered in this case? Justify your answer.
   - b Why was an injunction ordered in this case?
   - c To what extent has the injunction achieved its purpose in this case?
   - d Conduct some further research to determine whether there have been any further developments in this case.

CASE STUDY

McDonald's Australia Ltd v. Watson [2013] VSC 502

Justice Kyrou of the Supreme Court ordered an injunction against a group of protesters, preventing them from protesting at a McDonald's construction site and using social media to coordinate protest efforts.

On 1 July 2013, McDonald's, the plaintiff, began preparatory work for the demolition of buildings on land in Tecoma, Victoria, for the construction of a 24-hour McDonald's restaurant. From the outset, the protest group sought to thwart the demolition process by trespassing on the land and obstructing access to vehicles and workers. Some protesters climbed onto the roofs of buildings.



Figure 9.9 Protesters outside the Supreme Court in Melbourne

The plaintiff began proceedings on 16 July 2013 and sought an interlocutory injunction. Justice Kyrou granted an interim injunction on 18 July 2013, restraining the defendants and certain other persons from trespassing on the land or interfering with the plaintiff's use and enjoyment of the land. The interim injunction was extended by consent of the parties on two occasions. It expired on 27 August 2013.

On 27 August 2013, after hearing arguments from both sides, Justice Kyrou extended the injunction until 20 September 2013. On that day, the judge ordered the extension of the injunction until the hearing and determination of the proceeding.

In October 2013, the proceeding was settled between the parties. The settlement was subject to approval by the judge.

4 Conduct some Internet research. Find at least two other cases where an injunction was intended to be sought, or was sought, by the plaintiff. Explain the facts of each case and what type of injunction was being sought.

>>GOING FURTHER

Other remedies

The following types of remedies may also be available to plaintiffs in civil actions.

Order for specific performance

An order for specific performance is an order telling a person to fulfil a promise or the conditions of a contract. A court may refuse to grant an order for specific performance if it feels that the contract is unfair or if the contract is for something illegal. An order for specific performance is unusual. A court will usually prefer to order damages against a person who has not fulfilled a contract.

Specific restitution

A court may order a person to return land or goods to the rightful owner if it can be shown that the land or goods have been wrongfully detained.

Costs and interest

The unsuccessful party may be ordered to pay the legal costs of the successful party. The judge decides if costs should be awarded against one of the parties. Usually costs are awarded in addition to another remedy such as damages or an injunction.

The court may also order that the defendant pay interest on the damages as well as the damages themselves. The interest is usually calculated from the time the writ was issued, and is equivalent to the amount of interest that would have been received if the plaintiff had the money immediately and put it in the bank.

Enforcement procedures

What happens if a court orders an amount of money to be paid to one party, but the other party, who has been ordered to pay the money, does not pay?

The various court rules provide for enforcement proceedings to be issued by a party who is owed money pursuant to a court order.

Enforcement procedures mentioned in the Supreme Court Rules are similar to those used by the Magistrates' Court and County Court. Below is a list of some of the procedures that can be used if an order or judgment is not complied with.

- **warrant of seizure and sale** – Goods or land are seized and sold to pay the money owed, with the remainder being given to the defendant.
- **attachment of debts** – The plaintiff's award for damages attaches to the defendant's debts; that is, where a third person owes money to the defendant, the third person is required to pay the plaintiff rather than the defendant.
- **attachment of earnings** – The court can order the defendant's employer to pay the debt at regular intervals directly out of the defendant's wages.
- **sequestration** – This is an order by the court commanding certain persons (for example, the sheriff of the court) to seize property owned by the defendant and to hold the property until the defendant pays the money owed.

The ability of remedies to achieve their purposes

To what extent do remedies achieve their purposes? Do they achieve them at all? Sometimes a plaintiff may be satisfied with the outcome of a trial, but sometimes a plaintiff may feel that the remedy has not achieved what it was meant to.

The purposes of remedies

The purposes of remedies are summarised in table 9.4.

Table 9.4 Purposes of remedies

ALL REMEDIES	TO RESTORE THE PLAINTIFF TO THE POSITION HE OR SHE WAS IN BEFORE THE HARM OCCURRED
Damages	• to compensate the plaintiff for losses they have suffered such as payment of medical expenses (compensatory damages) • for the plaintiff to make a point about being legally right and show their rights have been infringed (nominal damages) • to show contempt for the claim that is made, while admitting the plaintiff's right to make the claim (contemptuous damages) • to punish the defendant for an extreme infringement of rights (exemplary damages)
Injunctions	• to rectify a situation caused by the person found to be in the wrong • to refrain someone from doing something (restrictive injunction) • to order someone to do a particular act (mandatory injunction) • to preserve the position of the parties until the final determination of the matter (interlocutory injunction)

In some situations, two or more remedies may be appropriate. For example, a company may seek a permanent injunction restricting someone from trespassing on their land, as well as seek damages for the trespass that has already occurred. In this instance, the purpose of these remedies is not only to compensate the company for losses they have already suffered, but also to prevent further losses from happening by having an injunction in place.

The purposes of remedies can differ from case to case, as it will depend on the circumstances of the plaintiff and what the plaintiff is seeking to achieve.

The extent to which remedies achieve their purposes

While remedies are intended to achieve a particular purpose, in many situations they do not. For example, if the plaintiff has suffered the loss of a limb, or has a defect or disorder because of the wrongs that occurred, could any remedy achieve its purpose?

Table 9.5 shows the considerations to be taken into account to determine whether a remedy can achieve its purpose.

Table 9.5 The extent to which remedies achieve their purposes

REMEDY	FACTORS TO CONSIDER WHEN DETERMINING TO WHAT EXTENT THE REMEDY ACHIEVES ITS PURPOSE
Damages	• What sort of loss has the plaintiff suffered – economic, physical, emotional, mental? • What is the appropriate measure for unquantifiable losses such as pain and suffering, humiliation and loss of life? • Is the plaintiff's injury such that money can return them to the position they were in before the harm occurred? • Can damages compensate for time in having the case heard, and for stress and inconvenience? • Does the defendant have the capacity to make payment? • What is the measure of future earning capacity? • Are there are any restrictions in place which limit the amount to be compensated (e.g. non-economic loss or economic loss under the *Wrongs Act 1958* (Vic)? • Is there any other reason for which the plaintiff may not be returned to their original position? • Is there some other remedy, such as an injunction or an order for specific performance, that would better compensate the plaintiff?
Injunctions	• Has the defendant already done something damaging and the plaintiff is stopping the defendant from causing any further damage? • Will an injunction stop the defendant from doing other things? • Will the defendant comply with the injunction? • Even if the defendant does comply with the injunction, does it mean the plaintiff is fully returned to their original position? • Is there some other remedy, such as damages or an order for specific performance, that would better compensate the plaintiff?

LEARNING ACTIVITY 9.13

The ability of remedies to achieve their purposes

1 Distinguish between civil remedies and criminal sanctions.
2 Explain two purposes of injunctions and two purposes of damages.
3 Read the following case study 'Court of Appeal allows appeal in negligence case' and answer the questions.
   a State who were the plaintiff and defendant in this case.
   b What type of civil action does this case involve?
   c Explain the circumstances of this case.
   d What was the decision that was handed down in the Supreme Court and later in the Court of Appeal?
   e Explain the overall purpose of civil remedies. To what extent was this aim achieved in this case?

CASE STUDY

Court of Appeal allows appeal in negligence case

In *Hudspeth v. Scholastic Cleaning and Consultancy Services Pty Ltd & Anor* [2014] VSCA 3, the Court of Appeal upheld an appeal from the Supreme Court of Victoria.

The appellant, Hudspeth, made a claim for damages for personal injuries allegedly suffered in the course of her employment while working as a cleaner in a suburban school. The appeal centred around whether or not the trial judge erred in failing to discharge the jury following statements made by one of the barristers on behalf of the second respondent, being the school, in his closing address.

Justices Tate and Whelan allowed the appeal, with Chief Justice Marilyn Warren dissenting. As a result, the trial was to be reheard, either before a trial judge alone or before a new judge and jury.

4 You have been asked to write a report about civil remedies. Write a 250-word report demonstrating your understanding of two civil remedies and the ability of each remedy to achieve its purpose.

5 **Mock court**

Form into groups to prepare a mock court of a civil case. Each group is to:

- decide on a scenario
- work out who will be the plaintiff, defendant, witnesses, plaintiff's legal representative and defendant's legal representative, with the remainder of the class to act as judge and jury
- make a list of questions to be asked by the plaintiff's legal representative
- make a list of questions to be asked by the defendant's legal representative
- conduct the mock court; the jury is to hand down the verdict and state the remedy that will be given if the plaintiff is successful.

6 Read the following four case studies and answer the questions.

a Do you think that these cases show inconsistency in the amounts of damages awarded? Explain.

b If you were on a civil jury, how would you go about deciding the damages for these cases?

c Do you think the remedies in each case achieved their purpose? Justify your answer.

CASE STUDIES

Case 1

Guy Edward Swain was awarded $3.75 million to be paid in compensation by a Sydney council. Swain became a quadriplegic after he dived into the water at Bondi Beach and struck a sandbar. The accident happened between surf lifesaving flags.

Case 2

A County Court jury awarded a Melbourne nurse $50 000 in damages after breast reduction surgery caused her severe ongoing pain. The jury found that the surgeon was either negligent towards the plaintiff or had breached his agreement with her, so he was ordered to pay damages.

Case 3

A court awarded a plaintiff just over $200 000 in damages from the defendant, a surgeon, for a failed breast enlargement that resulted in the woman needing a double mastectomy. While the judge

commented that there was no evidence that the defendant had been incompetent, the court found that the plaintiff had not been properly warned of the risks from the procedure.

Case 4

A woman paralysed from the mouth down after a car accident received a record compensation payout of more than $16 million. Lisa Denise Palmer, 27, was left a quadriplegic after her car rolled down a three- to four-metre embankment near Bathurst, west of Sydney. The damages were for economic loss, past expenses, domestic care, equipment, housing, future medical expenses and holidays.

EFFECTIVENESS OF CIVIL PROCEDURE

Civil procedure should be evaluated with reference to the three elements of an effective legal system, which are entitlement to a fair and unbiased hearing, effective access to the legal system, and timely resolution of a dispute. For each element, you should consider:

- the processes and procedures that contribute to its achievement
- the processes and procedures that hinder its achievement
- recent changes and recommendations for change that might improve (or recent changes that have improved) its achievement.

Entitlement to a fair and unbiased hearing

A party who feels that they have had their rights infringed or that they have been wronged by another party should be able to resolve their civil claim in a fair and unbiased hearing or trial. Each party should have an equal opportunity to persuade the court that, on the balance of probabilities, their version of the facts is the truth. Some features of civil procedure can both help and hinder the achievement of this element.

Processes and procedures that contribute to a fair and unbiased hearing

The following processes attempt to achieve the element of a fair and unbiased hearing in a civil trial.

- **pleadings stage** – This stage enables the parties to become aware of the claims, defences and counterclaims that are being made in the proceeding to afford them natural justice and procedural fairness. It ensures that the parties are prepared for the case and the trial proceeds on the basis that the parties have made all the possible claims they can in their pleadings.
- **court powers** – The courts now have extensive powers to manage civil disputes, due to the rules of the court and the introduction of the *Civil Procedure Act 2010* (Vic.). The courts must use these powers to give effect to the overarching purpose of the *Civil Procedure Act*, which is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. The powers of the court are broad and include allowing the court to make any orders it considers appropriate with respect to the conduct of the hearing.
- **directions hearings** – Having both parties present at directions hearings ensures a proper opportunity to make any submissions, applications or arguments to the judge (or associate judge) about what orders should be made or the timetable that should be set down for pre-trial procedures. This allows the case to proceed fairly and ensure that all parties have the opportunity to be heard.

- **discovery process** – This is designed to ensure that all parties have access to information and documents that are relevant for the trial. Particularly during discovery stage, the parties become aware of the evidence of each party's evidence, which reduces the element of surprise at trial. This assists in both parties being on an equal footing with respect to knowledge of documents at the trial.

Problems and difficulties that may hinder a fair and unbiased hearing

The following processes and factors may hinder the ability of a party to receive a fair and unbiased hearing in a civil trial.

- **pleadings stage** – Although pleadings are designed to ensure that each party is aware of the claims and defences, and to clarify the issues in dispute, often the pleadings are so complex that they disadvantage a party who does not have legal representation. Pleadings normally require the expertise and knowledge of a solicitor and/or barrister. This can disadvantage an unrepresented litigant who may not understand what pleadings are and therefore does not begin on the same footing as their opponent.
- **discovery process** – Again, although designed to clarify issues in dispute, avoid surprises at trial and allow parties to understand the claims and evidence involved, the discovery process can often be long and complex and require legal representation. This can disadvantage people who represent themselves.
- **directions hearings and mediation** – A party with more experienced legal representation may argue their case better at a directions hearing and thus may be better placed to obtain the orders they require in the case. Further, at mediation, a party without legal representation may feel intimidated by the process, or is unable to clearly present their argument, and the result may therefore be an unfair outcome.
- **costs** – The costs of pre-trial procedures and taking a matter to trial are significant, and can be a serious impediment to many people trying to access the legal system. In some ways, the cost of accessing civil justice can act as a barrier to many people trying to resolve their dispute, and people can be dissuaded from pursuing resolution, making it an unfair system. Many of these people are ineligible for legal aid, which leaves them to either be self-represented, or not pursue or defend their claim.
- **different cultural backgrounds** – Defendants from different cultural backgrounds may be confused by the legal processes and the adversary system of trial. This may hinder the ability of these defendants to receive a fair and unbiased hearing.
- **inconsistency in damages** – If a jury is required to decide on the amount of damages, the amount can be different from that awarded (by other juries) in other similar cases and can often be very large, which can be unfair to the defendant.

Recent changes

The following recent changes could assist in achieving a fair and unbiased hearing.

- **introduction of the *Civil Procedure Act 2010* (Vic.)** – In addition to requiring parties to file certifications with the court and giving greater powers to judges to order the parties attend mediation, the Act also makes various changes to the way civil proceedings are conducted in Victoria. These changes include imposing obligations on the parties to act honestly and cooperate with each other, and allowing the court to make any direction or make any order it considers appropriate in the interests of the administration of justice or in the public interest. An amendment to the *Civil Procedure Act* in 2012 provided for further powers for the courts in relation to the making of costs orders and the provision of expert evidence.

- **restrictions on damages** – Restrictions have been placed on damages payable in certain circumstances, which may reduce the number of exorbitant amounts of damages awarded by jurors in some instances. These restrictions are limited to certain circumstances, such as claims for non-economic loss.
- **changes to evidence laws** – The *Evidence Act 2008* (Vic.) makes various amendments to rules in relation to evidence from witnesses, and admissibility of evidence, including relevance, hearsay and credibility rules, and proof of matters in proceedings. Section 72 also provides an exception to the hearsay rule, in relation to Aboriginal and Torres Strait Islander traditional laws and customs. These changes attempt to relax the evidence rules to ensure a fair and unbiased hearing that takes cultural differences into account.

Recommendations for change

The following recommendations for change could further assist in achieving a fair and unbiased hearing.

- **greater funding for legal aid** – In more recent times, Victoria Legal Aid has suffered a lack of funding for the services it provides, despite a greater demand for legal aid lawyers. More funding for legal aid could improve flexibility in being eligible for legal aid, thus ensuring that more people, particularly disadvantaged people, are entitled to a fair and unbiased hearing.
- **greater awareness and legal assistance for disabled persons** – Submissions to the current Productivity Commission, which is inquiring into access to justice, make recommendations in relation to the ability of disabled people to get a fair hearing. Recommendations made include training of legal personnel about the needs of disabled people and providing greater awareness and funding for disability legal services.

LEARNING ACTIVITY 9.14

Fair and unbiased hearing

1 Explain two ways in which the legal system endeavours to achieve a fair and unbiased hearing.
2 Explain two problems in achieving a fair and unbiased hearing.
3 Outline one change in the law that has taken place or one recommendation that will assist the legal system in achieving a fair and unbiased hearing.

Effective access to the legal system

Parties who are in dispute must be given effective means by which their dispute can be resolved. Otherwise, the legal system runs the risk of people taking the law into their own hands when settling civil disputes, or not being able to pursue or defend a dispute at all. The legal system provides a range of dispute resolution mechanisms, although a party's access to them can vary depending on the costs and complexity of the case.

Processes and procedures that contribute to effective access

The following aspects of the legal system attempt to achieve the element of effective access to the legal system to resolve civil disputes.

- **court system** – Courts have been established to enforce the law, including civil rights. Each court has a specific jurisdiction and deals with cases in its area of expertise. For example, the Family Court deals with cases for the dissolution of marriage, and the Magistrates' Court deals with

claims of damages up to $100 000. This ensures that parties have suitable and appropriate courts to deal with their disputes.

- **ADRs and tribunals** – The legal system provides a range of mechanisms, other than courts, to assist parties in resolving disputes. The Victorian Civil and Administrative Tribunal (VCAT) can deal with a variety of claims, including disputes between consumers and traders. In addition, parties have access to alternative dispute resolution methods such as mediation and conciliation, available in centres such as the Dispute Settlement Centre.
- **collaborative law** – Collaborative law provides another method of dispute resolution, whereby disputing parties and their lawyers sign a contract agreeing that they will work together in good faith to resolve their dispute without going to court. The aim is to avoid the costs, delays and stress involved in court action, and also to preserve the existing relationship between the parties. If the parties are unable to resolve their dispute through negotiation, then the lawyers acting for the parties will all withdraw from the case and not act for their clients in any further litigation on the matter.
- **pre-trial procedures** – A party will have access to pre-trial procedures that may assist them in resolving their case which they would otherwise not have access to if they did not issue proceedings. For example, a party will have access to court-ordered mediation, documents discovered by the other side and the ability to order interrogatories to help assist them with their claim. These procedures may result in an early out-of-court settlement, or help define the issues in dispute.
- **contingency-based legal representation** – Some firms of solicitors will represent clients on a 'no win, no pay' basis. This helps people with a genuine claim but limited funds to get a matter to court. If the plaintiff loses the case they do not have to pay the legal fees. If the case is won, the solicitors usually take their legal fees out of the damages paid by the defendant. Without this arrangement a plaintiff may have to abandon the claim because of the high cost of proceedings and the risk of not winning the case.
- **litigation-funding companies** – This is another option that has emerged for those unable to afford legal representation. These funding companies can cover the litigation costs of individuals and small businesses. If the party wins the case, then the funding company takes a share of the proceeds, often between 30 and 40 per cent. If the party loses, then the funding company normally pays the other party's costs.

Problems and difficulties that may hinder effective access

The following aspects may hinder the ability of a party to effectively access the legal system.

- **costs** – Courts are expensive and lawyers are often a necessary element of achieving a fair outcome. However, utilising their skills can be very expensive. This high cost can be prohibitive to people who wish to take an issue to court. People therefore do not have easy access to courts as a mechanism for resolving disputes due to the high costs that may outweigh the potential benefit to be gained.
- **complexity of procedures, including pre-trial procedures** – Pre-trial procedures are often complex and difficult to understand, and usually require the assistance and expertise of solicitors. This poses problems for unrepresented litigants, who find it difficult to easily use the court system to resolve their disputes. Other procedures such as directions hearings, mediation and trials also add to the complexity of the court system.
- **lack of knowledge of ADRs and tribunals** – Many people are not aware that there are alternatives to the court system. Often they may issue proceedings in court, without knowing that their matter could be heard by a list in VCAT, or that they could contact a body such as the Dispute Settlement Centre to arrange mediation. Although these bodies exist, people may not have easy

access to them because they are not aware of their existence or the extent of their powers to determine disputes.

- **delays** – The court system has been criticised for extensive delays in hearing civil disputes. This is not only due to the backlog of court cases in the system, but also the extensive number of pre-trial procedures that parties usually have to go through. This often deters people from issuing civil proceedings and hinders their access to this mechanism to resolve their dispute.

Recent changes

The following recent changes could assist in providing parties with effective access to mechanisms for the resolution of disputes.

- **greater use of VCAT and ADRs** – VCAT has made efforts to advertise its role and existence to increase community awareness of the existence of tribunals. The Dispute Settlement Centre produces leaflets to inform people about their options. The courts have also increasingly referred matters to mediation in an attempt to reach an out-of-court settlement.
- **increased use of collaborative law** – Collaborative Professionals Victoria (CPV) has been established to encourage the use of collaborative law in all areas of law, including family and civil law. It emphasises problem-solving, negotiation and client empowerment in resolving disputes without the need to go to court. The Law Institute of Victoria now maintains a Collaborative Professionals' Directory that enables parties to find a professional who will assist them in resolving their dispute without having to go to court. This enables them to use an alternative method, which is cheaper and relatively quicker than going to court to resolve a dispute.
- **justice service centres and multi-jurisdictional courts** – The justice service centres around Victoria offer a number of services including dispute resolution, mediation and consumer advice. Some regional centres have multi-jurisdictional courts that house a number of courts under one roof, such as the Moorabbin multi-jurisdictional court, which also includes the Moorabbin Justice Centre. This assists access to the legal system for people in the area.
- **William Cooper Justice Centre** – This is a new court complex intended to house six new courtrooms plus rooms for mediation. It is situated in the old County Court building opposite the Supreme Court and Magistrates' Court (and diagonally opposite from the County Court) and will provide more space for the Supreme Court and Children's Court in an attempt to manage caseloads. In 2013, the large courtroom in the centre was used to hear the bushfires class action. In 2014, a new **Mediation and Arbitration Centre** opened at the William Cooper Justice Centre.
- **restructure of VCAT** – In 2013, VCAT restructured its lists to reduce them from 16 to 11. This was part of an attempt to make it easier for the community to navigate the jurisdictions of the tribunal and simplify registry procedures. It is hoped that this will improve people's ability to use VCAT to resolve disputes.

Recommendations for change

The following recommendations for change could further assist in providing parties with effective access to mechanisms for the resolution of disputes.

- **encouragement and retention of lawyers in rural areas** – A report by the Law Institute of Victoria in 2009 found that there is a significant issue with access to justice in rural, remote and regional areas in Victoria, where there are fewer lawyers and thus less ability for potential litigants to seek legal advice and representation. The Law Institute has called on the state government to introduce monetary allowances or bonuses for lawyers to relocate to rural areas, as well as to promote job vacancies in rural areas to law students and graduates.

- **access to interpreters in civil matters** – In its *Advocating Justice for All* publication, the Law Institute of Victoria has called for a 12-month pilot program to provide interpreters to parties in a civil dispute at the legal advice stage. Following that, the Law Institute recommends a pilot program to provide interpreters at the court stage of civil proceedings. This follows a 2008 report by the Victorian Law Reform Commission (VLRC) that language barriers and hearing impairments can cause difficulty in the basic communication required in a civil dispute, and affect access to the courts as well as discourage people from taking court action. The VLRC has also called for an Interpreting Fund to pay for interpreters in civil cases.
- **reducing the risk of adverse costs orders** – The rules of the court allow the court to make an adverse costs order against an unsuccessful party. This is often seen by some parties, particularly those that are in a poor financial situation or of a low socioeconomic background, as a barrier to pursuing their claim. Submissions to the Productivity Commission and the Law Institute of Victoria encourage a reconsideration of these rules to substantially reduce the risk of an adverse costs order.

PRODUCTIVITY COMMISSION

In June 2013, the Commonwealth Government announced a Productivity Commission to examine how to improve access to justice in Australia.

The Commission has sought submissions from interested parties in its examination of factors that contribute to the current costs of securing legal representation and accessing justice services, the social and economic impacts of these costs, and whether they are proportionate to the issues in dispute.

The Commission will report on options for achieving lower-cost dispute resolution, including through alternative dispute resolution, the use of technology and expedited procedures. The Commission will also report on the number of Australians who may not be able to afford to secure legal representation but who also do not qualify for legal assistance.

Submissions have already been made to the Productivity Commission, which will release a report in due course.

Timely resolution of disputes

The timely resolution of civil disputes is important, as delays in legal processes and procedures can limit the effective operation of the legal system. Both parties to a civil dispute could be severely disadvantaged if it takes a long time to resolve. The plaintiff could be injured or out of work with little money. The defendant could be in a stressful situation with the threat of a court case hanging over their head, not knowing whether they will need to pay large sums of money to the plaintiff.

In addition to the stress of worrying about the outcome of a case, and the undue hardship while waiting for financial settlement, the chances of winning the case could also be reduced as time elapses due to the loss of memory of the witnesses. As a result of these effects of delay, a fair outcome might not be achieved, regardless of the decision in the case. For example, even if a plaintiff wins a case, the delay itself might have caused hardship, which is not recoverable through the court case.

Processes and procedures that contribute to a timely resolution

The following aspects attempt to achieve the element of timely resolution of disputes.

- **pleadings and discovery** – The pre-trial procedures in a civil action can reduce the time needed to resolve a dispute. The pleadings and discovery stages provide both sides to a case with the

opportunity to find out details of the case being brought against them. This could result in one party deciding not to pursue their case. Alternatively, these exchanges could encourage discussion between the parties, which could lead to an out-of-court settlement that satisfies both parties. If the matter does proceed to court, the pre-trial procedures, such as directions hearings, could reduce the time to be spent in court. However, some legal commentators have pointed to the long and protracted pre-trial procedures as adding to the time delay in resolving a dispute.

- **directions hearings** – Directions hearings have been introduced in civil matters to try to speed up the process of getting a matter to trial and to make the trial shorter by clarifying issues before the trial, so that these do not need to be contested in the trial. Directions hearings also help the parties to become better acquainted with the strengths of each party's case, and as a result can lead to the parties deciding to settle out of court rather than go to trial. Some issues can be settled during directions hearings, and aspects of the plaintiff's case may be admitted before attending court, which can result in the trial being shorter as these issues do not then need to be settled at trial.
- **active court management** – The court rules and the *Civil Procedure Act 2010* (Vic.) provide the judges with powers to actively manage a case. The powers include the ability to reduce the number of witnesses that may be called, limit the time by which certain steps are to be conducted and limit the scope of discovery. This has been seen to substantially reduce the time it takes for a trial to be heard.

Processes and procedures that may hinder timely resolution

The following factors may cause delays that hinder the timely resolution of disputes.

- **failure to take the initial steps** – Delays in civil cases are often caused by the individuals failing to take the initial steps to seek legal advice about a problem that has occurred. This may be because they are unaware of their legal rights and how to pursue them, or they are fearful about the costs or outcome of the case.
- **increased litigation** – While there are still people who are unaware of their rights, there is a general trend towards people being prepared to pursue their rights when these have been infringed. This has increased the number of civil cases being brought before the courts, thereby adding to delays.
- **increase in volume and complexity of information** – Improved technology has provided businesses and individuals with the ability to do far more in terms of gathering information and expanding business opportunities. It has also created a situation where there is likely to be more information to gather and sift through when a case comes to trial. This can result in delays in getting a case to court. If trials are taking more time, it might take longer to get a case listed for trial.
- **delays in civil pre-trial procedures** – The pre-trial procedures are long and complex, and cause delays in getting the matter to trial. Often these delays are caused by the parties, who may not understand the procedures and require adjournments of times by which proceedings are to be completed. Particular procedures, such as discovery, often take time as a result of a large volume of documents, thereby delaying the time it takes to get the matter heard.

Recent changes

The following recent changes have attempted to achieve a timely resolution of disputes.

- **use of witness statements and outlines of evidence to reduce delays in the Supreme Court** – A witness statement is taken to be the witness's examination-in-chief and, on the day of the court case, the witness confirms his or her witness statement, or tells the judge of any

changes. He or she is then cross-examined. This reduces the time taken for the witness to give their evidence. The alternative is an outline of evidence, which is intended to be a summary of the evidence the witness will give at trial so that the other party knows what he or she will say.

- **introduction of the Commercial Court in the Supreme Court** – In 2009, the Supreme Court combined its two specialist lists, the commercial list and corporations list, into the Commercial Court. The Commercial Court has been compared to a 'litigation laboratory' by Chief Justice Warren, indicating that the court intends to try various procedures to attempt to have matters heard in a much more timely fashion.
- **limiting discovery** – The Supreme Court's Commercial Court has tried to encourage parties to limit the categories of documents to be discovered. In its 2011 'Green Book', a statement setting out the requirements of the court, parties are encouraged to agree on limiting discovery to only documents critical to the resolution of the dispute, thus avoiding the time it would take to discover hundreds of documents that are not critical to resolving the issues in dispute.
- **introduction of e-discovery** – The Federal Court has introduced a system whereby much of the discovery of documents process occurs online – the documents are exchanged and lodged electronically. It is only used in certain cases where the number of electronic documents, such as emails, exceeds 500. It is recommended that the Supreme Court introduces a similar scheme to assist in speeding up the discovery stage. This has not yet been implemented, but some judges have ordered discovery to be undertaken by way of exchanging documents electronically as opposed to physically inspecting documents.
- **electronic case management system** – In September 2011, the Supreme Court announced it had developed an electronic case management system for the Technology, Engineering and Construction List. Its implementation began as a pilot project and is intended to manage cases electronically, including the filing of documents, using the system to show documents to be produced as evidence in the court and enabling communication between the parties and the court. It has now expanded into other lists and divisions of the court and is intended to reduce the time taken in civil proceedings.
- **judicial resolution conferences** – In civil cases for matters over $10 000, the Magistrates' Court, County Court, Supreme Court and Children's Court can refer matters to a judicial resolution conference. A judicial resolution conference is presided over by a judge of the court or an associate judge for the purposes of negotiating a settlement of a dispute. Mediation, early neutral evaluation, judicial settlement conferences and conciliation can be used during this process.

Recommendations for change

The following recommendations for change could achieve a timely resolution of disputes.

- **greater use of court powers** – There has been an increased focus on the judges to use the powers given to them to actively manage a case and to avoid any unnecessary time delays. In a 2013 case involving an issue relevant to discovery, the High Court noted that 'Parties continue to have the right to bring, pursue and defend proceedings in the court, but the conduct of those proceedings is firmly in the hands of the court'.



Figure 9.10
Mediation

- **greater use of mediation in pre-trial procedures** – The courts have shown a commitment to greater use of mediation to try to resolve civil actions faster and with less expense. This has proved very

successful at reducing backlogs in courts and assisting the parties. Mediation has become one of the fastest-growing methods of dispute resolution because of its ability to produce acceptable outcomes quickly, cheaply and in a less confrontational manner. It helps to achieve just outcomes in civil cases.

LEARNING ACTIVITY 9.15

Elements of an effective legal system

1 Read the case study 'Millionaire appeals Supreme Court decision' and answer the questions.
   - a Who was the plaintiff and who was the defendant?
   - b What was the main claim of the plaintiff? Did the defendant counterclaim and, if so, for what?
   - c Describe three of the pleadings that would have taken place before the case came to court.
   - d Explain one difficulty that Mr Kakavas might have experienced in using the legal system.
   - e Explain the remedy sought by the plaintiff and the defendant, the remedy received and the costs awarded in this case. To what extent do they fulfil the aim of civil remedies?
   - f Other than court, what mechanisms could have been used to resolve this type of dispute?

CASE STUDY

Millionaire appeals Supreme Court decision

A millionaire property developer appealed against a decision of the Victorian Supreme Court.

High-rolling gambler Harry Kakavas sued Crown Casino for $35 million, claiming that the casino exploited his gambling addiction. He claimed that the casino had lured him back to the casino with the use of a private jet, boxes of cash and tickets to special events, and deliberately exploited his pathological addiction to gambling. Mr Kakavas at times bet up to $300 000 a hand and on one weekend gambled with $243 million. At one stage, Harry Kakavas had placed himself under a self-execution order, banning himself from Crown casino.

In December 2009, Justice David Harper handed down his decision, stating that while Mr Kakavas was once a pathological gambler, he had presented himself to Crown as if he was in control of his addiction. Justice Harper said that Crown had 'no conception of Mr Kakavas as suffering from any kind of relevant disadvantage'.

Crown Casino made a counterclaim for $1 million, arguing that Mr Kakavas owed the casino the money it had lent him on credit.

Justice Harper found in favour of Crown Casino and ordered Mr Kakavas repay the casino $1 million. Harry Kakavas appealed the decision, claiming he was not truly responsible for his own actions and the casino should have refused to deal with him. On 21 May 2012, the Court of Appeal dismissed the case.

Harry Kakavas appealed to the High Court. On 5 June 2013, the High Court dismissed the appeal and ordered that Kakavas pay Crown's costs.



Figure 9.11 Harry Kakavas sued the Crown Casino for damages.

2 Read the case study 'Quadriplegic blamed for his injuries' and answer the questions.
   a Who is the plaintiff in this case?
   b Why is he saying that the Coffs Harbour City Council owed a duty of care and was negligent? Explain.
   c Explain the decision of Justice Whealy in this case.
   d How can this case be distinguished from the Guy Edward Swain case?
   e Do you think the decision in each case is fair? Explain.

CASE STUDY

Quadriplegic blamed for his injuries

Garry Sean Mulligan, an Irish backpacker, became a quadriplegic after he dived into a creek and struck his head on a sand bar beneath the surface. He and his girlfriend had been swimming in the creek for quite a while. They were getting in and out of the water. The area where he dived in appeared to be deep. Mulligan, the plaintiff, said:

'I proceeded to wade into the water, again the water was up to around my thighs, around my swimming shorts. I launched myself into a dive, I had my arms out in front of me, I hit the water and then I remember just hitting something on the bottom and it felt like sand – I remember just feeling something snap in my head, it seemed quite painful at the time.'

The court declared that Mulligan's damages would have been worth $9 million. He sued the Coffs Harbour City Council and four other NSW Government agencies for negligence. The plaintiff maintained that the council owed a duty of care because they were responsible for the care of the area and they had also developed a swimming area at the creek. The plaintiff also argued that warning signs about the variable depths of the water should have been visible at public access areas.

Justice Whealy in the NSW Supreme Court found none of the defendants were in breach of their duty of care. Justice Whealy said, 'The danger of diving in the creek ... was or should have been obvious to the plaintiff. It was an inherent risk in the plaintiff's swimming activities on that day'.

Justice Whealy ordered Mulligan to pay all legal costs, including the cost of the hearing in Ireland.

This decision reverses the current trend of large payouts to injured people. For example, Waverley Shire Council was ordered to pay $3.75 million to Guy Edward Swain, who dived into a sandbar while swimming between the flags at Bondi Beach and was left a quadriplegic.

3 **Internet exercise**

Go to the Productivity Commission's web page. Select 'Projects' and then 'All commissioned projects' and find the Commission's investigations into access to justice.
   a State at what stage the Productivity Commission is with its investigations.
   b Identify four different bodies, representing different classes of people, that have made submissions to the Productivity Commission.
   c Choose one submission. State any problems associated with the legal system that have been identified. For each problem, identify which element of an effective legal system it is hindering the most.
   d If any recommendations have been made for each problem, list them. If not, suggest any recommendations to help overcome each problem.

PRACTICE EXAM QUESTIONS

Read the following two case studies, 'Award of $62 000 for schoolboy' and 'School not responsible for accident', and answer the questions.

1 Describe two pre-trial procedures that would have taken place before these civil cases reached court. In your answer outline the purpose of each pre-trial procedure described. *(6 marks)*
2 To what extent were these pre-trial procedures successful in achieving their aims in these cases? Justify your answer. *(6 marks)*
3 Suggest two reasons why these two cases had different outcomes. *(4 marks)*
4 Define the term 'damages'. Distinguish between special and general damages, using examples from the Dunn case. *(6 marks)*
5 Analyse the extent to which the award of damages in the Dunn case would have achieved the purpose of civil remedies. *(5 marks)*
6 Suggest two problems in civil procedure that are evident in these cases, and justify one recent change in the law that may assist the legal system in overcoming each problem. *(6 marks)*
7 Using information from the two cases, analyse the effectiveness of the legal system in resolving civil disputes. *(7 marks)*

(Total 40 marks)

Award of $62 000 for schoolboy

A teenager was awarded more than $60 000 in damages for injuries to his eye sustained during a schoolyard incident. Rodney David Dunn sued the State of Victoria for damages for negligence. He had been asked to leave the classroom by another student during rehearsals for a school play. Rodney banged on the window and a boy shouted abuse at him. The other boy later chased Rodney and hurled a stone at him that hit him in the eye.

The County Court found that the school had been negligent because they had failed to provide adequate supervision. There had only been one teacher on yard duty instead of the usual two. Rodney was awarded $55 000 for general pain and suffering, $5480 for future medical care and other like expenses, plus interest of $2400 as well as costs.

School not responsible for accident

The High Court held that a primary school in Canberra was not responsible for the injuries sustained by an eight-year-old girl when she was pulled off a flying fox by two other students. The court stated that the school had a clear 'hands-off rule' that students were not to touch each other when playing, and that this rule had been communicated clearly to students via posters and repeated verbal messages. At the time of the incident there was a staff member on yard duty supervising the play equipment, but her attention was diverted by other students. Two students then grabbed the plaintiff's legs when she climbed on the flying fox, pulling her off the flying fox. She hit her head on the platform.

The case started initially in the ACT Supreme Court, which found for the defendant (the primary school). This decision was reversed in the Court of Appeal, which held that the playground was inadequately supervised. The High Court then reversed this decision, stating that it was unlikely that a supervising teacher would have been able to prevent the plaintiff's fall once the other two children grabbed her legs.

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK CASE STUDY

Damages for Twitter defamation

Read the article 'Teacher awarded $105 000 damages in landmark Twitter defamation' and answer the questions.

1 Identify the parties to this case, and state why civil proceedings were instigated. *(3 marks)*
2 Provide one pre-trial procedure that would have occurred if this was a serious criminal case. Explain your answer. *(3 marks)*
3 If this case had been heard in the Supreme Court in Victoria, identify and explain two other pre-trial procedures that may have occurred and describe their purposes. *(6 marks)*
4 Describe the remedy that was awarded in this case. *(4 marks)*
5 To what extent would this remedy return the plaintiff to the position she was in before the wrong occurred? Give reasons for your answer. *(5 marks)*
6 Would mediation have been appropriate to use as a civil pre-trial procedure in this case? Justify your answer. *(4 marks)*
7 Select one element of an effective legal system and discuss the extent to which it was achieved in this case. *(5 marks)*

(Total 30 marks)

Teacher awarded $105 000 damages in landmark Twitter defamation

Michaela Whitbourn, *The Age*, 5 March 2014

A NSW teacher has made legal history after a former student was ordered to pay $105 000 for defaming her on Twitter and Facebook.

