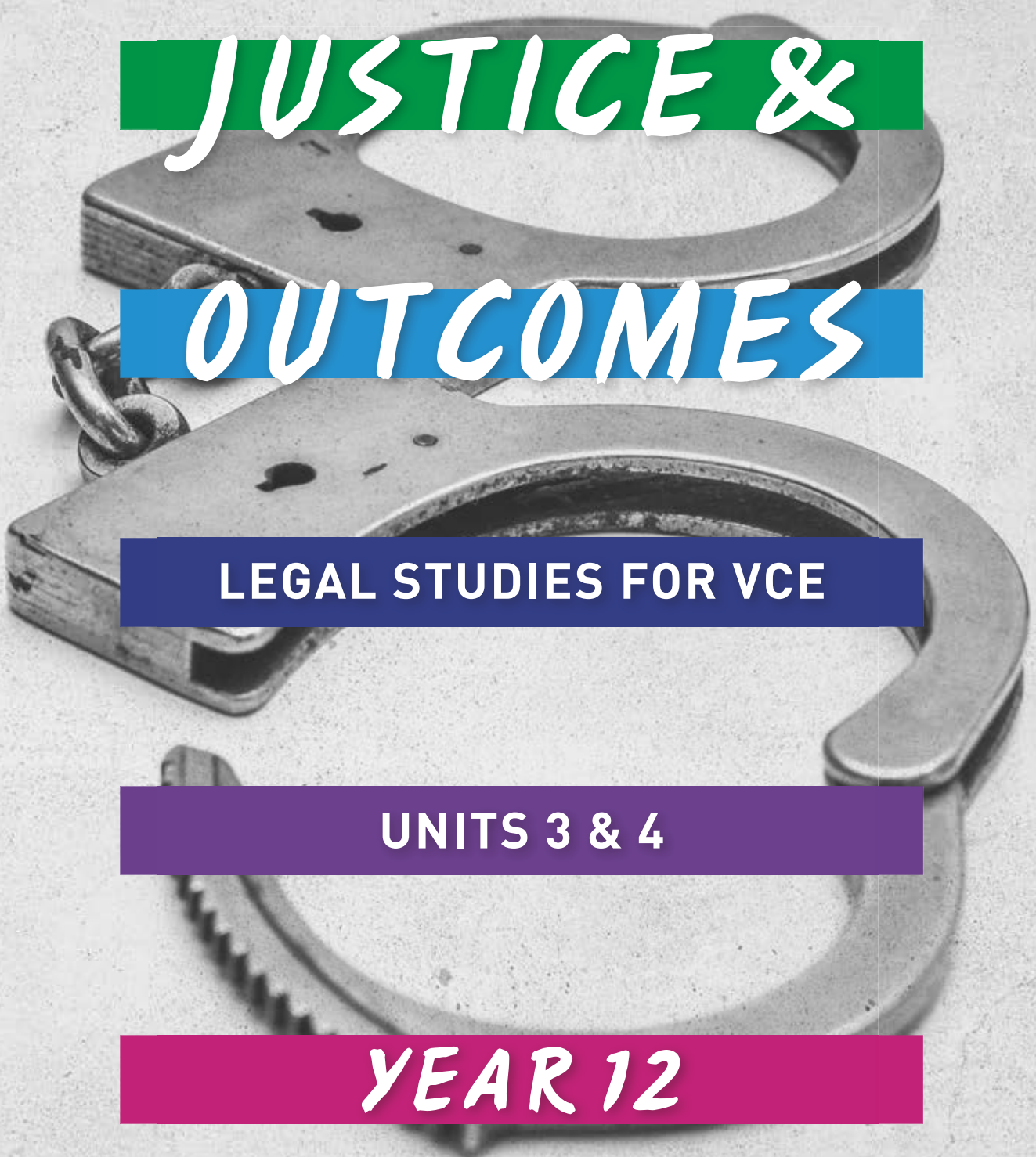
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LEGAL STUDIES FOR VCE

UNITS 3 & 4

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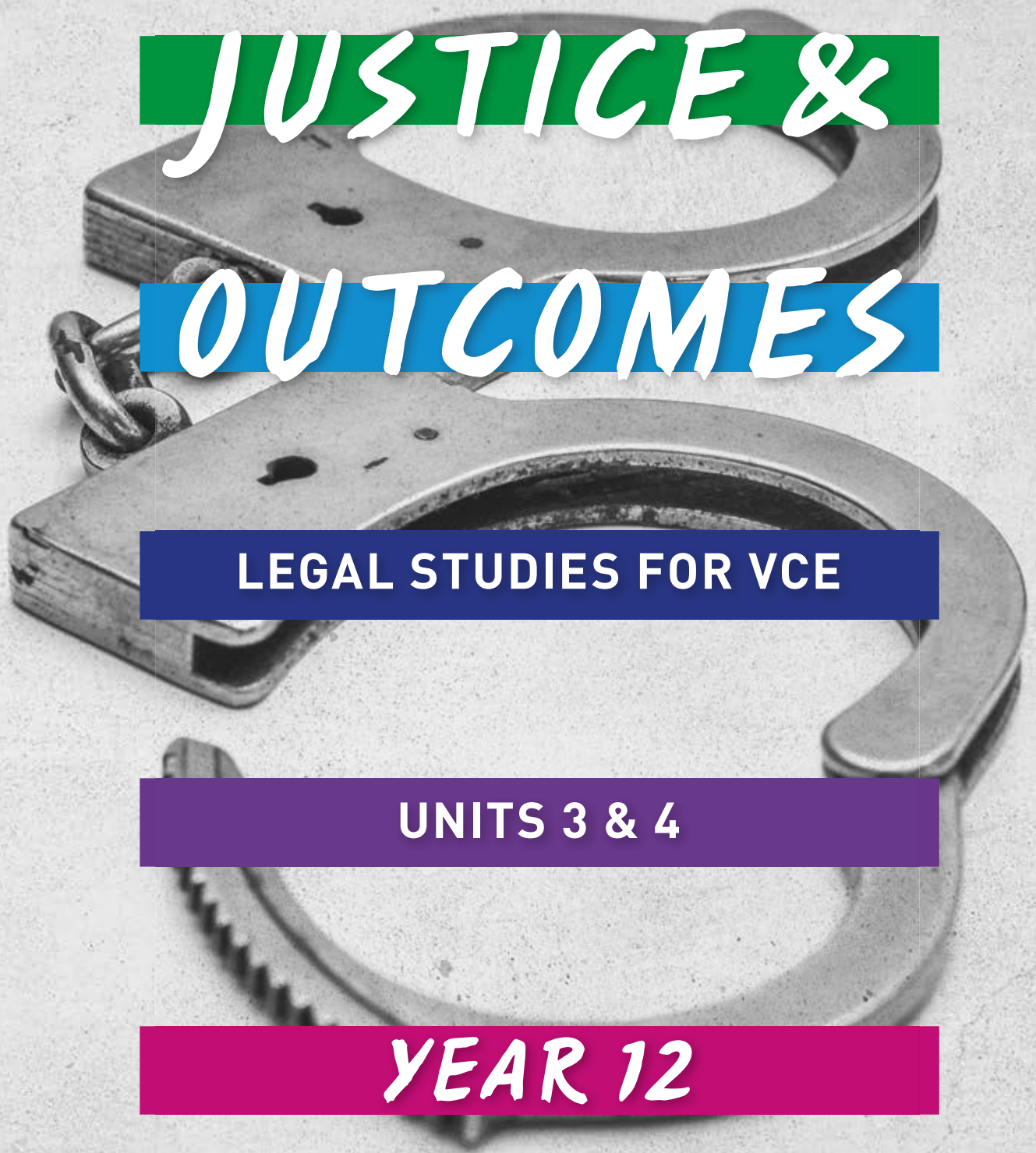


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USING *JUSTICE & OUTCOMES*

Legal Studies for VCE Units 3 & 4

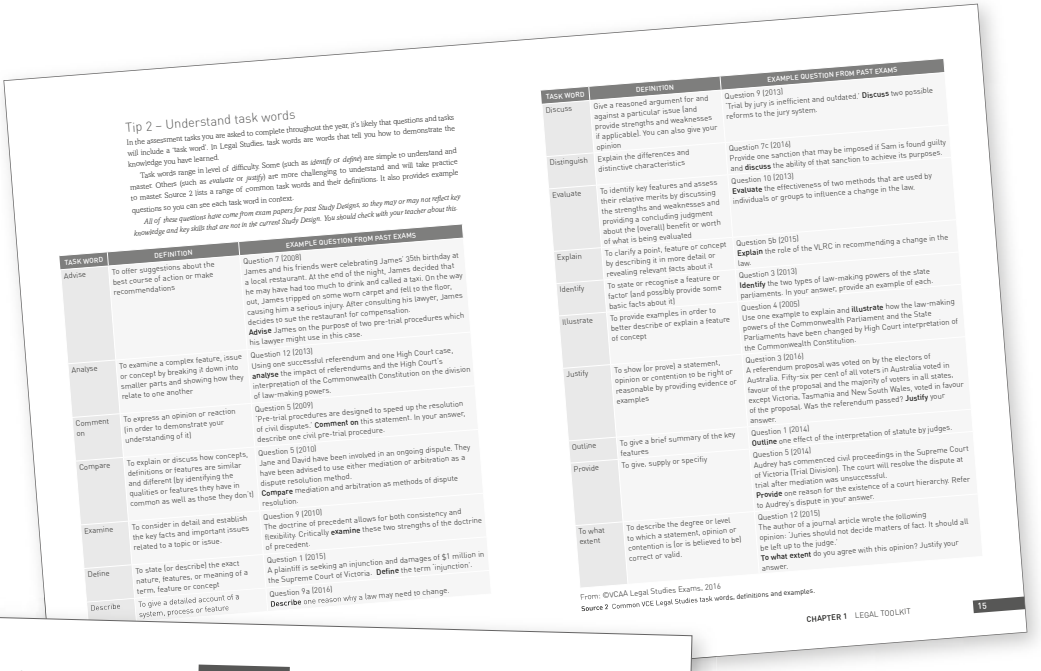
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Key features of the Student book

Legal toolkit

The legal toolkit at the front of the book is a stand-alone reference section for students that includes:

- tips for success on SACs and the end-of-year examination
- advice on mastering legal citation
- information about careers in the law



Tip 2 – Understand task words

In the assessment tasks you are asked to complete throughout the year, it's likely that questions and tasks will include a 'task word'. In Legal Studies, task words are words that tell you how to demonstrate the knowledge you have learned.

Task words range in level of difficulty. Some (such as *identify* or *define*) are simple to understand and to master. Others (such as *evaluate* or *justify*) are more challenging to understand and will take practice to master. Source 2 lists a range of common task words and their definitions. It also provides example questions so you can see each task word in context.

All of these questions have come from exam papers for past Study Designs, so they may or may not reflect key knowledge and key skills that are not in the current Study Design. You should check with your teacher about this.

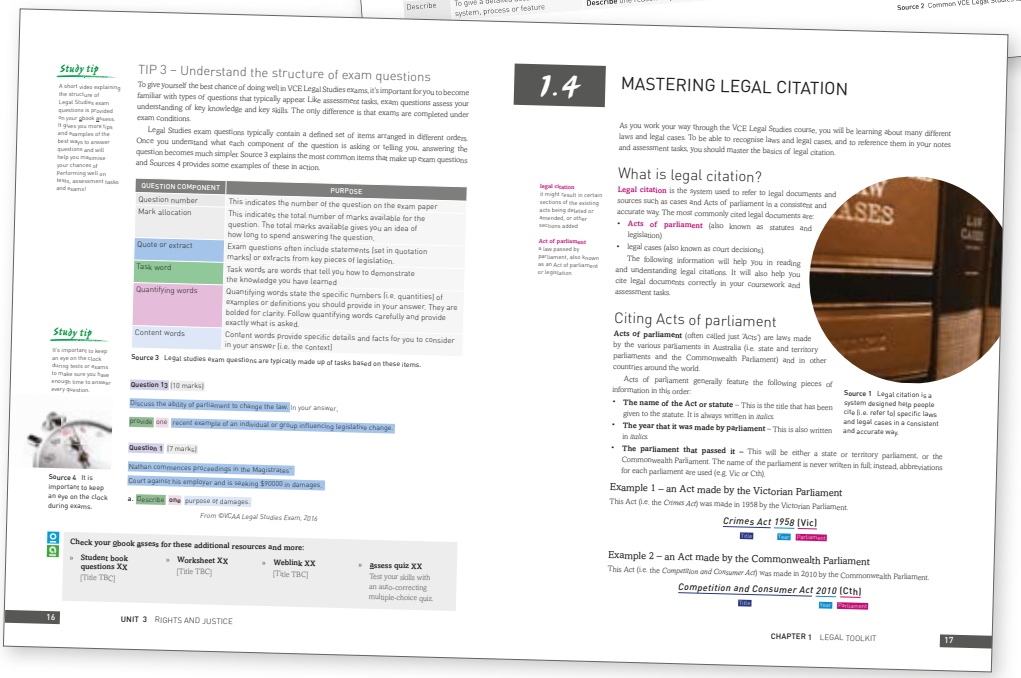
TASK WORD	DEFINITION	EXAMPLE QUESTION FROM PAST EXAMS
Advise	To offer suggestions about the best course of action or make recommendations	Question 7 (2008) James and his friends were celebrating James' 35th birthday at a local restaurant. At the end of the night, James decided that he may have had too much to drink and called a taxi. On the way out, James tripped on some worn carpet and fell to the floor, causing him a serious injury. After consulting his lawyer, James decides to sue the restaurant for compensation. **Advise** James on the purpose of two pre-trial procedures which his lawyer might use in this case.
Analyse	To examine a complex feature, issue or concept by breaking it down into smaller parts and showing how they relate to one another	Question 12 (2013) Using one successful referendum and one High Court case, **analyse** the impact of referendums and the High Court's interpretation of the Commonwealth Constitution on the division of law-making powers.
Comment on	To express an opinion or reaction (in order to demonstrate your understanding of it)	Question 5 (2009) 'Pre-trial procedures are designed to speed up the resolution of civil disputes.' **Comment on** this statement. In your answer, describe one civil pre-trial procedure.
Compare	To explain or discuss how concepts, definitions or features are similar and different (by identifying the qualities or features they have in common as well as those they don't)	Question 5 (2010) Jane and David have been involved in an ongoing dispute. They have been advised to use either mediation or arbitration as a dispute resolution method. **Compare** mediation and arbitration as methods of dispute resolution.
Examine	To consider in detail and establish the key facts and important issues related to a topic or issue.	Question 9 (2010) The doctrine of precedent allows for both consistency and flexibility. Critically **examine** these two strengths of the doctrine of precedent.
Define	To state (or describe) the exact nature, features, or meaning of a term, feature or concept	Question 1 (2015) A plaintiff is seeking an injunction and damages of $1 million in the Supreme Court of Victoria. **Define** the term 'injunction'.
Describe	To give a detailed account of a system, process or feature	Question 9a (2014) **Describe** one reason why a law may need to change.

TASK WORD	DEFINITION	EXAMPLE QUESTION FROM PAST EXAMS
Discuss	Give a reasoned argument for and against a particular issue (and provide strengths and weaknesses if applicable). You can also give your opinion	Question 9 (2013) 'Trial by jury is inefficient and outdated.' **Discuss** two possible reforms to the jury system.
Distinguish	Explain the differences and distinctive characteristics	Question 7c (2014) Provide one sanction that may be imposed if Sam is found guilty and **discuss** the ability of that sanction to achieve its purposes.
Evaluate	To identify key features and assess their relative merits by discussing the strengths and weaknesses and providing a concluding judgment about the (overall) benefit or worth of what is being evaluated	Question 10 (2013) **Evaluate** the effectiveness of two methods that are used by individuals or groups to influence a change in the law.
Explain	To clarify a point, feature or concept by describing it in more detail or revealing relevant facts about it	Question 5b (2015) **Explain** the role of the VLRC in recommending a change in the law.
Identify	To state or recognise a feature or factor (and possibly provide some basic facts about it)	Question 3 (2013) **Identify** the two types of law-making powers of the state parliaments. In your answer, provide an example of each.
Illustrate	To provide examples in order to better describe or explain a feature of concept	Question 4 (2005) Use one example to explain and **illustrate** how the law-making powers of the Commonwealth Parliament and the State Parliaments have been changed by High Court interpretation of the Commonwealth Constitution.
Justify	To show (or prove) a statement, opinion or contention to be right or reasonable by providing evidence or examples	Question 3 (2016) A referendum proposal was voted on by the electors of Australia. Fifty-six per cent of all voters in Australia voted in favour of the proposal and the majority of voters in all states, except Victoria, Tasmania and New South Wales, voted in favour of the proposal. Was the referendum passed? **Justify** your answer.
Outline	To give a brief summary of the key features	Question 1 (2014) **Outline** one effect of the interpretation of statute by judges.
Provide	To give, supply or specify	Question 5 (2014) Audrey has commenced civil proceedings in the Supreme Court of Victoria (Trial Division). The court will resolve the dispute at trial after mediation was unsuccessful. **Provide** one reason for the existence of a court hierarchy. Refer to Audrey's dispute in your answer.
To what extent	To describe the degree or level to which a statement, opinion or contention is (or is believed to be) correct or valid.	Question 12 (2015) The author of a journal article wrote the following opinion: 'Juries should not decide matters of fact. It should all be left up to the judge.' **To what extent** do you agree with this opinion? Justify your answer.

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Source 2 Common VCE Legal Studies task words, definitions and examples.

CHAPTER 1 LEGAL TOOLKIT 15



Study tip

A short video explaining the structure of Legal Studies exam questions is provided on your obook assess. It gives you more tips and examples of the best ways to answer questions and will help you maximise your chances of performing well on SACs, assessment tasks and exams!

TIP 3 – Understand the structure of exam questions

To give yourself the best chance of doing well in VCE Legal Studies exams, it's important for you to become familiar with types of questions that typically appear. Like assessment tasks, exam questions assess your understanding of key knowledge and key skills. The only difference is that exams are completed under exam conditions.

Legal Studies exam questions typically contain a defined set of items arranged in different orders. Once you understand what each component of the question is asking or telling you, answering the question becomes much simpler. Source 3 explains the most common items that make up exam questions and Sources 4 provides some examples of these in action.

QUESTION COMPONENT	PURPOSE
Question number	This indicates the number of the question on the exam paper
Mark allocation	This indicates the total number of marks available for the question. The total marks available gives you an idea of how long to spend answering the question.
Quote or extract	Exam questions often include statements (set in quotation marks) or extracts from key pieces of legislation.
Task word	Task words are words that tell you how to demonstrate the knowledge you have learned
Quantifying words	Quantifying words state the specific numbers (i.e. quantities) of examples or definitions you should provide in your answer. They are bolded for clarity. Follow quantifying words carefully and provide exactly what is asked.
Content words	Content words provide specific details and facts for you to consider in your answer (i.e. the context)

Source 3 Legal studies exam questions are typically made up of tasks based on these items.

Study tip

It's important to keep an eye on the clock during tests or exams to make sure you have enough time to answer every question.

Source 4 It is important to keep an eye on the clock during exams.

Question 13 (10 marks)

Discuss the ability of parliament to change the law. In your answer, include one recent example of an individual or group influencing legislative change.

Question 1 (7 marks)

Nathan commences proceedings in the Magistrates' Court against his employer and is seeking $90000 in damages.

a. Describe one purpose of damages.

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Check your obook assess for these additional resources and more:

- Student book questions XX [Title TBC]
- Worksheet XX [Title TBC]
- Weblink XX [Title TBC]
- Assess quiz XX Test your skills with an auto-correcting multiple-choice quiz.

16 UNIT 3 RIGHTS AND JUSTICE

1.4 MASTERING LEGAL CITATION

As you work your way through the VCE Legal Studies course, you will be learning about many different laws and legal cases. To be able to recognise laws and legal cases, and to reference them in your notes and assessment tasks, you should master the basics of legal citation.

What is legal citation?

Legal citation is the system used to refer to legal documents and sources such as cases and Acts of parliament in a consistent and accurate way. The most commonly cited legal documents are:

- **Acts of parliament** (also known as statutes and legislation)
- legal cases (also known as court decisions).

The following information will help you in reading and understanding legal citations. It will also help you cite legal documents correctly in your coursework and assessment tasks.

legal citation A method of referencing legal documents and sources such as cases and Acts of parliament in a consistent and accurate way.

Act of parliament A law passed by parliament, also known as an Act of parliament or legislation.

Source 1 Legal citation is a system designed help people cite (i.e. refer to) specific laws and legal cases in a consistent and accurate way.

Citing Acts of parliament

Acts of parliament (often called just 'Acts') are laws made by the various parliaments in Australia (i.e. state and territory parliaments and the Commonwealth Parliament) and in other countries around the world.

Acts of parliament generally feature the following pieces of information in this order:

- **The name of the Act or statute** – This is the title that has been given to the statute. It is always written in *italics*.
- **The year that it was made by parliament** – This is also written in *italics*.
- **The parliament that passed it** – This will be either a state or territory parliament, or the Commonwealth Parliament. The name of the parliament is never written in full; instead, abbreviations for each parliament are used (e.g. Vic or Cth).

Example 1 – an Act made by the Victorian Parliament

This Act (i.e. the *Crimes Act*) was made in 1958 by the Victorian Parliament.

Crimes Act 1958 (Vic)

Title | Year | Parliament

Example 2 – an Act made by the Commonwealth Parliament

This Act (i.e. the *Competition and Consumer Act*) was made in 2010 by the Commonwealth Parliament.

Competition and Consumer Act 2010 (Cth)

Title | Year | Parliament

CHAPTER 1 LEGAL TOOLKIT 17

- an overview of the structure of the VCE Legal Studies course
- a range of helpful study tips.

Chapter openers

Each chapter begins with a chapter opener that includes:

an engaging and relevant image that links to core content in the chapter



- a summary of outcomes, key knowledge and key skills dot points from the VCE Legal Studies Study Design 2018–2022
- a list of key legal terms that appear in the chapter (with supporting definitions).

Clear topic-based approach

Content is sequenced in structured topics that are aligned to the Study Design. Each topic contains the following elements:

Study tip

Targeted study tips are provided in the margin where relevant. These are designed to explicitly help students to achieve better results on school-based and external assessment tasks.

Extract

Extracts from relevant legislation, acts, reports, speeches and websites support learning



Case study

Recent examples and scenarios show how key legal concepts are applied in real life situations.

Legal case

Relevant legal cases with accompanying legal citation provide real-world examples of the law in action.