In the first Twitter defamation battle in Australia to proceed to a full trial, District Court judge Michael Elkaim ruled that former Orange High School student Andrew Farley pay compensatory and aggravated damages for making false allegations about music teacher Christine Mickle.

Judge Elkaim said the comments had had a 'devastating effect' on the popular teacher, who immediately took sick leave and returned to work only on a limited basis late last year.

'When defamatory publications are made on social media it is common knowledge that they spread,' Judge Elkaim said in an unreported judgment in November.

'Their evil lies in the grapevine effect that stems from the use of this type of communication.'

Mr Farley, who was 20 at the time of the judgment, and the son of the school's former head of music and arts, was described as a 'gentle man who had a number of health issues'.

Mr Farley Jnr graduated from high school in 2011 and had never been taught by Ms Mickle.

In November 2012, he posted defamatory comments on Twitter and Facebook about Ms Mickle, who took over his father's job on an acting basis after the senior teacher left in 2008 for health reasons.

The *Gazette of Law and Journalism* reported that after Mr Farley was warned on social media to be careful what he posted online, he replied: 'I can post whatever the f--- I like. I don't give a shit ... if anyone gets hurt over what I have to say about her.'

Judge Elkaim said Mr Farley bore a grudge against Ms Mickle, 'apparently based on a belief that she had something to do with his father leaving the school'.

'There is absolutely no evidence to substantiate that belief,' he said.

He ordered Mr Farley to pay $85000 in compensatory damages and an additional $20000 in aggravated damages.

Judge Elkaim said the apparent sincerity of an apology by Mr Farley was contradicted when he attempted to argue that the comments were true.

'The defence of truth when it is spurious is particularly hurtful to a person who has been the subject of such unsubstantiated allegations,' the judge said.

Ms Mickle's lawyer, Kennedys partner Patrick George, said the judgment would 'draw a line in the sand for those who up until now have used social media to defame others to hurt them and think there are no consequences. If someone wants to continue to do it despite being warned, it is particularly appalling, as it was in this case.

'The law will award substantial damages for defamation ...'

The decision is the first defamation case involving Twitter to go to trial.

Liberal pollsters Mark Textor and Lynton Crosby's Federal Court case against former federal Labor MP Mike Kelly is still at the pre-trial stage, while author Marieke Hardy settled a case in 2011 for erroneously 'naming and shaming' a Melbourne man on Twitter as the author of a hate blog.

Summary

Pre-trial procedures for cases to be heard in the County Court or Supreme Court

- obtaining legal advice
- letter of demand
- pleadings
  - writ or originating motion
  - statement of claim often attached to the writ
  - notice of appearance
  - defence
  - counterclaim
  - reply
  - further and better particulars
- directions hearings
- discovery
  - discovery of documents
  - interrogatories
  - discovery by oral examination
  - medical examination and provision of hospital and medical reports
- mediation
- other procedures
  - notice of admission of facts
  - expert evidence
  - offer of compromise
  - certificate of readiness for trial
  - pre-trial conference

Remedies

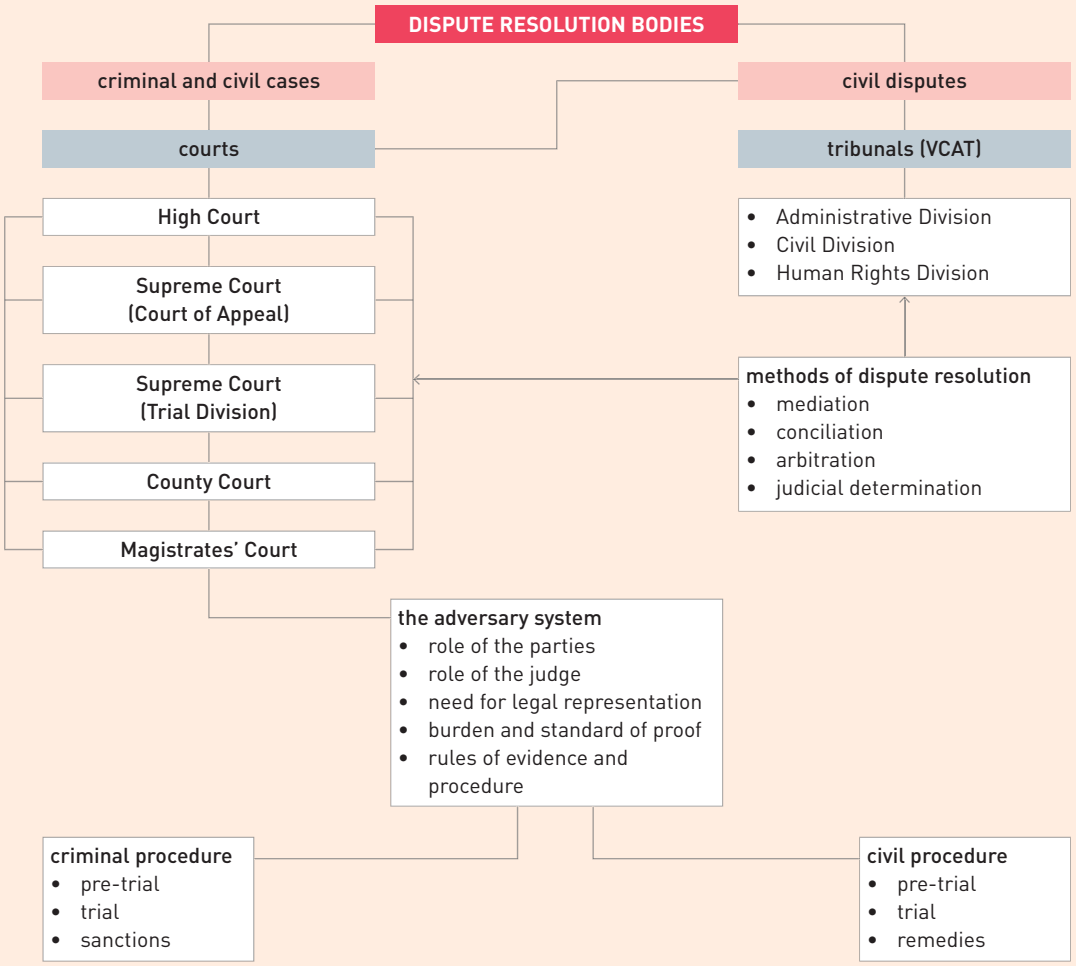
- damages
  - compensatory damages – specific, general and aggravated damages
  - nominal damages
  - contemptuous damages
  - exemplary damages
- injunction
  - restrictive or mandatory
  - interlocutory or perpetual
- other remedies
  - order for specific performance
  - specific restitution
  - costs and interest

Appeals heard

- Magistrates' Court – no appeals heard
- County Court – no appeals in civil cases
- Supreme Court – appeals from the Magistrates' Court and VCAT on points of law
- Court of Appeal – appeals from the County Court and Supreme Court on points of law, points of fact and amount of damages, and from VCAT when presided over by the president or vice-president

Effectiveness of civil procedure

- fair and unbiased hearing
- effective access to the legal system
- timely resolution of disputes





CHAPTER 10 THE JURY SYSTEM

OUTCOME

This chapter is relevant to learning outcome 2 in Unit 4. You should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, and evaluate their operation and application, and evaluate the effectiveness of the legal system.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- the role of juries, and factors that influence their composition
- strengths and weaknesses of the jury system
- reforms and alternatives to the jury system.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- critically evaluate the effectiveness of juries
- suggest and discuss reforms and alternatives to the jury system
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

KEY LEGAL TERMINOLOGY

challenge for cause A challenge of a prospective juror before a trial begins, with a legitimate reason that is accepted by the court.

disqualified jurors People who are prohibited from being on a jury because of something they have done in the past that makes them unsuitable, such as having a criminal record.

excused jurors People who have been granted permission to not attend jury service by the Juries Commissioner, who is satisfied that they have a good reason.

foreperson A member of a jury who has been elected by the other members of that jury as the spokesperson for the jury.

hung jury A jury that cannot reach a verdict.

ineligible jurors People who are not eligible for jury service because of their inability to comprehend the task or because of their occupation, such as someone employed in the legal profession.

jury An independent group of people summoned to a court and empanelled to decide on the evidence in a case and reach a verdict.

majority verdict A majority verdict in criminal cases is 11 out of 12 jurors (or 10 out of 11, or 9 out of 10). A majority verdict in civil cases is 5 out of 6.

peremptory challenge A challenge of a prospective juror before a trial begins, without giving a reason for the challenge.

unanimous verdict A verdict of all the jury (with every juror deciding in the same way).

THE ROLE OF THE JURY

The jury system is trial by peers. It dates back to the Magna Carta in England, when it was said that no free man shall be imprisoned except by lawful judgment of his peers. The jury system provides the opportunity for community participation in the legal process, and for the law to be applied according to community standards.

THE MAGNA CARTA

The Magna Carta was written in 1215. It required King John of England to proclaim certain rights, respect certain legal procedures and be bound by the law.

The jury acts as an **independent decision-maker** in criminal trials and in some civil trials. A jury is never used in the Magistrates' Court, in appeal cases or when the accused pleads guilty, and is optional in civil cases.

For a jury to be required, a situation must first have arisen that involves either a dispute between two individuals (a civil case) or a person who has breached society's rules and has committed a crime.

In both civil and criminal trials, the jury is the **decider of the facts**. In other words, it makes a decision about which facts it believes to be true. For example, was the accused actually at the scene of the crime, or at the cinema as stated? Did the witness actually see the accused or was the witness mistaken? Did an article written in a newspaper actually damage the reputation of the plaintiff in a civil case? Was it actually untrue? The jury must also apply the facts to the law as explained by the judge. The judge makes decisions on points of law.

The jurors, as a general rule, take the job of being on a jury very seriously and make every effort to reach the right decision. Each juror must make their own decision without undue influence from other jurors.

The role of the jury in both civil and criminal trials is to:

- listen to all the evidence
- understand and remember the evidence put forward (which is sometimes complicated)
- not lose concentration (which can be especially difficult during long and complicated questioning)
- make sense of all the evidence (which is presented piecemeal, in the form of questions and answers)
- understand the points of law as explained by the judge
- be objective and bring an open mind to the task, putting aside any prejudices or preconceived ideas
- form an opinion on which party is in the right, or on whether the accused is guilty or not guilty
- take part in the deliberations in the jury room
- make a decision on the facts of the case (called a verdict) – if the defendant is guilty or not guilty (in a criminal trial); in the wrong or not in the wrong (in a civil trial)
- decide on the amount of damages (in civil cases only).

Jurors can take notes if it helps them to remember information, but must make sure that they continue to concentrate on what is taking place in the courtroom.

Evidence in the trial

Jurors are required to consider only the evidence that is presented to them in the trial when making their decision. Jurors can ask the judge questions and request information, but they are not permitted to undertake any investigations of their own in relation to the case.

This was emphasised with the passage of the *Courts Legislation Amendment (Juries and Other Matters) Act 2008* (Vic.), which made it an offence for jurors to make an inquiry about a case or its parties, and imposed a fine of 120 penalty units (approximately $17 000). This change was made in response to a number of mistrials where jurors had undertaken their own investigations, visiting crime scenes, and using the Internet to research the case.

CASE STUDY

Charges dropped against juror for illegal research

A juror was charged for illegally carrying out research during a 2012 County Court trial, without the authorisation of the judge. Jurors are specifically warned not to act as amateur detectives by performing their own investigations.

The guidelines state that jurors are banned from viewing or inspecting a place or object that is relevant to the trial, conducting an experiment or asking another person to make an inquiry.

Dr Jacqueline Horan from Melbourne University said, 'the only people who are on the Internet researching are the jurors that generally want to do a really good job. We need to revise the jury system to help them. We need to encourage them to ask more questions and make it easier for them.'

The charges against the juror were dropped.

In 2013, Supreme Court Justice Phillip Priest was forced to discharge a jury in the murder trial of Johanna 'Jazzy O' Martin. A juror fell asleep while the judge was telling the jury they must not base their verdict on any information obtained outside the court.

In another Victorian case, a mistrial occurred because a juror looked up the definition of 'beyond reasonable doubt'. Looking up definitions on the Internet is common sense and something we all do instinctively. Some people have argued that it is wrong to stop jurors doing their best to come to the right answer. Experience has shown that the fact that it is against the law has not stopped jurors from at times doing some research. Given that jurors can be imprisoned for doing their own research, other jurors are reluctant to report them.

Reasons for decision

When a jury has reached a decision, the foreperson will state 'guilty' or 'not guilty' in a criminal trial, or find for the plaintiff or the defendant in a civil trial. The jury **does not have to give a reason for its decision**. This gives the jury the flexibility to make its decision for reasons other than following the appropriate points of law. The jury is able to decide on matters according to their conscience.

Table 10.1 Advantages and disadvantages of giving a reason for the decision

ADVANTAGES	DISADVANTAGES
• Jurors would be more likely to follow the law if they had to give a reason for their decision. • The parties would know whether the law was followed. • The accused could feel more confident in the result and would know whether the reasons were reasonable. • Juries may be less likely to discriminate against the accused on inappropriate grounds.	• Juries would have to make decisions that strictly followed the law rather than be free to make decisions in line with community thinking. • It would be difficult to come up with just one reason for the decision among the whole jury, so it could be more likely that the jurors would not reach a decision (a **hung jury**), making a retrial necessary. • It could result in more appeals because the reasons given may seem unreasonable.

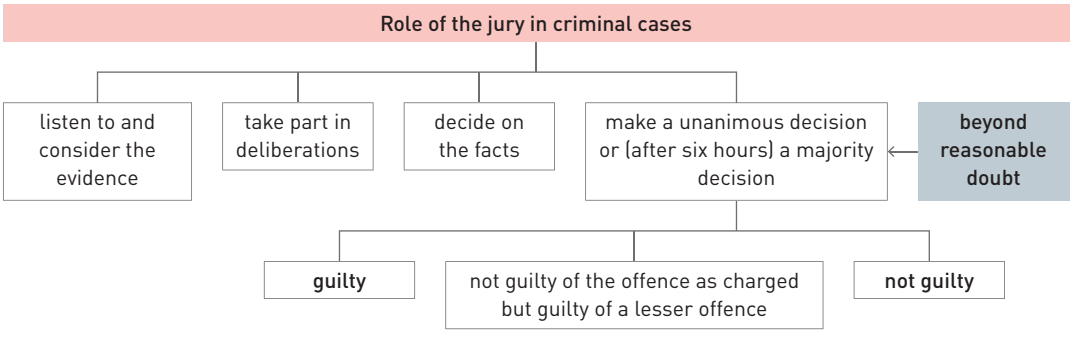
In a criminal trial

In a criminal trial, the jury will endeavour to find the accused either guilty or not guilty of the crime with which he or she has been charged, or guilty of a lesser crime. The decision by the jury must be **beyond reasonable doubt**; that is, the jurors must feel as sure as reasonably possible (seeing as they were not at the scene of the crime at the time the crime was committed). If they cannot be sure of the guilt of the accused, they must reach a decision of not guilty.

Verdicts in criminal trials

The jury must first try to reach a **unanimous verdict** (a verdict where all members of the jury agree), but if this is not possible after six hours, a **majority verdict** (11 out of 12 jurors) can be accepted as the verdict of all the jury except in cases of murder, treason, trafficking or cultivating commercial quantities of drugs or narcotic plants, or Commonwealth offences. If there are only 11 jurors left, a majority verdict would be 10 out of 11, or 9 out of 10 if only 10 jurors are left.

The jury can find an accused not guilty of one offence but **guilty of a lesser offence**; for example, not guilty of murder but guilty of manslaughter or defensive homicide. If the jury finds the accused guilty, the judge will pass sentence. The Victorian Government has stated it will abolish the defensive homicide law.



The judge can **direct the jury to acquit** the accused if the judge believes that the evidence does not support a conviction. The jury is not required to follow this direction, although it usually does.

If a jury is unable to reach either a unanimous or majority verdict, then it cannot reach a decision and is said to be a **hung jury**. A new trial, with a new jury, will usually be conducted after a hung jury verdict.

The use of juries in criminal cases

Juries are used in cases involving indictable offences (not heard in the Magistrates' Court). All criminal trials heard in the County Court and Supreme Court, in their original jurisdiction (that is, for the first time), are heard before a judge and jury of 12, or more for long trials. If, however, the accused is pleading guilty, there is no need to empanel a jury.

A trial comes to an end when a person is found either guilty or not guilty, and the jury is discharged. The post-trial stage involves evidence of the good character of the accused (this may help to reduce the sentence), pre-sentence reports from experts and the handing down of the sentence by the judge. Juries are not involved in the post-trial or sentencing stages.

In most criminal cases, no jury is required. In almost 70 per cent of suspects who are charged with criminal offences decide to plead guilty and therefore a jury is not required. About 80 per cent of criminal cases that go to court are dealt with summarily in the Magistrates' Court, where there is no jury.

Only about two per cent of all people charged with criminal offences actually end up facing trial by jury. Of those who plead not guilty, it is likely that some are guilty and some are not guilty. It could therefore be argued that an acquittal rate of about 50 per cent of those offenders who face trial by jury is a reasonable and acceptable outcome.



Figure 10.1 A criminal jury of 12 undertaking deliberations

CASE STUDY

Johnson found guilty of murdering Carl Williams

On 29 September 2011, Matthew Charles Johnson, 38, was convicted of murdering Carl Williams in April 2010. A jury rejected Johnson's argument that he had killed Williams in self-defence following an altercation with Williams. According to the information brought out in the trial, Johnson snuck up behind the gangland boss in the prison unit they shared and bashed him to death with a bicycle stem. At the time this occurred, Williams was reading a newspaper in which he featured on the front page. The court heard that Carl Williams was helping police to solve a notorious double murder before he died. This might have cost him his life.

Judge's directions to the jury

The judge has the task of summing up the evidence that has been presented to a jury in a way that helps the jury to understand the various elements of the trial and assists them in their task of finding the accused guilty or not guilty, without showing any preference for the prosecution or the accused. Jurors have found difficulty in understanding complex evidence and legal language. Numerous amendments to criminal offences have resulted in trial judges giving juries an array of increasingly

detailed and often complicated directions, which took longer in Victoria than in any other state in Australia. These problems have led to appeals and retrials.

After a thorough investigation, the Victorian Law Reform Commission (VLRC) recommended that jury directions should be simple and easy to understand, and that legislation should be passed creating guiding principles to judges in criminal trials. Following these recommendations, the *Jury Directions Act 2013* (Vic.):

- provides new processes for identifying the directions a trial judge must give to a jury
- clarifies the obligation of the trial judge to identify evidence and encourages a targeted and succinct summing-up
- improves the way directions are given to the jury, by supporting the use of integrated jury directions
- allows trial judges to answer questions from juries about the meaning of 'proof beyond reasonable doubt' and provides guidance to the trial judge on the content of such a direction
- provides for simple and clear directions on post-offence conduct evidence. (Post-offence conduct refers to acts or omissions by the accused after the offence occurred – circumstantial evidence that implies the guilt of the accused. It only refers to behaviours and acts relevant to the crime, such as telling lies about the offence.)

The Act also enables the defence to request jury directions, and allows trial judges to shorten jury directions and change the way they are given.

The *Jury Directions Amendment Bill 2014* (Vic.) was introduced to the Victorian Parliament in March 2014 but not passed. It proposed further changes to simplify jury directions, such as giving clear directions on 'proved beyond reasonable doubt', misconduct evidence, unreliable evidence, and delay and forensic disadvantage. In June 2014, the Victorian Government suggested changes to further simplify jury directions in family violence cases.

In a civil trial

In a civil trial, the jury must make a decision on the **balance of probabilities**; that is, which party is most probably in the right and which party is most probably in the wrong.

Verdict in civil trials

In a civil trial, the jury will find for either the plaintiff or the defendant. If the judge or jury find in favour of the defendant, it means that the plaintiff was not able to prove their case on the balance of probabilities. The decision can be a **majority decision** (five out of six) if they are unable to reach a unanimous decision after at least three hours of deliberation.

Damages in civil trials

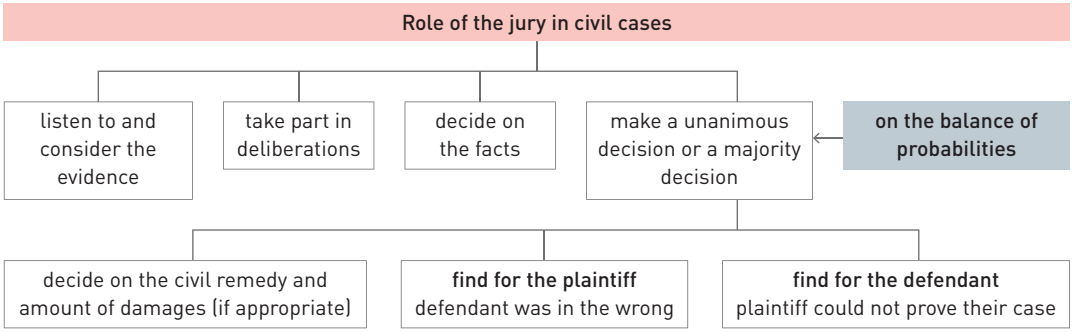
In addition to the general role of the jury, the jury also has to decide on the **amount of damages** to be paid to the plaintiff if the plaintiff is successful and damages are sought.

The use of juries in civil cases

Juries are optional in civil cases. Either party to a civil dispute that is heard in the County Court or Supreme Court can request a jury. However, the party requesting the jury will bear the ultimate cost of a jury trial. The court has the discretion to refuse to allow a trial by jury in complex cases.

Most civil cases are heard in the Magistrates' Court where there is no jury or the cases are settled out of court and therefore do not reach a trial. Only about five per cent of civil cases go to trial in the County Court or Supreme Court. Of those, fewer than half choose to have their case tried before a jury.

Some states have abolished the right to trial by jury in civil cases. While that right is retained in Victoria, fewer people are choosing to use a jury in a civil case because of the likelihood of greater expense, a lengthier trial and inconsistency in the amounts awarded for compensation.



LEARNING ACTIVITY 10.1

The role of juries

1 How many jurors are empanelled for a criminal trial and how many for a civil trial?

2 Read the case study 'Hung jury in murder trial' and answer the questions.

- a What occurred in this case?
- b The jury and the judge in a trial have distinct tasks during the course of a trial. Describe the role of the jury in criminal trials.
- c What is the role of the judge in criminal trials? How does the judge assist the jury in its task?
- d A friend asks you: 'Isn't a hung jury the same as finding the accused not guilty?' Explain the meaning of a hung jury.
- e What was the outcome of this trial? What is likely to happen in the future?
- f Do you think having a hung jury helps in the achievement of justice in this case? Explain.

CASE STUDY

Hung jury in murder trial

A Supreme Court jury in a murder trial twice informed the judge that they could not reach a unanimous decision.

Bradley Thomas Danual Auckram, 52, was accused of murdering his stepson Jason Burton, 41, in the family home. Mr Auckram pleaded not guilty to murder. He claimed he had shot Burton in self-defence. Burton was shot four times with a .33 calibre rifle. In only a matter of seconds he was shot once in the arm, knocking him to the floor, then twice in the back and once in the head.

The trial lasted for three days. After counsel gave their closing addresses, the judge gave directions to the jury. The judge asked the jury to find the accused guilty of manslaughter if they could not reach a verdict of guilty of murder.

After more than five hours of deliberations, the jury could not agree on a verdict. The jury asked the judge five questions and informed him that they were having difficulty in reaching an agreement. They then returned to the jury room for more deliberations.

When the jury once again informed the judge they could not reach a unanimous decision, the judge dismissed the jury. Another trial will be set at a later date.

3 What is the main difference between the role of a jury in a criminal trial and the role of a jury in a civil trial?
4 What difficulties do you think could be caused for jurors having to sit on a jury in a long trial?
5 What is the difference between the role of the judge in a criminal trial and the role of the judge in a civil trial?
6 'Only a minority of cases in the justice system are decided by juries.' Discuss.
7 'Juries should give a reason for their decision.' Discuss this statement commenting on the advantages and disadvantages of giving a reason for a decision.
8 Look back at the case study 'Charges dropped against juror for illegal research' and answer the questions.
   a Why was the juror charged?
   b What caused the mistrial in a Victorian case?
   c Do you think jurors should be allowed to do their own research? Give reasons.
   d How may the changes in the law in relation to judges' directions to juries help to resolve the problem of mistrials?
9 Look back at the case study 'Johnson found guilty of murdering Carl Williams'. If you were on the jury of this case, how would you decide? Give your reasons.
10 Briefly explain the changes in the law in relation to judges' directions to juries in criminal cases.
11 Do you think juries should be able to make suggestions for the sentence in criminal cases? Justify your view.
12 Read the case study 'Mercedes Corby wins case' and answer the questions.
   a What type of civil action is referred to in the Corby case?
   b How many jurors would be empanelled for a civil case like this in Victoria?
   c In a civil case, must the verdict reached be a unanimous decision or a majority verdict? Explain.
   d Do you think that majority verdicts are suitable for civil trials? Explain.
   e Do you think that the jury may have been influenced by their knowledge of the Corby family? Discuss.

CASE STUDY



Mercedes Corby wins case

Mercedes Corby, sister of convicted Bali drug smuggler Schapelle Corby, has won a civil action against the Seven Network and a former friend, Jodie Power. Corby sued the defendants claiming that she and her family were defamed in interviews with Jodie Power by *Today Tonight*, where Power stated that Corby was a drug smuggler, user and dealer.

Figure 10.2 Mercedes Corby and her legal counsel, after winning her defamation case against Channel Seven

After a four-week trial in the NSW Supreme Court, the jury found that three *Today Tonight* programs and one news broadcast made defamatory comments.

The Seven Network entered into a confidential settlement with Mercedes Corby's lawyers, reportedly worth up to $1 million.

13 Read the case study *Smith v. Western Australia* [2014] and answer the questions.

- **a** What were the grounds for the appeal in this case?
- **b** Explain the exclusionary rule and its purpose.
- **c** What did the High Court decide in this case?

CASE STUDY

Smith v. Western Australia [2014] HCA 3 (12 February 2014)

In the case of *Smith v. Western Australia*, a note was found in the jury room after the case had been decided by the jury. The note implied that one juror had been physically threatened to agree with the majority so a decision could be reached. The accused was found guilty of two counts of indecently dealing with a child under the age of 13 years. The foreman was asked, in accordance with usual practice, if the verdict was the verdict of all the jury, to which he replied in the affirmative.

Smith appealed the conviction on the grounds that the 'trial had miscarried due to a juror being physically coerced into changing his verdict to one of guilty'. The Court of Appeal dismissed Smith's appeal against the verdict as being a miscarriage of justice due to the operation of the common law rule known as the 'exclusionary rule' which prevents evidence of jury deliberations being given in a court. Smith appealed to the High Court. The High Court noted that the exclusionary rule was aimed at preserving the secrecy of jury deliberations and the integrity and finality of the formal verdict, but did not extend to evidence of unlawful physical coercion. A jury must be able to deliberate freely. In this case, there was evidence that was capable of creating a reasonable suspicion that a juror's verdict had been unduly influenced. The High Court found that Smith's appeal should be reheard by the Court of Appeal in accordance with the findings of the High Court.

14 Read the case study 'Jury directed to acquit' and answer the questions.

- **a** Why did the judge order the jury to acquit Leung in the first two trials?
- **b** Does the jury have to follow the directions of the judge?
- **c** What is unusual about this case?
- **d** What was the final outcome in this case? Do you agree with the verdict? Give your reasons.

CASE STUDY

Jury directed to acquit

In 2007, Philip Leung was found rocking from side to side at the foot of his stairs, cradling his blood-stained partner, Mario Guzzetti. A short time later, Mr Guzzetti died, having suffered head injuries.

At his original trial in 2009, Mr Leung was acquitted of murder after a judge directed the jury to find him not guilty.

The Crown, however, used New South Wales' changes to double jeopardy laws to have the verdict quashed. In April 2011, Mr Leung faced court on a manslaughter charge, but became the first person in Australian legal history to be acquitted twice by a judge's directed verdict.

In March 2012, the NSW Court of Criminal Appeal upheld a second appeal by the Crown and ordered that Mr Leung be tried again for manslaughter.

According to reports, on the night of Mr Guzzetti's death, a neighbour heard Mr Leung and his partner, Mr Guzzetti, having a fight. The Crown stated that Mr Guzzetti's injuries could have been caused by a blunt instrument and a fall. The court was also advised that the bruising around the neck could have been caused by a fall and an amateurish effort to resuscitate him.

Consequently, Justice Stephen Rothman, in the original trial, directed the jury to deliver a not-guilty verdict, ruling the Crown had failed to properly establish how Mr Guzzetti had died. Subsequently, Justice Michael Adams reached the same conclusion, directing a second jury to find Mr Leung not guilty.

Mr Leung was released on bail awaiting the third trial. In November 2012, he was found guilty of manslaughter. In March 2013, he was sentenced to eight years in prison with a non-parole period of four and a half years. With time already served, his earliest release date is 25 January 2017.

DOUBLE JEOPARDY IN VICTORIA

The *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic.) provides exceptions to the rule against double jeopardy that would permit a person to be tried or retried in certain circumstances despite an acquittal.

The Director of Public Prosecutions may apply (only once) to the Court of Appeal to get permission to reinvestigate the case if there is fresh and compelling evidence. To be compelling, the evidence must be reliable, substantial and highly probative (able to be tested).

COMPOSITION OF JURIES

There are a number of factors that influence the composition of juries. These occur during the jury selection and empanelment stage, and include the random selection of potential jurors, categories of people who are ineligible or disqualified from serving on juries, jurors seeking to be excused from cases, and jurors being challenged by the parties in a case.

Selection of jurors

People are randomly selected for jury duty from the electoral rolls. If a person is a registered voter, he or she may be called for jury duty. The Juries Commissioner notifies the Electoral Commissioner of the number of people estimated to be required for jury service for any particular jury district. In Victoria, jury districts are the same as the electoral districts or subdivisions for the Victorian Legislative Assembly. The Electoral Commissioner **randomly selects** the required number of people from the electoral rolls. The list of prospective jurors is sent to the Juries Commissioner.

Questionnaire

The Juries Commissioner sends a **questionnaire** to each person on the list. The questionnaire is designed to ascertain whether the person is qualified to serve on a jury or if there is any reason why they cannot serve.

It is an offence not to answer the questionnaire and return it to the sheriff within seven days. The fine is 30 penalty units. It is also an offence to give any false information.

After checking each questionnaire, the Juries Commissioner will decide whether the person is liable for jury service.

Liability for jury service

The *Juries Act 2000* (Vic.) lays down the requirements for the composition and empanelling of juries. Every person aged 18 and above who is enrolled as an elector for the Legislative Assembly and Legislative Council is qualified and liable to serve as a juror, except for:

- any person referred to in schedule 1 as being **disqualified** from serving as a juror
- any person referred to in schedule 2 as being **ineligible** to serve as a juror
- any person that the Juries Commissioner has **excused for good reason** from serving as a juror.

If eligible, prospective jurors will be sent a **jury summons**, which requires them to attend court for jury service at a later date. All people who attend jury service, whether they are selected to sit on a jury or not, are paid for their days in attendance. An employer is required to pay a juror his or her normal wage less the amount the person receives for jury service.

EXTRACT

Juries Act 2000 (Vic.)

SCHEDULE 1

PERSONS **DISQUALIFIED** FROM SERVING AS JURORS

1. A person who has been convicted, in Victoria or another jurisdiction, of treason or one or more indictable offences and sentenced to –
   (a) imprisonment for a term or terms in the aggregate of 3 years or more; or
   (b) a period of detention, for 3 years or more, under a hospital security order made under section 93A of the *Sentencing Act 1991* or an equivalent order in another jurisdiction –

   but any conviction of an offence in respect of which a free pardon has been granted must be disregarded.
2. A person who within the last 10 years has been, in Victoria or another jurisdiction –
   (a) sentenced to imprisonment for a term or terms in the aggregate of 3 months or more (excluding a suspended sentence of imprisonment); or
   (b) ordered to be detained, for a period of 3 months or more, under a hospital security order made under section 93A of the *Sentencing Act 1991* or an equivalent order in another jurisdiction –

   but any conviction of an offence in respect of which a free pardon has been granted must be disregarded.
3. A person who within the last 5 years, in Victoria or another jurisdiction –
   (a) has been sentenced to imprisonment for a term or terms in the aggregate of less than 3 months; or
   (b) has been ordered to be detained, for a period of less than 3 months under a hospital security order made under section 93A of the *Sentencing Act 1991* or an equivalent order in another jurisdiction; or
   (c) has served a sentence of imprisonment by way of intensive correction in the community within the meaning of the *Sentencing Act 1991* as in force before the commencement of

section 15 of the *Sentencing Amendment (Community Correction Reform) Act 2011*, or an equivalent sentence in another jurisdiction; or

(d) has been sentenced to a suspended sentence of imprisonment; or

(e) has served a sentence of detention in a youth training centre or youth residential centre or an equivalent sentence in another jurisdiction –

but any conviction of an offence in respect of which a free pardon has been granted must be disregarded.

4. A person in respect of whom a court in Victoria (including the Magistrates' Court) or another jurisdiction, has, within the last 5 years, made an old community-based order (within the meaning of clause 1 of Schedule 3 to the *Sentencing Act 1991*), or an equivalent order in another jurisdiction, but any conviction, or finding of guilt, of an offence in respect of which a free pardon has been granted must be disregarded.

4A. A person in respect of whom a court in Victoria (including the Magistrates' Court), has, within the last 5 years, made a community correction order under Part 3A of the *Sentencing Act 1991*, or an equivalent of a community-based sentence in another jurisdiction, but any conviction, or finding of guilt, of an offence in respect of which a free pardon has been granted must be disregarded.

5. A person who within the last 2 years –

(a) has been sentenced by a court, in Victoria (including the Magistrates' Court) or another jurisdiction, for an offence; or

(b) has been released on the giving of an undertaking under section 72 or 75 of the *Sentencing Act 1991*, or an equivalent undertaking in another jurisdiction.

6. A person who has been charged with an indictable offence and is released on bail in respect of that offence.

7. A person who is remanded in custody in respect of an alleged offence.

8. A person who has been declared bankrupt and has not obtained a discharge.

SCHEDULE 2

PERSONS **INELIGIBLE** TO SERVE AS JURORS

1. A person who is or, within the last 10 years, has been –

(a) the Governor or the Official Secretary to the Governor

(b) a judge, a magistrate or the holder of any other judicial office

(c) a member of the Police Appeals Board

(d) a bail justice

(e) an Australian lawyer (within the meaning of the *Legal Profession Act 2004*)

(f) a person employed or engaged (whether on a paid or voluntary basis) in the public sector within the meaning of the *Public Administration Act 2004* in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration

(g) a member of the police force

(h) the Secretary to the Department of Justice, the Secretary to the Department of Human Services or the Secretary to the Department of Health

(i) a member of the Legislative Assembly or Legislative Council

(j) the Auditor-General

(ja) the Commissioner of the IBAC within the meaning of the *Independent Broad-based Anti-corruption Commission Act 2011*

(jb) any other IBAC Officer within the meaning of the *Independent Broad-based Anti-corruption Commission Act 2011*

(k) the Ombudsman or the Acting Ombudsman
(l) an employee of the Ombudsman
(la) the Director, Police Integrity or Acting Director, Police Integrity
(lb) an employee in the Office of Police Integrity
(lc) the Special Investigations Monitor or acting Special Investigations Monitor
(ld) an employee in the office of the Special Investigations Monitor
...
(m) a person employed as a Government shorthand writer or court reporter or in connection with any court recording service.

2. A person who is –
(a) the Electoral Commissioner
(b) the Legal Ombudsman or an acting Legal Ombudsman
(c) employed by a person admitted to legal practice in Victoria in connection with legal practice.

3. A person who –
(a) has a physical disability that renders the person incapable of performing the duties of jury service
(b) is a patient within the meaning of the *Mental Health Act 1986*
(c) has an intellectual disability within the meaning of the *Intellectually Disabled Persons' Services Act 2006*
(d) is a represented person within the meaning of the *Guardianship and Administration Act 1986*
(e) is subject to a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*
(f) is unable to communicate in or understand the English language adequately.

Source: Victorian Parliament, *Juries Act 2000*

Disqualified

Some people are disqualified from jury service because of **something they did in the past** that makes them unsuitable. For example, people who have been convicted of an indictable offence and sentenced to a term of imprisonment of more than three years or who are bankrupt are disqualified because they may be seen as unreliable or may be biased towards the accused. Schedule 1 of the *Juries Act 2000* (Vic.) shows people who are disqualified from serving as jurors.

Ineligible

Someone may be ineligible because of their **occupation or their inability to comprehend the task of a juror**. For example, people who are employed in law enforcement or the provision of legal services in criminal cases are ineligible for jury service because their opinion might carry too much weight. Each member of the jury should make a decision on the facts as they see them. If a person who is involved in the legal profession believes, for example, that the accused is guilty, other jury members might think that the person must be right because of their training.

People who are **unable to comprehend the task or carry out the duties** of being on a jury are also ineligible because they would not be able to make an appropriate decision on the facts before them. This includes people who cannot read or understand English, or a person who has a physical disability that renders him or her incapable of performing the duty of being a juror, for example being deaf or intellectually disabled. Schedule 2 of the *Juries Act 2000* (Vic.) lists people who are ineligible to serve as jurors.

Excused

A person may apply to the Juries Commissioner to be excused from jury service for the whole or any part of the jury service period. The Juries Commissioner will excuse the person if satisfied that there is a good reason for doing so. Good reasons include:

- illness or poor health
- incapacity
- the distance to travel to the place at which the person would be required to attend for jury service is:
  - if the place is in Melbourne, over 50 kilometres or
  - if the place is outside Melbourne, over 60 kilometres
- travel to the place at which the person would be required to attend for jury service would take excessive time or cause excessive inconvenience
- substantial hardship to the person would result from the person attending for jury service
- substantial financial hardship to the prospective juror would result from the person attending for jury service
- substantial inconvenience to the public would result from the person attending for jury service
- the person has the care of dependants and alternative care during the person's attendance for jury service is not reasonably available for those dependants
- the advanced age of the person
- the person is a practising member of a religious society or order which has beliefs or principles that are incompatible with jury service
- any other matter of special urgency or importance.