Key terms

Key legal terms are clearly identified in text the first time they appear in each chapter. Definitions are provided in the margin to support student understanding. All key terms also appear in the glossary at the end of the book.

Did you know?

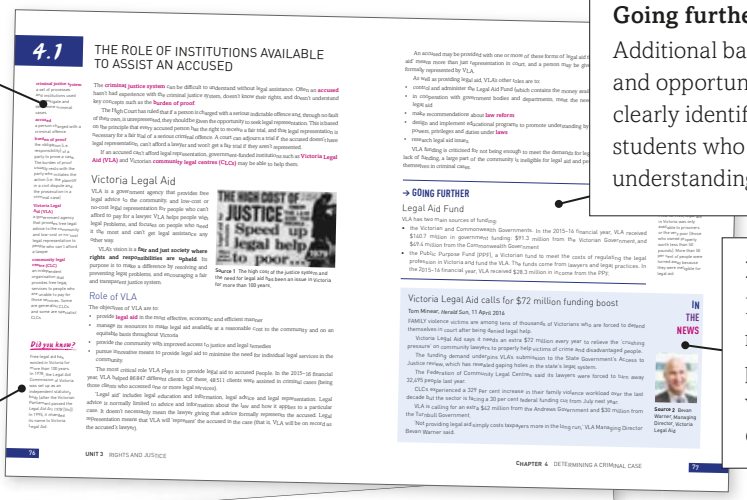
Interesting, quirky or fun facts about the law are provided to engage students and bring content to life.

Example

Hypothetical situations that raise legal points for discussion are provided to stimulate discussion and illustrate how laws work in different contexts.

Links to supporting digital resources on obook assess

Links to a range of supporting digital resources appear at the end of every topic. These include links to videos, worksheets, interactive quizzes, revision notes and weblinks.

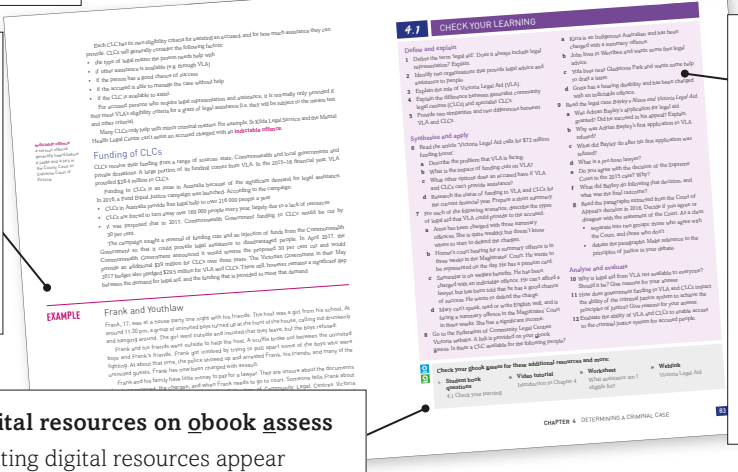


Going further

Additional background information and opportunities for extension are clearly identified in text and support students who want to gain a richer understanding of the subject matter.

In the news

Relevant and recent media articles are provided to show real-world applications of concepts being studied.



Check your learning

Structured questions and tasks appear at the end of every topic. These provide opportunities for students to consolidate and extend their understanding. They are levelled under the following headings to allow for differentiation:

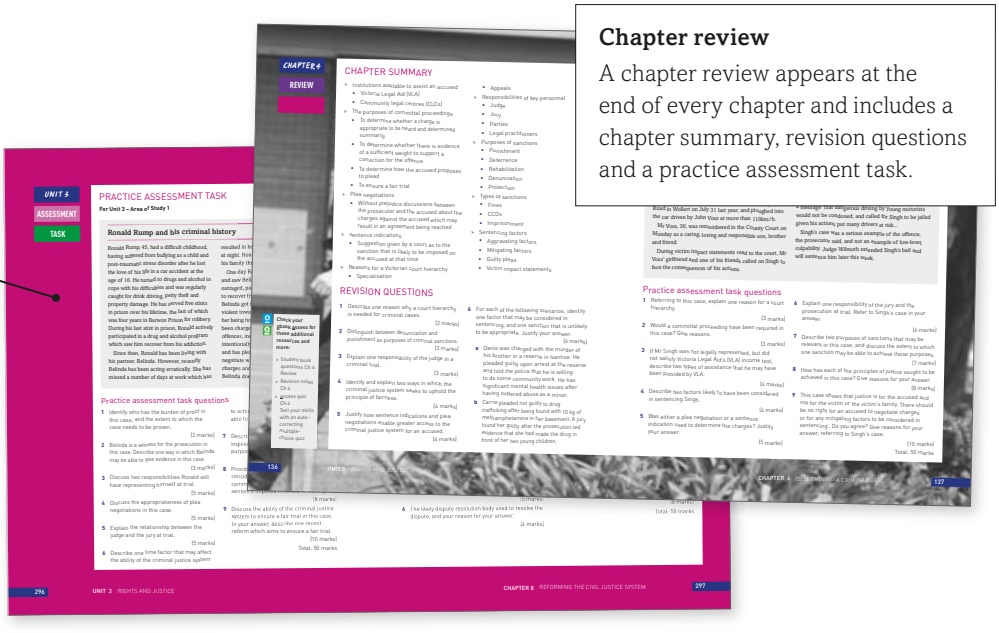
- Define and explain
- Synthesise and apply
- Analyse and evaluate.

Chapter and unit reviews

Each chapter and unit wraps up with opportunities for review and revisions.

Unit review

Unit assessment tasks appear at the end of Unit 3 and Unit 4. These cover the key knowledge dot points for the whole Area of Study and are structured in line with a range of suggested assessment tasks covered in the *VCE Legal Studies Study Design*.



Chapter review

A chapter review appears at the end of every chapter and includes a chapter summary, revision questions and a practice assessment task.

Key features of digital support

Justice & Outcomes Legal Studies for VCE Units 3 & 4 is supported by a range of engaging and relevant digital resources provided via obook assess.

obook assess



Students receive:

- a complete digital version of the Student book with notetaking and bookmarking functionality
- case study videos (with supporting worksheets) from some of Australia's finest news and current affairs outlets (including ABC and SBS)
- targeted instructional videos by some of Victoria's most experienced Legal Studies teachers, designed to help students prepare for exams and assessment tasks
- a range of engaging worksheets for every chapter, designed to consolidate and extend understanding on key points from the study design
- additional case studies and examples for extension
- access to interactive auto-correcting multiple-choice quizzes.

TEACHER obook assess



Teachers receive:

- access to all student resources
- detailed course planners, teaching programs and lesson plans
- answers to every question in the Student book
- chapter summary PowerPoint presentations ideal for whole-class revision
- practice exams and SACs with answers.

CHAPTER 1

LEGAL TOOLKIT



Source 1 Congratulations on choosing VCE Legal Studies! This chapter provides you with an introduction and overview to the course, but is also a handy reference that can be revisited throughout the year.

WELCOME TO VCE LEGAL STUDIES UNITS 3 & 4

Congratulations on choosing Legal Studies as part of your VCE studies!

Legal Studies is an exciting, relevant and engaging course that will explore the meaning of justice and help you become active and informed citizens. It will provide you with opportunities to develop problem-solving skills as you navigate your way through criminal cases and legal problems, and explore the meaning of justice.

This student book has been purpose-written to meet the requirements of the *VCE Legal Studies Study Design* 2018–2022 and includes content you are required to cover in Units 3 & 4.

This legal toolkit contains a range of useful and relevant information to help you get the most out of VCE Legal Studies. It can be used as an introduction and overview to the course, but is also designed as a handy reference that can be revisited throughout the year.

TOPICS COVERED

This chapter provides an introduction to:

- Understanding the VCE Legal Studies course
- Setting yourself up for success in VCE Legal Studies
- Tips for success on assessment tasks
- Mastering legal citation
- Careers in the law.

Best of luck with your studies this year!

1.1 UNDERSTANDING THE VCE LEGAL STUDIES COURSE

Study tip

Make sure you visit the VCAA website and download a copy of the *VCE Legal Studies Study Design*. It sets out all of the information you are expected to learn and provides important information on how you will be assessed.

A link to the current Study Design is provided on your obook assess.

The requirements of the VCE Legal Studies course are set out in a document known as a Study Design. The *VCE Legal Studies Study Design* is published by the Victorian Curriculum and Assessment Authority (VCAA).

The Study Design is the most important document supporting the VCE Legal Studies course. It sets out all of the information you are expected to learn and provides important details about the way you will be assessed. The current Study Design has been accredited from **1 January 2018**.

Structure of the VCE Legal Studies course

VCE Legal Studies is a two-year course made up of four units:

UNIT	COMMENTS
Unit 1 – Guilt and liability	• Units 1 & 2 are most commonly completed in Year 11
Unit 2 – Sanctions, remedies and rights	
Unit 3 – Rights and justice	• Units 3 & 4 are most commonly completed in Year 12
Unit 4 – The people and the law	• Units 1 & 2 are not a pre-requisite to complete Units 3 & 4.

Source 1 Structure of VCE Legal Studies Units 1–4

Each Unit of the course is separated into **Areas of Study**. You are required to achieve an **Outcome** for each Area of Study. **Source 2** shows how Units 3 & 4 of the course are broken down into Areas of Study and Outcomes. It also shows the chapters in this book that cover this content.

UNIT 3 – RIGHTS AND JUSTICE

AREA OF STUDY	OUTCOME	MARKS ALLOCATED	CORRESPONDING CHAPTERS IN THIS BOOK
Area of Study 1 The Victorian criminal justice system	**Outcome 1** On completion of this unit the student should be able to explain the rights of the accused and of victims in the criminal justice system, discuss the means used to determine criminal cases and evaluate the ability of the criminal justice system to achieve the principles of justice.	50	• **Chapter 3** Introduction to the Victorian criminal justice system • **Chapter 4** Determining a criminal case • **Chapter 5** Reforming the criminal justice system
Area of Study 2 The Victorian civil justice system	**Outcome 2** On completion of this unit the student should be able to analyse the factors to consider when initiating a civil claim, discuss the institutions and methods used to resolve civil disputes and evaluate the ability of the civil justice system to achieve the principles of justice.	50	• **Chapter 6** Introduction to the Victorian civil justice system • **Chapter 7** Resolving a civil dispute • **Chapter 8** Reforming the civil justice system
	Total marks	**100**	

Source 2 An overview of the content, structure and marks allocated in Unit 3. Extracts from the VCE Legal Studies Study Design (2018–2022) reproduced by permission, © VCAA.

UNIT 4 – THE PEOPLE AND THE LAW

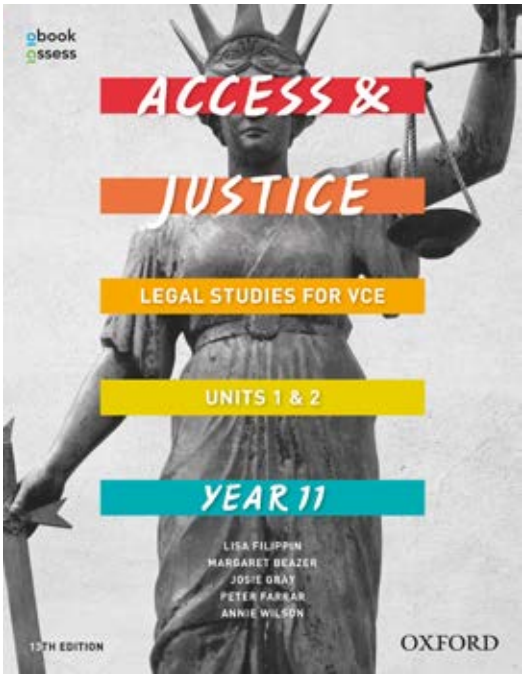
AREA OF STUDY	OUTCOME	MARKS ALLOCATED	CORRESPONDING CHAPTERS IN THIS BOOK
Area of Study 1 The people and the Australian Constitution	**Outcome 1** On completion of this unit the student should be able to discuss the significance of High Court cases involving the interpretation of the Australian Constitution and evaluate the ways in which the Australian Constitution acts as a check on parliament in law-making.	40	• **Chapter 10** The people and the Constitution • **Chapter 11** Changing and protecting the Constitution
Area of Study 2 The people, the parliament and the courts	**Outcome 2** On completion of this unit the student should be able to discuss the factors that affect the ability of parliament and courts to make law, evaluate the ability of these law-makers to respond to the need for law reform, and analyse how individuals, the media and law reform bodies can influence a change in the law.	60	• **Chapter 12** The parliament • **Chapter 13** The courts • **Chapter 14** Law reform
	Total marks	**100**	

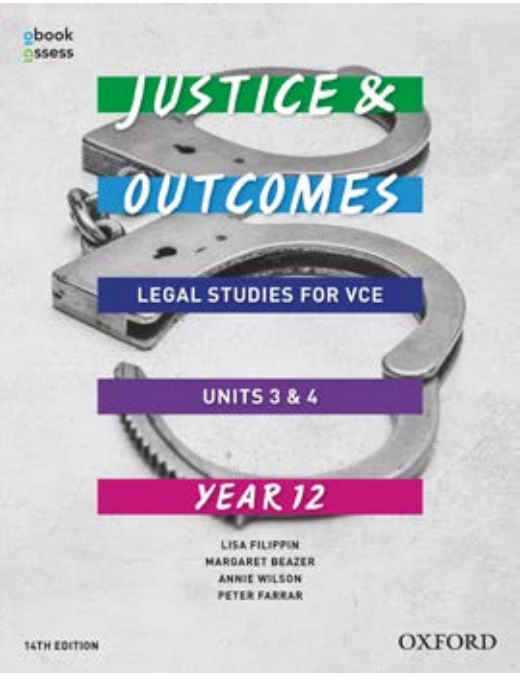
Source 3 An overview of the content, structure and marks allocated in Unit 4. Extracts from the VCE Legal Studies Study Design (2018–2022) reproduced by permission, © VCAA.

Each Outcome in the course includes a series of **key knowledge** dot points and **key skills** dot points:

- the key knowledge dot points tell you what you should know and learn
- the key skills dot points tell you what you should do with that knowledge.

You will find the key knowledge and key skills for each Outcome at the start of each chapter of this book. It is important that you read and become familiar with these before you begin each chapter.





Source 4 The VCE Legal Studies course is a two-year course made up of four units. Units 1 & 2 are covered in *Access & Justice Legal Studies for VCE Units 1 & 2* (13th edition). Units 3 & 4 are covered in *Justice & Outcomes Legal Studies for VCE Units 3 & 4* (14th edition).

Assessment and reporting

As you complete Units 3 & 4 of the VCE Legal Studies course, your teacher will use a variety of learning activities and assessment tasks to assess your knowledge and understanding of key knowledge and key skills.

Satisfactory completion

The award of satisfactory completion for each unit of the VCE Legal Studies course is based on your teacher's decision that you have demonstrated achievement of the set of Outcomes for that unit. For example, to be awarded satisfactory completion in Unit 3 – Rights and Justice, you will need to demonstrate the required achievement for Outcomes 1 and 2.

At the end of each unit, your school will submit a result for each student to the VCAA:

- students who demonstrate the required level of achievement will receive an **S (Satisfactory)**
- students who do not demonstrate the required level of achievement will receive an **N (Not Satisfactory)**.

Your teacher's decision to award you with an S or an N will be based on your performance in a range of learning activities and tasks, known as **school-assessed coursework (SACs)**. Your teacher's decision to award you with an S or an N in each unit is separate from the levels of achievement (i.e. mark) you receive on your (SACs).

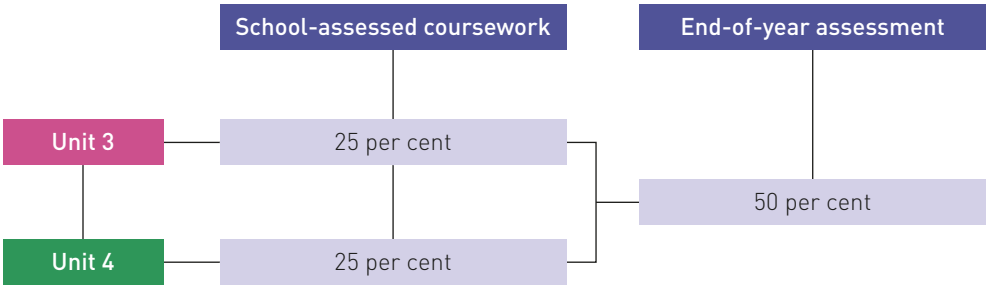
Assessment tasks

Your level of achievement in VCE Legal Studies Units 3 & 4 is determined by:

ASSESSMENT TASK	DESCRIPTION
School-assessed coursework (SACs)	Your school will determine these tasks. The range of tasks you may be required to complete includes: • a case study • structured questions • an essay • a report in written format • a report in multimedia format • a folio of exercises.
End-of-year examination	The final assessment task you will undertake is the end-of-year examination, set by VCAA and held in November each year. The VCAA will release a complete examination timetable (for all subjects including Legal Studies) during the year and publish the exact time and date on its website. Details of the examination specifications are published on the VCAA website. A link to these details is provided on your obook assess.

Source 5 School-assessed coursework and assessment tasks

The percentage contributions to your final study score in VCE Legal Studies are as follows:



Source 6 Level of achievement and assessment tasks

Key themes of the VCE Legal Studies course

A number of key themes flow through VCE Legal Studies Units 1–4. Being aware of these themes and understanding them will help you to connect the information you learn in each unit of the course and place it in a broader context. The key themes are discussed in Source 8.



Source 7 The final assessment task that you will undertake is the end-of-year examination, set by VCAA and held in November each year.

KEY THEME	DESCRIPTION
Active citizenship	Many parts of the course demonstrate the way in which we can become active and informed citizens. This is known as active citizenship. You will study this through both Units 3 & 4 in understanding and appreciating how individuals can influence changes in the law, how individuals can use the court system to enforce their rights, and how members of society can show the need for reform to our justice systems.
The principles of justice	'Justice' refers to the fair and equitable treatment of all individuals under the law. It is a common concept and something that Australians often want to see being upheld – particularly when it comes to serious crimes that have been committed. In this course you will look at the three principles of justice: • **fairness** • **equality** • **access**.
Problem-solving and application skills	A key focus in this course is developing your problem-solving and application skills. Legal Studies requires you to consider a range of real and/or hypothetical scenarios and apply your knowledge and skills to those scenarios. You will consider areas of the law such as: • criminal cases and civil disputes • problems with the law and the legal system • problems with the way in which our law-makers operate. In each of these areas, you may be expected to develop possible strategies to help resolve problems and issues.
Recent focus	An important part of this course requires you to be up to date with what is happening in Australia's legal system. For example, in Unit 3 you are required to discuss recent reforms to the criminal and civil justice systems.

Source 8 Key themes covered in VCE Legal Studies Units 3 & 4

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing [or trial] processes should be fair and impartial)

equality
one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

Check your obook assess for these additional resources and more:

- **Video tutorial** How to structure an essay
- **Weblink** VCAA – current Study Design
- **Weblink** VCAA – examination table
- **Course planner** Printable course planner for VCE Legal Studies

1.2 SETTING YOURSELF UP FOR SUCCESS IN VCE LEGAL STUDIES

Successfully completing your VCE is not an easy thing to do. For many people it can be a challenging and stressful time. This topic is designed to help you plan and prepare for success. Some of the tips provided below relate specifically to VCE Legal Studies, but others are more general and apply to all of your other VCE subjects.

These tips are just a starting point. You might already have your own strategies. If so, stick with those. Your friends and teachers might have some great study tips too, so be sure to ask them, and implement the strategies that work best for you!

Top 10 tips for study success

Tip 1 – Get hold of key documents and read them carefully

One of the quickest and simplest things you can do to set yourself up for success in VCE Legal Studies is to get your hands on key documents and read them carefully.

- The most important document in VCE Legal Studies is the Study Design. It sets out all of the information you are expected to learn and provides important details about the way you will be assessed. The current Study Design has been accredited from 1 January 2018. You can download a copy from the VCAA website link on your obook assess.
- The VCAA also make a number of other useful documents available at no charge on its website. These include past exam papers, examination reports and other support materials.
- You should also make sure you keep all documents from your teacher relating to assessment tasks, and read them carefully. Understanding exactly what is required in an assessment task is your first step towards doing well on it. Make sure you also get copies of any assessment advice related to assessment tasks (e.g. marking criteria or assessment rubrics). These are the documents that your teacher will use to assess your level of achieving, so understanding mark allocation and high-scoring responses will ensure that you give yourself the best chance of success.



Source 1 Understanding exactly what is required in an assessment task is your first step towards doing well on it. Make sure you also get copies of any assessment advice related to assessment tasks (e.g. marking criteria or assessment rubrics).

Tip 2 – Study

Success in VCE Legal Studies doesn't just begin and end in the classroom. If you're going to perform at your best, you will need to make time for regular periods of study and revision outside school hours. This doesn't mean you have to study for hours every day, but it does mean you should incorporate short periods of revision into your daily routine. Studying daily will help you to continually reinforce new concepts in your mind and help you avoid the stress of last-minute cramming. Here are some tips to help you study effectively:

Choose the best place to study

- Everyone has their own idea about the best study environment. Whether it's in your bedroom, at your local library, or at your favourite café, you need to find a regular study space that works for you. Ideally, your study space should be quiet, comfortable, bright and airy, and free from distractions.
- Make sure your study space is stocked with the things that you need (such as stationery) and decorated with things that make you feel calm (such as artworks or plants).

- If you like to listen to music while you study, make sure you are able to do this without disturbing others.

Choose the best times to study

- Choosing the best time of day for regular study is important. Some people find it easier to concentrate early in the morning while other people find it easier to concentrate at night. Decide what works best for you and plan for regular study sessions at this time of day. Don't work too late into the evenings though, as this can make you tired for school the next day.

Remember that studying can take many different forms

- Finding time for study can sometimes be difficult, so keep in mind that effective studying can take different forms and happen almost anywhere:
  - you might read over your notes for 10 minutes on the bus on your way to school
  - you might have a chat to your friends at lunch about a concept that you found difficult in class or organise regular group study sessions with your friends.
  - you might make an audio recording of your notes and listen to them while you're exercising.



Source 2 Whether it's in your bedroom, at your local library, or at your favourite café, you need to find a regular study space that works for you.

Tip 3 – Manage your study time effectively

Now that you have your study space set up and have chosen a regular time to study, it helps to put some practical strategies in place to stay on track. Try one or more of the following time management strategies.