A person wishing to be excused must either give evidence on oath or provide a statutory declaration. The Juries Commissioner may permanently excuse a person for good reason, including continuing poor health, disability or advanced age.

A person may also apply to the Juries Commissioner for a deferral of jury service to another period within the next 12 months.

A person may also be excused from future jury service if they have been a member of a jury in a difficult and lengthy trial.

CASE STUDY

Jurors excused for 10 years after difficult trial

In the trial of five high-security inmates of Barwon Prison, who were accused of bashing double murderer Gregory John Brazel, Judge Fagan told the jury he would ask the relevant authorities to take reasonable steps to ensure their safety.

The jury had to endure violent verbal attacks from the accused, and at one stage, one of the accused threw a bag of excrement at the jury. The juror it hit was excused from the trial. After the trial, Judge Fagan thanked the jurors and expressed the community's gratitude to them because of the length of the unusual trial and its nature. He excused them from jury duty for 10 years.

A summons for jury duty

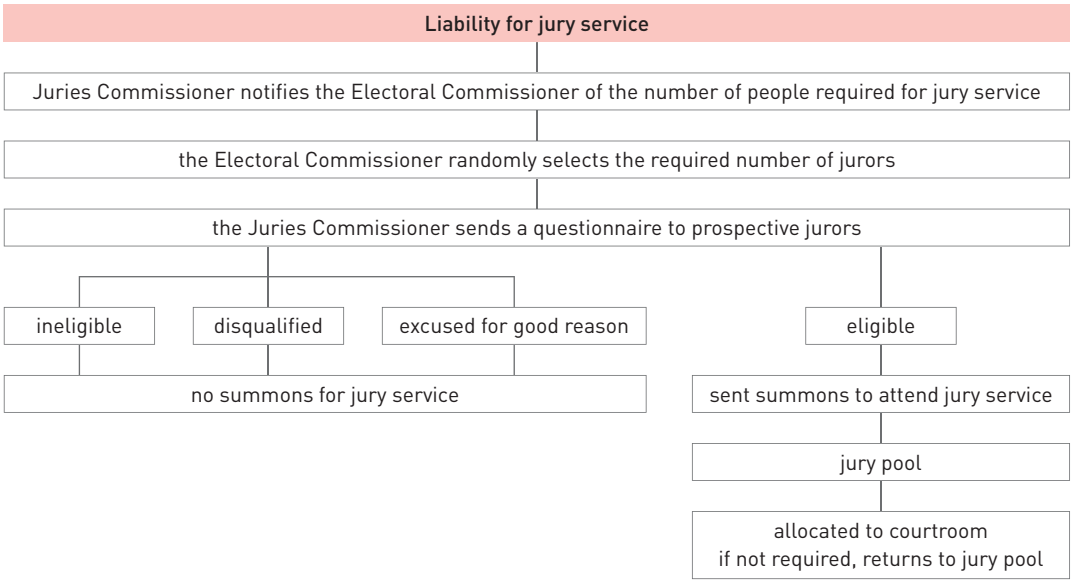
The Juries Commissioner will summon the people who are liable for jury service when the court needs them. The summons should be received at least 10 days before the prospective juror is expected to appear in court.

If a person is deemed to be liable for jury service, it is an **offence** not to attend when called; this is punishable by a fine of 30 penalty units or imprisonment for three months.

Jury pool

The Juries Commissioner will have a pool of jurors for the Supreme Court or County Court from which jurors can be drawn at any time.

Jurors who have received a summons to attend jury duty, and have been selected, must present themselves at the court building. They will become part of the jury pool for one or two days. In the jury pool room, the pool supervisors will determine each prospective juror's identity and inquire as to their availability for particular lengths of trials.



>>GOING FURTHER

Payment for jury service

An employer must release a person who has been selected for jury service. The rate of pay for jury service is $40 per day for the first six days. For each day of attendance in excess of six days the rate of pay is $80 per day.

A juror's employer is required to pay the difference between the amount received in jury fees and the amount the juror would have received from an ordinary day's work. However, this does not help the growing number of self-employed people.

LEARNING ACTIVITY 10.2

Composition of juries

1. What is the purpose of the questionnaire sent to potential jurors?
2. Who is eligible to be sent a questionnaire?
3. Explain why a person may be disqualified from jury service and why someone may be ineligible for jury service.

4 Why might some members of the community be able to be excused from jury duty? Identify three good reasons for being excused from jury service.
5 Look back at the case study 'Jurors excused for 10 years after difficult trial' and explain why the jurors were excused for 10 years following this case.
6 State which exemption category each of the following could fall into:
   a someone who has an intellectual disability
   b a person who lives over 60 kilometres from the court
   c an undischarged bankrupt
   d the Ombudsman
   e a member of the police force
   f a person who, within the last five years, has served a sentence in a youth justice centre
   g a bail justice
   h someone who has been in prison for more than three years
   i a lawyer
   j a person employed in the administration of justice.
7 What is the purpose of the jury pool?
8 Do you think the selection process for jury duty provides a good cross-section of the community? Discuss.
9 Read 'Proposal to broaden the jury pool' and answer the questions.
   a Suggest an argument for implementing this proposal.
   b Suggest an argument against implementing this proposal.

PROPOSAL TO BROADEN THE JURY POOL

The previous Labor Government in Victoria released a discussion paper in late 2009, Jury Service Eligibility, asking whether it was still relevant for members of parliament, judicial officers, lawyers and police officers to be ineligible for jury service.

The discussion paper also considered whether the current period of exemption that prevents these people from serving on juries for 10 years after their retirement should be reduced.

The then attorney-general, Rob Hulls, said, 'Jury service is an important civic duty that ensures community participation in the justice system. While juries are selected randomly, they should also be able to be drawn from the widest pool of prospective jurors as possible with the aim of representing a cross-section of the community.'

The *Juries Amendment Reform Bill 2010*, introduced by the previous Labor Government in Victoria aimed to increase the community representation on juries by reducing the categories of occupation which render a person ineligible for jury service, and making the period after ceasing some occupations, such as lawyers, shorter before becoming eligible. This Bill lapsed after the 2010 Victorian election when there was a change of government.

EMPANELLING THE JURY

When a case requires a jury, a jury pool supervisor will randomly choose a number of prospective jurors to go to a particular courtroom to form a **jury panel** and undergo the empanelling process. If jurors are empanelled as jurors for a trial, the number of days they will be needed will depend on the length of the trial.

Not all prospective jurors will be selected for a jury. Some prospective jurors may be **challenged**. If a juror is not selected, he or she returns to the jury pool until another trial requires a jury and the process is then repeated.

Each juror selected to sit on a jury is given a *Juror's Handbook*. This gives the jurors information about what is expected of them as members of a jury, such as listening to the evidence and being impartial, and how to assess the evidence in a case. Jurors are also told what they must not do, such as performing their own investigation or visiting the scene of the alleged crime.

The panel of jurors selected for a trial is informed about the case to be tried. They are told:

- the type of action or charge
- the name of the accused in a criminal trial or the names of the parties in a civil trial
- the names of the principal witnesses expected to be called in the trial
- the estimated length of the trial
- any other information that the court thinks relevant.

The court may excuse a person from being in the jury for a particular case, if the court is satisfied that the person will be unable to consider the case impartially (for example, they may know one of the parties or witnesses), or is unable to serve for any other reason, such as the likely length of the case.

Challenges

The parties to a case have some say in the composition of the jury in that they may challenge some of the jurors if they feel these people would be unsuitable for their case.

The jurors are called one by one. Each juror's name or number is called out. The juror's occupation can be given in some circumstances, such as if there are two jurors with the same name. A juror will be called by number only if the court considers that the names on a panel should not be read out in open court.

If one of the parties decides to challenge one of the jurors, the challenge must be made before the juror sits down in the jury box. If a person is not challenged, the juror sits in the jury box ready for the trial.

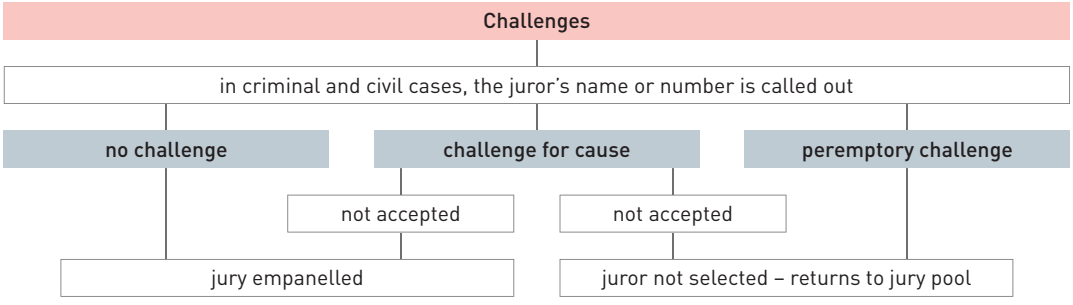
If a person is not selected for a trial they will be dismissed after their second day in the jury pool.

Challenges for cause

A juror may be challenged for a reason (known as a challenge for cause), such as knowing the accused. There are unlimited challenges for cause.

Peremptory challenges

A juror may be challenged without a reason (known as a peremptory challenge). Challenges without a reason are usually based on an assumption that the juror might not be favourably disposed to the challenger. This assumption might be based on appearance, age or occupation, if given.



Jury in a criminal case

A criminal trial in the County Court or Supreme Court must have a **jury of 12** when heard for the first time (although this can increase to 15). A court may order the empanelling of up to **three additional jurors** in a criminal case that is expected to last for a long time. If at the end of the trial more than 12 jurors remain on the jury, a ballot will be held to reduce the number of jurors to 12. The jurors whose cards are drawn in the ballot are excused. If the foreperson's card is drawn out, it is put aside and another card drawn in its place.

Theoretically, a jury can be used in the High Court in a criminal case. This is rare as only a very limited number of criminal cases are heard for the first time in the High Court. These include treason and sedition.

Selecting a jury for a criminal trial

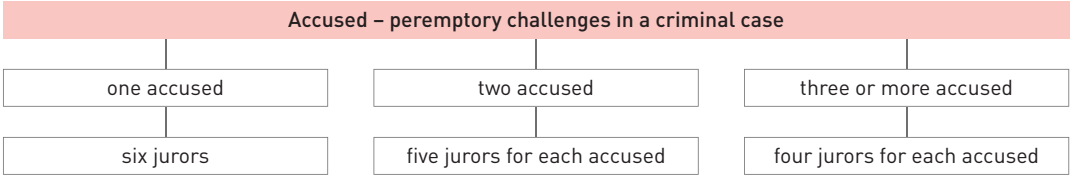
The name or number of each prospective juror is called out. The accused (or their legal counsel) may **challenge** a juror or the prosecution may request that a juror **stand aside**. Jurors who have been asked to stand aside must wait until the end of the challenging process. If there are no more jurors left in the jury pool, the jurors who have been asked to stand aside can be called on again to take their place in the jury.

Once 12 jurors have been selected, they take an oath to exercise their duties in a proper manner and they elect a **foreperson** (spokesperson for the jury). The jurors are expected to attend the jury for the duration of the trial.

The empanelling of more than 12 jurors (up to 15) is designed to avoid having a jury reduced to less than 12 because of such things as illness, although a jury can continue with only 10 members. If a person is unable to continue on the jury because of death or illness the court has the power, if it thinks fit, to direct that the trial continue with a jury of not less than 10 (from an original jury of 12 or more).

Peremptory challenges for the accused

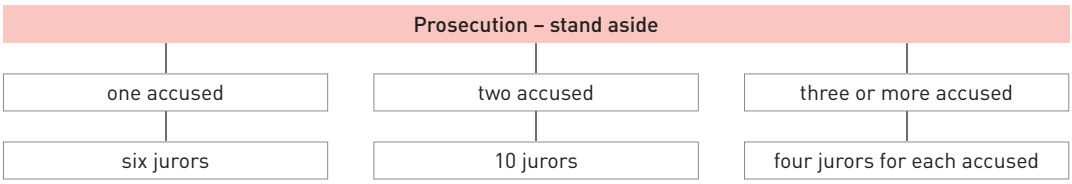
Each person who is accused of a crime and is being tried is allowed **six peremptory challenges**. However, this changes according to the number of accused in one trial.



Prosecution stand aside jurors

The prosecution is allowed to **stand aside six jurors** if there is one accused. Again, this changes if there is more than one accused.

The requirement to stand aside must be made as the potential juror comes to take his or her seat and before he or she sits down.



Challenges for cause in a criminal trial

The accused and the prosecution have the right to **unlimited challenges for cause**, on the approval of the judge.

EXTRACT

Challenging the peremptory challenge system in Australia

... the peremptory challenge process is a prominent, visible and costly phase in the empanelment of a jury. A recent high-profile terrorist trial in Victoria illustrates the burden of this process to the community and the courts. In *R v. Benbrika (2009) 222 FLR 433*, the 12 defendants each had four potential peremptory challenges to exercise [48 potential peremptory challenges]. The Crown had the right to 'stand aside' an equal number of prospective jurors. To accommodate 96 potential peremptory challenges, on the day of empanelment the Juries Commissioner had to present an additional 96 citizens qualified and able to serve a lengthy term of jury duty. To empanel one jury, 2000 citizens were summoned, of whom just over half (1075) attended court. The accused exercised 44 out of a possible 48 challenges; only one out of a possible 48 'stand aside' challenges was made by the Crown. A substantial number of eligible citizens who set aside time for jury service were peremptorily dismissed.

Source: J Horan & J Goodman-Delahunty, 2010, 'Challenging the peremptory challenge system in Australia', *Criminal Law Journal*, 34.

Jury in a civil case

A jury in a civil trial is **optional**. Either party may choose to have a jury. The party who wishes to have a jury usually pays for it.

If a jury is to be used in a civil trial in the Supreme Court or the County Court, it must consist of **six members**. Up to **two extra jurors** may be empanelled if the trial is likely to be a lengthy one. At the end of the trial, if eight jurors still remain, the court will decide by ballot which two jurors should be excused from the deliberation. The jury foreperson must remain on the jury, and so is excluded from this ballot. If a juror is unable to continue on the jury because of death or illness, the court has the power, if it thinks fit, to direct that the trial continues with a jury of five.

The party requiring a civil case to be tried by jury (usually the plaintiff) should pay the fee for the jury. In the County Court this amounts to about $700 for the first day of trial, about $500 per day for days two to six, and about $1000 for the seventh and each subsequent day.

Selecting a jury in a civil trial

The names or numbers of the prospective jurors are put on a list. Six jurors are chosen for the jury (eight if it is anticipated that it will be a long trial).

The plaintiff and the defendant or their representatives have the opportunity to cross off those names that they wish to challenge. They can make peremptory challenges or challenges for cause. Those names that remain on the list form the jury.

Peremptory challenges

The plaintiff and the defendant are entitled to three peremptory challenges each. A peremptory challenge in a civil trial is made by striking the name or number of the potential juror from the list of persons selected.

Challenges for cause

There can be an unlimited number of challenges for cause. The judge makes the decision on whether to allow any challenges for cause.

Summary of factors that affect the composition of a jury

- jurors selected at random
- jurors have to be over 18 and listed on the electoral roll
- jurors can be disqualified
- jurors can be ineligible
- jurors can be excused
- jurors can be challenged – with or without cause



Figure 10.3 When the jurors have been selected, they will swear an oath or make an affirmation.

ROLE OF THE FOREPERSON

Once a jury is empanelled, the jurors elect a foreperson to act as their spokesperson. The foreperson will chair the deliberations and ensure that each juror has an opportunity to have their say. They will ask the judge questions and deliver the verdict. During the jury's deliberations, the foreperson is responsible for the conduct of the deliberations, although his or her vote does not carry any extra weight, and he or she should not try to influence the other jurors in any way.

JURY DOCUMENTS

At any time during the trial, the judge may order that the jury be given documents to help them understand the issues or the evidence. These documents include:

- the indictment
- the summary of the prosecution opening
- the response of the accused

- any documents admitted as evidence
- any statement of facts
- opening and closing addresses of the prosecution and the accused
- any address of the trial judge to the jury
- any schedules, charts, diagrams or other explanatory material
- transcripts of evidence
- the trial judge's directions to the jury
- any other document that the trial judge considers appropriate.

At the end of the trial

At the end of the trial, the jury members are given a certificate of attendance to present to employers, and those who have served on long trials may also receive an exemption certificate from further jury service.

Disclosure of information

In Victoria, it is illegal for jury members to talk about how the jury came to its decision.

A person must not publish the names of any of the members of a jury. Members of the jury are prohibited from publishing any statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of the jury. The penalty is 600 penalty units or imprisonment for five years. This penalty also applies to a person who solicits or obtains the identity of a person who has been a member of a jury.

After a case has been completed, general information can be disclosed about the deliberations of the jury as long as the identities of the jurors or the relevant legal proceedings are not disclosed.

The non-disclosure of information was thought to be necessary following the Lindy Chamberlain trial in 1982 for the murder of her baby, Azaria, who the accused alleged had been taken by a dingo. Some of the jurors reported in the media that they did not understand the forensic evidence in the trial. This type of disclosure has a tendency to undermine the jury system.

LEARNING ACTIVITY 10.3

Empanelling the jury

1 How many challenges is the accused allowed in a criminal trial?
2 What is the difference between peremptory challenges and challenges for cause?
3 How many prospective jurors is the prosecution able to stand aside if there is one accused?
4 Why are jury members not able to disclose information about the deliberations of a particular case?
5 Read the following case study '$400 000 in damages for former residential care worker' and answer the questions.
   a What occurred in this case?
   b What could have occurred in this case as each prospective jury member walked into the court?
   c How many challenges would each side have had in this case?
   d Think of a scenario where a person could be challenged for cause in this case. Explain.

CASE STUDY

$400 000 in damages for former residential care worker

In June 2010, a former residential care worker was awarded more than $400 000 in compensation after a jury found that his employer was negligent and did not satisfy its contractual obligations to provide him with a safe working environment and adequate support.

The employee was required to work in a highly stressful environment, in which he was subjected to numerous assaults, both physical and verbal.

6 Discuss the advantages and disadvantages of the peremptory challenge system.

7 Read the case study 'Darcey jury had difficulty reaching a verdict' and answer the questions.

- a Under what circumstances are juries of 15 people likely to be empanelled?
- b What was the composition of the jury at the time of deliberations?
- c Suggest reasons why the jury was down to 10 members by the time of deliberations. Discuss the advantages and disadvantages of increasing the number of jurors in long criminal trials.
- d What would have been the procedure had there been more than 12 jurors remaining at the beginning of jury deliberations?
- e What did the judge ask the jury to do when they thought they could not reach a decision? How long did the jury deliberate before they reached a decision?
- f How many peremptory challenges would the defence have had in this case? How does this compare to the prosecution's right to stand aside jurors?
- g Why was this case being heard in the Victorian Supreme Court?
- h What defence did Freeman use in this case?
- i Do you think Freeman was given an appropriate sentence for the crime committed? Discuss.

CASE STUDY

Darcey jury had difficulty reaching a verdict

The foreperson for the jury of five men and five women in the murder trial of Arthur Phillip Freeman, who threw his four-year-old daughter off Melbourne's West Gate Bridge, said they will 'never be able to reach a unanimous verdict, no matter how much further time the jury spends on deliberations'.

Justice Coghlan said he understood that it was a stressful task but urged them to continue discussions. 'This is a difficult case with hard issues and I thank you for the work you've done.'

The judge said the jury had been a remarkably thorough and conscientious group, which had been deliberating for long hours for several days – including all weekend.

He said he could discharge the jury if he was satisfied further discussions would not help them reach a unanimous decision. But he was not yet satisfied that was the case.

Experience showed jurors could agree if given more time for calm and rational discussion, he said.

The jurors in the Victorian Supreme Court had to determine whether Freeman, 37, of Hawthorn, was 'mad' or 'bad' when he threw his daughter Darcey 58 metres to her death on 29 January 2009. While Freeman did not deny he threw his daughter off the bridge, he had pleaded not guilty on the grounds of mental impairment.

Graham Burrows, a psychiatrist called by the defence, said Freeman was in a dissociative state and suffering from possible psychosis when he killed Darcey. Two psychiatrists called by

the prosecution found he was not mentally impaired at the time. Freeman had his custody of his children reduced the day before he killed Darcey. As he drove towards the West Gate Bridge, Freeman spoke to his former partner Peta Barnes on the phone. He told her to 'say goodbye to your children'.

After five days of difficult deliberations, the jury returned a guilty verdict. Justice Paul Coghlan sentenced Freeman to life in jail with a non-parole period of 32 years.

Justice Coghlan said Freeman had not shown remorse or even begun to understand the enormity of his brutal crime. 'Your attitude to these matters remains self-centred. I regard your prospects of rehabilitation as bleak.'

But he said he did not think he was 'beyond redemption' and took into account good behaviour, family support and references.



Figure 10.4 Arthur Phillip Freeman

8 Read the case study 'Jury asked judge to clarify self-defence' and answer the questions.
- a What occurred in this case?
- b Explain the role of the foreperson.
- c Why did the foreperson ask the judge to clarify the issue of self-defence?
- d What rights does the jury have to ask the judge questions?
- e Do you agree with the decision of the jury in this case? Explain. In your explanation, comment on:
  - the answer the judge gave with respect to self-defence
  - whether you think it would have been helpful if the jury had given a reason for the decision in this case
  - whether you think this decision reflects community values.

CASE STUDY

Jury asked judge to clarify self-defence

Helen Curtis was shot dead in a West Footscray street on 19 November 2012. Phillip Bracken pleaded not guilty to her murder in the Supreme Court in February 2014. He claimed Curtis had earlier threatened to kill his father and he acted in self-defence.

The jury had been deliberating for three days when they returned to the courtroom. The foreperson asked Supreme Court Justice Chris Maxwell to clarify the issue of self-defence to assist them in their decision.

Curtis went to the home of Bracken's father, who lived in the street where the fatal shooting took place. She was extremely abusive and threatened to kill Bracken's father. The court heard that Helen Curtis had subjected Bracken to regular beatings and verbal abuse for four years. According to evidence during the trial, Curtis had a bipolar disorder and began drinking every morning.

Dr Roger Chau, a psychiatrist, told the Supreme Court that Ms Curtis, a truck driver, admitted having days where she felt like 'a madwoman'. She started attending Dr Chau following a bad accident in 2009. She told Dr Chau that she had had a few bad outbursts; lashing out, smashing things, being agitated and angry, and her head feeling like a spinning top. He noted she told him: 'Last 12 months getting worse', 'Smashed my kids out of frustration' and 'Partner copped a beating'. One witness told the court, 'She can't help getting angry. She can't control it'.

After her verbal abuse of Bracken's father outside his home, Bracken took the gun that Curtis had in her car (which was parked in the street near his father's home) and he shot her five times, twice while she was standing and three times while she was on the ground.

In explaining the issue of self-defence, Justice Maxwell told the jury, 'A person is not guilty of murder if the killing was done with a lawful justification or excuse; in this case, self-defence. People have a right to defend themselves or others from attacks or threatened attacks. The law says that people may even commit acts which would otherwise be murder if they believe those acts are necessary to defend themselves or another person from being killed or really seriously injured'.

The prosecution argued that Bracken's acts were disproportionate to any threat he or his father faced. The defence said Bracken had to make a decision in a split second, while someone who had been violent with him in the past was coming towards him.

'The law says that where a person is killed in circumstances where family violence is alleged, as it is here, the accused may have the belief that what he did was necessary, even if he is responding to a harm that is not immediate,' Justice Maxwell said.

After considering their verdict for a further one-and-a-half days, the jury of nine women and three men reached the verdict of not guilty.



Figure 10.5 Police attend the scene of the fatal shooting of Helen Curtis in West Footscray.

STRENGTHS OF THE JURY SYSTEM

The strengths or advantages of the jury system should be seen in light of the extent to which **the jury contributes to the effective operation of the legal system**. The jury system has been in existence for many centuries and is generally accepted by the community. However, some people believe that

a jury is unable to deal with the complex issues of some of the trials of today. Others believe that the jury is still an important cornerstone of our legal system. As a general rule, the jury accepts its responsibility with great dedication to what has to be achieved by the trial. The jury system has stood the test of time.

One important aspect of the jury system is that it brings together people from different backgrounds, embodying a variety of different experiences, attitudes and values to reach an impartial verdict. Some of the many advantages of the jury system are discussed next.

- **comprises a cross-section of people** – A trial by jury represents **trial by one's peers**. A jury is made up of average men and women who are not selected as people in a position of authority but are, as far as possible, a cross-section of the community. An accused person can therefore feel confident that they are not being oppressed by authority but are being tried by people like themselves from within society. A jury is able to assess the situation before it, not in legalistic terms, but according to the current standards of the general community.

  It is argued, however, that the jury is not a true cross-section because some people are disqualified, ineligible or excused, and because of challenges made. The challenges allow the parties to have some say in the composition of the decision-makers in their case.
- **involves the general community** – Serving as a juror is seen as part of a citizen's civic duty. A person who serves on a jury is able to participate in the legal system and see the legal system in operation. This can help members of society improve their knowledge of how the legal system works, allow the jurors to see the plight of others in society and generally help those participating to gain a feeling of confidence in the legal system.

  Research by the Australian Institute of Criminology found that empanelled jurors reported significantly higher confidence in the criminal justice system than non-empanelled jurors.
- **spreads the responsibility** – The use of a jury allows the decision-making to be spread over more shoulders, rather than being placed solely in the hands of a judge. For example, if 12 people decide that a person is guilty, this decision is more likely to be correct than a decision made by one person. People are therefore more likely to feel confident in the decision made.
- **reflects community values** – The jury is able to reflect community values and bring a commonsense approach to decision-making in the court. It is able to take into account the social, moral and economic values of the time, and make a decision from the point of view of the ordinary person in the street, rather than the legal reasoning that a judge may bring to a decision.

  A jury **does not need to give a reason for its decision**, so the jury members can carefully follow the points of law explained by the judge, or ignore the law if they disagree with it. For example, a man who was charged with murder because he aided in the euthanasia of his terminally ill and dying spouse, which is illegal, may be found not guilty, not because the jury believed he had not assisted in his wife's death, but because the jury believed the law should be different.
- **safeguards against misuse of power** – The judges in a courtroom hold enormous power. Their decisions will have an effect on every person who comes before them. The jury acts as a **buffer between the parties to a case and the state**.

  Australian judges are employed by the state, but they jealously guard their independence from political influence. The problem mentioned here may be more in the minds of litigants (parties to civil proceedings) than real. However, a person taking a matter to court is likely to feel more confidence in the system if tried by their peers.

  In a criminal case, the state is responsible for the prosecution of the accused, but the peers (the jury) of the accused decide on guilt or innocence, not the state. This removes any opportunity for the state to make political decisions about who should be found guilty or not guilty, and helps individuals feel more satisfied with the decision.

In a civil case, the parties are able to present their evidence before the jury as an independent arbiter, not one employed by the state, which avoids state interference in civil matters between individuals.

- **ensures less legal jargon** – The presence of the jury should ensure that **evidence is given in a clear and non-technical way**, with legal jargon kept to a minimum. The legal personnel have to explain legal concepts to the jury throughout the trial. This enables the parties to the case to have a better understanding of what is going on within the court.
- **tends to make the right decisions** – As a general rule, the legal profession supports the jury system. They believe that the **jury takes its role very seriously** and tends to arrive at the right decision. Experience has shown that the jury listens carefully to all the evidence and as a group remembers the facts well. Jurors generally pay careful attention to the judge's explanation of the points of law and ask questions to clear up points. Information from those who have served on a jury suggests that jurors act responsibly and take their time to reach a verdict.
- **helps to protect democracy** – In a democracy, the people are governed by their elected representatives. These representatives make the laws according to the needs of the people. The courts enforce the laws. A jury, which is made up of representatives of the people, is another way in which the people are involved in the system and are able to scrutinise the interpretation and application of the law. The jury is also able to **scrutinise the role of the judges**, who are not elected but have considerable power over the lives of individual members of society.

LEARNING ACTIVITY 10.4

Strengths of the jury system

1 How can the jury system act as a buffer between the state and the community?
2 How can the presence of a jury help to protect the interests of the parties in a trial?
3 In what way is the jury able to reflect community values when reaching a verdict?
4 Read the extract 'The jury' and answer the questions.
   a How can the jury system help to protect democracy in our community?
   b Explain why a possibly unpopular decision of a jury might be more likely to be accepted than a decision reached by a judge.
   c Do you agree with the highlighted quote of Justice John Dunford? Explain.
   d Write an argument in favour of the jury system. Comment on five different reasons for the retention of the jury system.

EXTRACT

The jury

I turn now to the jury, and let me start by saying that I am a firm believer in the jury system for the trial of serious criminal offences. I also believe in it for the trial of various types of civil matters but that is a different question. The reason I support the jury system for serious criminal trials is that it is a feature of our democracy in that it enables ordinary men and women to take part in the judicial process and exercise their right as citizens in determining the guilt or otherwise of their fellow citizens. It is of the essence of a democracy that decisions (whether political through the ballot box or judicial through the jury system) are shared amongst the community as a whole, rather than being limited to the exercise of power by a few elite. Moreover the exercise of the common sense of the community as a whole, as opposed to the perceived attitudes of a legal elite, is desirable, and controversial or potentially unpopular

decisions are more likely to be accepted by the community generally and in the media if they are decisions of fellow citizens rather than decisions of professional judges.

But most importantly, I see the jury as a bulwark against the exercise of arbitrary power by a corrupt or politically motivated judiciary – not that such is a problem in this country at present, but one only has to look to Nazi Germany or Soviet Russia, or to the threat presently posed in Zimbabwe, to understand what I mean.

Moreover, the jury system can be a check on unpopular laws, as for example when juries repeatedly failed to convict those engaged in the Eureka Stockade in 1854–55, notwithstanding the clearest, most cogent, evidence or in the censorship trials in this state in the early 1960s.

Unfortunately there are a number of persons in the legal profession who seem to regard jurors in much the same way as politicians regard voters, that is, as absolute idiots, who need to be spoon fed any information, are incapable of rational thought and can be easily swayed by irrelevant matters and information. I disagree. Jurors are our fellow citizens, our neighbours, the persons with whom we do business and so on, and they are not lawyers.

I know some lawyers believe that juries can be swayed by emotion and red herrings, but after almost 18 years on the bench I remain, as I say, a supporter of the jury system, and over that time there are only a handful of cases where I have personally disagreed with the jury's decision, and even in those cases, I have been able to see a reasonable and logical reason why the jury has come to a different conclusion.

From time to time suggestions are made that certain types of cases should no longer be tried by juries, for example, white collar or corporate fraud cases, which are said to be too complicated for lay juries to understand, and recently a former Chief Justice suggested that where jury verdicts in sexual assault cases are set aside on appeal, the retrial should be by the Court of Criminal Appeal on a review of the evidence in the previous trial aided, as I understand it, by a video recording of the complainant's evidence in the earlier trial. I would not support either proposal.

In my experience, juries do not find corporate fraud cases too complicated and it is up to the Crown to present the case in an intelligible form. This can often be facilitated by charging a number of specific simple offences, rather than a general conspiracy count, which tends to get lost in its own detail. An intent to defraud, which is often an ingredient in the offence, involves a subjective finding to be inferred from surrounding circumstances applying ordinary common sense based on the conscience of the community, and is accordingly a most suitable issue for trial by a lay jury of fellow citizens.

Similarly I would not support the abolition of juries in retrials of sexual assault cases. These cases are, from their very nature, almost always cases of word against word where the essential issue in the case is the assessment of the credibility and reliability of the complainant. Unfortunate and all as it is (and it is most unfortunate), that victims of such crimes have to go through the ordeal of giving evidence a second time, I do not see how the complainant's credibility can be assessed otherwise than by a real live hearing.

Source: The Honourable Mr Justice John Dunford, Supreme Court of New South Wales, 'Looking forward – the direction of criminal law', Criminal Law Conference 2004

WEAKNESSES OF THE JURY SYSTEM

The weaknesses or disadvantages of the jury system should be seen in the light of the extent to which the jury may limit the effective operation of the legal system.

- **not a true cross-section of the community** – Trial by peers means that the jury should be a cross-section of society, representative of the community, impartial and independent. Even with

the random selection process, it is unlikely that a jury will fully represent a cross-section of the community because communities comprise interest groups with very different needs.

A jury is also not a true cross-section of society because some members of the community are ineligible, disqualified or excused, and because each side has a right to challenge jurors to try to achieve a jury that they think may favour their side. The decision of the jury may not, therefore, reflect community values.

- **difficult task** – The jury is expected to collate, remember, analyse and interpret the facts of the case and to follow the instructions of the judge, as well as being unbiased and unemotional. This is an extremely difficult task for anyone and especially so for the many people who have had little training in these skills.
- **complicated evidence** – A juror might experience difficulty in understanding the complicated nature of some evidence and the **sheer volume of evidence**. The witnesses are questioned by both sides, and the jury has to piece together the whole picture from the answers given. This is made even more difficult by evidence that is hard to understand; for example, medical evidence or evidence relating to fraud. In some commercial fraud trials, large sums of money and numerous witnesses are involved. Often the evidence relates to a series of interrelated transactions that require specialist knowledge to fully understand.
- **deliberations behind closed doors** – Juries' deliberations are carried out behind closed doors without anyone present other than the jury members. Their decision could be unjust if all the evidence is not considered.

  Judges and magistrates could be seen as better equipped to decide on the credibility of the witnesses. They have the professional training and experience to take an objective view and perform the necessary fact-finding function that is expected of a jury.
- **concentration for long periods** – The jury is expected to concentrate for long periods of time and comprehend everything that is presented to it. There is no way of knowing whether the jurors actually understood the evidence brought before them. Juries are not able to disclose information about their deliberations on a case, so it is not possible to tell whether the decisions are made on sound reasoning.

  The NSW drug trial of Andrew Dane Lonsdale and Kane Holland, costing $1 million, was aborted because it was discovered that some jurors were **playing sudoku** while listening to evidence. Lonsdale and Holland faced charges of conspiracy to manufacture a commercial quantity of amphetamines. Holland faced further charges of firearms and drugs of possession. There had been 105 witnesses over a period of three months.
- **unfamiliarity with legal procedure** – The jury is made up of average people, most of whom would have **little knowledge or experience of courtroom procedure**, and they may feel quite confused and overwhelmed by the courtroom formalities. The jury is given basic information about the case before the trial begins. This includes the type of action or charge, the names of the parties to the case and the witnesses, the estimated length of the trial and any other information the court thinks relevant.

  The *Juror's Handbook* gives a brief explanation of the processes to expect during the trial. However, the jurors will be in very unfamiliar territory and are likely to feel unsure of what is happening in the courtroom.

  Courtroom dramas on television have to some extent lifted the awareness of the role of the jury, although jurors have been known to use terms and considerations more relevant to US law.
- **counsel could unduly influence a jury** – In the adversary system, both sides are endeavouring to win the case. Every barrister will try to influence the jury to find in favour of their client – the more experienced barrister will do so more successfully. As a result, **jurors could be influenced**

by emotional elements of the trial or an eloquent and powerful closing speech made by a barrister, rather than the logic of the case put by both sides.

- **jurors could be biased** – Jurors usually take the task of being on a jury very seriously. They are meant to put out of their minds any biases they may hold that could be relevant to the case before them. However, this could be very difficult to do. People might be **unaware of biases** that they hold, such as racial biases, or biases against homosexuals. Even if they are aware of their biases, they may find it difficult to ignore them.
- **jury is not required to give a reason** – The decision of a jury is made in secret and no reasons are given for the decision. There is therefore no way of telling what reasoning was used in reaching their decision. The jurors are able to base their decision on whatever reasons they consider appropriate. They **could make a decision according to what they think is right** in the circumstances rather than what the law dictates.

  It is not possible for the parties to the case to know whether the points of law have been followed or whether the reasons for the decision were reasonable. If a reason for the decision had to be given, it would be difficult for the jurors to provide one reason as the reason favoured by all, because each juror may have a different reason for the decision.
- **delays** – Because legal personnel have to **explain the legal terms** they use to the jury, the trial is likely to take longer. A longer trial is likely to be more expensive, inconvenient and traumatic for the parties involved, and lead to delays in bringing matters to court because they take up more court time.

  The empanelling of the jury and the deliberations of the jury also add to the length of the trial. The jury in the West Footscray shooting of Helen Curtis took four and a half days to reach a decision. A previous Victorian Director of Public Prosecutions, Jeremy Rapke QC, suggested that juries should not be used in long and complex criminal cases.
- **high cost** – Bringing a matter to court is expensive. The use of a **jury makes the whole process more expensive** in that the trial is often longer and the jury has to be paid, either by the state in a criminal trial, or by the party that decides to use a jury in a civil trial. In the case of a criminal trial, the burden is placed on the taxpayers.

  If a jury cannot reach a decision and there is a hung jury, it is very costly for the state to bring a criminal trial to court for a second time. It is also very costly for the parties in a civil case to go through a retrial, although hung juries are less common in civil trials.
- **difficulty of reaching a decision** – A jury often consists of **people who come from different backgrounds and have different values**. It is therefore difficult for 12 jurors in a criminal trial (or six in a civil trial) to reach a unanimous decision about the facts of a case. When a unanimous verdict is required (as in a murder case) it is only necessary for one person to disagree with the others for a hung jury.

  The use of majority verdicts for civil and criminal cases (except cases of murder, treason, trafficking or cultivating commercial quantities of drugs or narcotic plants, or Commonwealth offences) has made a hung jury less likely. However, even with a majority verdict, if two people disagree with the rest of the jury there will be a hung jury.

  Unanimous verdicts and majority verdicts (with only one juror being able to disagree) safeguard the innocent and make wrong verdicts less likely.
- **inconsistent damages** – If there is a jury in a civil trial, the jury is required to assess damages. Juries tend to be very **inconsistent and unpredictable in assessing damages**. Their assessment could depend on the different spread of people on the jury. For example, a jury mainly made up of people in a high income bracket might award higher damages than a jury made up of people in a lower income bracket to whom larger amounts might seem unrealistic and out of the question.

- **media influence** – Jurors **may be influenced by media reports of a case**. If a case has caught the public interest, the jurors may have formed some ideas about the case before hearing the evidence in the trial. It is then very difficult for jurors to put their knowledge of the case out of their minds. However, jurors generally take their task very seriously and make every effort to approach it in an unbiased way.

  The **Jill Meagher** case was a high-profile case. At the time of her murder, there were many media reports about her disappearance and later about the arrest of Adrian Bayley and finding her body. After her death, an estimated 10 000 people walked along Sydney Road in Brunswick to remember her. There were over 12 million Tweets about Jill Meagher. Bayley pleaded guilty to the rape and murder of Jill Meagher.

  In 2009, Mokbel was tried for the murder of Lewis Moran. The jury found him not guilty of murder. Before the commencement of this trial, Mokbel made an application to the Supreme Court to have the trial stopped because of the pre-trial publicity. Justice Kaye found that the publicity was not sufficient to stop the jury from doing its job. In 2011, Tony Mokbel was sentenced to 30 years in prison with a non-parole period of 22 years after pleading guilty to three charges of large-scale drug trafficking.

EXTRACT

R v. Mokbel [2009] VSC 342

... as a result of the analysis which I [Justice Kaye] have undertaken of the publicity relating to the accused, I am satisfied that it will be possible for the accused to have a fair trial of the charge against him, notwithstanding the very substantial adverse publicity to which he has been subjected for a number of years. In particular, as I have noted, most, if not all, of the species of prejudice identified by Ms Morgan [the accused's solicitor] in her affidavit have been present in other cases, in which the courts have considered that appropriate judicial directions will ensure that the accused, nevertheless, has a fair trial.



Figure 10.6 Tony Mokbel

US JURY AWARDED $150 BILLION

In December 2011, a US jury awarded a record $US150 billion in damages to the family of a boy who was burned beyond recognition on his eighth birthday and died of the injuries 12 years later.

The accused tied Robbie Middleton to a tree and threw petrol over him and set him on fire – he managed to escape but had burns to 90 per cent of his body. He never recovered. His parents knew they were unlikely to ever receive a penny from the neighbourhood bully who ruined their son's life and went on to sexually assault at least one other young boy.

Their aim was to use the civil case to pressure prosecutors in Montgomery County, Texas, to charge Don Wilburn Collins with murder.

Table 10.2 Advantages and disadvantages of the jury system

ADVANTAGES	DISADVANTAGES
• decisions made by a cross-section of the people (peers) • involves the general public • used over many years and has stood the test of time • spreads responsibility • reflects community values • less legal jargon • safeguard against misuse of power • juries generally get it right • helps to protect democracy	• not a true cross-section of the people • may have difficulty understanding complicated evidence • unfamiliar with legal procedure • may have difficulty reaching a decision • unpredictable decisions • swayed by clever counsel and/or media influence • difficult task, expertise needed • delays and high cost • the jury does not have to give reasons for decisions • jurors could be biased • the jury deliberates behind closed doors • jurors have to concentrate for long periods of time • inconsistent damages in civil cases

LEARNING ACTIVITY 10.5

Weaknesses of the jury system

1 One of the strengths of a jury is that it comprises a cross-section of the community. Explain why the jury is thought to be a cross-section of the community. Why do you think a jury could be seen as not being a true cross-section of the community?

2 Do you think that a jury can reach a fair decision in a complicated fraud trial? Discuss.

3 Discuss the problem of jurors having to concentrate for long periods of time. Comment on the NSW drug trial of Andrew Dane Lonsdale and Kane Holland, where jurors were found playing sudoku. Do you think the judge was right to dismiss the jury in this case? Explain.

4 Why is the fact that juries do not have to give a reason for their decision a disadvantage of the jury system?

5 To what extent do you think jurors may be influenced by media reports? Comment on the Mokbel case in your answer.

6 Read the case study 'Temptations to trawl Internet threaten jury system' and answer the questions.

- a Explain the problems that the UK is experiencing with respect to technology.
- b How do you think this could undermine the jury system?
- c Do you think individuals should be able to do this or, in your opinion, should jurors only rely on evidence given in court? Discuss.

CASE STUDY

Temptations to trawl Internet threaten jury system

In December 2011, concerns were raised in the UK about jurors who are tempted to use the Internet to discover information about a trial. In three separate appeals that year, convictions were found to be unsafe in the light of jury irregularities; retrials were ordered in two of those cases.

Information that can be found on the Internet could be false, or could be evidence that should not be heard by the jurors, and the outcome of a trial could be based on this information rather than the evidence before the court. In one case, a juror looked up previous convictions of the accused and informed the other jurors.

In another case in the UK, a juror was jailed for eight months for contempt of court for using the Internet to exchange messages with a defendant who had already been acquitted in a drug trial.

7 Read the case study 'Jurors' actions result in a retrial' and answer the questions.
- a Explain why the appeal court ordered a retrial in this case. Do you think this type of conduct should be allowed? Discuss.
- b Suggest the possible consequences of such a retrial to the victim, witnesses, accused and the community.
- c Explain how this case is an illustration of a strength of the jury system.
- d Explain how this case is an illustration of a weakness of the jury system.
- e What changes in the law have been made in Victoria to overcome this problem?

CASE STUDY

Jurors' actions result in a retrial

Two jurors sitting on a criminal gang rape trial jeopardised the outcome of the trial by visiting the crime scene. The jury foreperson and another juror decided to visit the park where the alleged rape occurred in order to view the park, conduct experiments and check out the lighting, in breach of court rules.

The two accused were found guilty of the charges, but appealed to the NSW Court of Criminal Appeal on the grounds that the jurors had miscarried the trials because they had ignored directions to rely only on courtroom evidence. The appeal court ordered retrials for both accused.

8 Read the case study 'Murder of Jill Meagher' and answer the questions.
- a What occurred in this case to cause concern that a fair trial may not be achieved for Adrian Bayley?
- b If Bayley had pleaded not guilty to Ms Meagher's murder and rape, do you think the jury would have been able to ignore previous media coverage and make their decision only on the evidence presented in court? Discuss.

CASE STUDY



Murder of Jill Meagher

Jill Meagher disappeared when walking home from a night out. She was last seen walking down Sydney Road in Brunswick. Following police investigation, Adrian Bayley was arrested for the rape and murder of Ms Meagher. At a committal hearing, the court heard that Bayley accosted Ms Meagher in the early hours of 22 September 2012. It was alleged Bayley raped and strangled her and left her body in the street. After collecting a spade he returned and collected the body and drove to Gisbourne where he buried her.

Figure 10.7 Jill Meagher

The public demonstrated outrage at what had happened to Jill Meagher. In October 2012, approximately 10000 people marched down Sydney Road in remembrance of her. Social media platforms were ablaze with news of the developments in the case, and tweets mentioning Ms Meagher's name hit almost 12 million Twitter news feeds.

Former Victorian premier Ted Bailleu said he would ask the Victorian Law Reform Commission to review whether legal changes were needed to address the impact of social media on jury trials. Victoria Police asked social media users to exercise caution in light of court proceedings against Adrian Bayley.

Bayley later pleaded guilty to the rape and murder of Jill Meagher. Supreme Court Justice Geoffrey Nettle sentenced Bayley to a minimum of 35 years in jail, which was life for murder (20 years) plus 15 years for what he described as 'a savage violent rape of the worst kind'. Bayley appealed his sentence on the grounds that 35 years was too severe. His appeal was dismissed.

9 Why do you think that it might be difficult for 12 jurors to reach a verdict in a criminal trial?

10 Read the case study ' Wrongfully accused' and answer the questions. What problem with the jury is illustrated by this case?

CASE STUDY

Wrongfully accused

The accused, a 21-year-old man from Somalia, was convicted of the rape of a 48-year-old woman in the toilet of a nightclub in Doncaster. The case rested solely on the fact that DNA evidence was found connecting the accused to the crime. Nearly 18 months after the man's incarceration, his conviction was overturned, due to the strong likelihood of contamination of the DNA sample.

The then Director of Public Prosecutions, Jeremy Rapke QC, was concerned about the influence of US legal shows on the jury, thinking that DNA evidence was the 'be-all and end-all of the case'. Rapke declared that future cases based solely on DNA evidence would need his authorisation to proceed. The man received half a million dollars in compensation for his false imprisonment.

11 Read the following case study 'Jaidyn Leskie' and answer the questions.

- a Explain why the jurors may have had preconceived ideas about this case before being selected for the jury. Do you think these ideas may have influenced the outcome? Discuss.
- b What was the general message to the jury by Justice Vincent in his summing-up?
- c What is meant by the term 'cross-section of the community'?
- d Do you think that the jury was a cross-section of the community in this case? Discuss.
- e How many more jurors could the defence counsel have challenged?
- f How many could the prosecution have asked to stand aside?
- g Why do you think some people are more likely to be challenged than others?
- h If the case had been a prosecution for corporate fraud, which of the jurors that were chosen do you think you would challenge if you were the defence counsel? Explain.
- i The jury verdict is final. Do you think this is a benefit or a disadvantage? Discuss.
- j With reference to this case, present a reasoned argument against the use of the jury system.

CASE STUDY

Jaidyn Leskie

Jaidyn Leskie was a one-year-old child who disappeared from his babysitter's house. His body was found in a dam near Morwell. The man who was looking after him at the time was charged with murder but was later acquitted.

Greg Domaszewicz was charged with the murder of Jaidyn Leskie. This case caught the attention of the nation because of the bizarre circumstances that surrounded the case, and it drew wide media coverage. Jaidyn went missing on 14 June 1997. He had been in the care of Domaszewicz. Jaidyn was left at Domaszewicz's house while Domaszewicz went to pick up Jaidyn's mother from a local hotel. When Domaszewicz returned, the little boy was missing and a pig's head was found in the garden of Domaszewicz's house. Jaidyn's body was found in the Blue Rock Dam near Moe on New Year's Day 1998 (more than six months later).

Details about this case were in every newspaper in the country. The members of the jury would have been fully aware, before the trial began, of the circumstances of the disappearance of the little boy and Domaszewicz's connection with the case. They had to put all preconceived ideas out of their mind and listen to the facts of the case as presented during the trial.

Various doubts were raised and theories offered during the trial. In summing up the case, Justice Frank Vincent told jurors to limit themselves to the evidence in considering a verdict. He said that jurors had heard various theories given by both sides about what had happened to Jaidyn, and they had to be acutely conscious about filling in the gaps with their own theories. Justice Vincent also commented about the intense media and public interest and the wild propositions that had been put forward. He went on to say, 'You must draw rational conclusions as the case requires, from the evidence, and only on the basis of the evidence, which has been given in the trial'. He went on to say that they should rely on basic commonsense and notions of justice when they were deliberating.

On 4 December 1998, the jury found Domaszewicz not guilty of murder and not guilty of manslaughter. He was allowed to go free.

The jury was made up of eight men and four women. The jurors cannot be identified, but their occupations represented a cross-section of the community, and their ages ranged from early 20s to late 60s. They included:

- a panel beater (male) – jury foreman
- a water maintenance worker (male)
- an unemployed person (female)
- a clerk (female)
- a motor mechanic (male)
- a storeman (male)
- an accountant (male)
- a communications coordinator (female)
- a technical writer (male)
- a nurse (female)
- a retired person (male)
- a journalist (male).

Jurors were chosen from a panel of 60 summoned for jury service. Twenty-eight of the 60 asked to be excused, and went back into the pool. The defence counsel challenged five members of the jury panel. These were three women and two men. The prosecution asked no one to stand aside.

One of the 12 jurors empanelled was excused on compassionate grounds late in the trial after the death of a close relative. Justice Vincent allowed the trial to continue with 11 jurors.

Observers noted that one of the jurors regularly fell asleep during the trial, and showed little interest when awake.

In August 2002, the police working for the coroner began re-interviewing witnesses after Jaidyn's mother wrote to the then Attorney-General, Rob Hulls. Further DNA tests were conducted. A new inquest was announced on 21 July 2003. This inquest began in late 2004. However, in December 2004, Domaszewicz won a legal battle to stop the inquest after the Supreme Court found that the coroner, Graeme Johnston, was acting outside his jurisdiction.

On 29 March 2005, Jaidyn's mother, Bilynda Williams, again begged the state coroner to open a new inquest into her 14-month-old son's death. She stated that Domaszewicz avoided testifying during the trial and in the subsequent inquest that was stopped. Whatever any future inquest may reveal, Domaszewicz cannot be recharged with either Jaidyn's murder or manslaughter. Under what is known as the double-jeopardy rule, a person cannot be tried twice for the same offence. This law has recently been changed to allow retrials in certain circumstances.

12 Read the case studies 'Man awarded $730 000 for pain and suffering' and 'Barmaid awarded damages after bullying, intimidation and harassment'. Do you think that juries should decide on the amount of damages or could there be a problem with inconsistency of damages? Explain.

CASE STUDY

Man awarded $730 000 for pain and suffering

The Supreme Court awarded a plaintiff, who suffered from mesothelioma as a result of exposure to asbestos, $730 000 in damages for pain and suffering. Many people around Australia expressed concern about this verdict, given that most state courts still assess pain and suffering damages in similar cases at under $300 000 (and significantly under $300 000 in some states).

The verdict was appealed, and on 22 December 2011, in *Amaca Pty Ltd v. King* [2011] VSCA 447, the Court of Appeal upheld the damages verdict. The Court of Appeal stated that despite the fact that $730 000 for pain and suffering was beyond what a reasonable jury properly instructed and with all due attention to the evidence could award, it was not persuaded that the amount should be changed.

CASE STUDY

Barmaid awarded damages after bullying, intimidation and harassment

Carol Anne Bailey sued her former employer because of a 'concerted campaign' of workplace harassment that led her to suffer severe psychological disorders.

Bailey's boss used extremely vulgar language to her and repeatedly indicated that her job was precarious and he would 'get rid of her'. He pressured her into bending liquor licensing rules regarding gaming and the service of alcohol.

Bailey was awarded $507 550 in damages.

13 Investigate the sexual assault trial of Rolf Harris in the United Kingdom. Do you think Rolf Harris's celebrity status would have influenced the jury in this case? Discuss.

14 Read the following case study 'Found guilty after fourth attempt'. How does this case illustrate a problem with the jury system?

CASE STUDY

Found guilty after fourth attempt

David James Ross, a truck driver, was found guilty of dangerous driving causing death by a fourth jury. Ross, driving his semitrailer at about 95 km/h, hit a car from behind causing the death of the driver, Dianne Beel, in an area where roadworks were taking place and the traffic was required to slow down.

The initial trial was aborted shortly after the opening address because a juror found the details of the crash too upsetting. Judge Paul Lacava ruled that the juror's distress could prejudice the juror against Ross. The second jury was dismissed after a week of hearing evidence when prosecutor Bruce Nibbs argued that Ross's defence was incompetently run. The third jury was dismissed soon after the opening address when one of the jurors recognised a lawyer sitting in court on behalf of the transport company.

REFORMS TO THE JURY SYSTEM

There have been several changes to the jury system over the last 15 years that aim to improve the efficiency of the jury system.

Extra jurors

Civil juries in the Supreme Court and the County Court are allowed two extra jurors in case someone becomes ill or needs to be excused for another reason during the trial. Criminal juries are allowed three extra jurors. This helps to ensure that the accused will have their case decided by the full number of jurors. It also helps to prevent mistrials, which could occur if the number of jury members falls below 10 in a criminal trial.

Majority verdicts

Majority verdicts have been introduced in criminal cases (except cases of murder, treason, trafficking or cultivating commercial quantities of drugs or narcotic plants, or Commonwealth offences). If a unanimous verdict cannot be reached after six hours in a criminal trial, a majority verdict will be accepted as a verdict of all the jury. This speeds up the process of reaching a verdict and it is more likely that a verdict can be reached.

Jurors not allowed to make their own enquiries

Under the *Courts Legislation Amendment (Juries and Other Matters) Act 2008* (Vic.), a juror must not make an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, other than in the proper exercise of his or her functions as a juror or authorised by the trial judge. Making an enquiry includes consulting with another person, conducting any research, such as using the Internet to search for information, viewing or inspecting a place or object that is relevant to the trial, conducting an experiment or requesting another person to make an enquiry.

This Act also gave the Juries Commissioner the ability to exclude a person from a pool if he or she is satisfied that the person is unavailable to sit on a trial due to the likely length of the trial.

Simplifying jury directions

The *Jury Directions Act 2013* establishes a new structure for jury directions and provides guidelines for judges when summing up at the end of a trial to make the directions more easily understood by the jurors. The aim is also to ensure that juries feel free to ask questions of the judge, rather than look things up on the Internet or make other enquiries.



Figure 10.8 A female juror in the UK was thrown off a trial after it was discovered she turned to Facebook for help in her decision.

SUGGESTED REFORMS TO TRIAL BY JURY

Suggested reforms to the jury system are improvements that could be made to the existing system, rather than suggestions for removing the jury system altogether.

Require juries to give reasons for their decisions

If the jury were required to give a reason for its decision, the accused in a criminal trial would know why they had been found guilty and the parties in a civil case would know why the jury had decided the way it did. The **parties would also know whether due attention had been given to points of law**. This would be more satisfying for the parties but could lead to more appeals, especially if it was thought that the jury had not followed the law as explained by the judge.

In some US states, the jury is required to use a special verdict form to provide reasons for their decision. This form contains a number of questions that the jurors are required to answer. These questions can relate to the facts of the case or the application of the law. In Spain, juries are directed to give a 'succinct rationale' for their general verdict, which may assist an appeal court to decide whether their decision was appropriate according to their understanding of the facts and the law.

CASE STUDY

Jury found Towle not guilty of culpable driving

Discussion in the community regarding whether juries should explain their verdicts erupted after the 2008 decision in the Thomas Towle case. Towle was found not guilty of six counts of culpable driving causing death and four counts of negligently causing serious injury, but guilty of the lesser charges of dangerous driving causing death and dangerous driving causing serious injury.

The incident occurred near Mildura when a car being driven by Towle hit a group of teenagers, killing six and seriously injuring four others. He was sentenced to a total of 10 years in prison with a minimum of seven.

Public outcry followed this decision because of the lenient sentence Towle received. Demands for reasons for decisions of juries followed. The public would like to know why the jury decided he was not guilty of culpable driving, which carries a much heavier maximum sentence of 20 years.

Make juries more representative

A number of reforms have been implemented to make juries more representative, such as reducing the number of peremptory challenges and removing the right to be excused as a right. The distance a person lives from a court before he or she is excused from jury service was changed from 32 kilometres from the courthouse to over 50 kilometres (60 kilometres if the court is outside Melbourne). This change was aimed at having people from outside the cities and main towns on the jury and more Indigenous people.

The classes of people who are ineligible were reduced in 2001; for example, ministers of religion are no longer ineligible. The *Juries Amendment Reform Bill 2010* (Vic.) was aimed at increasing the community representation on juries by reducing the categories of occupations that render a person ineligible for jury service; for example, members of parliament, judicial officers, lawyers and police officers should be eligible for jury service. This Bill was not passed.

Peremptory challenges could be reduced further. The jury would then be more of a mixture of people, rather than those chosen by the parties as being likely to favour their client. However, under our adversarial system of party control, the parties like to have some say in the make-up of the decision-making body.

Further simplify jury directions

Attorney-General Robert Clark suggested that there was a need for further improvements to law governing the lengthy and complex directions that judges are often required to give to jurors in criminal cases. The *Jury Directions Amendment Bill 2014* was introduced into the Legislative Council of the Victorian Parliament in March 2014 to clarify issues further. This Bill was not passed. This Bill proposed that judges be required to give clear directions on:

- what must be proved beyond reasonable doubt
- unreliable evidence
- identification evidence
- delay and forensic disadvantage
- delay and credibility
- the failure to give or call evidence.

In June 2014, the Victorian Government stated it would introduce a Bill to the Victorian Parliament to further simplify jury directions in family violence cases.

Have a specialist foreperson

One of the problems of the jury system is that the jury is unfamiliar with the legal system and court procedure. It might be possible for the court to employ a specialist foreperson who could inform the jury on the relevant law and court procedure, which could assist them in reaching the right decision. It might be, however, that the opinion of a specialist foreperson could carry too much weight; that is, the jurors may take too much notice of what the foreperson feels would be the right decision, rather than basing their decision on their own intuitive feelings and understanding of the facts.

Give instructions before the trial

Jury members often find it difficult to understand courtroom procedure and legal processes. The jury is given basic information about the case including the type of action, the names of the parties and principal witnesses. It could be beneficial to give the jurors some instructions about legal procedure and rules of evidence before the case begins, so they are **better able to comprehend the trial** as it unfolds. However, jurors do receive the *Juror's Handbook*, which gives information about jury service, such as how to assess evidence, what happens during a trial, selecting a foreperson and conducting deliberations.

Research has shown that the handbook helps jurors to establish ground rules for discussion and there are fewer disagreements during deliberations.

Introduce 'not proven' verdicts

In Scotland, juries can give a decision of 'not proven'. This means that if new evidence is brought out after the trial, the accused can be retried for the same offence. A problem with this could be that a jury may be tempted to take the 'soft option' of not proven, rather than thoroughly examining the evidence and reaching a final decision. This could be very costly because there could be more retrials.

With the changes to the double-jeopardy law that now allows a retrial after an acquittal in certain circumstances, this change may not be necessary.

Juries to participate in sentencing

Currently the role of the jury in a criminal trial ends with their decision of whether the accused is guilty or not guilty. If the accused is found guilty, the judge will sentence him or her, taking into account a range of factors.

It has been suggested that the role of the jury be extended to also include being involved in the sentencing process. The jury has listened to the evidence and therefore could be able to decide on an appropriate sentence. This could ensure the courts are following community views on crime and punishment.

However, judges frequently cite sentencing as being one of the most difficult aspects of their job, and there could be concerns if this task was undertaken by inexperienced jurors. Further, there are many factors that need to be taken into account when sentencing that do not form part of the trial, such as the accused's prior convictions and character evidence, of which the jury would need to be informed if they were to decide sentencing. Also of concern would be the greater possibility of inconsistent sentencing.



Figure 10.9 During the jury selection in the *Apple v. Samsung* patent trial in the US, it was found that one potential juror was employed by Apple and five others had connections to Apple.

More technical assistance

For the purpose of helping the jury to understand the issues, a trial judge may order that the jury be given copies of documents such as opening and closing statements, charts or diagrams, and judge's instructions. **Extra information could be provided to juries in electronic form** on a regular basis. This occurred in December 1999 in *R v. Dowding & Grollo* (1999) VSC 497. Juries were provided with online access to the trial transcript and copies of documents through the use of two computers placed in the jury room. They were also given word-processing facilities to assist them in making and collating their notes.

Having the trial transcript in electronic form could help the jurors to search various issues that were covered in the transcripts, but the sheer volume of the documents might be overwhelming and the jurors may be better off relying on their own memory or written notes.

Reduce the size of the jury

Former Supreme Court judge Kenneth Marks has stated that justice could be well served if the number of jurors required to hear a long and complex fraud trial was reduced, say, to eight. In this way it may be **easier to reach a decision** among the group and deliberations may be shorter. However, having fewer people to convince may mean that the likelihood of a correct result is reduced.

POSSIBLE ALTERNATIVES TO TRIAL BY JURY

Some people have suggested that the jury system as we know it should be abolished and replaced with something different; for example, a judge sitting alone, a specialist jury or a panel of professional jurors.

A judge alone or a panel of three judges

A judge would be able to make a decision based on the law with a thorough understanding of the law. A judge would also understand legal procedures and processes. The decision might therefore be more likely to be right. A panel of three judges could discuss the salient issues and spread the decision between them.

But a decision based on the law alone might not take into account the feelings and attitudes of ordinary people. A verdict going against the law, but in line with current community standards, would be far less likely; for example, an acquittal in a 'mercy killing' trial.

A judge might also have formed biases against certain types of people or cases, which could colour his or her judgment. A decision by a judge alone or a panel of three judges would be a disadvantage in that judges are employed by the Crown and the parties might feel more confident in a decision made by their peers. If there were three judges, this would be very expensive for the legal system.

Professional jurors

A professional jury employed by the state would have a better understanding of court procedure and legal processes. They could also develop expertise in certain kinds of cases.

They might, however, make decisions based on biases resulting from the many cases they had seen previously instead of seeing a case fresh for the first time. As employees of the state, they would lose the advantages of being an independent body.

Specialist jurors

A specialist jury could be a jury made up of, for example, medical experts in a case involving complicated medical evidence, or accountants in a case of fraud. One of the disadvantages of the jury system is that the jury may not understand complicated evidence put before it. A specialist jury would not have this problem.

A specialist jury might, however, have biases against people in the same profession who had allegedly done something wrong. The accused in a criminal case, or the parties in a civil case, would not have the benefit of having their case heard before a panel of ordinary people who brought with them the attitudes of ordinary people.

From a practical point of view, it could be difficult to find a group of specialists who would be prepared to give up their professional life for what could be many months of sitting on a jury. To pay such specialists an amount of money that would induce them to attend jury service would be expensive either for the state (in a criminal case) or for the party wishing to use a jury (in a civil case).

LEARNING ACTIVITY 10.6

Reforms and alternatives to the jury system

1 Identify two changes in the law that have affected the operation of the jury system. Discuss the advantages and disadvantages of these changes in the law in relation to the effective operation of the legal system.
2 Suggest one advantage and one disadvantage of having a professional foreperson in a jury trial.
3 Do you think reforms should be passed to make the jury more of a cross-section of the people? Give reasons.
4 Look back at the case study 'Jury found Towle not guilty of culpable driving'. Evaluate the consequences of having juries give a reason for their decisions. Comment on the Towle case.
5 Evaluate the changes in the law in relation to jury directions. How can these changes make the jury system more effective?
6 What advantage is there in a jury being able to give a 'not proven' verdict, rather than being a hung jury, if a verdict cannot be reached?
7 What is your opinion of the proposal to have juries involved in sentencing offenders? Provide arguments to justify your view.
8 Discuss the use of a judge alone (without a jury) instead of a jury reaching a verdict. Do you think this could be a better way of achieving a fair trial? Give reasons.
9 In what way is the jury system beneficial to society as a whole?
10 Debate, or discuss, the need for reform of the jury system.
11 Read the case study 'Snowtown jury exempted from jury duty for life' and answer the questions.
   a Why do you think four jurors were excused during the course of the trial?
   b Is it fair to subject ordinary people to detailed information about such horrific crimes? Discuss.
   c Explain an alternative to trial by jury that would help to avoid the psychological harm that could be suffered by these jurors.

CASE STUDY

Snowtown jury exempted from jury duty for life

One of the longest-running criminal trials in Australian history, the first of the Snowtown murder trials ran for 11 months from October 2002 to September 2003. During that time jurors heard gruesome evidence of the torture and murder of eight victims in the disused Snowtown bank vault in South Australia. Psychologists expressed concern about the likely impact of this experience on the jurors, likening its effects to suffering first-hand trauma, due to the detail they heard and saw of the horrifying acts.

While some of the jurors were counselled during the trial, the law prevents them from speaking about the details to others. Four jurors were excused during the 11 months of the trial. Justice Brian Martin exempted the jury from further jury service for life. Further trials for other Snowtown defendants continued for a number of years.

12 Read the article 'Don't hang the jury' and answer the questions.
- **a** Explain the suggestion made by a Sydney judge.
- **b** What solution to the problem is suggested in this article? Give reasons for the suggestion.
- **c** In what way are jurors making decisions that can affect the safety of us all?
- **d** Explain the arguments for and against replacing the jury mentioned in this article.
- **e** How does the jury's presence make it easier for the victim according to John Hinchey?
- **f** If you were accused of a serious crime, or you were related to the victim of a serious crime, who would you prefer to be the decider of the facts, a panel of judges or a jury of 12 of your peers? Discuss.

EXTRACT

Don't hang the jury

Lucy Kippist, *The Punch*, 15 December 2011

In a perfect world, justice would be swift. Right and wrong would be black and white. Good people would feel protected by the law and bad people would go to jail. In reality, crimes like murder and rape are as complicated as they are common. Sound verdicts take time.

So a Sydney judge's suggestion to do away with juries in these cases, in the interests of efficiency, presents serious risk to the way we understand and trust the law.

Speed in these decisions risks poor judgement. Worse, it can destroy people's lives.

According to *The Daily Telegraph*, Justice Peter McClellan, who has recently presided over the appeals of both Jeffrey Gilham and Gordon Wood, said the increasingly complex nature of criminal cases are resulting in longer trials, at great expense to both the juror and the state.

His solution: Replace juries with a panel of up to three judges to avoid 'perplexity' and be 'less time consuming'. Words we're more likely to associate with supermarket aisles or a busy commute than the cornerstones of our justice system.

Criminal cases are complex for jurors. But the majority of this complexity arises from the enormous responsibility of their decisions. Murder and rape cases raise questions about how we define acceptable social behaviour; what we do and do not accept and who we do and do not trust to be part of our society. In other words, they're making decisions that affect the relative safety of us all.

Replacing jurors with a panel of judges will not make this job easier. Or less complicated. A socially responsible verdict requires strong community representation and to achieve this, balance is imperative.

Jurors bring commonsense and real-life touch points to the law. While judges and lawyers can be overly technical, the familiarity of the truck driver, the nurse, the school teacher or the business person help win our trust in the law. If we recognise ourselves in the people making the decision, then we are more likely to accept and understand it.

The jury is also fundamental to the victim's experience of a criminal trial. According to John Hinchey, the ACT Victims of Crime Commissioner, the jury helps victims of crime to recover. Not only does the jurors' presence make it easier for the victims to follow the process of the trial – because the legalese is broken down into layman's language – it also helps them to accept the decision, as they can see it is representative of the broader society.

'Juries give people a sense that a fair and balanced verdict should be reached,' he told *The Punch*.

Another way to think about this is to put yourself in those shoes. Imagine it was you on trial for murder. Or worse, close to a victim of it. Who would you trust to hold your life in their hands? A panel of judges, who've seen your case and possibly worse many times before? Or twelve individuals from different walks of life, ready to debate the facts?

Hard choice, huh? It's almost an impossible divide. The law can be blind to a lot of the grey areas of life while the human experience can bring insight, empathy, emotion and understanding. The best and most equitable system of justice utilises both.

13 **Internet exercise**

Using the Internet, investigate the use of the jury system. This can include the jury system in the United States and the United Kingdom. Find at least two articles. Write a summary of each article. In your summary include:

a the source and date of the article

b the main features of the article.

14 **Connect, extend and challenge**

Using the articles you have found on the Internet:

- connect – explain how the ideas and information presented are connected to what you already know
- extend – explain any new ideas you found that extended your knowledge and thinking about juries
- challenge – what is still challenging; discuss anything that still raises questions in your mind relating to juries.

EFFECTIVENESS OF THE JURY SYSTEM

The operation of the jury system is considered to be a cornerstone of our justice system. There are ways in which it assists in achieving just outcomes, such as **trial by peers**, although in some ways it can be seen as hindering the effective operation of the legal system.

When assessing the effective operation of the jury system, you should consider the extent to which each of the three elements of an effective legal system is achieved. For each element, you should consider:

- the processes and procedures that help the achievement of each element
- the processes and procedures that hinder the achievement of each element.

Entitlement to a fair and unbiased hearing

One of the aims of the jury system is to provide a group of people, with no biases, who decide on the outcome of a case.

Processes and procedures that contribute to a fair and unbiased hearing

For a fair and unbiased hearing to be achieved it is essential that the jury remain an independent and impartial decider of fact. This can be achieved by:

- the **random nature of jury selection**, which promotes the ideal of the jury being made up of a cross-section of the community
- removing potentially biased jurors at the jury selection stage; some people are **ineligible or disqualified** from serving on juries due to their experiences with the legal system
- removing any juror who knows either party to a case or any of the witnesses – they should ask to be **excused** from that trial, to remove the potential for bias
- both sides of the case being able to **challenge jurors** they believe would be prejudicial to the case
- the **jury acting as a buffer between the state and the individual**; the state prosecuting the accused and the jury reaching the verdict, ensuring a fair and unbiased hearing
- the guilt of the accused being determined by a **majority verdict** (or unanimous verdict for some offences such as murder) of a jury with no former knowledge of the accused and that holds no preconceived ideas about the accused.

Problems and difficulties that may hinder a fair and unbiased hearing

A fair and unbiased hearing may be hindered in a jury trial because:

- juries are **not necessarily made up of a cross-section of the community**
- **some people are unlikely to be tried by their peers** – for example, few Indigenous people are chosen for jury service, which could result in an Indigenous accused having their case heard before an all-white jury
- a juror may find it difficult to set aside a **bias** that they hold against particular groups in the community, such as racial biases
- the **jury could be influenced** by things they may have read or heard in the **media** before a case begins, and have difficulty setting this aside
- jurors may **have difficulty in understanding** the complicated nature of a trial and any complex evidence in a case, which could mean that the accused is not given a fair hearing on the evidence
- courtroom dramas made in the US can confuse jurors in that they may believe some of the terms used on television are applicable in Australian courts; although they can help jurors get a better understanding of court procedures.

Recent changes

The following recent changes could further assist in achieving a fair and unbiased hearing for trials conducted using a jury.

- **juror access to information** – The *Courts Legislation Amendment (Juries and Other Matters) Act 2008* (Vic.) inserted a new section (S78A) into the *Juries Act 2000*. This section states that 'a juror must not make an inquiry for the purpose of obtaining information about a party to the trial or about any matter relevant to the trial that they are hearing, except in the proper exercise of his or her functions as a juror'. Inquiries include consulting with another person, conducting research by any means, such as using the Internet to search for information, conducting an experiment, viewing objects or places relevant to the trial. However, the section does not prevent a juror from making an inquiry with the court or another member of the jury, or asking the judge to have something clarified. This change is designed to ensure that jurors consider only the evidence that is presented to them in the courtroom – evidence that is considered to be relevant and reliable.

- **simplifying jury directions** – The *Jury Directions Act 2013* sets out guidelines to make jury directions much easier to understand for the jury. In response to the Victorian Law Reform Commission's recommendations, the Jury Direction Advisory Group (consisting of legal profession stakeholders) developed the Act, which lists the general jury directions that must be given to the jury and streamlines the summing-up process. The jury is provided with sufficient information to make an informed decision.

  The Act allows the judge to explain the concept of 'beyond reasonable doubt' if requested. The judge is able to give the jury a list of factual questions, which will help the jury to understand some of the difficult issues. The *Jury Directions Amendment Bill 2014* was aimed at giving further assistance to the jury but was not passed. The Victorian Government aims to introduce changes to further simplify jury directions in family violence cases.

Recommendations for change

The following recommendations for change could further assist in achieving a fair and unbiased hearing.

- **review jury eligibility** – The previous Victorian Labor Government released a discussion paper in November 2009 suggesting that some people who are currently ineligible for jury service due to their involvement in the legal system should now be made eligible for jury service. Such people include members of parliament, judges, lawyers, bail justices and police officers. The paper also questions whether the current period of exemption that prevents these people from serving on juries for 10 years after their retirement should be reduced. This change has not occurred.
- **introduce a 'public defenders' scheme** – Public defenders are barristers employed by the state to provide legal services to people charged with serious criminal offences who have been granted legal aid. They are the defence equivalent of Crown prosecutors who are barristers employed by the state to act for the prosecution in criminal cases. Public defender schemes have been operating successfully in New South Wales since 1941 and in Queensland since 1916.

Effective access to the legal system

The jury system is an important part of our system of trial in criminal cases, although the parties can choose not to use a jury in civil cases.

Processes and procedures that contribute to effective access

A jury provides the general public with a chance to be involved in legal processes, giving them a greater knowledge and understanding of the operation of the courts. This enhances the opportunity for effective access to the legal system. The jury system also gives people confidence that their case will be heard by their peers, who are more likely to have an understanding of their predicament.

Problems and difficulties that may hinder effective access

The use of a jury in a civil trial is optional and, if used, the party requesting the jury must bear the cost. This can be an expensive process, and is in addition to all the other fees and costs associated with pursuing a case. These high costs would preclude some parties from using a jury in their civil trial, denying them access to this mechanism.

In a criminal trial, the financial burden of a trial before a jury is borne by the taxpayers, although other problems of effective access to the legal system are present in criminal cases. For example, if a person is accused of a crime, his or her effective access to the court would be diminished if he or she was not able to obtain the services of a good lawyer because of the high cost.

Effective access to the legal system may also be reduced if the people involved in a civil dispute or criminal case were not aware of their rights.

Timely resolution of disputes

The aim of the legal system is to finalise a criminal case as quickly as possible. Awaiting the outcome of a trial is stressful.

Processes and procedures that contribute to timely resolution

The speedy completion of a case frees up the courts for other cases and gives a verdict as quickly as possible to the accused and the victim or relatives of the victim, or the parties in a civil case. However, the courts must ensure that the accused has been given a fair trial and the jury is able to reach the right decision.

Problems and difficulties that may hinder timely resolution

The use of juries adds to the time taken for a trial for a number of reasons:

- The empanelment process can often take hours or even days for long trials.
- During the course of the trial, proceedings may need to be halted and jurors removed from the courtroom while legal counsel argues a point of law.
- The filing in and out of the courtroom and the jury room can add to delays in the trial.
- The trial itself can often take longer because the legal counsel are at pains to explain concepts to the jury so that members of the jury can understand the evidence given.
- Jury deliberations may take some time.

Delays are even more extreme if the outcome is a hung jury, and the case needs to be retried before a new jury. In the case of Edwin Lewis, there were two hung juries before the jury in the third trial found Lewis guilty of the manslaughter of Paul Higgins and the murder of Carmel Higgins.

In addition, *The Age* reported an analysis of criminal appeals to the Court of Appeal during 2009, which found that all but one of the 14 cases where retrials were ordered was due to the trial judge misdirecting the jury. These added to delays experienced by the legal system, and delays to the parties in having a final determination of their case.

Recent change

The following recent change could further assist in achieving a more timely resolution of disputes in relation to trials conducted before juries.

- **simplifying judges' directions to juries** – The *Jury Directions Act 2013* is aimed at simplifying judges' directions to juries. This should overcome the problem of long a complicated judges' directions and help juries to reach a decision quicker. This change to judges' directions should also reduce the need for retrial due to a trial judge misdirecting the jury.

Recommendations for change

The following recommendations for change could help to achieve a more timely resolution of disputes in relation to trials conducted before juries.

- **remove juries from long and complex criminal trials** – This suggestion, made by the previous Victorian Director of Public Prosecutions (DPP), Jeremy Rapke QC, is aimed at speeding up trials; long complex cases would be quicker if heard by a judge alone.
- **time limits for lawyer's submissions** – The previous DPP also suggested that time limits should be placed on the length of submissions by legal counsel, including opening and closing addresses, as well as the cross-examination of witnesses. He says long trials distract juries, and need to be shortened.