TIME MANAGEMENT STRATEGY	DETAILS
Create a study timetable	• Creating a study timetable that helps you schedule periods of regular study and revision in all your subjects is key to your success. • Once you set your study timetable, be sure to stick to it. If your timetable isn't working, revisit it and make a new one.
Use a diary, wall planner or calendar to record key dates	• Recording key dates is essential to your success. Adding due dates for assessment tasks and assignments will help you manage your time effectively and meet your deadlines (especially in weeks when you have multiple assessment tasks due). • Recording the dates of tests and exams will also help you keep your preparations on track.
Make lists	• A simple 'to do' list can be a great tool to help you manage your time and achieve your goals. Creating a short list of daily goals for each study session can also be a great way of keeping you on track each day. • A separate list of weekly or monthly goals can help you keep the bigger picture in mind. • Using lists is a great way to help you break big tasks down into smaller, more manageable tasks, so that you gain a sense of achievement.
Set reminders	• Setting a regular alarm to remind you it's time to study can keep you on track.

Source 3 Time management strategies

Tip 4 – Discover your learning style

Everyone learns differently, so getting to know the way you learn can help you to focus on strategies for study that are most effective for you.

TYPE OF LEARNER	WAYS IN WHICH YOU LEARN	BEST LEARNING STRATEGIES AND TOOLS
Visual learner	you learn by seeing and looking	you learn best by using pictures, images, diagrams, colour coding and mind maps
Auditory learner	you learn by hearing and listening	you learn best by using sounds, music, audio recordings and mnemonics (songs, rhymes or phrases designed to aid memory)
Verbal learner	you learn best by using words, both in speech and writing	you learn best by reading content aloud, engaging in discussions, using word-based memory techniques (such as scripting)
Physical learner	you learn best by touching and doing	you learn best by drawing diagrams and using physical objects and role-playing situations

Source 4 Strategies for different learning styles

Tip 5 – Take care of yourself

Once of the most important things you can do during your VCE is look after yourself. Staying healthy is key to your success. Make sure you:

- eat a balanced diet – try to avoid too much caffeine and junk food
- get enough sleep – ideally around 7–8 hours per night
- stay hydrated – try to drink lots of water and limit your intake of soft drinks and energy drinks
- get regular exercise – a brisk 30-minute walk every day is a great place to start and any more is a bonus.

Tip 6 – Use different strategies to review and revise

At the end of each week of class, it's a great idea to summarise your notes so that you can review and revise what you've learned ahead of any assessment tasks, tests or exams. Regular revision will help you understand concepts more fully and recall key information when you need to. A range of common revision strategies and ideas are provided below. Try one or more of the following revision strategies:

REVISION STRATEGY	DETAILS
Create detailed revision notes	• creating your own revision notes can be time consuming, but it's time well spent! • taking the time to create your revision notes reinforces what you've learned and means that they will be written in language that makes sense to you, not someone else
Dot-point summaries on index cards	• detailed revision notes are great, but you may also benefit from creating really brief study notes in the form of dot-point summaries • copy these summaries onto index cards so you can carry them with you and revise on your way to school or at home on the couch
Record your revision notes and listen to them	• record yourself as you read your revision notes or dot-point summaries aloud • listen to yourself

REVISION STRATEGY	DETAILS
Quiz yourself	• quizzes are quick, fun, and a good way to test what you know and find out your areas of weakness • use your textbook, revision notes or quiz cards to quiz yourself • ask friends or family members to quiz you on key legal terms and key concepts
Do practice questions, essays and exams	• practice makes perfect, so the more you test your knowledge and develop your skills by completing practice questions, essays and exams, the better • ask your teacher to provide feedback on your practice responses to help you improve

Source 5 Revision strategies



Source 6 Detailed revision notes are great, but you may also benefit from creating really brief study notes in the form of dot-point summaries. Copy these summaries onto index cards that you can carry with you, and use them to revise on your way to school or at home on the couch.

Tip 7 – Stay up to date with current events

This course focuses on our law-makers and our justice system, which are constantly evolving and reforming. So are our laws. It's important to stay up to date with developments in our legal system so you can incorporate current details and facts into your coursework and assessment tasks.

Newspaper articles, digital news feeds, television programs and journal articles are all good sources of current information. Keep your eye out for ongoing developments in legal cases and current events and file these away for later! One way to do this is by creating an automatic internet search. Alert services (such as Google Alert) can send you emails when they find results that match your search terms – such as web pages, newspaper articles, blogs, or even legal cases.

As you collect current information, make sure you label and save it carefully so you can find it when you need it.

Study tip

Setting up automatic alerts is a great way of keeping up to date with developments in legal cases and legislation. Just enter the keywords you want to search for and enter your email address. You'll receive regular updates on anything you're interested in – and it's free!

A link to Google Alerts is provided on your obook assess.



Tip 8 – Make time for breaks

Regardless of where or when you study, make sure you plan to take regular study breaks. You should aim to work in 50-minute blocks and then take a meaningful 10-minute break.

Make sure your break has nothing to do with your studies. Get up from your desk and leave your study space. Take the dog for a quick walk, make something to eat, or chat to your family or friends.

Some days are tough, so if you're feeling tired, upset or frustrated you might need to take a break or take a night off from study. Just make sure you don't do this too often!

Tip 9 – Ask for help

- Completing your VCE can be a challenge sometimes – especially if you have other commitments like work, sport, or music outside school hours. If you're feeling stressed or overwhelmed, make sure you talk to people around you and get support if you need it. Your teachers, friends and family are there to help you and many schools have services and programs set up to help you.
- If you're having problems understanding a particular concept or completing a certain task, make sure you ask for help! Your teacher is there to help you in class and will make time to explain things you don't understand. If your teacher isn't available, talk to your friends and other students in your class to see if they can help.



Source 7 Some people find it motivating to decorate their study space with inspirational quotes or pictures of the people they care about. These things can help you stay motivated by reminding you of your goals and the reasons why you are working so hard.

Tip 10 – Stay motivated

- Staying motivated and keeping a positive attitude is important during your VCE. Make sure you reward yourself for achieving your daily and weekly goals!
- Try not to compare yourself to other students in your class. Instead, set goals that are right for you and focus on achieving those.
- Many parts of the VCE Legal Studies course require repetition, practice and resilience to master. Many of the concepts are complex, and you may not understand them the first time you come across them, so don't give up! Try some of the different tips and strategies listed above to understand them.
- Some people find it motivating to decorate their study space with inspirational quotes or pictures of the people they care about. These things can help to remind you of your goals and the reasons why you are working so hard.

Check your obook assess for these additional resources and more:

» **Weblink**
VCAA

» **Weblink**
Google alerts

» **Study timetable**
Study timetable template

1.3 TIPS FOR SUCCESS ON SACs AND THE END-OF-YEAR EXAMINATION

As you work your way through the VCE Legal Studies course, your teacher will use a variety of learning activities and SACs to assess your understanding of key knowledge and key skills. In order to give yourself the best chance of success on these SACs – and the end-of-year examination – be sure to follow these tips.

Tip 1 – Use key legal terminology

One of the key skills you are expected to demonstrate throughout Units 3 & 4 is the ability to define and use key legal terminology.

A list of key legal terms (with definitions) is provided at the start of every chapter of this student book. These words then appear throughout each chapter and are also listed in the glossary at the end of the book.

Learning these key legal terms and using them correctly in your assessment tasks will show your teacher that you understand them – and will help you achieve a great result.

Some simple strategies to help you learn and remember key legal terms include:

- writing words and definitions on Post-it notes and sticking them around your room or house
- making flashcards that you can carry with you and use to quiz yourself and others
- using the digital flashcard glossary interactive provided on your obook assess to quiz yourself and others
- getting into the habit of adopting and using legal terminology in your everyday language (e.g. use 'plaintiff' instead of 'a person who is suing another person').



Source 1 Learning key legal terms and using them correctly in your assessment tasks will show your teacher that you understand them. Getting into the habit of adopting and using legal terminology in your everyday language will help you learn key terms quickly!

Tip 2 – Understand task words

In the assessment tasks you are asked to complete throughout the year, it's likely that questions and tasks will include a 'task word'. In Legal Studies, task words are words that tell you how to demonstrate the knowledge you have learned.

Task words range in level of difficulty. Some (such as **identify** or **define**) are simple to understand and master. Others (such as **evaluate** or **justify**) are more challenging to understand and will take practice to master. Source 2 lists a range of common task words and their definitions. It also provides example questions so you can see each task word in context.

All of these questions have come from exam papers for past Study Designs, so they may or may not reflect key knowledge and key skills that are not in the current Study Design. You should check with your teacher about this.

TASK WORD	DEFINITION	EXAMPLE QUESTION FROM PAST EXAMS*
Advise	To offer suggestions about the best course of action or make recommendations	Question 7 (2008) James and his friends were celebrating James' 35th birthday at a local restaurant. At the end of the night, James decided that he may have had too much to drink and called a taxi. On the way out, James tripped on some worn carpet and fell to the floor, causing him a serious injury. After consulting his lawyer, James decides to sue the restaurant for compensation. **Advise** James on the purpose of two pre-trial procedures which his lawyer might use in this case.
Analyse	To examine a complex feature, issue or concept by breaking it down into smaller parts and showing how they relate to one another	Question 12 (2013) Using one successful referendum and one High Court case, **analyse** the impact of referendums and the High Court's interpretation of the Commonwealth Constitution on the division of law-making powers.
Comment on	To express an opinion or reaction (in order to demonstrate your understanding of it)	Question 5 (2009) 'Pre-trial procedures are designed to speed up the resolution of civil disputes.' **Comment on** this statement. In your answer, describe one civil pre-trial procedure.
Compare	To explain or discuss how concepts, definitions or features are similar and different (by identifying the qualities or features they have in common as well as those they don't)	Question 5 (2010) Jane and David have been involved in an ongoing dispute. They have been advised to use either mediation or arbitration as a dispute resolution method. **Compare** mediation and arbitration as methods of dispute resolution.
Examine	To consider in detail and establish the key facts and important issues related to a topic or issue.	Question 9 (2010) The doctrine of precedent allows for both consistency and flexibility. Critically **examine** these two strengths of the doctrine of precedent.
Define	To state the exact nature, features, or meaning of a term, feature or concept	Question 1 (2015) A plaintiff is seeking an injunction and damages of $1 million in the Supreme Court of Victoria. **Define** the term 'injunction'.
Describe	To give a detailed account of a system, process or feature	Question 9a (2016) **Describe** one reason why a law may need to change.