LEARNING ACTIVITY 10.7

Effectiveness of the jury system

1 Explain how the jury selection and empanelment procedure helps to achieve a fair and unbiased hearing.
2 'The jury system ensures that people accused of a crime always receive a fair trial.' Discuss.
3 Suggest and explain two actual changes in the law and two recommended changes in the law that could help to ensure that a jury trial facilitates a fair and unbiased hearing.
4 Who bears the cost of a trial by jury in criminal and civil cases? Do you think that this is fair? Explain.
5 In what way may the effective access to the legal system be diminished in a criminal case?
6 Read the case study 'Trial of Daniel Morecombe killer' and answer the questions.
   a Why might it be difficult to achieve a fair and unbiased hearing if there has been considerable publicity about a case before it goes to trial?
   b How was the killer of Daniel Morecombe identified?
   c What was the outcome of this case? Do you think a fair and unbiased hearing was achieved? Discuss.

CASE STUDY

Trial of Daniel Morecombe killer

Daniel Morecombe was abducted from the Sunshine Coast in Queensland on 7 December 2003. He was 13 years old. The investigation into his disappearance continued for many years and there was massive publicity about the case during that time.



Figure 10.10 Daniel Morecombe

In August 2011, bones that were identified to be those of Daniel Morecombe were found in Glass House Mountains bushland. Brett Peter Cowan was arrested and charged with Daniel's murder. Cowan's defence barrister told the jury that Cowan pretended to have killed Daniel because he wanted to become a member of a gang. Cowan had been told by two gang members (who were undercover policemen) that if he wanted to be included in the gang he had to show them where Daniel was buried. The Crown prosecutor Michael Byrne said that Cowan had led police to Daniel's remains and his confessions to the two undercover policemen were not forced.

Justice Roslyn Atkinson told the jury to put out of their minds anything they had seen, heard or read about the trial outside the courtroom. 'The evidence is what you've heard in this court and not recollections of what you might have read in the newspaper or seen on television or heard on the radio at some time during the past or even during the trial', Justice Atkinson said.

At the trial, Peter Cowan pleaded not guilty and refused to give evidence. There were 116 witnesses that gave evidence and over 200 exhibits tendered in evidence. On 7 March 2014, Cowan was found guilty of the murder of Daniel and sentenced to life imprisonment with the possibility of parole after 20 years. Cowan had two previous convictions for child sex offences.

7 Explain how juries can add to delays in trials.

8 'The previous DPP's suggestion to remove juries from long and complex criminal cases could assist in a more timely resolution of disputes, but would come at the cost of a fair and unbiased hearing.' Discuss.

PRACTICE EXAM QUESTIONS

1 Read the first extract and answer the questions.
   - a To what extent would you say that the jury is a cross-section of the community? *(4 marks)*
   - b 'Juries usually get it right.' Do you agree with this statement? Discuss, referring to the comments made in the extract. *(10 marks)*
   - c Suggest two alternatives to the jury system, and discuss the advantages and disadvantages of each alternative suggested. *(6 marks)*

2 Read the second extract and answer the questions.
   - a What is the role of juries in civil and criminal trials? *(6 marks)*
   - b Discuss the reasons for the retention of juries in criminal trials. Refer to the extract in your discussion. *(8 marks)*
   - c Critically analyse two features of the jury system which may assist in achieving a fair and unbiased hearing. *(6 marks)*

3 a Explain the factors that influence the composition of juries. *(6 marks)*
   - b To what extent do you think abolishing the use of juries could achieve a more effective legal system? Discuss. *(8 marks)*
   - c Suggest two improvements to the jury system and critically analyse their implications. *(6 marks)*

Extract 1

The reason a jury generates such strong antipathy in certain quarters is not hard to find. Indeed, the very concept of a jury might be thought absurd. Twelve individuals, often with no prior contact with the courts, are chosen at random to listen to evidence (sometimes of a highly technical nature) and to decide upon matters affecting the reputation and liberty of those charged with criminal offences. They are given no training for this task, they deliberate in secret, they return a verdict without giving reasons, and they are responsible to their own conscience but to no-one else.

Source: J Baldwin & M McConville, *Jury Trials*, Clarendon Press, 1979

Extract 2

Trial by jury has been a fundamental safeguard against arbitrary justice for nigh on a thousand years. It is a system that, in principle, has stood the stern test of time, experience and public approval. But in practice, it has become warped and in need of remedial restoration.

There are those who argue that the jury system should be abolished, preferring trial only by learned judges or qualified magistrates. Justice Vincent, of the Victorian Supreme Court, is not one of these detractors. He firmly believes in the value of trial by jury, and in the commonsense and sound perception of most people who serve on juries.

Source: *The Sunday Age*, 3 September 1995

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK CASE STUDY

Jury finds defendant civilly liable for rape

Read the case study 'Jury finds defendant civilly liable for rape', and answer the questions.

1 Describe the process by which the jury for this case would have been empanelled, and explain how this would have affected the composition of the jury. *(4 marks)*

2 Explain the role of the jury in this case. How would it differ from the role of a criminal jury? *(4 marks)*

3 Explain the jury's decision in this case. Do we know how the jury arrived at their estimate of damages? Evaluate the advantages and disadvantages of juries not being required to give a reason for their decisions. *(6 marks)*

4 'This case highlights the need to maintain juries as part of our civil justice system.' Discuss, including an evaluation of civil juries. *(8 marks)*

5 Suggest two reforms to trial by jury that might improve the existing jury system. *(4 marks)*

6 Explain how the use of juries in civil cases contributes to the achievement of a fair and unbiased hearing. *(4 marks)*

(Total 30 marks)

Jury finds defendant civilly liable for rape

The plaintiff, Carol Stingel, brought a civil action against the defendant, Geoff Clark, for harm he caused her after allegedly raping her in the 1970s. Stingel claimed that Clark was the leader of two pack-rapes against her in Warrnambool in 1971 when she was 16 years old. She also stated that she was raped another four times later that year by other local boys, who had come to see her as an easy target. Stingel did not come forward with her allegations against Clark until 2000, after having been diagnosed with delayed-onset post-traumatic stress disorder in 1999, as a result of the two alleged rapes. She filed a writ with the County Court in August 2002. Clark has denied his involvement in the rapes. A criminal case against Clark was discharged during committal proceedings due to lack of evidence in 2000.

After some delays, in July 2006, the High Court told Stingel she was able to pursue a civil case.

During the 10-day trial in early 2007, the jury of three men and three women heard evidence from both the plaintiff and the defendant and had to determine whether Clark had committed the alleged sexual assaults, on the balance of probabilities. Specifically, they had to decide five questions.

- In or about late March 1971 did Clark assault and rape Stingel in the Warrnambool municipal gardens?
- In or about April 1971 did Clark assault and rape Stingel at the Lady Bay beach in Warrnambool?

- If yes to the first question, was such assault and rape a cause of injury, loss and damage to Stingel?
- If yes to the second question, was such assault and rape a cause of injury, loss and damage to Stingel?
- If yes to the third and fourth questions, at what sum would Stingel's compensatory damages and punitive damages be assessed?

After two days' deliberation, the jury answered 'yes' to questions 1 to 4, having found that Clark had committed the alleged sexual assaults. They awarded Stingel $20000 compensatory damages, but no punitive damages.

Clark appealed the decision on a number of grounds, including that trial judge David Morrow provided inadequate direction to the jury regarding the standard of proof required, and that the judge's charge to the jury did not adequately direct the jury in relation to the effect of the time elapsed on the memory of witnesses. The Court of Appeal dismissed Clark's appeal.



Figure 10.11 Geoff Clark outside the County Court

ASSESSMENT TASK STRUCTURED QUESTIONS

Judge and jury

Read the newspaper article 'Judge and jury' and answer the questions.

1 Explain the problems the person referred to in the article experienced during her time serving on a jury. *(2 marks)*

2 Discuss the comments and findings of studies of Professor James Ogloff in relation to juries' comprehension of information delivered in a trial. *(3 marks)*

3 What approach did Professor Ogloff find juries usually take when deliberating in the jury room? *(1 mark)*

4 To what extent do you think that watching American courtroom dramas on the television enhances, or is detrimental to, the ability of jurors to reach a fair verdict? Discuss. *(2 marks)*

5 How is the Court of Appeal dealing with some of the problems? Do you think this would be helpful? Discuss. *(3 marks)*

6 What suggestion has Justice mark Weinberg of the Court of Appeal made to try to overcome some of the problems? *(1 mark)*

7 How do jury directions in Victoria differ from jury directions in Scotland and the United States? Do you think the Victorian model is better? Explain. *(2 marks)*

8 Explain the opinion of Court of Appeal judge Marcia Neave. *(1 mark)*

9 Why might an accused believe he or she has lost his right to a fair trial and therefore is seeking an appeal? *(1 mark)*

10 Explain the recommendations of the Victorian Law Reform Commission. *(2 marks)*

11 What further suggestions does Professor Ogloff make? *(2 marks)*

12 Do you believe that the jury is able to achieve a fair outcome? Should the jury remain in its current form or should changes be made? Justify your point of view. In your discussion bring in points from the article to illustrate points made. *(10 marks)*

(Total 30 marks)

Judge and jury

Farah Farouque, Law and justice editor, *The Age*, 6 February 2012

When most jury members in criminal trials don't understand legal jargon or judges' directions, how can the accused get a fair trial?

She served on a jury nearly 20 years ago (and by law she must remain anonymous) and her experience then left her with many concerns that are still as vital today as they were then.

'The real problem occurred in the deliberating room,' says the woman, who had kept a diary of her experience. After several hours of confusion and debate over legal concepts – including the seemingly basic notion of 'beyond reasonable doubt' – the jurors finally reached a unanimous guilty verdict in the County Court drug-dealing case.

She says after they trooped back into the court to deliver their verdict, the judge who had given them detailed instructions summarising the evidence and law before they retired, was confused as to why the decision had taken so long.

'As we were leaving the courtroom, the judge quickly read a long list of priors to which some jurors – to my shock and horror – whispered: 'If he had told us that to start with, I would have found the accused guilty ages ago.' The judge obviously had no idea how confused the jurors had been about their responsibilities,' she recalls.

'Based on conversations I had with my fellow jurors, I would go so far as to say that they were so intimidated by their surroundings and the legal jargon, that they were unable to absorb most of the information presented – including directions given.'

Fast forward to today, and the issue of how much 12 conscientious jurors randomly summoned from the electoral roll really understand, as criminal trials become ever more complex, still holds true.

And now new research suggests that juries sometimes deliberate from a base of almost total incomprehension of what they have been told.

James Ogloff, a forensic psychologist at Monash University, is an expert in jury studies in Australia. A Canadian by origin and also trained as a lawyer, over nearly three decades he has conducted more than 24 studies here and in the US into juries' perceptions of trials, and importantly, the level of members' understanding of directions given by judges.

In one local study, done with co-operation from Victoria's Department of Justice, understanding was tested among 725 would-be jurors exposed to a simulated rape trial based on real facts. Ogloff says researchers found comprehension averaged at 'basically about 40 per cent'.

Exposing the jurors, who were convened in panels of 10 to 12, to more than the usual information available in standard trials, including a PowerPoint presentation by the judge and access to a written transcript in the jury room, improved comprehension 'to only about the low 60 per cent'.

Filming hundreds of simulated jury deliberations for one of his North American studies, Ogloff also found that jurors normally spent 'about 90 seconds' on the judge's instructions.

'What they do is that they go to their common sense,' he says. 'They don't sit around like a judge and think how the law applies. Instead, they think: "Oh, this guy wasn't very believable, I knew someone just like this." '

He also found that television and popular culture are having 'an extraordinary effect' in jury rooms with Australian jurors' views of law heavily influenced by American television. Would-be jurors based in this state, for example, threw around terms like the 'Miranda warnings', a term popularised in the *Law and Order* programs, which has no relevance to Australian law.

Ogloff says: 'We can't be confident that, based on the work that's been done, that jurors comprehend the law and apply it in the manner that we'd expect – and in the manner that many legal practitioners think they do.'

Ogloff is not alone in his views and is finding support in the upper echelons of the state's legal hierarchy.

The president of Victoria's Court of Appeal, Chris Maxwell, says alarm bells are also ringing in judges' chambers at the increasing complexity and burdens imposed on trial judges by higher courts. Judges feel they now must provide elaborate – and time-consuming – instructions to juries to minimise appeals.

'My perception is that in the understandable pursuit of ensuring a fair trial for the accused, appellate courts have continued to add to the number and complexity of warnings and directions that have to be given to juries,' Maxwell told *The Age*.

'The result of this process is that the latticework of directions and warnings is beyond the comprehension of most jurors ... We have trial judges complaining routinely that the Court of Appeal and High Court are burdening them with all these obligations – a judge will say: 'I am talking to the jury about some issue of proof and their eyes glaze over.'

Chief Justice Marilyn Warren agrees. 'Changes in the law, especially sexual assault reforms, and decisions of the High Court have made the task of judges in telling juries how to reach their verdicts – "charging the jury" – very difficult,' she says.

The Chief Judge of the County Court, Michael Rozenes, told *The Age*, through his spokeswoman, he was 'very supportive' of a push by Justice Mark Weinberg of the Court of Appeal, for a court-driven bid to simplify jury directions in key areas that lead to appeals. They include, for example, more clarity in the minefield of DNA evidence.

Weinberg says jury directions have evolved in Victoria to be more complex than in other Australian states, and compare unfavourably with those overseas. In Scotland, for example, a standard jury direction takes about 15 to 18 minutes, and in the US most directions in criminal trials are in a standard formulation and take about half an hour. In Victoria, jury directions typically 'take hours, if not days to deliver'.

Weinberg also says he has been present at trials as a presiding judge where jurors looked him in the face 'and certainly I could feel that they haven't understood a word that I've said'.

A leading Victorian criminal lawyer put the problem even more starkly: 'A lot of the judge's charge – that has got to be on the law – has developed into a magical incantation. I don't think juries understand most of the legal directions that are given in trials.'

Last financial year, 63016 citizens in Victoria were randomly selected from the electoral roll and summoned for jury duty in County and Supreme court trials, primarily in the criminal area. Of this large pool, 6857 were empanelled to serve on 616 jury trials.

Overall, the time taken up with jury service equalled 795 trial days, which in some cases included more than one day taken listening to judges' instructions.

Another Court of Appeal judge, Marcia Neave, has drawn attention to 'often very long' instructions dispensed from the bench. She recently told a judges' conference that 'most of us would not contemplate listening to a lecture that might go on for hours or even days. Comprehension fades, boredom sets in and people stop listening after a relatively short period.'

Yet, judges at the apex of the system continue to have enormous confidence in juries – because they say these 12 good men and women get it overwhelmingly right. Research showing low levels of comprehension, they argue, doesn't translate to a damning indictment of the very foundations of the jury system, which in this state was permanently introduced in 1847 (the first jury trial took place here in 1839).

'I don't think there is a crisis in the criminal justice system in that we are getting all sort of faulty decisions,' says the Court of Appeal's Chris Maxwell.

'The problem with overly complex directions is that you then get to the point where the trial judge fails to convey all of the subtleties of the directions. The conviction is probably quite sound but the accused, on appeal, can quite rightly say: "The judge didn't warn them that they weren't able to do that and they aren't able to do that ... I may have lost my right to a fair trial."'

While there is a renewed bid within Victoria's courts for change, this push takes place against a backdrop of considerable work already done within the court and elsewhere.

Apart from Ogloff's field work – his latest project involves interviewing real-life jurors at the conclusion of 50 trials in Victoria and New Zealand (an innovator in jury reform) – the Victorian Law Reform Commission considered the issue nearly three years ago.

In its final report, the commission said the law concerning jury directions in criminal trials should be simplified into a single statute. When addressing the jury about the issues that are expected to arise in a trial, the commission proposed a judge should also be able to provide a jury with a number of written documents to help them, including an 'Outline of Charges', identifying elements of the accused's alleged offences.

The commission also said the trial judge should also be expressly permitted to provide the jury at the start of a trial with a document known as a 'Jury Guide' – a list of questions of fact designed to guide them towards their verdict.

'The jury guide amounts to providing essentially an overview of the jury's task,' Ogloff says. 'It would likely include things like outlining to the jury the key players in the courtroom and communicating key concepts of law relevant to the case. It would also instruct jurors that they must be unbiased, listen to the evidence and such.'

Ogloff, however, argues that written materials offered to the jury should go even further than that proposed by the commission. 'If you think about a jury's task, the jury doesn't really have to understand the law – they need to apply the law.'



Figure 10.12 Professor James Ogloff in the jury box at the Supreme Court

He says the best way to help juries who engage in a sophisticated fact-finding process in which they have to apply the law is for the trial judge to take a more hands-on role.

Ogloff has been converted to the 'Question Trail' method adopted in New Zealand, where judges present a jury with a series of questions, the answers to which require the jurors to basically apply the law.

'What they do now there is the judge summarises the evidence and says in order to find the person guilty you must find X, Y, Z, and the jury goes off just to do their job.

'It's actually not too messy, because even in very complex cases there really aren't that many questions they need to ask,' he says.

In his next simulated trial, Ogloff will present jury panels with this scenario to test the degree to which it enhances comprehension. He is confident that he will see positive results, echoing the success the approach has found across the Tasman.

'My faith in juries comes from the fact that they do best what they should be doing, which is interpreting facts and answering factual questions.

'Where they need assistance – and where we need to pick up our game – is in ensuring that the approaches we use and adopt are going to maximise their ability to do what they need to – which is to apply the law to the facts.'

This intense push for reform – coming from both within and outside the courts – is an immense relief to the frustrated juror of 20 years ago.

She says jurors can often feel almost physically sick when the verdict is announced because of the burden placed on them. 'Judges need to be educated to understand the problems confronting jurors. Because the courtroom is such a familiar place to them, they may not appreciate the confusion and fear, which often face jurors. Don't assume the common man understands courtroom procedures and legal language.'

ASSESSMENT TASK ESSAY

Jury in criminal cases

'The current jury system operating in Victoria should be retained for criminal cases as it remains the most effective way of determining the guilt or innocence of an accused.'

Discuss, making reference to the role of the criminal jury, strengths and weaknesses of the jury system, and reforms or alternatives that have been or could be made to improve the effectiveness of the jury system. *(20 marks)*

Summary

Role of the jury

- provides an independent decision-maker
- applies all the facts to the case
- listens to all the evidence
- remembers the evidence, keeps concentrating and makes sense of it all
- understands the points of law
- puts aside prejudices or preconceived ideas
- forms an opinion about the case
- undertakes deliberations
- makes a decision on the facts of the case
- in civil trials decides on the amount of damages

Use of juries

- jury not used in the Magistrates' Court
- jury not used for appeals

- jury used in criminal cases of first instance (heard for the first time) in the County Court and Supreme Court where defendant has pleaded not guilty
- jury optional in civil cases (never in the Magistrates' Court); in civil cases the party who decides to have a jury pays for the jury

A jury in criminal trials

- jury in all criminal trials in Supreme Court and County Court
- 12 jurors, can be up to 15 (extra three excused at end, before deliberation)
- jury can continue with 10
- six peremptory challenges for accused – if there is one accused
- prosecution can stand aside six jurors – if there is one accused
- unlimited challenges for cause for accused and prosecution
- majority verdict (11 out of 12) is accepted, except for murder, treason, some drug offences and Commonwealth offences, which must be unanimous
- jury decides on the facts – guilty or not guilty

A jury in civil trials

- optional (and party who wishes to have a civil jury pays the fee for the jury)
- six jurors, can be up to eight (extra two excused at end, before deliberation), jury can continue with five
- both sides can have three peremptory challenges
- majority verdict (five out of six)
- decides on the facts – if the defendant is liable
- decides on the amount of damages

Composition of juries

Selection of the jury

- jury districts same as electoral districts
- Juries Commissioner notifies the Electoral Commissioner of the number of jurors required
- Electoral Commissioner randomly selects required number from the electoral rolls
- list of prospective jurors sent to the Juries Commissioner
- questionnaire sent to each person to determine eligibility
- offence not to answer questionnaire
- Juries Commissioner checks the questionnaires and informs people that they are selected or not selected
- Juries Commissioner summons each person who is eligible to attend
- it is an offence not to attend once summoned to appear
- prospective jurors placed in a jury pool
- jury panel selected from jury pool
- panel given basic information about the case

Challenges

- in civil case, plaintiff and defendant allowed three peremptory challenges each and unlimited challenges for cause
- in criminal case, defence allowed six peremptory challenges and prosecution able to set aside six; unlimited challenges for cause

Liability for jury service

- exemptions from jury service
  - disqualified
  - ineligible
  - excused for good reason

Strengths of the jury system

- decision made by a cross-section of people
- involves the general public
- spreads responsibility for making the decision
- reflects community values
- less legal jargon
- safeguard against misuse of power
- juries generally get it right
- helps to protect democracy

Weaknesses of the jury system

- not really a true cross-section of the people
- may have difficulty understanding complicated evidence
- deliberates behind closed doors
- has to concentrate for long periods of time
- unfamiliar with legal procedure
- does not have to give reasons for decision
- can be swayed by clever counsel

- can be influenced by the media
- difficult task, expertise needed
- delays and high cost
- may have difficulty reaching a decision
- inconsistent damages in civil cases

Changes in the law

- extra jurors
- majority verdicts
- jurors not allowed to make their own enquiries
- simplifying judges' direction

Suggested reforms

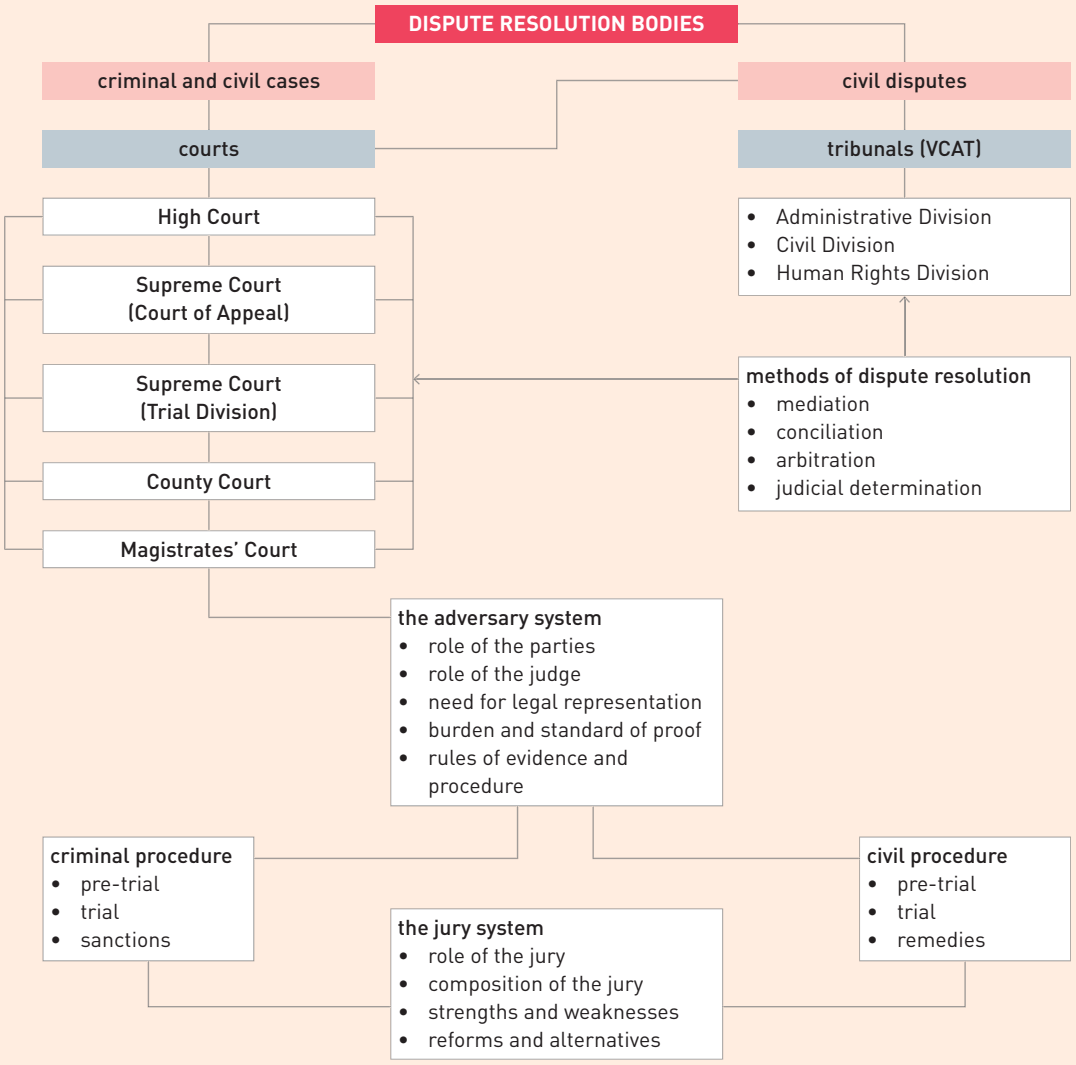
- require juries to give reasons for their decisions
- make the jury more representative
- have a specialist foreperson
- give instructions before the trial
- introduce 'not proven' verdict
- have juries participate in sentencing
- provide more technical assistance
- reduce size of the jury

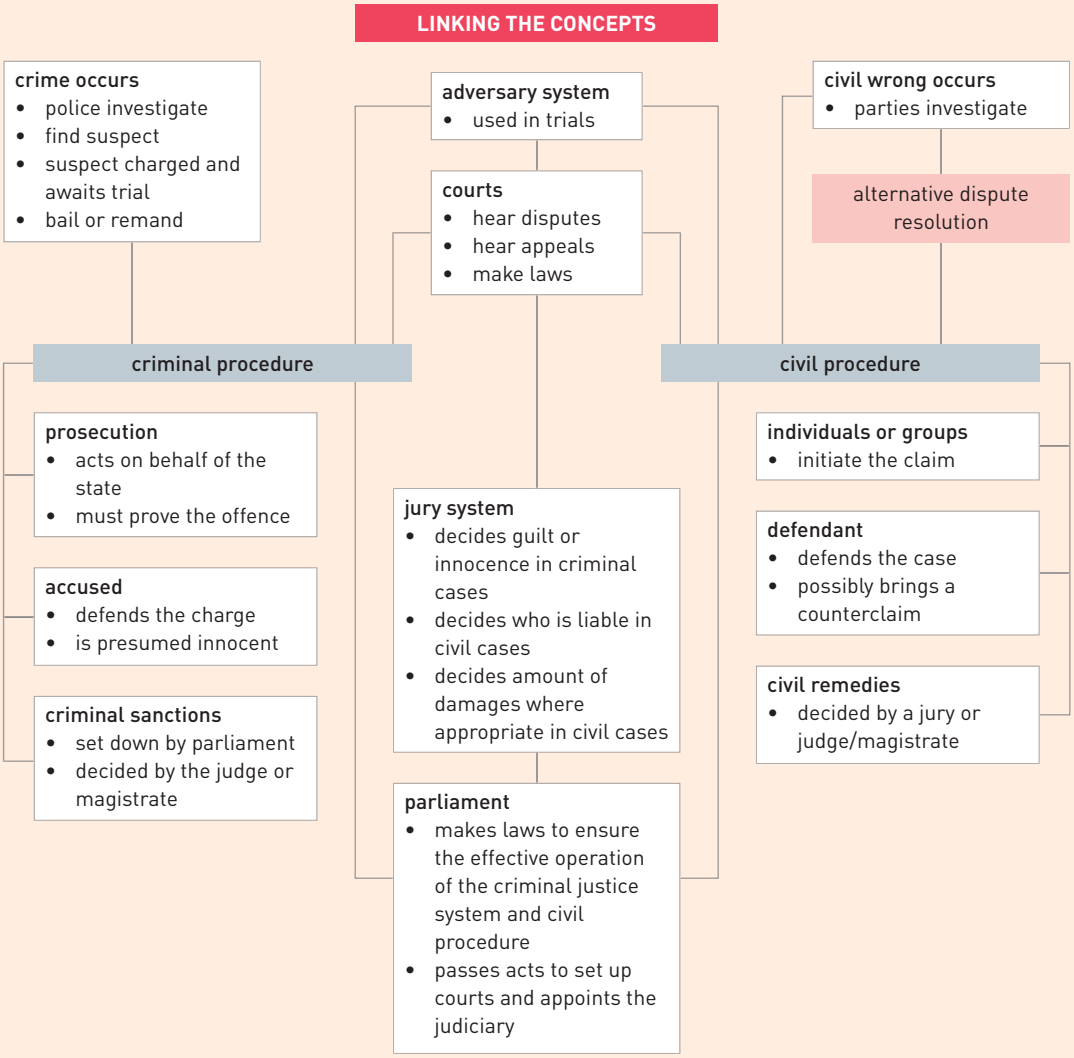
Possible alternatives

- judge alone or three judges
- professional jurors
- specialist jurors

Evaluation of the legal system

- everyone is entitled to a fair and unbiased hearing
- effective access to the legal system
- timely resolution of disputes




LINKING THE CONCEPTS
crime occurs
• police investigate
• find suspect
• suspect charged and awaits trial
• bail or remand
adversary system
• used in trials
courts
• hear disputes
• hear appeals
• make laws
civil wrong occurs
• parties investigate
alternative dispute resolution
criminal procedure
civil procedure
prosecution
• acts on behalf of the state
• must prove the offence
accused
• defends the charge
• is presumed innocent
criminal sanctions
• set down by parliament
• decided by the judge or magistrate
jury system
• decides guilt or innocence in criminal cases
• decides who is liable in civil cases
• decides amount of damages where appropriate in civil cases
parliament
• makes laws to ensure the effective operation of the criminal justice system and civil procedure
• passes acts to set up courts and appoints the judiciary
individuals or groups
• initiate the claim
defendant
• defends the case
• possibly brings a counterclaim
civil remedies
• decided by a jury or judge/magistrate



CHAPTER 11

EFFECTIVE OPERATION OF THE LEGAL SYSTEM

OUTCOME

This chapter is relevant to learning outcome 2 in Unit 4. You should be able to explain the processes and procedures for the resolution of criminal cases and civil disputes, and evaluate their operation and application, and evaluate the effectiveness of the legal system.

KEY KNOWLEDGE

The key knowledge covered in this chapter includes:

- the elements of an effective legal system: entitlement to a fair and unbiased hearing, effective access to the legal system and timely resolution of disputes
- problems and difficulties faced by individuals in using the legal system
- recent changes and recommendations for change in the legal system designed to enhance its effective operation.

KEY SKILLS

You should demonstrate your ability to:

- define key legal terminology and use it appropriately
- discuss, interpret and analyse legal information
- apply legal principles to relevant cases and issues
- evaluate the extent to which court processes and procedures contribute to an effective legal system.

KEY LEGAL TERMINOLOGY

alternative dispute resolution (ADR) A method of less-formal dispute resolution, such as mediation, conciliation or arbitration, where a civil dispute is reconciled between the parties, with the help of an independent third party. It is also known as appropriate dispute resolution.

collaborative law Disputing parties, together with their lawyers, sign a contract to work together in good faith to resolve their civil dispute without going to court, using problem-solving and negotiation techniques to achieve a just outcome.

legal aid Publicly funded legal advice, assistance and/or representation.

EFFECTIVE OPERATION OF THE LEGAL SYSTEM

This chapter helps you to pull together all the knowledge of the legal system that you have gained and to consider the effectiveness of the legal system. It brings together concepts and issues discussed in chapters 7 to 10 relating to the evaluation of the effectiveness of the legal system in resolving criminal cases and civil disputes. It recaps the elements of an effective legal system and considers how different court processes and procedures contribute to the achievement of these elements.

These elements are:

- entitlement to a fair and unbiased hearing
- effective access to the legal system
- timely resolution of disputes.

The extent to which our legal system can be considered effective is measured by the degree to which it achieves each of the three elements considered necessary for upholding justice. These three elements form the basis of the evaluation of the processes and procedures examined in Unit 4, and have been investigated in detail throughout the previous four chapters.

This chapter highlights a range of factors operating in the legal system that lead to some people having difficulties in using the legal system. Such factors include the cost of justice, delays experienced in the legal system, and social disadvantage of Indigenous people. The chapter also investigates recent changes and recommendations for changes in the law that are designed to enhance the legal system's effective operation.

An effective legal system is one in which the laws reflect the needs and values of the society that it serves, and where the laws are considered acceptable by the majority of the community. It is also a system in which disputes can be heard and resolved in a peaceful way that is considered to be just by the community, and which fosters confidence in the legal system.

LEARNING ACTIVITY 11.1

Achieving the elements of an effective legal system

1 Outline each of the three elements of an effective legal system.

2 Explain the role of the three elements in determining the effective operation of the legal system.
3 Why is it important that the legal system operates effectively? What are the consequences if it does not?
4 Go through chapters 7, 8, 9 and 10 and make your own list (which you can add to as you go through this chapter) of examples that show how effective the legal system is in achieving the three elements of an effective legal system. For each of these three elements also include associated problems and changes, or suggested changes, to assist in its achievement.

A FAIR AND UNBIASED HEARING

To provide a fair and unbiased hearing, the legal system should ensure that people are not **disadvantaged** when dealing with the legal system, people are not **discriminated** against, and both sides to a dispute receive a fair hearing. The adversary system provides the parties with control over the proceedings of the case, so they have the opportunity to do the best they can to achieve a fair outcome. The judges and magistrates are **independent** and ensure that the rules of evidence and procedure are followed so witnesses can be questioned and evidence provided in a manner that is fair to both parties.

In **criminal cases**, the accused is presumed innocent until proven guilty and has the right to silence. In this way, he or she has the right to be tried on the facts of the offence as charged and is protected from having to provide evidence that may be incriminating.

Pre-trial procedures such as bail and committal proceedings provide the accused, in most cases, with an opportunity to prepare a defence, while still living in the community. Legal aid is available to assist in this process.

In **civil cases**, the parties are able to gather their evidence and present their case to the best of their ability in order to reach a fair outcome. Pre-trial procedures are aimed at reaching an early resolution to the case. If, or when, the case goes to trial, pre-trial procedures enable the disputing parties to be aware of the claims and documents relevant for the trial and to clarify issues in dispute. Greater emphasis on mediation and conciliation has led to quicker and fairer outcomes. Judicial resolution conferences are designed to reach a settlement of a civil matter using mediation, conciliation, early neutral evaluation and settlement conferences.

The features and procedures discussed in previous chapters generally operate to facilitate the achievement of a fair and unbiased hearing. However, some people or groups continue to experience problems and difficulties in using the legal system and may not receive a fair and unbiased hearing. Recent changes in the legal system have been made in an effort to overcome these problems and improve the effective operation of the legal system. Further changes are still recommended in some instances.

Table 11.1 summarises the procedures, processes and features of the legal system studied in chapters 7 to 10 that operate to achieve a fair and unbiased hearing. It also lists a range of problems and difficulties that could arise in using the legal system, which can prevent the achievement of a fair and unbiased hearing. Actual and recommended changes designed to overcome existing problems and difficulties are also provided.

Table 11.1 Entitlement to a fair and unbiased hearing – to achieve this, everyone should be treated equally before the law and the adjudicators should be independent and unbiased

PROCEDURES/PROCESSES/FEATURES	
Procedures, processes or features in place in the legal system to assist the achievement of this element include:	
• **pre-trial procedures such as bail, committal proceedings, pleadings and discovery** – enable the parties to learn of the other party's case and evidence against them and allow them to prepare their case • **adversary system** – gives both sides the opportunity to present their case and equal chance to win the case • **party control** – allows the parties to be in control of the progress of their case • **independence of the judiciary** – the case is heard by an independent and impartial adjudicator	• **rules of evidence and procedure** – help to ensure that the truth will come out, as the parties are given equal opportunity to bring out appropriate, admissible evidence and for it to be tested by the other party • **right to silence** – people accused of a crime can remain silent to prevent them from incriminating themselves • **burden of proof** – is placed on the party bringing the action, so they have to prove the case • **jury system** – trial by peers who represent a cross-section of the community, hold community values and are unbiased; spreads the responsibility of the decision.
PROBLEMS AND DIFFICULTIES	
An unfair or biased outcome could arise because of:	
• **strict rules of evidence** – may result in useful evidence being inadmissible in court • **difficulties with witnesses giving evidence** – due to language difficulties, nervousness, lack of understanding of court processes, memory lapses, conflicting expert witnesses • **high cost of legal representation** – an unrepresented party is likely to be disadvantaged as they may be unfamiliar with pre-trial and trial procedures and unable to present their case in the best possible light • **tighter guidelines to qualify for legal aid** – may result in more parties being unrepresented in the legal system • **judicial bias** – the magistrate or judge may have personal biases that affect the case	• **jury bias** – the jury may have biases and preconceived ideas, be influenced by media coverage of the case, have difficulty understanding the case and not necessarily be representative of the community • **complex pre-trial procedures (particularly in civil cases) and trial procedures** – require the expertise and knowledge of legal counsel, which can disadvantage unrepresented parties • **inconsistency in damages** – if a jury is required to decide the amount of damages in a civil case, the amount may be different from that awarded in other cases • **cultural differences** – parties from different cultural backgrounds may be confused by pre-trial and trial procedures.
RECENT CHANGES	
Recent changes that have taken place in relation to achieving a fair and unbiased hearing include:	
• **change to evidence laws** (*Evidence Act 2008*) – to relax the evidence rules to allow relevant evidence to be heard in court • **exceptions to double-jeopardy laws** – to allow a retrial where there is fresh or compelling new evidence • **changes to bail laws** (*Bail Amendment Act 2013*) – to give a fairer and more consistent approach to bail and associated conditions for bail • **consistency in criminal procedure** (*Criminal Procedure Act 2009*) – across different jurisdictions; simplification of the grounds for appeal and related tests • **proper basis for civil claim** – the *Civil Procedure Act 2010* requires parties to act honestly and cooperate with each other, and ensures that there is a proper basis for a claim	• **simplification of jury directions** (*Jury Directions Act 2013*) – provides guidelines for a judge's directions to the jury and streamlines the summing-up process • **juries not able to make their own enquiries into any matter relevant to the trial** – only information presented at the trial should be considered by jurors (*Courts Legislation Amendment (Juries and Other Matters) Act 2008*) • **help for people with mental illness or cognitive impairment** – the Assessment and Referral Court List of the Magistrates' Court is designed to help the accused whose offending behaviour is related to their mental illness or cognitive impairment • **extension of the Koori Court program** – in the Magistrates' Court and County Court.