TASK WORD	DEFINITION	EXAMPLE QUESTION FROM PAST EXAMS*
Discuss	Give a reasoned argument for and against a particular issue (and provide strengths and weaknesses if applicable). You can also give your opinion, and should do so if the question asks you to give it	Question 7c (2016) Provide one sanction that may be imposed if Sam is found guilty and **discuss** the ability of that sanction to achieve its purposes.
Distinguish	Explain the differences and distinctive characteristics	Question 1 (2011) **Distinguish** between exclusive and residual powers.
Evaluate	To identify key features and assess their relative merits by discussing the strengths and weaknesses and providing a concluding judgment about the (overall) benefit or worth of what is being evaluated	Question 10 (2013) **Evaluate** the effectiveness of two methods that are used by individuals or groups to influence a change in the law.
Explain	To clarify a point, feature or concept by describing it in more detail or revealing relevant facts about it	Question 5b (2015) **Explain** the role of the VLRC in recommending a change in the law.
Identify	To state or recognise a feature or factor (and possibly provide some basic facts about it)	Question 3 (2013) **Identify** the two types of law-making powers of the state parliaments. In your answer, provide an example of each.
Illustrate	To provide examples in order to better describe or explain a feature or concept	Question 4 (2005) Use one example to explain and **illustrate** how the law-making powers of the Commonwealth Parliament and the State Parliaments have been changed by High Court interpretation of the Commonwealth Constitution.
Justify	To show (or prove) a statement, opinion or contention to be right or reasonable by providing evidence or examples	Question 3 (2016) A referendum proposal was voted on by the electors of Australia. Fifty-six per cent of all voters in Australia voted in favour of the proposal and the majority of voters in all states, except Victoria, Tasmania and New South Wales, voted in favour of the proposal. Was the referendum passed? **Justify** your answer.
Outline	To give a brief summary of the key features	Question 1 (2014) **Outline** one effect of the interpretation of statute by judges.
Provide	To give, supply or specifiy	Question 5 (2014) Audrey has commenced civil proceedings in the Supreme Court of Victoria (Trial Division). The court will resolve the dispute at trial after mediation was unsuccessful. **Provide** one reason for the existence of a court hierarchy. Refer to Audrey's dispute in your answer.
To what extent	To describe the degree or level to which a statement, opinion or contention is (or is believed to be) correct or valid	Question 12 (2015) The author of a journal article wrote the following opinion: 'Juries should not decide matters of fact. It should all be left up to the judge.' **To what extent** do you agree with this opinion? Justify your answer.

*Selected VCE Legal Studies examination questions (2008–2016) are reproduced by permission, © VCAA.

Source 2 Common VCE Legal Studies task words, definitions and examples.

Tip 3 – Understand the structure of exam questions

To give yourself the best chance of doing well in VCE Legal Studies exams, it's important for you to become familiar with types of questions that typically appear. Like assessment tasks, exam questions assess your understanding of key knowledge and key skills. The only difference is that exams are completed under exam conditions.

Legal Studies exam questions typically contain a defined set of items arranged in different orders. Once you understand what each component of the question is asking or telling you, answering the question becomes much simpler. Source 3 explains the most common items that make up exam questions and Sources 5 provides some examples of these in action.

Study tip

A short video explaining the structure of Legal Studies exam questions is provided on your obook assess. It gives you more tips and examples of the best ways to answer questions and will help you maximise your chances of performing well on tests, assessment tasks and exams!

QUESTION COMPONENT	PURPOSE
Question number	This indicates the number of the question on the exam paper.
Mark allocation	This indicates the total number of marks available for the question. The total marks available gives you an idea of how long to spend answering the question.
Quote or extract	Exam questions may include statements or extracts from key pieces of legislation.
Task word	Task words are words that tell you how to demonstrate the knowledge you have learned.
Quantifying words	Quantifying words state the specific numbers (i.e. quantities) of examples or definitions you should provide in your answer. Follow quantifying words carefully and provide exactly what is asked.
Content words	Content words provide specific details and facts for you to consider in your answer (i.e. the context).

Source 3 Legal Studies exam questions are typically made up of tasks based on these items

Study tip

It's important to keep an eye on the clock during tests or exams to make sure you have enough time to answer every question.



Source 4 It is important to keep an eye on the clock during exams.

Question 13 (10 marks)

Discuss the ability of parliament to change the law. In your answer, provide one recent example of an individual or group influencing legislative change.

Question 1 (7 marks)

Nathan commences proceedings in the Magistrates' Court against his employer and is seeking $90 000 in damages.

a. Describe **one** purpose of damages.

From ©VCAA Legal Studies Exams

Source 5 Examples of the common items that make up exam questions

Check your obook assess for these additional resources and more:

- **Video tutorial** Understanding the structure of Legal Studies exam questions
- **Flashcard glossary** Digital interactive to help you learn key legal terms

1.4 MASTERING LEGAL CITATION

As you work your way through the VCE Legal Studies course, you will be learning about many different laws and legal cases. To be able to recognise laws and legal cases, and to reference them in your notes and assessment tasks, you should master the basics of legal citation.

What is legal citation?

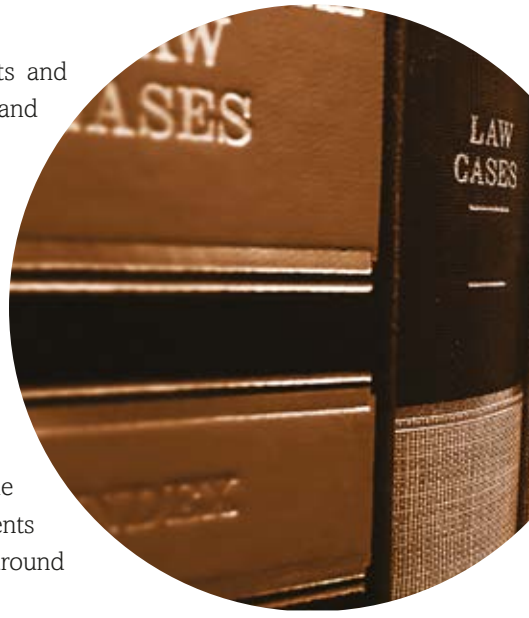
legal citation
the system used to refer to legal documents and sources such as cases and statutes

Act of Parliament
a law made by parliament; a bill which has passed through parliament and has received royal assent (also known as a statute)

Legal citation is the system used to refer to legal documents and sources such as cases and Acts of Parliament in a consistent and accurate way. The most commonly cited legal documents are:

- **Acts of Parliament** (also known as statutes and legislation)
- judgements from legal cases (also known as court decisions).

The following information will help you in reading and understanding legal citations. It will also help you cite legal documents correctly in your coursework and assessment tasks.



Source 1 Legal citation is a system designed to help people cite (i.e. refer to) specific laws and legal cases in a consistent and accurate way.

Citing Acts of Parliament

Acts of Parliament (often called just 'Acts') are laws made by the various parliaments in Australia (i.e. state and territory parliaments and the Commonwealth Parliament) and in other countries around the world.

Acts of Parliament generally feature the following pieces of information in this order:

- **The name of the Act or statute** – This is the title that has been given to the statute. It is always written in *italics*.
- **The year that it was made by parliament** – This is also written in *italics*.
- **The parliament that passed it** – This will be either a state or territory parliament, or the Commonwealth Parliament. The name of the parliament is never written in full; instead, abbreviations for each parliament are used (e.g. Vic or Cth).

Example 1 – an Act made by the Victorian Parliament

Crimes Act 1958 (Vic)
Title Year Parliament

This Act (i.e. the *Crimes Act*) was made in 1958 by the Victorian Parliament.

Example 2 – an Act made by the Commonwealth Parliament

Competition and Consumer Act 2010 (Cth)
Title Year Parliament

This Act (i.e. the *Competition and Consumer Act*) was made in 2010 by the Commonwealth Parliament.

Citing amending acts

Study tip

If you are looking for an act in a database such as the Australasian Legal Information Institute (AustLII), and you can't find it in the list called 'Victorian current acts', it might be an amending act rather than a main act (called the 'principal act'). If you know the year, you can look it up under 'Victorian numbered acts'. However, for your purposes, you will generally be citing the principal act anyway.

Amending acts are a type of statute that amend (i.e. change or update) a statute that already exists. Amending acts are repealed (i.e. cancelled) once the amendments are made to the existing statute.

For example, the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) is an amending Act which amends the *Sentencing Act 1991* (Vic), the *Bail Act 1977* (Vic) and various other Victorian Acts. The sole purpose of the *Sentencing (Community Correction Order) and Other Acts Amendment Act* is to amend (i.e. change or update) those Acts. For example, it might result in certain sections of the existing Acts being deleted, added and amend certain words or phrases being changed.

An amending act is cited in the same way as other acts. Sometimes the title will let you know that is an amending act, as in the above examples, but not always.

Example 3 – an amending act passed by the Victorian Parliament

***Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic)**

Title Year Parliament

Study tip

A short video with tips and examples of how to cite legal cases and Acts of Parliament is provided on your obook assess. Watch it to help develop your skills!

This amending act (i.e. the *Sentencing (Community Correction Order) and Other Acts Amendment Act*) was made in 2016 by the Victorian Parliament.

Once the amending act has done its work, it is repealed, and it will no longer appear in the list of current Acts. That will occur once the changes it makes to the principal act (the act it is amending) commence. In this example, the *Sentencing (Community Correction Order) and Other Acts Amendment Act* states that it will be repealed on 2 October 2018. That is because the changes it makes to various principal acts take effect on 1 October 2018.

Citing bills

Bills are drafts of proposed laws that have been presented to parliament but haven't been passed into law. When citing bills, you should adopt the same approach as acts, except the word 'Act' is replaced by the word 'Bill', and the title of the bill is not italicised.

Example 4 – a bill being presented to the Victorian Parliament

Disability Amendment Bill 2004 (Vic)

Title Year Parliament

This Bill (i.e. the Disability Amendment Bill) was presented in 2004 by the Victorian Parliament.

Citing legal cases

Like acts, decisions from legal cases that are heard in a tribunal or court also have citations. Whenever a written decision or judgment has been handed down by a tribunal or court, it is given a citation so that people can refer back to it.

Legal case citations generally feature the following pieces of information in this order:

- **The names of the parties** – The name of the person who starts the case (usually called the plaintiff, prosecutor or applicant) goes first. The names of the parties are separated with the word 'v' (e.g.

Smith v Jones). The names are written in italics. If there are multiple parties, the case name is generally shortened to include just the first party in the list.

- **The year of the decision** – This is the year that the decision or judgment is published. It might be in square brackets or round brackets, depending on the report in which the decision is published.
- **The citation it has been given** – All Australian court cases now have a 'medium neutral citation', which is the court's own unique identifier for the decision in its online database.

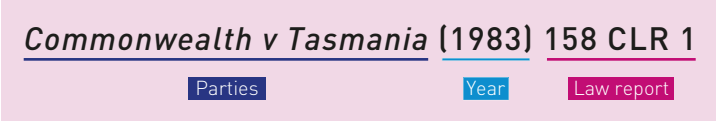
These citations are given by the court, and they always use an abbreviation that shows the court that heard the case. The most common abbreviations are set out below.

COURT IDENTIFIER	COURT
HCA	High Court of Australia
FCA	Federal Court of Australia
FamCA	Family Court of Australia
VSCA	Victorian Supreme Court (Court of Appeal)
VSC	Victorian Supreme Court (Trial Division)
VCC	County Court of Victoria
VMC	Magistrates' Court of Victoria
VCAT	Victorian Civil and Administrative Tribunal

Source 2 Court identifiers in legal citations make clear which court a case was heard in

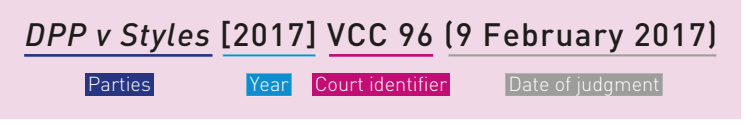
Examples of ways cases can be cited are as follows.

Example 5 – a civil case



- The parties in this civil case were the Commonwealth of Australia and the State of Tasmania.
- The 'v' between the names of the parties is short for versus, but is pronounced 'and'.
- The decision was published in 1983.
- This is an example of a written judgment published in a law report. It was published in Volume **158** of the Commonwealth Law Reports (**CLR**) on page **1**.

Example 6 – a criminal case



- The parties in this criminal case were the **Director of Public Prosecutions (DPP)** and a man called Christian Patrick Styles.
- The 'v' between the names of the parties is short for versus, but it is pronounced 'against' or 'and'.
- The case finished in 2017, and the written judgment was given by the court on 9 February 2017.
- The decision was handed down in the **County Court of Victoria** (VCC).
- The case was No. 96 in the Court's list for that year.

Citing other laws, rules and regulations

The parliament can authorise other bodies to make regulations and rules. These are described as 'delegated legislation or 'secondary legistation'. To cite them, you use the name they have been given ('Rules' or 'Regulations') and follow the same format as citing an Act of Parliament.

Example 7 – rules passed by the Victorian Parliament

Supreme Court (General Civil Procedure) Rules 2005 (Vic)

Title Year Parliament

These rules (i.e. *Supreme Court (General Civil Procedure) Rules)* were passed in 2005 by the Victorian Parliament.

Example 8 – regulations passed by the Commonwealth Parliament

Native Title (Federal Court) Regulations 1998 (Cth)

Title Year Parliament

These regulations (i.e. *Native Title (Federal Court) Regulations*) were passed down in 1998 by the Commonwealth Parliament.

Local laws

Local laws are passed by local councils. They are easily identifiable because they will contain the words 'Local Law' in the title.

Example 9 – a local law passed down by the Melbourne City Council

Melbourne City Council Activities Local Law 2009

Title Year

This Local Law (i.e. the Melbourne City Council Activities Local Law) was passed down in 2009 by the Melbourne City Council.

Check your obook assess for these additional resources and more:

- **Video tutorial**
  Citing legal cases and Acts of Parliament
- **Worksheet**
  How to find and understand acts and cases
- **Weblink**
  Australasian Legal Information Institute (AustLII)

1.5 CAREERS IN THE LAW

There are a wide range of exciting and meaningful careers related to the study of law, and VCE Legal Studies is an important first step towards gaining a range of skills and knowledge that can help get you there.

While many people who choose to study the law go on to become lawyers, this is certainly not the only career path available. In fact, a sound knowledge and understanding of the law is highly valued in a range of different industries.

In this topic we take a look at what it actually means to be a lawyer. We also take a brief look at a range of other career and job opportunities in which a sound knowledge of the law is highly valued and will help you secure a great job in the future.



Source 1 While many people who choose to study the law go on to become lawyers, this is certainly not the only career path available. In fact, a sound knowledge and understanding of the law is highly valued in a range of different industries.

What do lawyers do?

Members of the legal profession in Australia are known as **legal practitioners**, also called **lawyers**.

Legal practitioners can generally be divided into two groups:

- **solicitors**
- **barristers**.

All lawyers must have a law degree and also be 'admitted' to the profession. Admission is a ceremony in the Supreme Court which takes place after extra time spent in practical training. The lawyer then needs to be registered as a lawyer and obtain a practising certificate from the Legal Services Board (the regulator in Victoria). Both solicitors and barristers provide certain types of legal services, and often the types of legal services they provide overlap. To get a better idea of what lawyers do, we will now look briefly at both.

lawyer
a general term used to describe somebody who has been trained in the law and is qualified to give legal advice (a barrister or a solicitor)

solicitor
a qualified legal practitioner who will give advice about the law and a person's rights under the law

barrister
a legal professional who is engaged by a party's solicitor. One of the roles of the barrister is to advocate (argue) the party's position at formal hearings

Solicitors

Lawyers who see clients direct (also known as solicitors, to distinguish them from barristers) provide a range of legal services depending on the areas of law in which they are willing to accept work. Some of the more common services offered by lawyers are outlined in Source 2.



Source 2 Some of the more common legal services offered by lawyers

There are different ways in which a person can practice as an employed lawyer in Australia. These include government lawyers, in-house lawyers and private practice lawyers.

TYPE OF LAWYER	DESCRIPTION
Government lawyers	Government lawyers are employed by the government (e.g. government departments). They provide legal services exclusively to the governments they work for. For example, the Victorian Government Solicitor's Office (VGS) provides legal services to the Victorian Government.
In-house lawyers	In-house lawyers are employed by private companies and organisations. They provide legal services to the companies and organisations they work for. For example, Qantas may have its own lawyers who provide the Qantas business with legal services.
Private practice lawyers	Private practice lawyers are employed by private law firms. Private law firms can be: • small 'boutique' firms (that specialise in a particular area of law such as intellectual property) • medium-sized firms • large top-tier firms (that have a number of different teams specialising across different areas of the law). Private practice lawyers provide legal services to their clients in accordance with their needs. For example, a person who believes they have been unfairly treated by their employer may engage a private practice lawyer to help resolve their legal dispute.

Source 3 Ways employed lawyers can practice in Australia.

A lawyer may choose to provide legal services across many different areas of law, or they may choose to specialise in one area of law. For example, some lawyers specialise in **employment law**, while others specialise in **mergers and acquisitions**.

There are many different areas of law that a lawyer may specialise in, including

- wills and inheritance
- family law
- employment law
- personal injury
- mergers and acquisitions
- commercial disputes
- large infrastructure projects
- property
- entertainment
- building and construction.
- class actions
- charities and not for profit

Barristers

A barrister is a lawyer who specialises in giving advice in difficult cases and representing clients in court. As lawyers, they must be admitted and have a practising certificate. In Victoria, a lawyer who wishes to practice exclusively as a barrister must become a member of the **Victorian Bar**. The Victorian Bar is the professional association that represents more than 2000 barristers in Victoria. Becoming a member requires the barrister to undertake an exam and a course which allows them to develop the skills required to be a barrister.

Barristers generally specialise in a particular court and in a particular area of law. As a result, they develop a special set of skills. The barrister will be briefed (engaged in writing) by the solicitor or law firm, and generally not directly by the client who needs legal advice (though this can occur with experienced corporate clients). Communications will be between the barrister and the solicitor, not between the barrister and the client.

Unlike solicitors, all barristers practice as individuals, rather than as partners or employees of a law firm or company.

In Victoria, there are senior barristers (called Queen's Counsel or Senior Counsel) and junior barristers (called Counsel).

Career profile

Stephanie Hooper is a barrister with List A Barristers in Melbourne. She specialises in commercial disputes and corporate insolvency (when companies are unable to pay their debts). She represents clients in court, provides legal advice and runs cases.

We asked Stephanie to share some of her experiences working as a barrister. Here's what she had to say!



Stephanie Hooper
Barrister
List A Barristers

How did you first become interested in the law?
I first became interested in the law at school, when I did Legal Studies. I loved the chance to debate interesting legal issues and learn more about how our laws were created and enforced. It made me realise I wanted to be a lawyer when I finished school.

What qualifications have you completed?
After school, I went to university to do a double degree in law and business. After a few years at work as a solicitor, I went on to do my Master's degree in law in the United Kingdom. I have a Bachelor of Laws (Hons I) and a Bachelor of International Business from Griffith University in Queensland, and a Bachelor of Civil Law from the University of Oxford.

What's a typical day at work like for you?
Each of my days is quite varied. Sometimes I'll spend all day in court, arguing a case. Other days, I'll be doing legal research in my chambers, meeting with solicitors or clients about a case, providing legal advice, participating in a mediation or some mix of the above. The variety is great.

What do you like best about your job?
I like having the opportunity to solve complex legal problems, to learn more about different areas of law and to help people stand up for their legal rights, whether in court or otherwise. I also like wearing my barrister robes to court!

What about other legal careers?

Choosing to become a practising lawyer (a solicitor or a barrister) isn't the only option available to people who study law. There are many other job options and career opportunities for people who have a sound knowledge and understanding of the law. Some of these include:

- Law clerk
- Court personnel
- Conveyancer
- Policy adviser
- Paralegal
- Legal assistant
- Legal analyst
- Document database specialist
- Legal recruiter
- Teacher
- Journalist
- Mediator
- Politician
- Legal editor
- Police officer.

Check your obook assess for these additional resources and more:

» **Weblink**
Victorian Bar



UNIT 3

RIGHTS AND JUSTICE

Source 1 A statue of 'Lady Justice'. She is holding the scales of justice in her hand. These scales symbolise the impartial weighing of arguments and evidence for and against a case tried in court. In Unit 3 of VCE Legal Studies, you will learn about the principles of justice and how the criminal and civil justice systems aim to achieve them.

UNIT 3 — RIGHTS AND JUSTICE

Area of Study 1 – The Victorian criminal justice system

OUTCOME 1

On completion of this unit you should be able to explain the rights of the accused and of victims in the criminal justice system, discuss the means used to determine criminal cases and evaluate the ability of the criminal justice system to achieve the principles of justice.

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 3 – AREA OF STUDY 1 THE VICTORIAN CRIMINAL JUSTICE SYSTEM	Chapter 3	Introduction to the Victorian criminal justice system	• the principles of justice: fairness, equality and access • key concepts in the Victorian criminal justice system, including: – the distinction between summary offences and indictable offences – the burden of proof – the standard of proof – the presumption of innocence • the rights of an accused, including the right to be tried without unreasonable delay, the right to a fair hearing, and the right to trial by jury • the rights of victims, including the right to give evidence as a vulnerable witness, the right to be informed about the proceedings, and the right to be informed of the likely release date of the accused
	Chapter 4	Determining a criminal case	• the role of institutions available to assist an accused, including Victoria Legal Aid and Victorian community legal centres • the purposes of committal proceedings • the purposes and appropriateness of plea negotiations and sentence indications in determining criminal cases • the reasons for a Victorian court hierarchy in determining criminal cases, including specialisation and appeals • the responsibilities of key personnel in a criminal trial, including the judge, jury, parties and legal practitioners • the purposes of sanctions: rehabilitation, punishment, deterrence, denunciation and protection • fines, community corrections orders and imprisonment, and their specific purposes • factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements
	Chapter 5	Reforming the criminal justice system	• factors that affect the ability of the criminal justice system to achieve the principles of justice including in relation to costs, time and cultural differences • recent reforms and recommended reforms to enhance the ability of the criminal justice system to achieve the principles of justice

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Area of Study 2 – The Victorian civil justice system