RECOMMENDATIONS FOR CHANGES

Recommendations for changes include:

- **increased resources for trials involving persons with mental health issues** – currently being reviewed by the Victorian Law Reform Commission
- **greater awareness and legal assistance for disabled persons**
- **increased funding for legal aid** – to enable more people to use legal services
- **review jury eligibility** – to allow greater representation of the community on juries
- **training in Aboriginal and Torres Strait Islander culture for lawyers and judicial officers** – recognition of customary law in sentencing.

LEARNING ACTIVITY 11.2

Fair and unbiased hearing

1. Describe the processes and procedures in our legal system which help to ensure that parties have a fair and unbiased hearing.
2. Explain problems in our legal system that could reduce an accused person's opportunity of receiving a fair and unbiased hearing.
3. Explain four changes or suggested changes in the legal system that can enhance the opportunity of parties to receive a fair and unbiased hearing in criminal or civil cases.

Focus on social disadvantage: Aboriginal and Torres Strait Islander peoples

While the community in general is becoming more aware of the need to increase the participation of a wider cross-section of the population in legal decision-making positions and to incorporate a range of values into the legal system, some groups are often not treated equally or fairly by the legal system. Problems and difficulties that may confront socially disadvantaged people who need to use the legal system include lack of knowledge of the legal system, the legal system failing to account for differences, and misunderstandings in cultural issues.

NOTE

While respectfully acknowledging the many cultural differences, we use the term 'Indigenous' to cover all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples are particularly disadvantaged in our society. The problems and difficulties that they face when using the legal system are part of the reason for them being overrepresented in the criminal justice system. In June 2013, Indigenous Australians represented 27 per cent of the total prisoner population, despite comprising only around 3 per cent of Australia's population. Indigenous prisoner numbers have been increasing, although at a reduced rate recently, with an increase of 10 per cent between 2008 and 2009, slowing to only 1 per cent growth between 2010 and 2011, and rising to 5.6 per cent growth between 2012 and 2013 (ABS, *Prisoners in Australia*, 2013).

USEFUL WEBSITE

Australian Bureau of Statistics www.abs.gov.au

While Victoria has the lowest proportion of prisoners who are Indigenous, at 7 per cent of the prison population, Indigenous people are 14 times more likely to be imprisoned than other sections of the population; Indigenous juveniles under 15 are 15 times more likely to be in juvenile detention than other sections of the juvenile population.

Indigenous Australians have a very complex system of law and customs, which is handed down from generation to generation. These traditional laws and customs can contribute towards Indigenous people not achieving a fair outcome through mainstream Australian law.

Problems during questioning and giving evidence

Aboriginal and Torres Strait Islander people who are not familiar with contemporary Australian society are likely to experience difficulties in giving evidence in courts. They may experience problems in clearly understanding the English language, as well as complicated evidence presented in court. These difficulties are compounded by their natural shyness, language barriers, embarrassment and fear. Problems during questioning limit effective access to a fair and unbiased hearing and can lead to unjust outcomes.

The following are some of the problems and difficulties faced by Indigenous Australians.

- **language barriers** – There are subtle differences in the way language is used by Indigenous people that can cause misunderstandings, which could have adverse effects. For example, 'kill' may mean to hit someone, probably causing injury, but not necessarily killing them; 'story' in Aboriginal usage usually means the truth, the real account of an event, not something that has been made up.
- **responding to direct questions** – Traditionally, Indigenous children do not grow up in an environment where they are expected to answer when spoken to, and they feel ill at ease when questioned. This can therefore put Indigenous people at a disadvantage when being questioned by police or by legal personnel in a courtroom. In both remote and urban areas, it is considered intrusive to ask personal questions and quite contrary to conventions of Indigenous courtesy. A very direct questioning approach is often seen as discourteous. Some Indigenous people will go to great lengths to avoid direct verbal confrontation, such as procrastinating or saying what they think people want to hear. Attempts at avoiding direct questioning in the courtroom can be viewed with suspicion. Further, when Indigenous people are asked a question they often take considerable time in answering, preferring to first weigh up the question and their response before saying anything. This can be frustrating in a courtroom, and can lead to confusion if witnesses are not given the time they need to answer or can also result in questions being reworded or withdrawn. Unless legal personnel are familiar with this slow and diffident Indigenous approach, they are likely to repeat the question, often in slightly different wording, which can cause further confusion to Indigenous people who then have two questions to answer.
- **body language** – Direct eye contact is seen as disrespectful to some Indigenous people, who try to avoid it by looking down or to the side. This type of behaviour appears uninterested or unreliable to those who do not understand Indigenous customs.
- **shyness and submissiveness** – Most Indigenous people will answer questions posed by white people in the way in which they think the questioner wants, rather than necessarily what actually happened. Some Indigenous people tend to be submissive to authority and very willing to respond to police requests, even to the extent of admitting guilt, without realising the consequences and implications of the admission.
- **cultural taboos** – Within Indigenous culture it is forbidden to speak of certain things, such as the names of dead people, or someone the community holds in disgrace. In some instances it is forbidden to mention information in front of women. These traditional laws can cause difficulties and misunderstandings for Indigenous people who have been charged with an offence, and may result in them being denied a fair and unbiased hearing.
- **lack of understanding of court procedures** – Indigenous people often do not understand why they have to tell the same story over and over, such as during examination-in-chief and then cross-examination. Therefore in an attempt not to offend the authorities, they may think that they

are required to change their story for each telling. This makes it easier for the barrister to make a witness appear inconsistent. A Darwin magistrate has been quoted as saying that Indigenous witnesses give their view of the facts honestly during examination-in-chief, but they do badly in cross-examination because they do not understand its purpose.

- **different methods of dispute resolution** – Indigenous dispute resolution is more informal and involves emotional responses compared to the formal atmosphere and controlled responses in a court. A common way of resolving a grievance is to air it publicly by shouting or yelling. This is an open display of anger. The parties in a dispute are often people who live together and the dispute resolution takes place in front of the community. Communications are mainly oral and there are no strict rules of evidence. In contrast, in a courtroom the parties to a dispute are often strangers and the process is conducted in front of strangers.

All of these factors coupled with the confusion created by the unfamiliar environment can lead to courts having an overpowering psychological effect on people brought before them, especially those who are not used to formal social structures. Schooling for Indigenous children in remote areas may not prepare them for the formal surroundings of a courtroom.

The case of *R v. Robyn Bella Kina* (Court of Appeal, Queensland, President, Davis J and McPherson J, 29 November 1993) illustrates the problems of Indigenous people being confronted with the criminal justice system. Kina was found guilty of murdering her de facto partner. The court held that it was inappropriate for the defence of provocation to be used (which was at that time a possible defence). Kina found it difficult to talk to her legal representative and to the police. She was scared, embarrassed and shy. It would have been unlikely for her to reveal sensitive or significant information unless a person communicated with her in the traditional way, which does not involve direct questions. Her sense of family responsibility would have obstructed her ability or willingness to discuss the threats made by her de facto husband, who said he was going to have sex with her niece, which was one of the provoking factors.

Changes in the operation of the legal system: extension of the Koori Court

The adult Koori Courts and the Children's Koori Courts help to overcome some of the problems arising from the cultural differences of the Indigenous community. In doing so, the differences and values of the Indigenous community are being recognised in sentencing, thereby upholding a fair and unbiased hearing and helping to improve access to justice for people who might otherwise be treated unfairly by the white justice system.

The Koori Court Division of the Magistrates' Court opened in Shepparton in 2002, with another six Koori Magistrates' Courts being established since then. Australia's first Children's Koori Court was set up in Melbourne in 2004 to help address the overrepresentation of Indigenous youth in the criminal justice system. A second Children's Koori Court was set up in Mildura. Koori Court Divisions have also been established in the County Court.

NOTE

See chapter 6 for further discussion of the Koori Court Divisions.

County Koori Court

The County Koori Court aims to help overcome the problems faced by Indigenous people accused of serious offences. It was originally established in 2009, under the *County Court Amendment (Koori Court) Act 2008* (Vic.), as a four-year pilot program at the Latrobe Valley courts in Morwell. The program was extended in 2013 with the introduction of the **Melbourne County Koori Court**. The County Koori Court continues the principles of the Koori Court divisions of the Magistrates' Court and the

Children's Court, and is the first sentencing court for Indigenous offenders in a higher jurisdiction in Australia. Its jurisdiction includes sentencing for all offences dealt with in the criminal jurisdiction of the County Court except sexual offences and family violence cases.

The objective of the County Koori Court is 'to ensure greater participation of the Aboriginal community in the sentencing process of the County Court through the role played in that process by the Aboriginal Elders or Respected Persons and others such as the Koori Court officer' (County Court of Victoria, 2008). The aim is to ensure a fair hearing for Indigenous people accused of crimes, and a more culturally appropriate justice process. The informality of the court, coupled with the requirement that the accused and the Indigenous community are able to understand the proceedings, and the involvement of an Indigenous elder or respected person, assists the court to address some of the inequities faced by Indigenous people accused of crimes.

The participation of the Indigenous elder or respected person in the sentencing process and the actual sanction given reinforces the condemnation of the offence by the Indigenous community.

Between 2008 and 2013, the Latrobe Valley County Koori Court dealt with 80 people, of whom only three reoffended during this time. The operation and impact of the court has attracted praise from within the legal profession, such as County Court Judge John Smallwood, Federation of Community Legal Centres Executive Officer Hugh de Kretser and Victorian Aboriginal Legal Service Chief Executive Officer Wayne Muir.

EVALUATION OF THE COUNTY KOORI COURT

An evaluation report on the County Koori Court pilot program at Morwell was released by the County Court of Victoria and the Department of Justice in late 2011. The report concluded that 'there is strong evidence that the County Koori Court pilot program is making significant achievements in the program outcome area of providing access to fair, culturally relevant and appropriate justice'. The report's key findings highlighted the following benefits of the County Koori Court.

- There were very low levels of recidivism (reoffending) among the accused whose cases were heard in the County Koori Court, along with promotion of deterrence and the potential rehabilitation.
- There were improved experiences of the justice system by the Koori accused. Fourteen out of 15 accused interviewed agreed that the process was more engaging, inclusive and less intimidating than the mainstream court.
- There was more active participation in the court process. The accused reported that they valued the opportunity to speak directly to the court about their history and the circumstances relating to their offending behaviour.
- There was increased involvement by a range of stakeholder groups such as the accused, elders, family members, service providers, community members, victims and informants.

USEFUL WEBSITE

County Court of Victoria – County Koori Court Division
www.countycourt.vic.gov.au/county-koori-court

Suggested changes to overcome social disadvantage for Indigenous people

Suggested changes in the legal system that would assist Indigenous people include:

- **more education programs for Indigenous people** to assist them with legal problems
- **training in Indigenous culture** for lawyers and the judiciary so they will be aware of sensitive issues such as not being able to mention the name of a dead person

- **extending the Koori Court model** to the Supreme Court for Indigenous people accused of the most serious crimes – consideration could also be given to extending the Koori Court model and philosophy to contested cases, where the accused pleads not guilty, and not limiting the Koori courts to sentencing in uncontested cases
- **recognition of tribal customary law in sentencing** so that Indigenous people are not subject to a double sentence – one from the court system, and one according to Aboriginal tribal law.



Figure 11.1
Shepparton Koori Court

LEARNING ACTIVITY 11.3

Fair and unbiased hearing – Indigenous people

1 In what way do court procedures create problems for Indigenous people seeking a fair and unbiased hearing?
2 Suggest ways of overcoming the problems that Indigenous people experience in giving evidence. Explain how these suggestions would assist Indigenous people in achieving fair outcomes.
3 To what extent should traditional Indigenous customs be recognised in the administration of Australian law? Discuss.
4 Evaluate the operation of the Koori Courts, and their contribution to an effective legal system.
5 Read the extract 'Disadvantaged Aboriginal background now a factor in court rulings' and answer the questions.
   a Suggest why the High Court found that a person's Aboriginal background can be a mitigating factor in sentencing.
   b To what extent does this decision contribute to a fair and unbiased hearing?
   c Explain the effect of this High Court ruling on Victorian courts when sentencing an Aboriginal offender.

EXTRACT

Disadvantaged Aboriginal background now a factor in court rulings

Jane Lee, *The Age*, 3 October 2013

Judges will need to consider the Aboriginal background of an offender when sentencing them after a landmark High Court decision ruled that the effects of profound disadvantage do not diminish over time.

The High Court ruled for the first time on Wednesday that a person's Aboriginal background may reduce their sentence if they come from a deprived or disadvantaged background. It also ruled that this was one of a number of factors that judges had to consider, including the seriousness of an offence and the extent to which the victim has been harmed.

The judges unanimously allowed an Aboriginal Australian man, William Bugmy, to appeal the Court of Criminal Appeal's decision to resentence him to five years' imprisonment without parole.

Bugmy grew up in Wilcannia, in far-west NSW, in a home where alcohol abuse and violence were common. He was sentenced to four years in jail in the District Court of NSW for intentionally causing grievous bodily harm to a correctional services officer. The Director of Public Prosecutions appealed the sentence, arguing that it was 'manifestly inadequate'.

While not all Aboriginal offenders had similarly disadvantaged backgrounds, the court said: 'The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way' ...

From the late 1990s, prison sentences had lengthened disproportionately for Indigenous offenders ...

According to the National Aboriginal and Torres Strait Islander Legal Services, Indigenous people are now 15 times more likely to be incarcerated than non-Indigenous Australians, with imprisonment rates rising 50 per cent in the past decade compared with 5 per cent for the rest of the population.

ACCESS TO THE LEGAL SYSTEM

For a legal system to be effective, all people should be **aware of their right to take a matter to a court, a tribunal or other dispute resolution body**, and have equal access to these legal bodies.

Legal bodies, such as the courts and VCAT, have a range of dispute resolution processes to help to achieve access to the legal system. The **court hierarchy** provides the opportunity for minor cases to be heard more quickly and cheaply, with the more complex cases going before the more experienced judges. **Specialist courts** such as the Koori Court provide access for people with special needs within the legal system. The **appellate courts** provide an opportunity for people who feel there has been an incorrect decision by a court to take the matter further.

Parties to a case or dispute can engage the services of **legal representation** to assist them with the preparation and presentation of their case. The government provides **legal aid** to eligible individuals through Victoria Legal Aid, in order to assist people who might not otherwise be able to afford access to the legal system.

EXTRACT

Access to justice

Access to justice goes beyond access to tribunals and courts. It's also about:

- access to information and support
- access to opportunities, and having a fair and reasonable experience in everyday life (*everyday justice*).

Most of the time we manage conflict and disputes ourselves. The second most common way of resolving a dispute is through *informal justice*. This includes using a third party advisor or facilitator (for example, an alternative dispute resolution practitioner or lawyer). The least common way of resolving a dispute is through the *formal justice* system. This includes going through the courts and tribunals, often with a lawyer.

If you need help to resolve a dispute, you can find the range of options available to you on this website [Attorney-General's Department] including:

- easy-to-read legal information, such as factsheets and publications relating to your particular dispute
- links to other websites with specific information and forms you may need to fill in
- finding someone you can contact in your local area who can help you understand your options, and even help you decide what to do.

The best option for you will depend on a number of things, including the type of dispute and your relationship with the other people involved.

If you have a dispute with an employer or family member, it might be important to resolve it in a way that does not damage your ongoing relationship. Using a method of dispute resolution that focuses on agreement may be a good choice for you. If your dispute is complex and long-standing, you might need to use a more formal process, like arbitration or going to court. However, it can still be useful to try another method like negotiation or mediation first, to help clarify what is in dispute.

Source: Australian Government, Attorney-General's Deparment

However, some individuals, or groups of individuals, may experience difficulties in their dealings with court processes and procedures, which reduce the effectiveness of the legal system. These difficulties may take the form of:

- being unable to afford to pursue their case
- having limited access to legal representation
- not being aware of their legal rights
- difficulty in accessing the correct court
- cultural or social differences that restrict a person from being dealt with fairly in the legal system.

Some groups in society, such as Indigenous people, migrants and people with mental impairment, face additional challenges when dealing with the law that sometimes result in injustices occurring.

While there have been a number of changes made to structures, procedures and the operation of the legal system to enhance its effectiveness, there are also other recommendations for change that could be considered.

Table 11.2 summarises the procedures, processes and features of the legal system studied in chapters 7 to 10 that operate to achieve effective access to the legal system. It also lists a range of problems and difficulties that could arise in using the legal system and therefore prevent access to it. Also included are actual and recommended changes designed to overcome these problems and difficulties.

Table 11.2 Effective access to the legal system – to achieve this, everyone should be aware of their right to take their dispute to a court or tribunal, or use alternative dispute resolution (ADR) methods, and be able to access the legal system

PROCEDURES/PROCESSES/FEATURES	
Procedures, processes or features in place in the legal system to assist the achievement of this element include:	
• **opportunity to take the matter to a court** – this may include a specialist court or list (e.g. Koori Court, Family Violence Court, Sexual Offences List) where appropriate • **opportunity to take some civil matters to a tribunal such as VCAT** – which is less expensive and more accessible • **increased use of ADR in courts and tribunals for civil cases** – this may include being ordered by the court to participate in mediation • **collaborative law** – provides a means whereby parties and their lawyers in a civil dispute can work together to try to resolve their dispute in good faith • **the system of appeals** – if there is a question about whether an incorrect or unfair decision has been made, then either party can appeal the case, provided that they can establish grounds for appeal	• **access to legal advice and representation** – either privately or through Victoria Legal Aid or community legal centres • **options for affordable legal representation** in civil disputes – such as contingency-based legal representation and litigation-funding companies • **pre-trial procedures** in civil cases – may assist in resolving the dispute, as parties are encouraged to interact and understand the case against them • **the jury system** provides the general public with the chance to be involved in the legal system, giving them greater knowledge and understanding of the operation of the courts.
PROBLEMS AND DIFFICULTIES	
Access to the legal system can be difficult due to:	
• **a lack of awareness of legal rights or legal bodies** that can provide assistance • **limited physical resources and staffing** – courts and tribunals suffer • **the need for legal representation and its high costs** – may deter some parties from pursuing civil claims, or result in accused people in criminal cases being unrepresented and therefore disadvantaged	• **the complexity of pre-trial procedures** particularly in civil disputes – creates the need for the assistance of lawyers, which can be expensive • **parties and witnesses experiencing difficulties understanding legal proceedings** due to their complexity, language difficulties, or a hearing impairment • **problems with the jury system** – a jury may have biases or preconceived ideas, be influenced by media coverage of the case, have difficulty understanding the case or not necessarily be representative of the community.
RECENT CHANGES	
Recent changes that have taken place in relation to achieving better access to the legal system include:	
• **simplification of criminal procedures** under the *Criminal Procedure Act 2009* – increases accessibility and clarity for the parties • **Justice Connect** formed in July 2013 – works with law firms and lawyers to provide pro bono legal services to those in need • **multi-jurisdictional courts and community justice service centres**, such as the Collingwood Neighbourhood Justice Centre – provide a number of courts and services under one roof, thereby increasing access • **the William Cooper Justice Centre** – provides a new court complex in the city, including the Mediation and Arbitration Centre, which opened in 2014 • **the restructure of VCAT lists** in 2013 – designed to improve people's ability to use VCAT	• **disclosure of litigation costs** – courts can order lawyers to disclose the costs of their representation under the *Civil Procedure Amendment Act 2012*, thereby increasing parties' access to information about litigation costs • **limitations on the number of expert witnesses** under the *Civil Procedure Amendment Act* – saves costs for parties • **allowing courts to compel expert witnesses to deliver a joint report** – saves costs • **simplifying jury directions** under the *Jury Directions Act 2013* should reduce long and complicated judges' directions • **the National Partnership Agreement on Legal Assistance Services** – particularly aimed at increasing the effective delivery of legal services to disadvantaged Australians and the wider community • **collaborative law.**

SUGGESTED CHANGES

Recommendations for changes include:

- **legal expenses contribution scheme** – the Productivity Commission has raised the idea of a scheme that would offer interest-free loans to parties in civil actions who do not qualify for legal aid
- **fee waivers, postponements or reductions** – the Productivity Commission recommended that civil parties facing financial hardship should be able to have their court and/or tribunal fees waived, postponed or reduced
- **providing better support for victims**
- **encouraging the recruitment and retention of lawyers in rural, regional and remote areas of Victoria**
- **funding for community legal education**
- **expansion of the Court Integrated Services Program** to other geographical areas – currently offered in the Latrobe Valley, Melbourne and Sunshine Magistrates' Courts
- **an interpreting fund** to pay for interpreters in civil cases – proposed by the VLRC and the Law Institute of Victoria
- **greater use of group proceedings or class actions** – as a cheaper way of taking action against a party that has injured or harmed a number of people
- **the use of contingency fees** – to secure legal representation in civil disputes
- **a public defenders scheme** – the defence equivalent of prosecutors with salaried barristers.

LEARNING ACTIVITY 11.4

Access to the legal system

1 Look back at the extract 'Access to justice' and answer the questions.
   a What is the most common way of resolving a dispute?
   b What can you do if you need help to resolve a dispute?
2 Describe the processes and procedures in our legal system that help to promote effective access to the legal system.
3 Describe problems in our legal system that could reduce the opportunity for a party to a case to effectively access the legal system.
4 Explain four changes or suggested changes in the legal system that can enhance the ability of parties to access the legal system.

Focus on the cost of justice

A party involved in a criminal or civil case can incur high costs. This may discourage parties from pursuing a civil claim, and may present problems for parties involved in criminal and civil actions. The costs include the cost of legal representation and court fees. Further to this, the availability of legal aid is limited.

The cost of legal representation

Everyone has the right to legal representation before the courts. However, not everyone can afford to exercise this right. To achieve a fair outcome, legal representation is desirable because of the complexity of the law and the nature of the adversary system. The adversary system relies on each party having the best possible legal representation in order to maximise each party's chance of winning the case, for the truth to come out, and for a fair outcome to be achieved. If one party is not represented, or poorly represented, it could mean that the truth does not emerge, because a person acting for themselves might not be experienced at bringing the evidence out through questioning.

Engaging a solicitor or barrister or being represented in court is very costly. The client is paying for a high level of experience and training.

The cost of legal representation depends on:

- the complexity of the case
- the court in which the matter will be held
- the nature of the case – the number of witnesses, the extent of the evidence and the volume of documents involved
- the length of legal proceedings
- the expertise of the lawyers; lawyers with greater seniority or expertise usually charge higher fees
- the expertise of the barrister; more senior barristers usually charge higher fees
- whether it is possible to settle the matter out of court.



Figure 11.2
Jane Dixon, SC, is a senior counsel.

The high cost of legal representation is prohibitive to many people who wish to take a civil issue to court. Legal aid provides assistance to many who would otherwise not be able to afford legal representation, but many people are not eligible for legal aid. A fair outcome is not achieved by the legal system if someone is precluded from satisfactorily resolving a dispute because the high cost outweighs the potential benefit to be gained.

Some of the fees charged by lawyers are set down in statutes and judge-made rules. The Law Institute of Victoria publishes a practitioner remuneration order, which sets out limits on some non-litigious costs. For example, in 2014, transmitting or receiving material by facsimile or email incurred a cost of $12.70 for the first page, and $4.30 (fax transmissions) or $2.40 (email) for each subsequent page; the charge for a formal acknowledgment letter was set at $32.20. For a junior clerk to file, lodge or deliver documents incurred a cost of $58.60. Consultation or conference with legal counsel was charged at $219.70 for the first hour, and up to $170.70 per subsequent half hour, or part thereof. 'Scale fees' allow lawyers to charge particular fees for court work. In 2014, the Supreme Court fee for a solicitor instructing counsel in court was $370 per hour. Junior counsel fees for a trial appearance were allowed up to a maximum of $5285 per day; and $7928 per day for senior counsel. These costs are in addition to the costs that legal representatives charge to engage in all the pre-trial procedures involved in a civil case.

Court costs

Lodging a civil case with a court incurs a number of costs. The following are an indication of the relevant fees.

- **court filing fees** – For example, the Magistrates' Court filing fees range from $131 for a claim of less than $500 to $624 for a claim of more than $40 000; $769.10 in the County Court; $3306.30 to lodge a Notice of Appeal with the Court of Appeal (the Supreme Court costs differ according to the specialist lists and so on).
- **court hearing fees** – These are, for example, $535.40 per day after the first day in the Magistrates' Court; $472.50 per day for days two to four in the County Court; $590.60 per day in the Supreme Court (both Trial and Appeal divisions).
- **jury costs** – The parties who choose to have a trial before a jury will incur the cost of the jury. In the County Court, for example, a jury costs $697.20 for the first day, $500.80 per day for days two to six, and $993.80 a day from day seven onwards.

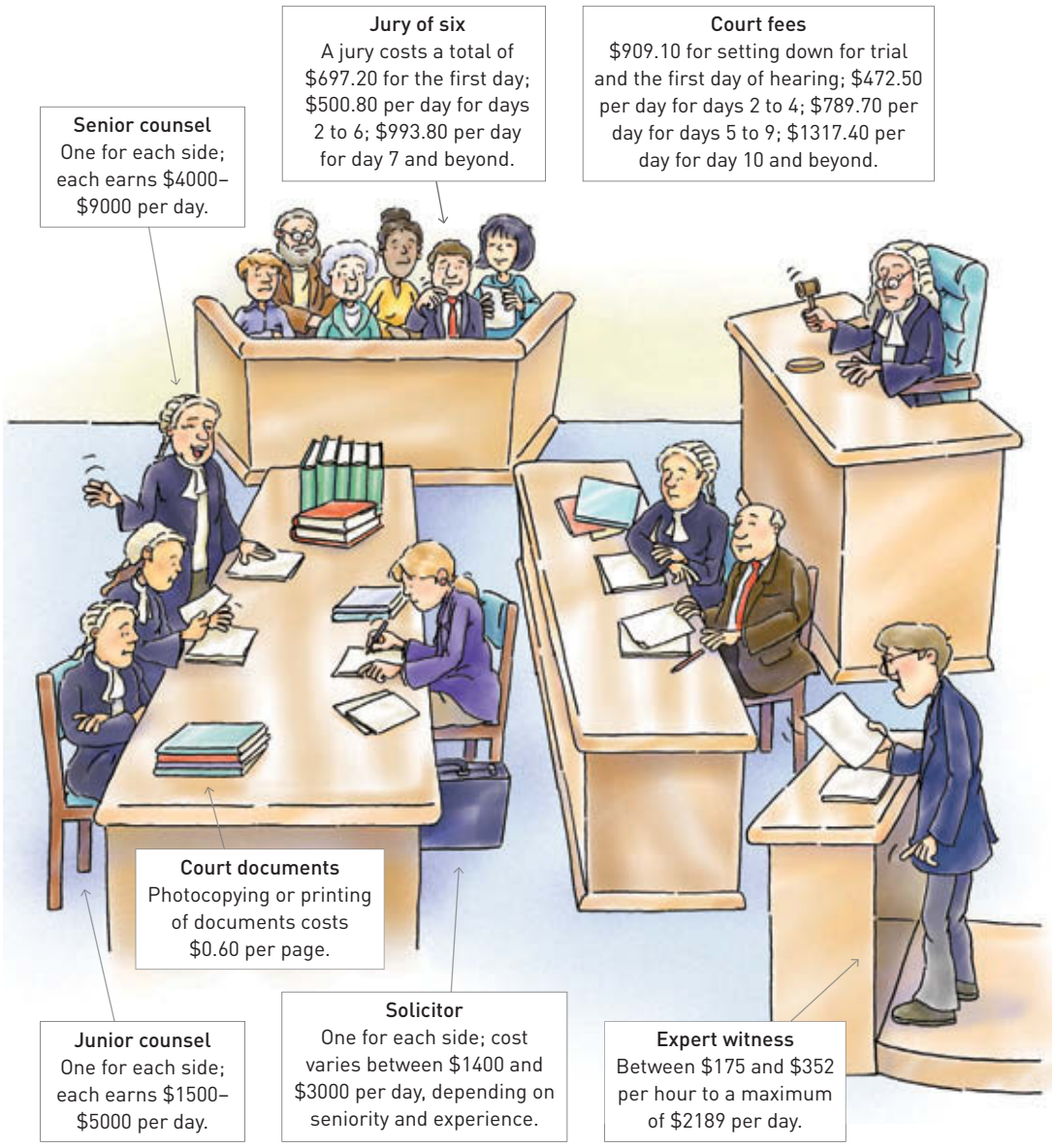


Figure 11.3 Civil trial costs in the County Court

The Honourable Justice Habersberger said the fees seemed to 'run counter to the principle of access to justice. You have to be exceedingly rich, or exceedingly poor to use the law'. (This comment was made by David Habersberger when he was a barrister. He is now a retired Supreme Court justice.)

The Productivity Commission estimated in its 2014 report *Access to Justice Arrangements* that the average amount spent by a plaintiff in a civil case in the Supreme Court of Victoria was about $60 000. This amount included legal fees, court fees and disbursements (such as fees paid to expert witnesses).

NOT EVERYONE HAS ACCESS TO THE COURTS

According to Paul Mulvany, a former senior partner with Slater & Gordon: 'Theoretically, justice is available to everyone, but it's becoming obvious not everyone has access to the courts when there are these court fees. It's just another hurdle for people pursuing their entitlements. It's not just another hurdle for the poor, injured and deprived but for small businesses wanting to recover debt. It may be uneconomical for businesses to use the courts to recover their debts.'

The availability of legal aid from Victoria Legal Aid

Legal aid has been available in Victoria in various forms for over 100 years. Victoria Legal Aid (VLA) provides access to the legal system by giving assistance to many people seeking legal advice and representation. It is a government-funded central agency for the organisation and distribution of legal assistance. VLA gives free legal advice on a range of matters, but focuses on people who need it most, including people who are socially and economically disadvantaged, cannot get help from a private lawyer, or do not have any other way to get legal advice.

USEFUL WEBSITE

Victoria Legal Aid www.legalaid.vic.gov.au

The main objectives of VLA are:

- to provide legal aid in the most effective, economic and efficient manner
- to manage its resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state
- to provide the community with improved access to justice and legal remedies
- to pursue innovative means of providing legal aid, directed at minimising the need for individual legal services in the community.

The main program areas for VLA include:

- **Access and Equity Program** – This program assists people with legal problems to access the appropriate VLA services including increasing the public's knowledge of legal rights and responsibilities, supporting community legal centres, referring clients to the most appropriate forms of legal and non-legal assistance, and advocating for justice and law reform.
- **Civil Justice Program** – This program provides civil and administrative advice and legal representation to acutely vulnerable people, such as the mentally ill, and seeks to influence changes in the law and legal processes where they impact disproportionately on disadvantaged people. It aims to contribute to a more inclusive and rights-respecting community.
- **Criminal Law Program** – This program provides representation to people charged with offences, with a focus on those who are disadvantaged or at risk of social exclusion. It tries to influence the criminal justice system to provide timely justice and a fair hearing of charges, and reach appropriate outcomes. It also ensures people are treated with dignity and are well informed about their rights in relation to the criminal justice system.
- **Family, Youth and Children's Law Program** – This program assists people to resolve their family disputes to achieve safe, workable and enduring care arrangements for children, and enables the resolution of future disputes without legal assistance.
- **Victorian Legal Aid Chambers** – This program provides high-quality in-court advocacy for clients with a grant of legal assistance in civil, criminal and family, youth and children's law. It also advises on and conducts strategic and test case litigation to challenge the law, and is involved in justice and law reform activities.

EXTRACT

Victoria Legal Aid services

Get a lawyer to run your case

If you are unable to resolve your legal problem on your own and cannot afford a lawyer, we may be able to pay for a lawyer to help you. This is called a 'grant of legal assistance'.

Grants of legal assistance are usually for criminal or family matters, but they can also be given in some other matters such as immigration, social security, mental health or discrimination cases.

A grant may pay for some or all of the following types of work:

- legal advice
- helping you resolve matters in dispute
- preparing legal documents
- representing you in court.

Who can get a grant of legal assistance

Our funds are limited and demand for legal services is high, so we have very clear rules about who can get a grant of legal assistance. This means that our money goes to help people who need us the most.

When considering if you are eligible for a grant, we look at:

- what your case is about
- the likely benefit to you
- if helping you can benefit the public
- your financial situation using a means test.

Means test

The means test applies to most adults and takes into account:

- money you get from work, welfare benefits or other sources
- if you own anything of value, like a house or car
- your weekly living expenses.

The means test also looks at whether you support anyone else, or if they support you. These people are called 'financially associated persons' and their income and assets are included when we work out if you are eligible for a grant.

Duty lawyers

Duty lawyers can help with the matters listed below.

Children's Court

At the Children's Court we can help you with:

- criminal law matters
- child protection applications
- family violence and personal safety intervention orders.

Magistrates' Court

At the Magistrates' Court we can help you with:

- adult criminal law matters
- serious traffic matters
- family violence matters and intervention orders
- some infringement matters (if you have special circumstances).

Mental Health Review Board

At the Mental Health Review Board (the in-patient units where the hearings are held) we can help you with:

- involuntary treatment orders
- community treatment orders.

Family Court

At the Family Court we can help you with family law matters.

Federal Circuit Court

At the Federal Circuit Court we can help you with:

- family law matters
- child support
- some immigration matters.

Victorian Civil and Administrative Tribunal

At the Victorian Civil and Administrative Tribunal we can help you with:

- guardianship and administration matters
- residential tenancy matters (tenants only)
- anti-discrimination matters
- some civil claims matters.

Administrative Appeals Tribunal

At the Administrative Appeals Tribunal we can help you with:

- Veterans' Affairs matters
- social security matters
- some immigration matters.

Roundtable Dispute Management

Roundtable Dispute Management (RDM) helps parents and other adult family members involved in family separation or divorce resolve their family disputes.

Disputes can be about:

- parenting arrangements and children's issues
- division of property (where parents have superannuation or a home mortgage)
- partner maintenance
- adult child maintenance or child support.

The law says that you should usually try to resolve disputes about parenting matters before you go to court.

Source: Victoria Legal Aid, 2014

Victoria Legal Aid does not provide legal advice for:

- business and commercial matters
- building, buying and selling houses and land
- defamation
- intellectual property
- pay disputes
- work injuries
- wills and deceased estates.

Problems in applying for legal aid

When the legal aid system was first established, its aim was to redress an unjust legal system that provided greater opportunities to those with the financial means to afford legal services. Because of lack of funding, however, a large proportion of the community is not eligible for legal aid and cannot afford legal services. These people are denied access to the law in many instances.

VLA has guidelines for specific types of cases; for example, criminal, family law and civil. There are limits on the amount of legal aid that can be provided to particular cases. These might be low compared to the cost of conducting trials.

The setting of maximum amounts that can be paid towards the cost of legal services by Victoria Legal Aid also restricts the access of applicants to ongoing assistance when dealing with the legal system. VLA provides a detailed schedule of fees that will be paid for a large variety of legal cases.

Most of VLA's funds come from the Victorian and Commonwealth governments. In 2012–13, income sources included $75.3 million from the state government, $46.9 million from the Commonwealth Government, and $25.7 million from the Public Purpose Fund.

In 2012–13, Victoria Legal Aid provided services to 86 861 clients. Types of legal assistance included:

- 39 782 grants of legal assistance under the National Partnership Agreement
- 10 227 in-house grants of legal assistance
- 29 072 private practitioner grants of legal assistance
- 81 790 calls to Legal Information Services
- 615 568 publications distributed
- 1 061 423 visits to the VLA website
- 51 598 legal advice, minor work and advocacy
- 58 581 in-house duty lawyer services
- 6722 private practitioner duty lawyer services.

Changes to VLA eligibility criteria

In early 2013, VLA introduced changes to legal aid eligibility criteria in order to manage its estimated $3.1 million budget deficit for the 2013–14 financial year. The VLA stated:

> The current economic climate as well as federal and state government commitments to making the community safer … mean that more people need legal help than ever before.
>
> In the face of this record demand and without an increase in government funding and very little indexation of funding for population growth and inflation, the Victoria Legal Aid Board has had to make thoughtful decisions about who is prioritised for legal assistance. We must manage public funds responsibly.
>
> Source: Victoria Legal Aid, 2012

Changes to eligibility criteria include:

- The funding of parents in family law matters that do not resolve through mandatory family dispute resolution will be limited to trial preparation.
- The age at which children will generally be considered mature enough to give direct instructions to lawyers in child protection matters will be increased from 7 to 10 years.
- Funding in child protection matters will only be provided to children and people defined as parents – extended family and other third parties will not be funded except in exceptional circumstances.
- Instructing fees for indictable crime trials will be capped at two half-days for qualified solicitors only.
- Appeals in the Victorian Court of Appeal and the High Court of Australia that do not have a reasonable prospect in resulting in a lesser total effective sentence or non-parole period will not be funded.
- In civil cases, the threshold at which assistance will be given to a person with unpaid infringements will be increased from $1000 to $5000.

These changes were criticised by many in the legal profession, including Reynah Tang, president of the Law Institute of Victoria, barristers, and judges such as Justice Lex Lasry.

In early 2013, two Supreme Court judges, Justice Forrest and Justice Lasry, decided that the serious cases they were each presiding over could not proceed because of the lack of an instructing solicitor assisting the legal-aid-funded barristers. They each ruled that a solicitor needed to be present throughout the trial in order for the accused to receive a fair trial. Funding for solicitors was capped at two half-days under the eligibility changes. These trials were delayed until VLA agreed to fund an additional lawyer in each case.

In March 2014, VLA stated that it would review its cuts to family services. The Chief Justice of the Family Court criticised these cuts because they were not in the best interests of children.

Changes to overcome the cost of justice – the National Partnership Agreement on Legal Assistance Services

A major change in the funding for legal aid and assistance services was implemented on 1 July 2010, through the National Partnership Agreement on Legal Assistance Services. This four-year agreement between the Commonwealth, state and territory governments replaced existing legal aid funding agreements with a national scheme focusing on outcomes of legal assistance rather than specifying means of service delivery.

The objective of the agreement is stated as:

> … a national system of legal assistance that is integrated, efficient and cost-effective, and focused on providing services for disadvantaged Australians in accordance with access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness.

Source: Council of Australian Governments, National Partnership Agreement on Legal Assistance Services, 2010

The agreement focuses on earlier resolution of legal problems for the community before they can escalate, and to avoid litigation if appropriate. Under the agreement, states and territories will receive $785 million over four years to deliver Commonwealth-funded legal aid services.

Collaborative law

Collaborative law is an emerging form of legal practice and dispute resolution. It is suitable for a range of civil matters, although in Victoria it is mainly used for family law disputes. It started in the United States in 1990, and is used widely in the US, Canada and the United Kingdom.



Figure 11.4
Collaborative law

Collaborative law uses a negotiation and problem-solving model, where disputing parties and their lawyers sign a contract agreeing that they will work together in good faith to resolve a dispute without going to court. It emphasises problem-solving, negotiation and client empowerment, with the aim of achieving a fair and just outcome for both parties and reducing the cost and stress involved with resolution through the courts. Parties set their own timeframes and agendas for meetings, therefore arrangements are discussed when each party is ready. Collaborative law represents a move away from adversarial approaches of dispute resolution to more mutually agreeable solutions. It is a model that allows the parties to settle the matter between themselves with the help of their legal representatives.

Collaborative Professionals Victoria (CPV) is an association of collaborative lawyers and non-lawyers who have trained and registered in the practice of collaborative law. The CPV Directory is maintained by the Law Institute of Victoria, and enables disputing parties in a civil dispute to find a legal professional who will assist them in resolving their dispute without having to go to court.

If the dispute cannot be settled by negotiation, then the lawyers acting for all parties will withdraw and not act for their clients in any further litigation on the matter. The parties can then choose to enlist the help of different legal representation and take the matter to court.

Suggested changes to reduce costs

Suggestions have been made to reduce the cost of civil cases. Some of these are shown below.

- **greater use of class actions or group proceedings** – In Australia, class actions (or group proceedings) can be commenced by a representative applicant in circumstances where seven or more people have claims that arise out of the same or related circumstances and give rise to a substantial issue of fact or law. This is a cheaper way of taking action against a party that has injured or harmed a number of people.
- **using contingency fees** – These provide another way for a person wronged in a civil matter to bring the matter to court. These differ from 'no win, no pay' arrangements in that they involve a successful party paying a percentage of the award for damages, rather than paying normal fees out of damages received. They are similar in that the person being represented does not pay legal fees if they are unsuccessful. This type of arrangement is currently not allowed in Victoria or other parts of Australia, but it is used in some states of the US.
- **public defenders scheme** – The Victorian Law Reform Commission (VLRC) recommended the introduction of a public defenders scheme, which is the defence equivalent of prosecutors. Public defenders are salaried barristers who are paid by the state, but independent of the government. They are available to represent clients who are charged with serious criminal offences and have been granted legal aid. Some public defenders are available through the Victorian Bar.
- **legal expenses contribution scheme** – The Productivity Commission, in its 2014 draft report *Access to Justice Arrangements*, raised the idea of a government-funded legal expenses contribution scheme (LECS). This scheme would offer interest-free loans to qualifying parties in civil cases, for example parties who do not qualify for legal aid, to pursue cases of merit. Those who qualify for a loan would repay the loan by contributing a percentage of their income over the period of the loan, or by repaying the loan out of an award of damages if the level of damages was sufficient.
- **waiver, reduction or postponement of fees** – The Productivity Commission, in its 2014 draft report, recommended that Commonwealth, state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. The Commission stated that postponements should be the preferred option.

Social disadvantage causing difficulties in accessing the legal system

All members of society should have the opportunity to participate fully in the legal system, regardless of their social circumstances or cultural heritage. The Australian Human Rights Commission seeks to ensure equality of opportunity and equal treatment for all people regardless of sex, race or disabilities. In Victoria, the Human Rights List of the Victorian Civil and Administrative Tribunal deals with issues of discrimination on the grounds of race, lawful sexual activity, physical features, age, marital status and so on.

Problems still exist for some groups of people who may be unaware of their rights and face barriers that limit their access to the legal system, such as Indigenous people and people suffering from mental illness. Some strategies to address this problem were discussed earlier in this chapter.

In 2008, the Victorian Law Reform Commission's Civil Justice Review found that language barriers and hearing impairment can cause difficulty in communications between litigants and the court. This may discourage potential litigants from pursuing their civil rights, and affect access to court services. The VLRC proposed an Interpreting Fund be established to pay for interpreters in civil proceedings. The Law Institute of Victoria has called for a three-stage program for interpreters in civil matters: Stage One, a 12-month pilot program to provide interpreters at the legal advice stage; Stage Two, a 12-month pilot program to provide interpreters at the court stage, particularly in the Magistrates' Court; Stage Three, the establishment of a grants program to provide civil justice interpreting services.

LEARNING ACTIVITY 11.5

The cost of justice

1 Explain why parties have to pay high costs when involved in a court case.
2 'The high costs involved in pursuing a civil case limit effective access to the legal system.' Discuss.
3 To what extent can the provision of legal aid contribute to the effective operation of the legal system? Discuss.
4 Explain the constraints faced by Victoria Legal Aid in providing legal services and assistance to disputing parties. How does VLA deal with these constraints?
5 Explain the aim of the National Partnership Agreement on Legal Assistance Services. Suggest how the agreement may help individuals to gain access to legal aid.
6 How can increased judicial powers of case management improve access to the legal system for litigants in civil disputes?
7 What is collaborative law? How does it improve access to justice in civil cases?
8 Read the newspaper article 'New legal service for cost-conscious DIY litigants' and answer the questions.
   a Why is there a growing need for 'court coaching'? How effective do you believe it is likely to be?
   b Explain the reasons for the increasing number of people representing themselves in court.
   c To what extent can self-representation in civil matters be considered as effective access to the legal system?
   d **Research**
   View the video produced by the County Court of Victoria to help self-represented litigants. This short film can be accessed from the County Court website. Select 'Going to court?', click on 'Are You Representing Yourself?' and play the film *Self Represented Litigants – County Court of Victoria*.
   You have been asked to advise a friend about representing yourself in a civil claim. Write a short report on the advice you would give.

EXTRACT

New legal service for cost-conscious DIY litigants

Jane Lee, *The Age*, 9 March 2014

A law firm is taking a novel approach to the growing rate of people fronting court without a lawyer – helping them represent themselves.

Lawyer Laura Vickers started Nest Legal at her kitchen table late last year, offering 'court coaching' for a lower fee to those unable to afford, or who do not want, full legal representation. This involves a one-hour conversation with Ms Vickers' partner, barrister Jeremy McWilliams, who gives clients tips on how to present themselves and their arguments in court.

The service comes as more people are appearing for themselves in court, with the County Court last year releasing a YouTube video to help self-represented litigants. Ms Vickers said many people could not afford to hire a lawyer and that cuts to Victoria Legal Aid were becoming the 'new normal'.

She said alternatives to full legal representation – such as advice on the merits of a case or court coaching – were better solutions than making all lawyers cheaper ...

The County Court last year hired a coordinator for self-represented litigants, Courtney Ryrie. While it was difficult to know how many there were at any one time, Ms Ryrie has had 690 'contacts' – including calls and counter queries – this financial year, and helped about 30 new people a month.

'Generally,' she said, 'their concerns centre around not being able to afford a solicitor, fearing that justice will not be done and feeling very confused about what is required and why.' ...

The Supreme Court's judicial registrar Mark Pedley said more people were also representing themselves in civil cases, making up about 20 per cent of all litigants, compared with 3 per cent of people facing criminal charges.

The Court of Appeal turned to the Victorian Bar Association in November for pro bono barristers to help clear the backlog of people without lawyers wanting to appeal civil disputes. Bar association chairman William Alstergren, SC, said cases with self-represented litigants took up to five times longer than those with lawyers.

He said the legal industry needed to be more flexible to improve access to justice and ease the pressure self-represented litigants placed on the courts. 'If professionals don't step up and provide services for unrepresented litigants, the system will get further behind and it's going to cost the community and courts a lot more money.'

9 Read the case study 'The high cost of legal representation' and answer the questions.

- **a** What complaint did the plaintiff have in this case?
- **b** What settlement did the plaintiff receive?
- **c** Do you think the courts are an effective mechanism for the resolution of disputes? Discuss in relation to the high cost of legal representation.
- **d** What can be done if someone feels they have been overcharged?

CASE STUDY

The high cost of legal representation

The plaintiff suffered extensive head injuries as a result of being involved in a car crash in which other people died. She spent a long period in hospital and suffered considerable emotional and physical trauma as well as memory loss. When she came out of hospital, she went to a solicitor to proceed with a claim for personal injury.

After a court hearing that lasted three days, she was offered an out-of-court settlement. She was advised by her solicitor to accept this offer. The out-of-court settlement was $175 000. After she had paid her legal costs she was left with $20 000.

10 Read the case study 'Asbestos payout paves way for 500 waterside workers' and answer the questions.
- a Explain the advantages and disadvantages of an out-of-court settlement.
- b Why do you think the out-of-court settlement has paved the way for 500 similar cases? Explain.
- c The legal firm Slater & Gordon often acts in a 'no win, no pay' capacity. Explain what this entails and the advantages of this type of representation.
- d What are group proceedings? How can they benefit people wishing to make a claim?

CASE STUDY

Asbestos payout paves way for 500 waterside workers

Joe Cachia, a wharfie in New South Wales, was awarded $250 000 in an out-of-court settlement as a result of contracting the asbestos-related disease mesothelioma. Cachia's employers, Patrick Stevedores, had failed to warn their employees of the dangers of asbestos or to provide suitable protective equipment. The solicitors, Slater & Gordon, said there were up to 500 waterside workers who were seeking compensation for asbestos-related disease.

11 Read the article 'A mother's plea: justice for all' and answer the questions.
- a How has this person's problem highlighted a deficiency in the legal system being able to achieve a fair and unbiased hearing?
- b Why do you think this problem has occurred?
- c What solution is the writer offering?
- d Explain two changes that the Victorian Parliament has implemented to overcome the problem of high costs in the legal system.

EXTRACT

A mother's plea: justice for all

The Age, 20 March 2012

The legal system is daunting even for people who can afford to hire a lawyer. Many people cannot, as the ordeal of a mother involved in a coronial inquiry into the police shooting of her son reminds us. Legal Aid initially rejected her under its tight criteria. Thinking she would have to represent herself, 'Bobbi' read 187 pages of a 481-page brief on her son's death. 'No mother should have to read so many accounts of her son's last half-hour on earth,' she said. She eventually received two days of legal counsel's time in a three-week inquest. 'Had I not been represented, I truly believe that I would not have uncovered the answers to many of my questions,' she said.

Bobbi believes 'everyone has the right to be heard and represented', but Legal Aid is so underfunded that it turns away most people who can't afford legal representation. The joke in the Australian comedy *The Castle* that defines a QC as a lawyer who appears for the rich is not really a joke. The 1997 movie coincided with a $120 million cut to Legal Aid funding by the Howard government. The Commonwealth funding share fell from 49 per cent to 32 per cent in

2009–10. The states never made up the shortfall, while costs across all courts rose 78 per cent in real terms over the next decade. Australia's Legal Aid funding is low, about a third of Britain's rate per capita. The Gillard government has lifted federal funding for the first time since 1997, but the last state budget had no new funding.

The Legal Aid crisis affects huge numbers of ordinary Australians who need legal representation, the costs of which are beyond all but the well-off. Even before the funding cuts, most people generally did not qualify for aid: 72 per cent of recipients were receiving social security benefits and 24 per cent had no income at all. It may be that politicians see no votes in showing sympathy for the rights of accused people in court, even if lack of representation means innocent people suffer grave miscarriages of justice. Yet this issue affects mainstream Australians who, at any time, can become involved in criminal or civil cases, including family law.

An unrepresented person is at such a disadvantage that the rights of equal access to the law, equality before the law and a fair trial are all at risk. On top of this, funding cuts may not even save money at all. Modelling of Queensland family law found every dollar to legal aid led to savings of between $1.64 and $2.25 in fees, court time and other expenses. In the interests of justice, efficiency and fairness – as well as saving public money – our governments must stop starving Legal Aid of funds.

12 Explain two changes regarding legal representation, either actual or proposed, that could help to enhance the ability of individuals to access the legal system.

TIMELY RESOLUTION OF DISPUTES

All people should be able to have their legal disputes resolved in a timely manner. Justice delayed is justice denied. Delays in legal processes and procedures can limit the effective operation of the legal system. It is important for people who are involved with a legal dispute, in both criminal and civil matters, that the **outcome is known as quickly as possible**. The **costs and stress** involved in going to court will be reduced when a quick resolution can be achieved. However, timeliness also includes having sufficient time to allow parties to prepare appropriately for cases and for all evidence to be considered. Timeliness is therefore a balance between minimising delays and allowing reasonable preparation time.

In **criminal cases** it is important for society, the accused, the victim, witnesses and related parties to have the case heard as soon as possible in order to alleviate the emotional distress and strain involved with the case. The effects of delays in criminal cases could include:

- emotional strain, whether the accused is on remand or on bail waiting for the case to come up
- the physical and mental effects of spending time in prison if on remand awaiting trial
- the stigma of having been in prison, even if found innocent
- possible loss of employment
- disruption to family life and possible break-up of relationships
- the inability to prepare a case adequately if on remand, in terms of contacting witnesses, gathering evidence and so on

- failure of memory of witnesses
- witnesses being unavailable.

The outcome of a case might therefore be quite unfair as there is no compensation to cover these effects. Compensation will only be paid to an accused if it can be shown that there was negligence on the part of the police or Office of Public Prosecutions and the accused should have been found not guilty. Such compensation does not cover time waiting for the trial.

Another effect of long delays is that a bail justice, magistrate or police sergeant might be reluctant to refuse bail because of the likelihood of a long wait for the trial, which could result in accused people who might be a danger to society being allowed to go free while they wait for their trial. On the other hand, a person might be refused bail unnecessarily. For example, a man was charged in the Ringwood Magistrates' Court with armed robbery, assault and aggravated burglary and was refused bail. This man was later found guilty and put on a good behaviour bond, after spending time in remand waiting for his case to be heard. Therefore, he was punished by being put in prison but this was not part of his sentence.

CASE STUDY

Apprentice amphetamines cook granted bail

Zlate Cvetanovski was accused of being an apprentice amphetamines cook in Tony Mokbel's drug syndicate and of trafficking commercial quantities of drugs. He was being held on remand. In April 2008, when magistrate Peter Couzens checked with the County Court, he found Cvetanovski would face a wait until 2010 before he would get a trial date because of the backlog in the County Court. This is a considerable time to spend in jail when it is not known whether the accused will be found guilty or not. The magistrate therefore granted Cvetanovski $350 000 bail, with conditions.

Delays in **civil cases** can severely disadvantage the parties. The plaintiff could be injured, out of work or suffering financially. The defendant may be equally stressed and concerned about an unfavourable court ruling. Delays in civil cases can have serious effects on the parties such as:

- extra stress worrying about the outcome of the case
- undue hardship while waiting for a financial settlement
- loss of confidence in the legal system
- chances of winning the case being reduced because of fading memories of events by the witnesses; the matter may also seem less serious after a long period of time.

As a result of these effects of delay, a fair outcome might not be achieved, regardless of the decision in the case. For example, even if a plaintiff does win the case, the delay itself might have caused hardship, which is not recoverable through the court case. Delays also adversely affect the court system by causing a backlog of cases to be resolved.

The way in which our legal system is structured or organised can contribute to problems and difficulties faced by individuals when trying to reach a timely resolution to a dispute. However, there have been a number of recent changes aimed at reducing delays in criminal and civil cases. Recommendations for further changes have also been considered.

Table 11.3 summarises the procedures, processes and features of the legal system studied in chapters 7 to 10 that operate to achieve a timely resolution of disputes. It also lists a range of problems and difficulties that could arise in using the legal system, thereby causing delays in cases, as well as actual and recommended changes designed to overcome these problems and difficulties.

Table 11.3 Timely resolution of disputes – to achieve this, all disputes that arise, whether criminal or civil, are required to be dealt with in a timely manner, without delays

PROCEDURES/PROCESSES/FEATURES	
Procedures, processes or features in place in the legal system to assist the achievement of this element include:	
• **continuous trial in the adversary system** – a trial is heard as a single, continuous event until its completion, without stopping • **court hierarchy** – provides the opportunity for minor cases to be heard quickly and cheaply • **committal proceedings** – these prevent cases with insufficient evidence, which are therefore unlikely to succeed, from progressing to trial in a higher court saving the time and resources of superior courts • **time limits** on criminal and civil procedures – these are set for different stages of a case	• **increased use of alternative dispute resolution** for civil cases • **civil pre-trial procedures such as pleadings, discovery and directions hearings** – these are aimed at providing both parties to a case the opportunity to find out details of the case brought against them and encourage discussion between the parties. This may lead to an out-of-court settlement, or can help to clarify issues before the case goes to trial. This will save time during the trial.
PROBLEMS AND DIFFICULTIES	
Failure to reach a timely resolution could arise because of:	
• **difficulties in collecting evidence** due to increased complexities of crimes and increased claims on police resources • **suspects refusing to cooperate with the police**, exercising their right to silence • **difficulties in locating witnesses** • **difficulties of witnesses remembering the facts clearly** • **long, complex and time-consuming pre-trial procedures** – for example, discovery often takes time due to the large volume of documents to be read and sorted through • **lengthy preparations for committal proceedings** – they add another step in getting a case to trial • **individuals who have been wronged failing to take the initial steps to seek legal advice about a problem that has occurred** – this could be due to a lack of awareness of their rights and how to pursue them, fear of high costs or distrust of lawyers	• **an increased court workload** – due to an increase in the number of cases being lodged in the courts as there is a general trend towards litigation when people's rights have been infringed and more awareness of rights • **an increase in volume and complexity of information in court cases** – improved technology has resulted in more information being gathered and used in civil trials • **a lack of sufficient court resources** – both physical resources and personnel • **the use of juries** – this adds to the time taken for a trial due to the empanelment process, lengthier court procedures and slower examination of evidence to ensure jurors' understanding and time taken for jury deliberations.
RECENT CHANGES	
Recent changes that have taken place in relation to achieving a more timely resolution of disputes include:	
• **weekend bail and remand court** • **Court of Appeal criminal reforms** – to increase the clearance rate of criminal appeals • **time limits on criminal procedure** – the *Criminal Procedure Act 2009* sets time limits for various stages of criminal pre-trial procedure, e.g. a trial must commence within three months of the date the accused was committed for trial in sexual offence cases and 12 months for other cases • **simplification of criminal procedure** – the *Criminal Procedure Act* and its 2012 amendment also streamlined procedure in order to save time during court hearings and trials	• **sentence indication** – encourages guilty pleas earlier in the proceedings, freeing up time and resources for other legal matters • **introduction of Court Services Victoria** (CSV) – provides greater administrative services to the courts and VCAT • **the use of witness statements and outlines of evidence** in civil trials in the Supreme Court – reduces the time for the witness to give their evidence • **limiting discovery in the Supreme Court's Commercial Court** to documents critical to the resolution of the dispute

- **e-discovery in the Federal Court** – for cases with a large number of electronic documents, the documents can be exchanged and lodged electronically
- **judicial resolution conferences** – civil matters over $10 000 can be referred to a judicial resolution conference, presided over by a judge or associate judge, where parties try to negotiate a settlement
- **modernisation of the practices, procedures and processes relating to the resolution of civil disputes and civil court proceedings** under the *Civil Procedure Act 2010* – simplifies the language relating to civil procedure and facilitates the efficient and timely resolution of issues in dispute
- **limitations on the number of expert witnesses** under the *Civil Procedure Amendment Act 2012*
- **court able to compel expert witnesses to deliver a joint report** under the *Civil Procedure Act 2010* – thereby saving time in court
- **simplification of jury directions** under the *Jury Directions Act 2013* – provides guidelines for a judge's direction to the jury and streamlines the summing-up process, saving time at the trial and reducing the incidence of retrials due to a judge misdirecting the jury.

SUGGESTED CHANGES

Recommendations for changes include:

- **expansion of the weekend pilot program**
- **extended court hours**
- **continuation of the 24 Hour Initial Directions Hearing pilot program in the County Court** – whereby the first directions hearing is scheduled for the day following the committal hearing
- **greater use of mediation in pre-trial procedures**
- **removal of juries** from long and complex trials
- **time limits for lawyers' submissions** – including opening and closing addresses and cross-examination.

LEARNING ACTIVITY 11.6

Timely resolution of disputes

1. Describe the possible impact on parties of having the resolution of their cases delayed.
2. Look back at the case study 'Apprentice amphetamines cook granted bail' and explain why you think Zlate Cvetanovski was given bail. What problems could be experienced by outcomes such as the one in this case?
3. Describe the processes and procedures in our legal system which help to ensure that disputes are resolved in a timely manner.
4. What are some of the causes of delays to criminal cases in our legal system?
5. What are some of the causes of delays to civil cases in our legal system?
6. Describe two changes that have been made to reduce delays experienced by parties to criminal cases.
7. Describe one change and one suggested change to reduce delays in civil disputes.

Focus on delays: court backlogs

The problem of delays in Victorian courts has been identified by many in the legal system as one of the biggest challenges facing the Victorian justice system. The Productivity Commission, in its annual *Report on Government Services*, stated that one of the key objectives of courts is 'to process matters in an expeditious and timely manner'. It uses the indicator of 'backlog' to measure performance against this objective.

As shown in table 11.4, in 2013 most Victorian courts exceeded the national standard benchmark for mid and higher level courts of having no more than 10 per cent of cases pending for more than 12 months, and no cases pending for more than 24 months (the exceptions being the criminal trial

division of the Supreme Court and criminal appeals in the County Court, which were within target). The Magistrates' Court target is for no more than 10 per cent of cases to be more than six months old, and no pending cases to be more than 12 months old; this was not achieved in Victoria. At 30 June 2013, there were 43 309 criminal cases and 23 597 civil cases waiting to be heard in Victoria's courts (including the Children's Court).

Table 11.4 Victorian court backlog at 30 June 2013

COURT	PENDING CASELOAD		CASES > 12 MONTHS (%)		CASES > 24 MONTHS (%)	
	Criminal cases	**Civil cases**	**Criminal cases**	**Civil cases**	**Criminal cases**	**Civil cases**
Court of Appeal	202	288	14.4	22.2	1.0	3.5
Supreme Court – Trial Division	99	4011	8.1	26.5	2.0	11.1
County Court – Appeals	1080	91	6.4	11.0	1.7	2.2
County Court – Trials	1637	7350	18.1	31.2	3.2	13.2
Magistrates' Court	36686	11857	7.6	21.7	–	–

Source: Productivity Commission, *Report on Government Services 2014*

Clearance rates

Clearance rates (which compare the number of lodgements in a period with the number of finalisations of cases in that period) for 2012–13 showed that some Victorian courts (such as the Court of Appeal and the Magistrates' Court, as well as the Supreme Court for civil matters) were finalising more cases than the number lodged for that year, thereby reducing the backlog of cases. This was not true for the other courts, where the number of cases lodged exceeded the number of cases finalised (see table 11.5).

Table 11.5 Victorian court clearance in 2012–13

COURT	CLEARANCE RATE (%)	
	Criminal cases	**Civil cases**
Court of Appeal	111.3	107.0
Supreme Court – Trial Division	88.9	106.6
County Court – Appeals	92.1	81.5
County Court – Trials	96.1	92.9
Magistrates' Court	107.5	107.7

Note: A figure greater than 100 per cent indicates that, during the reporting period, the court finalised more cases than were lodged. A figure less than 100 per cent indicates that, during the reporting period, the court finalised fewer cases than were lodged.

Source: Productivity Commission, *Report on Government Services 2014*

Changes in the operation of the legal system: weekend bail and remand court pilot

In November 2013, the Melbourne Magistrates' Court introduced a pilot program which involves hearing bail and remand applications on the weekend. Matters arising from courts in Melbourne, Heidelberg, Broadmeadows and Sunshine were included in the first stage of the program, which was extended to other metropolitan areas such as Ringwood, Dandenong, Frankston and Moorabbin in the second phase.

The court is in session from 10 am to 4 pm on Saturdays and Sundays in order to hear applications involving people arrested from Friday evening through to Sunday morning. The aim is to reduce the pressure of cases listed on Monday mornings at the Melbourne and suburban Magistrates' Courts by clearing these over the weekend. In addition, if people who are arrested over the weekend are granted bail, then they are released from the holding cells in the custody centre underneath the court, freeing up space for other prisoners to be brought into the cells on Monday. When an accused is remanded in custody by the magistrate, the accused may be remanded to a date other than a Monday, thereby allowing the court to distribute its caseload across the week and to bring the accused into timely contact with support services, where necessary. The court does not generally hear plea hearings; however, if a plea hearing is requested by all parties and is ready to proceed, the presiding magistrate has the discretion to proceed with a plea hearing.

There have been some issues raised by these weekend hearings. The Police Association has expressed concern about the strain on police prosecutors and informants to attend court on the weekends. Deputy Chief Magistrate Jelena Popovic raised concerns that the court did not have access to the wide range of support workers and health professionals who assist the court during the week; this could include support from organisations such as the Salvation Army, who can provide arrested people with food vouchers and clothing if needed, or from court-appointed people such as psychologists.

Suggested changes to reduce court backlog and overcome delays

The following recommended changes could reduce the backlog of cases in the courts:

- **extended court hours** – During his term of office as Victorian Attorney-General, Rob Hulls said that he was considering the inclusion of night courts, breakfast courts, afternoon courts and weekend courts in order to extend the sitting time of the Magistrates' Court and improve access to justice. He suggested two Magistrates' Court sitting times: 10 am to 4 pm and 2 pm to 8 pm, and Saturday morning courts. This would reduce delays in getting cases to court, promote flexibility and increase people's access to courts.
- **continuation of the 24 Hour Initial Directions Hearing pilot program** – In January 2013, the County Court introduced this program in order to reduce delays in criminal cases by scheduling the first directions hearing the day after the committal hearing. The County Court has stated that it wishes to expand this pilot program.

LEARNING ACTIVITY 11.7

Timely resolution of disputes – court backlog

1 Read the following extract 'Lodgement of cases', look back at tables 11.4 and 11.5, and answer the questions.
   - a How many criminal and civil cases in total are pending across all courts in Victoria?
   - b Which courts are managing to decrease their backlog? Suggest why this may be occurring.
   - c Suggest reasons to account for the decrease in the number of civil cases being initiated in the Magistrates' Court.
   - d Which courts appear to be having difficulties managing their caseload? Use evidence to support your answer.
   - e What types of cases continue to increase? How can this increase affect the timely resolution of disputes?

EXTRACT

Lodgement of cases

Data released by the Productivity Commission in its annual reports reveal that in the five years to 2012–13, the overall number of criminal cases initiated in Victorian courts increased from 176 100 in 2007–08 to 202 000 in 2012–13 – an increase of 14.7 per cent. During the same period, the number of civil cases lodged in Victorian courts decreased from 197 900 to 118 900 – a decrease of 40 per cent. The variation in both figures is due mainly to changes in the number of cases being initiated in the Magistrates' Court, which is the busiest court in the Victorian court hierarchy.

The number of cases in the superior courts has remained relatively constant, apart from a fall in criminal cases lodged in the Supreme Court from 700 in 2008–09 to 400 in 2012–13. During the same period, the number of full-time equivalent judicial officers (which includes judges, associate judges, magistrates, masters, coroners and judicial registrars) increased from 237.8 in 2007–08 to 240.8 in 2012–13, after peaking at 253.1 in 2010–11.

Source: Productivity Commission, *Report on Government Services*, 2009–13

2 Discuss how the weekend court for bail and remand hearings could improve the timely resolution of disputes, both for the parties involved and for the legal system overall.

3 Read the extract 'Judges seek funds to fix "crumbling" justice edifice' and answer the questions.

- a How can factors such as court facilities contribute to delays in the court system?
- b What other factors are affecting delays in the Magistrates' Court and the County Court?
- c What problems are being faced by people involved in cases in the Supreme Court? How does this affect access to justice?

EXTRACT

Judges seek funds to fix 'crumbling' justice edifice

Adrian Lowe, *The Age*, 20 February 2012

Victoria's most senior judges have demanded extra funding to fix what they see as a stressed and dilapidated justice edifice in which some court buildings are 'basket cases'.

... [T]he heads of the Supreme Court, County Court and Magistrates' Court have described a justice system struggling to deal with an increasing number of cases – and many complex and delicate cases – within deteriorating conditions.



Figure 11.5 Chief Judge of the County Court, Michael Rozenes

Chief Magistrate Ian Gray wants more staff to deal with the exploding number of family violence cases across the state, warning that the court is struggling to keep up. He says several court buildings need better facilities to deal with sensitive cases.

The Chief Judge of the County Court, Michael Rozenes, wants more judges, particularly to deal with an increased workload from extended supervision orders for sex offenders and people-smuggling trials.

He has also lamented the conditions in some regional courts, pointing out that 'Shepparton and Wangaratta have been basket cases for a long, long time'.

Chief Justice Marilyn Warren has renewed her call for a modern Supreme Court building, saying she worries about the victims and witnesses in case who must experience 'intimidating justice, rather than protective and welcoming justice'.

... The demands for funding come as the courts deal with new policy demands, such as community correction orders and statutory minimum sentences for 'gross violence' offences.

Chief Judge Rozenes says the correction orders will require a case to come before the court several times, which will 'cut into court time' and gross violence cases will result in more trials.

... [Chief Justice Warren] adds that the [Supreme] court does not always have enough courtrooms for the number of judges sitting, and if there is a security risk or a large number of parties involved, another court will have to be found ...



Figure 11.6 Chief Justice of the Supreme Court, Marilyn Warren

PRACTICE EXAM QUESTIONS

1 **a** To what extent can high costs involved in using the legal system limit the effective operation of the legal system? Briefly describe two improvements to the legal system that have been made recently, or have been suggested. Explain how these improvements will make the legal system more effective. *(8 marks)*

b Discuss how social disadvantages can lead to people experiencing difficulties in receiving a fair and unbiased hearing. *(6 marks)*

c To what extent can the problems of gaining access to the law limit the effective operation of the legal system? In your response consider the elements of an effective legal system. *(6 marks)*

2 **a** Explain how delays can limit an individual's access to the law. In your response, refer to one of the elements of an effective legal system. *(6 marks)*

b Select and describe a recent actual or proposed change to the law that could assist in reducing delays. In your response comment on how this change could help achieve a more effective legal system. *(6 marks)*

c Explain two changes to the law (other than the one mentioned in part b of this question) that you think have improved the legal system's ability to achieve justice. Explain how these changes, in your opinion, have improved the operation of the legal system. *(8 marks)*

ASSESSMENT TASKS

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

ASSESSMENT TASK FOLIO EXERCISE

Justice for all, bar none

Read the article, 'Justice for all, bar none' and answer the questions. Rob Hulls was the Victorian Attorney-General from October 1999 to December 2010.

1 What are some of the basic elements of the right to a fair hearing? *(2 marks)*
2 How can increased funding to community legal services and Victoria Legal Aid enhance a person's right to a fair hearing? Discuss. *(2 marks)*
3 What two other suggestions for achieving a fairer hearing are made in this article? *(4 marks)*
4 What problems could arise if the legal system moves further towards alternative dispute resolution in civil cases? *(2 marks)*
5 Explain how pro bono assistance may improve people's access to the law and enhance the effective operation of the legal system. *(2 marks)*
6 Comment on a change in the law that has occurred that will improve a person's ability to receive a fair hearing. *(2 marks)*
7 Discuss two suggestions that have been made to change the civil justice system to improve a person's access to the legal system in civil cases. *(6 marks)*

(Total 20 marks)

Justice for all, bar none

Ben Schokman, *The Age*, 11 June 2008

The state government holds the key to ensuring equal access to the legal system

Claims by state Attorney-General Rob Hulls that barristers' fees are becoming prohibitive and putting justice out of reach of many Victorians ignore the real barriers that exist to participating in the justice system. If the Victorian Government really is serious about ensuring that justice is accessible to all, it must consider its own obligations.

In this respect, the government can learn much from the right to a fair hearing that is enshrined in its own *Charter of Human Rights and Responsibilities Act 2006*. The basic elements of the right to a fair hearing include, among other important aspects, equal access to, and equality before, the courts, the right to legal advice and representation in certain circumstances, the right to procedural fairness and the right to have the free assistance of an interpreter when necessary.

Using these basic minimum elements of the right to a fair hearing as guidance, the government should consider the following measures to fulfil its obligation to ensure that the justice system is accessible to everyone.

First, the government must increase funding for community legal centres and Victoria Legal Aid. Community legal centres and the legal aid system have a vital role to play in helping to achieve a fairer and more effective justice system. The major problems experienced by community legal centres are a result of the reduced availability of legal aid and a lack of financial support.

Second, access to courts may be increased by simplifying court procedures. For many people, complicated rules of procedure act as a barrier to accessing justice. Individuals must be given a reasonable opportunity to present their case under conditions that do not put them at a disadvantage. The provision of legal aid represents only one means by which a state can meet its obligations to guarantee a fair hearing.

Third, in addition to increased funding, the government must provide adequate services such as that provided by interpreters, to help disadvantaged litigants.

As the Attorney-General acknowledged in his justice statement in 2004, the purpose of the justice system, and the community's confidence in it, are diminished if people are unable to use it because they cannot obtain the necessary assistance. In civil proceedings in Victoria, the court currently plays no role in making sure that the services of an interpreter are available where required.

Such measures are likely to make the justice system not only fairer but more efficient. An increase in the availability of legal advice and representation, together with other reforms guaranteeing the basic elements of the right to a fair hearing, would reduce the number of unmeritorious claims brought before courts and also enhance the protection of the human rights of litigants.

While Mr Hulls' case for a major shift towards the resolution of civil disputes is important (less adversarial and more alternative dispute resolution), this must be balanced with ensuring that people remain able to participate equally in such proceedings.

Any initiatives that push for increased mediation or alternative dispute resolution processes should recognise that parties don't always come to the negotiation table with equal standing.

Alternative dispute resolution must, therefore, take account of the inherent unequal bargaining power between a poorly funded individual and a well-resourced corporation.

In cases where the legal issues are complex, or where the potential outcome has serious implications for the person involved, this may require the provision of legal advice or representation where appropriate.

While this in no way means that free legal advice or representation must be provided in all matters, it is essential that individuals be able to participate meaningfully in proceedings where they might otherwise be unable to because of reasons such as the complexity of the court processes or the legal issues themselves.

Further to the Attorney-General's comments about prohibitive legal fees, it is important to remember the significant amount of pro bono work carried out by Victorian barristers. Lawyers in Victoria have a long and admirable history of providing free and low-cost legal services to disadvantaged people.

According to the Victorian Bar Legal Assistance Scheme, more than 400 Victorian barristers are prepared to accept instructions for no fee or for a reduced fee in appropriate cases.

The pro bono contribution of the Victorian Bar is an essential part of access to justice in Victoria and provides a highly valuable service. Without the contribution of pro bono barristers, many Victorians would find it impossible to navigate a highly complex legal system and realise their legal rights.

The right to a fair hearing is an essential feature of the judicial process and is indispensable for the protection of other human rights. Indeed, the justice system is a critical aspect of the promotion, protection, fulfilment and enforcement of other human rights, such as freedom from discrimination, the right to education, the right to work and the right to health.

By ensuring greater equality of access to justice the system will be more effective and just and litigation costs will be significantly reduced. Ultimately, a fair hearing is a hollow right for an individual who is unable to access the judicial system in the first place.

Ben Schokman is a lawyer with the Human Rights Law Resource Centre (www.hrlrc.org.au).

ASSESSMENT TASK REPORT IN WRITTEN FORMAT

Find one newspaper, magazine or web article relating to a criminal case or a civil case (or both).

1 Describe the situation of the case referred to in the article. *(2 marks)*

2 Describe two of the elements of an effective legal system. In your description refer to the situation in the article. What has happened, or needs to happen, to ensure that these two elements are achieved? *(6 marks)*

3 Explain three problems that may be faced by individuals in using the legal system and show how these problems limit the effective operation of the legal system. *(9 marks)*

4 Explain two changes to the legal system designed to enhance its effective operation. To what extent do these changes fulfil this aim? Discuss. *(8 marks)*

5 Identify a recommendation for a change in the legal system and discuss its strengths and weaknesses in relation to enhancing the effective operation of the legal system. *(5 marks)*

(Total 30 marks)

Summary

Elements of an effective legal system

- entitlement to a fair and unbiased hearing
- effective access to the legal system
- timely resolution of disputes

Fair and unbiased hearing

Aboriginal and Torres Strait Islander peoples

- problems with questioning and giving evidence
  - language and communication differences
  - unwillingness to respond to direct questions
  - differences in body language
  - natural shyness
  - cultural taboos
  - lack of understanding of court procedures
  - different methods of dispute resolution from our cultural practices
- changes to overcome social disadvantage for Indigenous people
  - extension of the County Koori Court
- suggested changes to overcome social disadvantage for Indigenous people
  - more education programs for Indigenous people
  - training for lawyers and the judiciary in Indigenous culture
  - extending the Koori Court model to the Supreme Court and to contested cases
  - recognition of tribal customary law in sentencing

Access to justice

The cost of justice

- the cost of legal representation
- court costs
- the availability of legal aid from Victoria Legal Aid
- problems in applying for legal aid
- changes to reduce costs
  - the National Partnership Agreement on Legal Assistance Services
  - collaborative law
- suggested changes to reduce costs
  - representative proceedings
  - contingency fees

Timely resolution of disputes

Delays in the legal system

- effects of delays
- causes of delays
- changes in the operation of the legal system to reduce delays
  - weekend bail and remand court pilot
- suggested changes in the operation of the legal system to reduce delays
  - extended court hours
  - continuation of the 24 Hour Initial Directions Hearing pilot program

UNIT 4 SHORT ANSWER QUESTIONS

Test your knowledge of Unit 4

1 Outline the jurisdiction of the Magistrates' Court. *(4 marks)*
2 Define the term 'indictable offences heard summarily'. *(2 marks)*
3 Outline the appellate jurisdiction of the Supreme Court (one justice) for criminal and civil cases. *(2 marks)*
4 Outline the jurisdiction of the Supreme Court including the Court of Appeal. *(2 marks)*
5 What is the jurisdiction of the County Court? *(3 marks)*
6 Explain two arguments that justify the existence of the hierarchy of courts. *(4 marks)*
7 Describe the role of VCAT in resolving civil disputes. *(3 marks)*
8 Explain the difference between mediation and arbitration. *(4 marks)*
9 Compare conciliation and judicial determination as methods of resolving disputes. *(4 marks)*
10 Describe how mediation is used in the Magistrates' Court to resolve disputes. *(4 marks)*
11 Explain the methods used by VCAT to resolve disputes. *(4 marks)*
12 Describe three problems with the process of mediation. *(3 marks)*
13 Discuss two strengths of using mediation to resolve disputes. *(4 marks)*
14 Explain one strength and one weakness of having a case resolved by a court. *(4 marks)*
15 Explain one strength and one weakness of dispute resolution by VCAT. *(4 marks)*
16 Describe two features of the adversary system. *(4 marks)*
17 Evaluate the role of the parties in the adversary system. *(4 marks)*
18 Compare the role of the judge in the adversary system and the inquisitorial system. *(4 marks)*
19 Suggest one reform to the adversary system of trial to improve its operation. *(3 marks)*
20 Explain two pre-trial procedures in a criminal matter. *(4 marks)*
21 Describe two circumstances that may result in bail being refused. *(3 marks)*
22 Explain the purpose of a committal hearing. *(3 marks)*
23 To what extent do committal hearings assist with timely resolution of disputes? *(4 marks)*
24 What are the burden of proof and the standard of proof in a criminal case? *(2 marks)*
25 Explain two aims of criminal sanctions. *(4 marks)*
26 Explain two criminal sanctions and their purpose. *(4 marks)*
27 Compare the purposes of pre-trial procedures in criminal cases with those in civil cases. *(4 marks)*
28 Explain the purpose of pleadings in a civil case. *(4 marks)*
29 Explain the purpose of two processes in the discovery stage of pre-trial procedures in a civil case. *(4 marks)*
30 Outline the roles of the judge and jury in a civil trial. *(4 marks)*
31 Describe two types of civil remedies. *(4 marks)*
32 How does the purpose of criminal sanctions differ from the purpose of civil remedies? *(4 marks)*
33 Explain the factors that affect the composition of juries. *(4 marks)*
34 Describe two situations when a jury will not be used in a criminal matter. *(2 marks)*
35 What is the role of the jury in a civil trial? How does this differ from their role in a criminal trial? *(4 marks)*
36 Evaluate one strength of the jury system. *(4 marks)*
37 Suggest and describe one reform to the jury system. *(3 marks)*
38 Describe two elements of an effective legal system and how they are achieved. *(6 marks)*
39 Describe two problems faced by people in using the legal system. *(4 marks)*
40 Describe one change in the law that has taken place, or one suggested change in the law, and explain how this change is likely to enhance the effective operation of the legal system. *(4 marks)*

GLOSSARY

abrogate
Abolish; law made through the courts can be cancelled by an Act of parliament if the Act specifically states that it abolishes the law made by the courts.

absolute privilege
A person has an exceptional right, immunity or exemption because of his or her office or status. It is a defence to defamation. A statement is privileged even though it is made with malice if it is made in the course of judicial proceedings, or in parliament, and no action can be taken.

accused
A person who has been charged with a criminal offence.

acquittal
A finding of not guilty for an indictable offence prosecuted in a criminal trial; the opposite of conviction.

Act of parliament
A law passed by parliament which must be followed by everyone it affects. A proposed law is known as a Bill. It becomes an Act when it has been passed by both houses of parliament and received royal assent.

actus reus
A guilty act.

adjournment with or without a conviction
This is a sanction, but the sentencing is delayed for a specified period of time on the condition that the person found guilty of the offence does not reoffend within that time. If the person does not reoffend within the specified time, he or she is not brought before the court again. If he or she does reoffend, he or she is sentenced for the original offence and the subsequent offence.

adjudicate
To judge and give a decision.

adversary system
The system of trial used in Australia in which two opposing sides try to win the case. Set rules of evidence and procedure must be followed, and the judge and jury are impartial arbitrators.

affidavit
Evidence in the form of a written statement of facts, made under oath or affirmation.

alternative dispute resolution (ADR)
A less formal method of dispute resolution than judicial determination, such as arbitration, conciliation or mediation, where the civil dispute is reconciled with the help of a third party; also known as appropriate dispute resolution.

amendment
An alteration to an existing Act of parliament.

appeal
A hearing that reconsiders a decision from a lower court. A person who has gone through a trial or hearing and is not satisfied with the decision can, in certain circumstances, apply to have the decision reconsidered by a higher court.

appellant
The party making an appeal.

appellate jurisdiction
The authority to hear a case on appeal.

appropriation Act
An Act that authorises the drawing and spending of money by the government.

arbitration
A method of dispute resolution in civil disputes that is outside the court system, although this method is used in the Magistrates' Court for disputes under $10 000. A third party is appointed to listen to both sides of the dispute and make a decision that is binding on the parties.

arrest
When the police take someone into custody because they suspect that the person has committed a crime.

assault
Assault is defined in S31 of the *Crimes Act 1958* (Vic.) as the direct or indirect application of force by a person to the body, clothing or equipment of another person, where the application of force is without lawful excuse and intentional or reckless, and results in bodily injury, pain, discomfort, damage, insult or deprivation of liberty. Under civil law, a person can also be sued for trespass to the person, which includes assault.

attachment of debts
An enforcement procedure against a person who has not paid a debt. This can be by way of a garnishee (where a third person owes money to the defendant and that third person pays the plaintiff directly).

attachment of earnings
An order can be made that the debt is paid directly out of the debtor's pay to the person the debt is owed to.

attorney-general
Principal legal officer of the Crown.

authority
A term for a decided case.

bail
The release from custody of a person accused of a crime and awaiting a hearing or trial, on an undertaking that the person will attend the hearing or trial. This often involves placing money with the court that will be forfeited if the accused fails to attend court for trial.

bail justices
Officers appointed by the attorney-general to perform functions under the *Bail Act 1977*, known as honorary justices. Their role is to decide whether an accused person is eligible for bail or should be kept in remand until the time of the trial.

balance of probabilities
The standard of proof required in a civil case.

barrister
A lawyer who represents a client in court, also known as counsel or advocate.

battery
A direct act of contact by one person to another person without their consent.

beyond all reasonable doubt
The standard of proof required in a criminal case. It is not possible for a juror or magistrate to be absolutely certain because he or she was not there when the crime was committed, but they must be as sure as is rationally possible. Reasonable in this instance is what the average person in the street would believe to be the case, that is, when the evidence is looked at in a logical and practical manner.

bicameral
Means 'two houses of parliament'. All parliaments in Australia except that of Queensland and the territories have two houses.

Bill
A proposed law.

bill of rights
A document that sets out individual democratic and human rights.

binding precedent
The precedent (reason for the decision, or ratio decidendi) is binding on future cases in the same hierarchy, provided the material facts are the same.

burden of proof
The responsibility of proving an action usually lies with the person who initiates the action.

burglary
Entering any building as a trespasser with the intent to steal, or committing an offence involving assault in a building entered as a trespasser, or damaging a building entered as a trespasser.

cabinet
Policy-making body that decides what changes should be made to the law. It is made up of senior ministers and the prime minister (or premier at state level).

calling on
The accused's name is called at the beginning of a trial and the prosecutor announces that they appear on behalf of the Crown and the defence counsel announces that they appear on behalf of the defence.

camera, in
In private; members of the public being excluded from viewing a judicial proceeding.

case
A criminal or civil proceeding.

cautioning
A formal caution can be given under the Child Cautioning Program or the Shop Stealing Program. It can only be given by a station commander or an officer of or above the rank of sergeant. The person will not have to attend court, but must be of good behaviour for the next five years. If they are found committing another crime in that time, they must attend court for the second offence and the original offence becomes a prior conviction. If they do not commit another offence during the five years, any record of the caution is erased.

challenge
Make objection to a potential juror. *See* peremptory challenge *and* challenge for cause.

challenge for cause
A challenge of a prospective juror before a trial begins, made for a reason that is accepted by the court.

charge
A formal written accusation naming a specific person and crime committed.

charge and summons
A summons is a document commanding a person to attend court on a given date. For a summons to be issued, a 'charge' is filed in the Magistrates' Court. The details of the offence and the circumstances surrounding the offence are recorded on the charge.

charge bargaining
Negotiation between the Crown and the accused whereby the accused agrees to plead guilty to a lesser charge rather than not guilty of the original charge. *See* plea bargaining.

circumstantial evidence
Evidence which takes the form of a set of circumstances or facts indicating that a certain event has happened, rather than proving a fact directly.

civil action
An action taken by an individual or group who claims his, her or their rights have been infringed. It is aimed at obtaining a remedy to return the wronged party to the position he or she was in before the wrong occurred.

civil law
The law that governs disputes between individuals and groups.

class action
In Australia, class actions (or group proceedings) can be commenced by a lead plaintiff in circumstances where seven or more people have claims that arise out of the same or related circumstances and give rise to a substantial issue of fact or law. This is a cheaper way of taking action against a party that has injured or harmed a number of people.

coalition
Political relationship between two or more political parties to form an effective larger group, often to gain government.

codifying Act
One Act gathering various Acts of parliament and common law on one topic into one Act.

collaborative law
Disputing parties, together with their lawyers, sign a contract to work together in good faith to resolve their civil dispute without going to court, using problem-solving and negotiation techniques to achieve a just outcome.

committal hearing
A hearing held in the Magistrates' Court for an indictable offence to assess whether a prima facie case exists; that is, whether the evidence is of sufficient weight to support a conviction by a jury at trial. This is part of the committal proceedings.

committal proceedings
The hearings that take place in the Magistrates' Court for indictable offences; one of the hearings is a committal hearing.

common law
Law made through the courts; case-made law and judge-made law. Common law is a system of deciding cases that originated in England. It is based on decisions made by judges that form part of the law.

community correction order
A sanction that is a supervised sentence served in the community, and includes special conditions such as treatment and unpaid community work for a specified number of hours.

compensation
Monetary payment for loss or injury.

compensation order
A person convicted of a crime may be ordered to pay compensation for damage arising out of an offence.

compensatory damages
Damages to compensate the plaintiff for any injury or loss caused by the defendant. They aim to restore the person whose rights have been infringed to the position they were in before the infringement.

conciliation
A method of dispute resolution for civil disputes using a third party to help disputing parties reach a resolution. The third party can make suggestions, but the parties reach the decision between themselves. The decision is not normally binding.

concurrent powers
Powers shared between the Commonwealth Parliament and the state parliaments.

concurrent sentences
Terms of imprisonment imposed for two or more separate offences to be served at the same time.

consolidating Act
One Act gathering various Acts of parliament on one topic.

Constitution
The *Commonwealth of Australia Constitution Act 1900* (UK), which came into force on 1 January 1901; a set of rules or principles guiding the way the nation is governed. States have their own separate constitutions.

contemptuous damages
Damages that are awarded when the court feels that the plaintiff has a legal right to compensation, but does not have a moral right. The amount is usually very small.

conviction
A criminal offence that has been proved. Prior convictions are previous criminal offences that have been proved and for which the person has been found guilty.

counterclaim
A claim made by a defendant when he or she feels that the plaintiff is wholly or partly in the wrong.

court hierarchy
State and federal courts are ranked in importance, the High Court of Australia being at the top of the hierarchy for each state. In Victoria the next courts in order in the hierarchy are the Supreme Court, the County Court and the Magistrates' Court.

crime
An act or omission that offends against an existing law, is harmful to an individual or society as a whole, and is punishable by law.

cross-examination
When a witness has been intentionally called by either party, the opposite party has a right to cross-examine him or her (ask questions). The purpose of cross-examination is to find flaws in the evidence of the witnesses and show up any inconsistencies or any indication that a witness may be unreliable. The cross-examination is not confined to matters proved in examination-in-chief, and leading questions may be put.

Crown
The authority of the Queen is represented in Australia by the governor-general (federal) and the governor of each state.

crown prosecutor
The legal representative of the Crown who initiates legal proceedings against those accused of criminal offences.

cumulative sentences
Terms of imprisonment that are to be served one after the other, thereby increasing the amount of time to be spent in jail.

damages
A type of remedy, being a sum of money awarded to a plaintiff by the court in a civil case, paid by the defendant in settlement of a claim for any loss or injury caused to the plaintiff as a result of a civil wrong.

de novo
When an appeal to a higher court is in the form of a rehearing (an appeal de novo) the court may consider fresh evidence and any changes in the law that have occurred since the case was heard originally.

defamation
Written or verbal statements that lower a person's good reputation in the eyes of the community.

default judgment
If the defendant does not appear at a civil case against him or her, judgment will take place in his or her absence.

defence
A document exchanged as part of pleadings that sets out a response to each of the allegations contained in the plaintiff's statement of claim.

defence response
Statement by the accused disclosing the facts of their case, outlining any inferences of their case, identifying expert witnesses to be called, indicating the facts in the prosecution case statement to which the accused objects, and indicating the inferences being drawn by the prosecution to which the accused objects.

defendant
Party who is alleged to have carried out the wrongful act.

defensive homicide
An indictable offence that applies where the accused believes they were acting in self-defence but a court finds the beliefs or actions of the accused unreasonable.

deferred sentencing
A sentence may be deferred for offenders aged between 17 and 25, for a period of up to six months. When the offender returns to court for sentencing, the court can take their behaviour during the deferral period into account in determining whether a lesser penalty is warranted, or whether treatment or other conditions should be attached to a sentence to provide ongoing management of the offender's specific needs.

delegated bodies
See subordinate authorities.

delegated legislation
Rules and regulations made by subordinate authorities.

denunciation
An aim of criminal sanctions. A particular punishment may be given to show the community that the court disapproves of the type of conduct engaged in by the offender.

deterrence
An aim of criminal sanctions. The punishment is aimed at deterring the offender from committing a similar offence again (specific deterrence) and at deterring the whole community from committing similar offences (general deterrence).

directions hearing
A pre-trial procedure where the court may give any direction to the parties about the conduct of the civil proceeding, such as requiring the parties to attend mediation before trial.

disapprove
A court expresses disapproval of an existing precedent but is still bound by it.

discontinuance
A stay of proceedings in criminal prosecutions, previuosly known as a nolle prosequi.

discovery
A pre-trial procedure that allows the parties to obtain further information about the dispute from the other party, including inspecting documents in the possession of the other party and examining a witness through interrogatories.

disqualified jurors
People who are prohibited from being on a jury because of something they have done in the past that makes them unsuitable, such as having a criminal record.

distinguish
A court decides that the main facts of a case are sufficiently different to a precedent and therefore that the precedent is not binding.

division of powers
The way in which law-making powers are divided between the Commonwealth and the states.

DNA
Deoxyribonucleic acid, a compound found in the nucleus of every living cell. Every part of you contains your personal DNA. The DNA patterns are unique to an individual (a person's genetic fingerprint) although there can be similarities between one individual's DNA pattern and that of a related individual, such as in members of the same family.

doctrine of precedent
The common-law principle by which the reasons for the decisions of courts higher in the hierarchy are binding on courts lower in the same hierarchy where the material facts are similar. This applies to important facts that could affect the outcome of the case.

double majority
The requirement in the process of changing the Constitution through a referendum – to achieve a yes vote by a majority of voters in the whole of Australia as well as a yes vote by a majority of voters in a majority of states (this means a majority in four out of the six states).

ejusdem generis
Legal rule meaning 'of the same kind', used by judges to help them interpret the words in a statute.

empanelling
A jury is empanelled when it is chosen for jury duty.

enabling Act
An Act that delegates law-making power to a subordinate authority.

entrapment
The police may, during the process of obtaining evidence, trap a habitual or prospective offender into committing a crime as long as it can be shown that the crime is one that would normally have been committed by that person. The person used to trap the offender is called an agent provocateur.

entrenched rights
Rights that are protected by a Constitution and can only be changed through the methods set out in the Constitution.

entry of appearance
A document lodged by the defendant informing the plaintiff that he or she wishes to defend the action against him or her.

evidence
Material used in legal proceedings to prove or disprove matters of fact presented in court.

ex parte
An application made to court by one party in the absence of the other.

ex post facto
After the act or omission took place. Courts make laws ex post facto.

examination-in-chief
The person who has called the witness in a court case asks questions, under oath, to draw out ('adduce') all the evidence that is favourable to their case (either the prosecution or the defence).

exclusive powers
Powers given to the Commonwealth Parliament by the *Commonwealth of Australia Constitution Act 1900* (UK) – the Constitution – that can only be exercised by the Commonwealth Parliament. The Constitution restricts the states from exercising power in these areas.

excused jurors
People who have been granted permission to not attend jury service by the juries commissioner, who is satisfied that they have a good reason.

Executive Council
Also known as the governor-general-in-council at a federal level or governor-in-council at a state level. At a federal level it is made up of the governor-general and relevant ministers. At the state level it is made up of the governor and relevant ministers. Its task is to pass delegated legislation in areas where an enabling Act has given power to the Executive Council to make delegated legislation (rules and regulations).

executive power
Power given to the governing body of the country responsible for administering and policing the laws. It is vested in the monarch by S61 of the Constitution and exercisable by the governor-general. In practice the governor-general acts on the advice of the prime minister and the ministers.

exemplary damages
Damages awarded in a civil case to seek to punish the defendant for an extreme infringement of rights. They are often very high amounts of money and are also called punitive damages.

express or explicit rights
Rights that are expressly referred to in a Constitution, Bill of Rights or similar document. Some express rights are entrenched in a Constitution. This means they cannot be easily changed by an Act of parliament. Express rights are also referred to as explicit rights.

extrinsic material
Material not part of an Act of parliament that may assist a judge to interpret the meaning of the words in an Act, such as parliamentary debates or committee reports.

false imprisonment
The wrongful total restraint of the liberty of a person, directly brought about by another person. This is a civil wrong (tort) of trespass to the person. An individual whose conduct constitutes the tort of false imprisonment might also be charged with committing the crime of kidnapping, since the same pattern of conduct may provide grounds for both. However, kidnapping may require that other facts be shown, such as the removal of the victim from one place to another.

federation
A union of sovereign states that relinquish some powers to a central authority to form one nation. Australia is a federation of six independent states with a federal body known as the Commonwealth Parliament. Each state parliament and the Commonwealth Parliament have their own powers. Some powers are shared between the Commonwealth Parliament and the states.

fine
A monetary penalty that can be imposed on its own or with another sanction such as imprisonment.

foreperson
The person chosen by a jury to be their chairperson during a trial and act as the spokesperson for the jury.

garnishee
An enforcement procedure against a person who has not paid a debt. If A owes money to B and B owes money to C, A can be ordered to pay the debt direct to C.

general damages
An unspecified amount of money to compensate for pain and suffering, loss of quality of life, loss of earning capacity, inconvenience and so on.

government
Government is formed by the political party that governs the country (or state). This is the party, or coalition of parties, that achieves the largest number of members voted into the lower house (the House of Representatives at a federal level and the Legislative Assembly at a state level). All members of parliament who belong to this political party form the government. Government does not make laws – this is the role of parliament. Government decides which laws should be introduced to parliament.

governor-general-in-council
See Executive Council.

group proceedings
In Australia, class actions (or group proceedings) can be commenced by a representative applicant in circumstances where seven or more people have claims that arise out of the same or related circumstances and give rise to a substantial issue of fact or law. This is a cheaper way of taking action against a party that has injured or harmed a number of people.

hand-up brief
A process in a committal proceeding where written statements are used instead of witnesses having to attend in person and give evidence.

heads of power
The areas of law-making power listed in S51 of the Constitution.

hearing
A judicial examination of a case reaching a decision in a court of summary jurisdiction (Magistrates' Court) presided over by a magistrate.

hearsay evidence
Evidence given about something said by another person who is not called as a witness.

homicide
The killing of a person; murder, manslaughter, defensive homicide, infanticide and child homicide are unlawful homicides.

honorary justices
People appointed to decide who is eligible for bail.

House of Representatives
The lower house of the Commonwealth Parliament.

hung jury
A jury that cannot reach a verdict.

implied rights
Rights that are not expressly referred to but are read into a Constitution by implication.

in future
For the future. Parliament generally makes laws for the future with, as far as possible, the future in mind.

inadmissible evidence
Some types of evidence are not admitted into a court hearing. These include hearsay evidence, irrelevant evidence, opinion evidence, evidence of bad character and privileged information.

indictable offence
A serious offence that can be heard before a judge and jury.

indictable offence heard summarily
A serious offence heard and determined as a summary offence in a court of summary jurisdiction.

ineligible jurors
People who are not eligible for jury service because of their inability to comprehend the task or because of their occupation, such as someone employed in the legal profession.

informant
A person laying charges against a suspect; usually a police officer.

injunction
A type of remedy; a court order that stops someone from doing something or compels someone to do something.

inquisitorial system
System of trial in some European and Asian countries in which the arbitrator of a dispute, the judge, plays an active role in examining and investigating the case in order to determine the truth of the matter in question.

interrogatories
Part of the discovery process, interrogatories are written questions sent by one party in a civil case to the other party before the trial.

intervention orders
Orders obtained through the courts under the *Crimes (Family Violence) Act 1987* to give protection to women and children in the home and to provide greater assistance to victims of domestic violence. These orders restrict the movements of a spouse or other person who is likely to cause harm.

intrinsic material
Material found within an Act of parliament that may assist a judge to interpret the meaning of the Act.

irrelevant evidence
Evidence is not allowed in a court hearing if it does not help to establish the important facts of the case. This would be time-wasting and could also mislead or confuse a jury.

judge
An officer appointed by the Crown with judicial power to preside over the County Court, Supreme Court or High Court. A judge decides on points of law and a jury (if present) decides on points of fact. If there is no jury, the judge will decide on points of law and points of fact.

judgment
A decision of a court of law.

judicial creativity
The creative interpretation of legal precedent or Acts of parliament by judges in superior courts.

judicial determination
A method of dispute resolution that involves the parties to the case presenting arguments and evidence to a judicial officer who then makes a binding determination or decision about the outcome of the case.

judicial power
Power vested in bodies responsible for enforcing the law and settling disputes. This role is carried out by the courts.

judiciary
The judges of the courts of law.

jurisdiction
The lawful authority of a court or tribunal to decide a particular case according to the severity of the case. Jurisdiction also refers to the geographical boundaries of a court's power.

jury
An independent group of people summoned to a court and empanelled to decide on the evidence in a case and reach a verdict.

legal aid
Publicly funded legal advice, assistance and/or representation.

legal rules
Laws and rules that are made by parliaments and courts and are enforceable through the courts.

legislation
An Act of parliament or a set of Acts.

Legislative Assembly
The lower house of the Victorian Parliament.

Legislative Council
The upper house of the Victorian Parliament.

legislative power
Law-making power vested in the parliament by S1 of the Constitution.

litigant
A party to a civil proceeding.

litigation
A civil proceeding; a lawsuit.

lobbying
Making requests to politicians or groups for their assistance in trying to influence a change in the law.

magistrate
A person who presides over courts of summary jurisdiction, as in the Magistrates' Court.

majority verdict
A jury verdict where not all members of the jury agree on the verdict, but there are sufficient numbers in agreement for the court to accept the verdict. In criminal cases in Victoria a verdict of 11 out of 12 will be accepted as a majority verdict; in civil cases the decision of five out of six jurors will be accepted as a majority verdict.

malice aforethought
The intention to commit the crime of murder; the mens rea. It also includes an intention to cause grievous bodily harm from which death results.

mandatory injunction
An order compelling someone to do a particular act, for example removing something from their land.

manslaughter
A person can be charged with manslaughter (or found guilty of manslaughter) if he or she was criminally negligent, or killed someone while conducting a dangerous and unlawful activity.

mediation
A method of dispute resolution using one or two third parties (mediators) to help the parties to the dispute reach a resolution to the dispute. The mediators do not make suggestions, but help the parties feel able to negotiate on their own behalf. The decision is made between the parties and is not binding.

mens rea
Guilty mind; the intention to commit the crime.

minister
A government minister is a member of parliament who is also a member of the political party that has formed government, and has some particular responsibility such as being in charge of a government department.

murder
The unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (10 years old and over) and of sound mind.

natural justice
The rules of natural justice provide that a person should be treated fairly, in good faith and without bias; that is, that justice should be done and should be seen to be done. Each party should be given the opportunity to state their case, and to correct or contradict any relevant statement prejudicial to their case. A judge must declare any interest he or she has in the subject matter of the dispute before him or her. A person should be made aware of what he or she is accused of, and any relevant documents that are being looked at by the court or tribunal should be disclosed to the parties interested.

negligence
Negligence is a tort. It is a careless action that damages other people or property. It is necessary to prove that a duty of care existed, that this duty was breached and that injury occurred as a result of the breach of duty of care.

neighbour principle
For an action of negligence to be successful, it must have been reasonably foreseeable to the defendant that the act or omission would lead to harm to the plaintiff. According to Lord Atkin, 'You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure … persons who are so closely and directly affected by (your) act that (you) ought reasonably to have them in contemplation when (you) are directing (your) mind to the acts or omissions which are called in question.'

next friend
A person who brings a civil case on behalf of a minor.

nolle prosequi
A stay of proceedings in criminal prosecutions (now called a discontinuance). It is not equivalent to an acquittal, and does not stop a new indictment for the same offence in the future.

nominal damages
Damages that are usually very small. They are awarded when the plaintiff is seeking to make a point about being legally in the right and to show that their rights had been infringed.

non-legal rules
Rules that are not enforceable through the courts.

notice of appearance
A document exchanged as part of pleadings which informs the court and the plaintiff that the defendant wishes to defend the claim.

oath
An oath is either a statement of fact or a promise calling on something or someone that the oath maker considers sacred, usually God, as a witness to the binding nature of the promise or the truth of the statement of fact. To swear is to take an oath or make a solemn vow.

obiter dictum
A statement made by a judge on a legal question (often referred to as a statement by the way), not requiring a decision to be made on the issue and therefore not creating a precedent, but which can be persuasive precedent.

office of parliamentary counsel
The office of parliamentary counsel is responsible for drafting legislation; the drafters are given instructions from cabinet about the purpose and extent of the proposed laws.

ombudsman
A person who investigates complaints made by individuals about decisions made by government departments or statutory authorities.

oral evidence
Evidence given by witnesses in a case in the form of answers to questions from legal representation.

order for specific performance
A court order compelling a person to fulfil a promise. A court will only enforce a contract if it feels that the contract is just. An award of damages is usually given instead of an order for specific performance.

original jurisdiction
The authority to hear a case for the first time (in the first instance).

originating motion
A document initiating proceedings in a civil case, stating the place and mode of trial. An originating motion can be used when there is little dispute over the facts or where there is no defendant to the proceedings.

overrule
A new case in a higher court creates a new precedent, which means the previous precedent in a different case is no longer applicable.

parent Act
An Act that delegates law-making power to a subordinate authority.

parliament
The supreme law-making body (within its jurisdiction) consisting of the Queen's representative (the governor-general), the Senate and the House of Representatives at a federal level, and the Queen's representative (the governor), the Legislative Council and Legislative Assembly at a state level in Victoria.

parliamentary counsel
A lawyer who has responsibility for framing legislation and who is given instructions from cabinet about the purpose and extent of proposed laws.

penal Act
An Act that creates a criminal offence.

penalty unit
The monetary unit in which a fine is expressed ($144.36 per unit in the 2013–14 financial year).

peremptory challenge
A challenge of a prospective juror before a trial begins, without giving a reason for the challenge.

perpetual injunction
A permanent injunction granted after the case has been heard.

persuasive precedent
Decisions from other hierarchies or from a court lower in the same hierarchy can act as persuasive precedent. This is influential on other courts, but not binding.

plaintiff
Party who is wronged and who commences the civil action.

plea bargaining
Agreements made between the accused and the prosecutor, on an informal basis, about the charges to be laid. This might lead to some charges being dropped in exchange for the accused pleading guilty to the main charges, or charges being dropped in exchange for evidence being given. It is sometimes referred to as charge bargaining.

pleadings
Documents exchanged between the plaintiff and the defendant in a civil case, normally through their solicitors, to establish the reason for the claim and which facts are in dispute. Pleadings include the writ, statement of claim, notice of appearance and defence.

precedent
Principles of law set down by a higher court that are binding on lower courts in the same hierarchy. Precedents can be binding or persuasive.

preliminary hearing
A hearing (also known as a committal hearing) held in the Magistrates' Court for an indictable offence to assess whether a prima facie case exists; that is, whether the evidence is of sufficient weight to support a conviction by a jury at trial. It is part of the committal proceedings.

pressure group
A group of people who have a common interest in trying to influence changes in the law.

prime minister
The member of parliament who leads the political party that has formed government.

private Act
An Act of parliament that is made concerning one individual or one group, and does not affect society as a whole.

private member's Bill
A Bill that is presented to parliament by a private member of parliament, i.e. not a minister acting on behalf of the government.

private nuisance
Substantial and unreasonable interference with the use and enjoyment of land.

privilege
A person has an exceptional right, immunity or exemption because of his or her office or status. It is a defence to defamation. *See* absolute privilege *and* qualified privilege.

propensity evidence
Propensity evidence is evidence which demonstrates that the accused has a tendency to commit the type of crime they are accused of. This evidence can include prior convictions.

prosecutor
The legal representative of the Crown who initiates proceedings against those who have been accused of a crime.

public nuisance
An act or omission that interferes with the comfort or convenience of a number of people to a considerable degree.

punitive damages
See exemplary damages.

qualified privilege
It is a defence to defamation. Qualified privilege is provided if a statement is made without malice and for a particular purpose, such as media reports of parliamentary proceedings or court cases, or because a person is under a moral or legal duty to advise others of a situation.

rape
Intentional sexual penetration of another person without that person's consent, while being aware that the person was not consenting or might not have been consenting; or not withdrawing from sexual penetration after becoming aware that the person is not consenting.

ratio decidendi
The legal reason for a decision of a court that is binding on lower courts in the same hierarchy and must be followed.

reasonable foreseeability
See neighbour principle.

recidivist
A person who continually commits crimes (often of a similar nature) despite being punished for them.

reckless indifference
An act or omission that shows no concern as to whether death or grievous bodily harm could result. Reckless indifference can be an element of a murder.

re-examination
The person who has called the witness in a court case is able to re-examine that witness after cross-examination, to explain or contradict any unfavourable impression produced by the cross-examination.

referendum
A vote of the people in which an entire electorate is asked to either accept or reject a particular proposal to change the words in the Constitution. This may result in the adoption of a change to the Constitution. The process of changing the wording of the Constitution by referendum is set out in S128 of the Constitution.

referral of power
The giving or returning of a law-making power from a state to the Commonwealth Parliament.

remand
When a person is held in custody awaiting a trial, during a trial or awaiting sentence.

remedy
A way in which a court will enforce a right, impose a penalty or make another court order for the benefit of the plaintiff. It is aimed at restoring the plaintiff back to the position he or she was in before the wrongful act occurred. The most common remedy is damages.

repeal
To cancel an Act of parliament.

representative government
A government that represents the views of the majority of the people.

residual powers
Powers left with the states, not given to the Commonwealth Parliament by the *Commonwealth of Australia Constitution Act 1900* (UK).

responsible government
The executive government (prime minister, senior ministers and government departments) is accountable to parliament, and can only continue to govern as long as it has the support of the lower house of parliament. If the government loses the support of the lower house, then it must resign.

restrictive injunction
An order stopping someone from doing something, for example stopping someone from destroying a building if it is in the interests of the nation to preserve it.

reverse
A higher court makes a different decision than a lower court in the same case.

right to silence
Individuals being questioned by police, or people accused of a crime being questioned in court, have a right to remain silent and not answer questions. Individuals suspected of an indictable offence, however, must give their name and address when questioned by the police. Motorists must give their name and address and produce their driving licence when required by the police.

robbery
The use of force on any person, or putting any person in fear of force being used, immediately before or during the act of stealing.

royal assent
A formal signing of a Bill by the governor-general (at a federal level) or governor (at a state level), after which the Bill becomes an Act of parliament.

sanction
A legal punishment given to a person who has been found guilty of an offence.

Scrutiny of Acts and Regulations Committee
A Victorian committee that looks at new Bills as they make their passage through the Victorian Parliament.

Senate
The upper house of the Commonwealth Parliament.

Senate Scrutiny of Bills Committee
A Senate committee that is responsible for examining all Bills that come before the Commonwealth Parliament.

sentence indication
This involves the judge or magistrate letting the defendant and the prosecutor know what sentence is likely to be given after reading the material on the case. This can give the defendant the confidence to plead guilty, having some idea of whether they are likely to go to jail and for how long.

separation of powers
The principle of separation of powers refers to the three separate types of powers in our parliamentary system. These are legislative power, executive power and judicial power. At a federal level, legislative and judicial power must be kept separate, although legislative and executive power are combined.

sequestration
An order by the court commanding certain persons (for example, the sheriff of the court) to seize property owned by the defendant and to hold the property until the defendant pays the money owed.

solicitor
A qualified legal practitioner who will give advice about the law and a person's rights under the law. He or she will also draw up documents, appear in court on behalf of a client (usually in the Magistrates' Court) or instruct a barrister to appear in court on behalf of the client.

special damages
A monetary compensation of a specified amount to cover the cost to the plaintiff of items such as medical expenses, loss of earnings, cost of artificial limbs.

specific powers
Those powers that are referred to in the Constitution specifically; these mainly appear in S51 and are numbered, hence they are also referred to as enumerated powers. Specific powers are either concurrent powers or exclusive powers.

standard-form contract
A contract written in advance and the details added later, such as the name of the customer and the agreed price.

standard of proof
The degree of proof. In a civil case the standard of proof is 'on the balance of probabilities'. In a criminal case the standard of proof is 'beyond all reasonable doubt', although this may change in some circumstances.

Standing Committee on Legal and Constitutional Affairs
This Senate committee is divided into two committees: a Legislation Committee that deals with Bills referred by the Senate, and a References Committee that deals with all other matters referred by the Senate.

stare decisis
Let the decision stand. When a decision in a court case is reached, the reason for the decision becomes part of the law that is binding on, or guides, the courts in later cases.

statement of claim
A document exchanged as part of pleadings that notifies the defendant of the nature of the claim, the cause of the claim and the remedy or relief sought.

statute
An Act of parliament; a piece of legislation.

statute law
Law made by parliament; also known as legislation.

statutory interpretation
The interpretation, by the courts, of law made by parliament. This will only occur if a relevant dispute is brought before the court.

statutory or unentrenched Bill of Rights
A Bill of Rights that is part of an Act of parliament and can be changed by an amending Act of parliament.

strict liability crime
Where the prosecution does not have to prove intention to commit the crime. It has only to be shown that the accused committed the offence for them to be found guilty. It might be possible for the accused to prove on the balance of probabilities that there was an 'honest and reasonable mistake'.

structural protection of rights
The structural protection of rights refers to the protection of rights contained in the structure and text of the *Commonwealth of Australia Constitution Act 1900* (UK), which provides indirect protection of the rights of Australians in their dealings with the Commonwealth Parliament.

subordinate authorities
Bodies given the power to make rules and regulations by an Act of parliament (an enabling Act), such as local councils (also delegated bodies).

subpoena
A writ used to summon witnesses to appear in court.

sue
To initiate legal civil proceedings against another person.

summary offence
A minor offence heard in the Magistrates' Court.

summons
A document issued by a court directing a person to appear before that court.

supply Act
An Act that authorises the drawing and spending of money by the government.

supremacy of parliament
Also referred to as sovereignty of parliament. This refers to the concept that the final law-making power rests with parliament. Parliament can repeal its own previous legislation and pass legislation to override common law, a capacity that no other state or Commonwealth body has. The Commonwealth Parliament cannot override a High Court decision that interprets the Constitution, without holding a referendum.

surety
A person who undertakes to ensure that the defendant in a criminal case (who has been allowed bail) will appear in court.

suspended sentence
On sentencing an offender to a term of imprisonment, a court may make an order suspending, for a period specified by the court, the whole or a part of the sentence if it is satisfied that it is desirable to do so. A suspended sentence can only be given if the term of imprisonment does not exceed three years. Suspended sentences are being phased out.

terms of reference
Instructions given to an organisation (for example, a law reform body) setting out the parameters within which an investigation will operate.

theft
An indictable offence that involves dishonestly taking (stealing) a person's property with the intention of permanently depriving the person of it.

tied grants
A grant to the states of a sum of money with conditions that effectively determine what the money has to be spent on and how it has to be spent. In this way the Commonwealth Parliament can have influence over areas of residual power, matters originally left with the states. Section 96 of the *Commonwealth of Australia Constitution Act 1900* (UK) gives the Commonwealth Parliament the right to grant financial assistance to any state on such terms and conditions as the parliament thinks fit.

tort
A civil wrong. An action or omission that infringes on the rights of another.

trespass to goods
Direct interference by one person with another person's possession of goods.

trespass to land
Direct physical interference with a person's exclusive possession of their land by another person.

trespass to person
Assault, battery or false imprisonment of another person.

trial
An examination and determination of a legal dispute in a higher court (normally the County Court and Supreme Court of Victoria) but not in a court of summary jurisdiction.

ultra vires
Beyond the power or authority. An Act of parliament or piece of delegated legislation may be deemed ultra vires by a court because it is outside the power of the body that made the law.

unanimous verdict
A verdict of all the jury (with every juror deciding in the same way).

values
Something that individuals and members of society hold in high regard. For example, society values the sanctity of life and the protection of children.

VCAT
Victorian Civil and Administrative Tribunal, a legal body consisting of numerous specialist lists that each resolve particular types of civil disputes.

victim impact statement
A statement made to a court by the victim, in writing by statutory declaration or in writing and orally, to give the victim an opportunity to explain the impact of the crime to the court, and to assist the court in determining the appropriate sentence for the offender.

view
Viewing of evidence at the scene of a crime.

vilification
The use of offensive words to stir up hatred or make people fear violence. There can be racial or religious vilification.

vindictive damages
See exemplary damages.

void
Of no legal effect. For example, a contract can be void if it deals with illegal goods or services.

warrant
A court document used to arrest a suspect and bring him or her before a court of law.

warrant of seizure and sale
The courts can seize goods or land and sell them to pay the money owed, with the remainder being given to the defendant.

Westminster principles
The set of principles that underpin our parliamentary system, inherited from the United Kingdom, known as the Westminster system. These are the principles of representative government, responsible government, the separation of powers, the structure of state and Commonwealth parliaments, and the roles played by the Crown and the houses of parliament.

writ
A document exchanged as part of pleadings, issued by the plaintiff in a civil proceeding (or his or her legal representatives) explaining the action being taken against the defendant by the plaintiff and informing the defendant of the place and mode of trial.

writ of attachment
A court order instructing the defendant's employer to regularly pay a certain amount of money to the complainant, the money to be deducted from the defendant's wages.

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