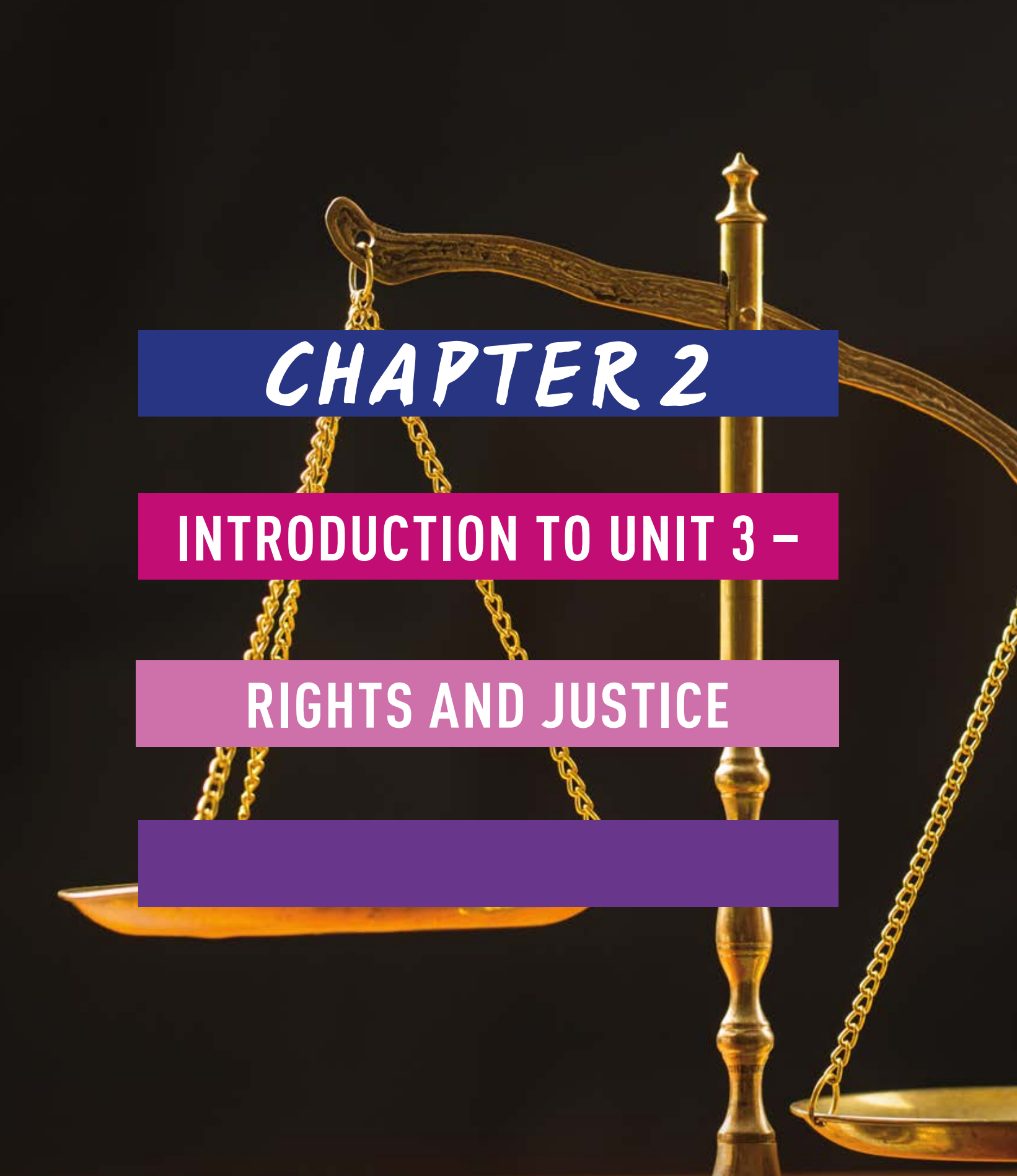
OUTCOME 2

On completion of this unit you should be able to analyse the factors to consider when initiating a civil claim, discuss the institutions and methods used to resolve civil disputes and evaluate the ability of the civil justice system to achieve the principles of justice.

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 3 – AREA OF STUDY 2 THE VICTORIAN CIVIL JUSTICE SYSTEM	Chapter 6	Introduction to the Victorian civil justice system	• the principles of justice: fairness, equality and access • key concepts in the Victorian civil justice system, including: – the burden of proof – the standard of proof – representative proceedings • factors to consider when initiating a civil claim, including negotiation options, costs, limitation of actions, the scope of liability and enforcement issues
	Chapter 7	Resolving a civil dispute	• the purposes and appropriateness of Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT) in resolving civil disputes • the purposes of civil pre-trial procedures • the reasons for a Victorian court hierarchy in determining civil cases, including administrative convenience and appeals • the responsibilities of key personnel in a civil trial, including the judge, jury, the parties and legal practitioners • judicial powers of case management, including the power to order mediation and give directions • the methods used to resolve civil disputes, including mediation, conciliation and arbitration, and their appropriateness • the purposes of remedies • damages and injunctions, and their specific purposes
	Chapter 8	Reforming the civil justice system	• factors that affect the ability of the civil justice system to achieve the principles of justice, including in relation to costs, time and accessibility • recent and recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice

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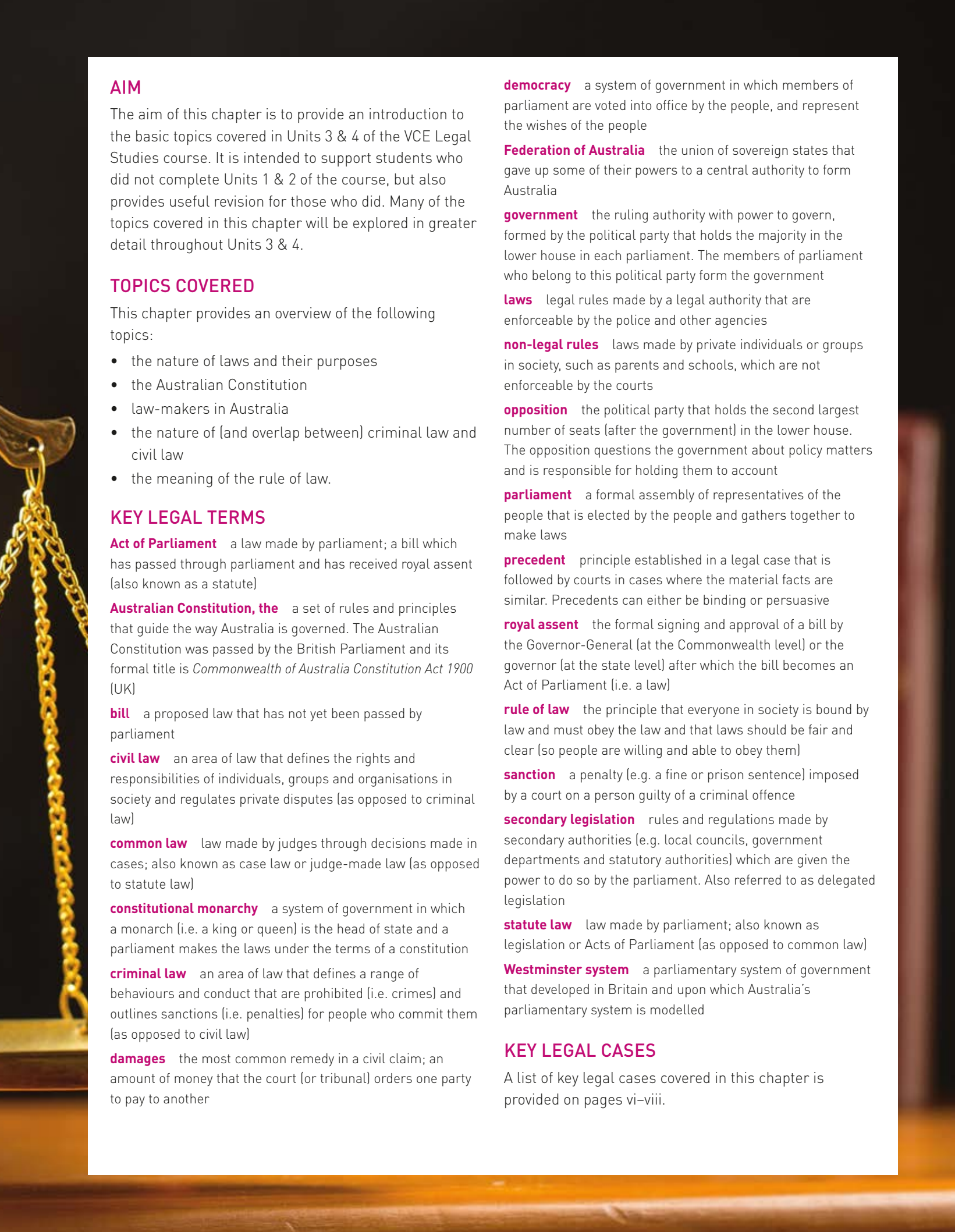




CHAPTER 2

INTRODUCTION TO UNIT 3 – RIGHTS AND JUSTICE

Source 1 The rule of law is a fundamental concept in Australia. It is the principle that everyone in society is bound by law and must obey the law. The rule of law also states that laws should be fair and clear, so people are willing and able to obey them. The scales symbolise the weighing of evidence for and against a case being tried in court. In Chapter 2, you will explore the nature of laws and law-making in Australia.



AIM

The aim of this chapter is to provide an introduction to the basic topics covered in Units 3 & 4 of the VCE Legal Studies course. It is intended to support students who did not complete Units 1 & 2 of the course, but also provides useful revision for those who did. Many of the topics covered in this chapter will be explored in greater detail throughout Units 3 & 4.

TOPICS COVERED

This chapter provides an overview of the following topics:

- the nature of laws and their purposes
- the Australian Constitution
- law-makers in Australia
- the nature of (and overlap between) criminal law and civil law
- the meaning of the rule of law.

KEY LEGAL TERMS

Act of Parliament a law made by parliament; a bill which has passed through parliament and has received royal assent (also known as a statute)

Australian Constitution, the a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

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

civil law an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

common law law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

constitutional monarchy a system of government in which a monarch (i.e. a king or queen) is the head of state and a parliament makes the laws under the terms of a constitution

criminal law an area of law that defines a range of behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

damages the most common remedy in a civil claim; an amount of money that the court (or tribunal) orders one party to pay to another

democracy a system of government in which members of parliament are voted into office by the people, and represent the wishes of the people

Federation of Australia the union of sovereign states that gave up some of their powers to a central authority to form Australia

government the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

laws legal rules made by a legal authority that are enforceable by the police and other agencies

non-legal rules laws made by private individuals or groups in society, such as parents and schools, which are not enforceable by the courts

opposition the political party that holds the second largest number of seats (after the government) in the lower house. The opposition questions the government about policy matters and is responsible for holding them to account

parliament a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

precedent principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

royal assent the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or the governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)

rule of law the principle that everyone in society is bound by law and must obey the law and that laws should be fair and clear (so people are willing and able to obey them)

sanction a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

secondary legislation rules and regulations made by secondary authorities (e.g. local councils, government departments and statutory authorities) which are given the power to do so by the parliament. Also referred to as delegated legislation

statute law law made by parliament; also known as legislation or Acts of Parliament (as opposed to common law)

Westminster system a parliamentary system of government that developed in Britain and upon which Australia's parliamentary system is modelled

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–viii.

2.1 THE NATURE OF LAWS AND THEIR PURPOSES

laws
legal rules made by a legal authority that are enforceable by the police and other agencies

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

social cohesion
a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

non-legal rules
laws made by private individuals or groups in society, such as parents and schools, which are not enforceable by the courts

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

fine
a sanction that requires the offender to pay an amount of money to the state

Laws are legal rules made by a legal authority (such as **parliament** or the courts). Laws control the behaviour of people and aim to achieve **social cohesion**. Laws help everyone to live together in a cohesive and harmonious way by establishing boundaries of acceptable behaviour.

Laws aim to protect the rights of individuals, including:

- the right to be presumed innocent until proven guilty
- the right not to be imprisoned without a court hearing
- the right to live free from discrimination or harassment
- the right to expect promises made in a contract to be kept.

People should be able to take legal action to have their rights enforced, and seek compensation for any loss they have suffered.

Non-legal rules are made and enforced by private individuals or groups (such as parents, sporting clubs and schools). They are not made by legal authorities. For example, your local cricket club may have a rule that players must attend training each week with the correct uniform and equipment. If you break this rule, the club may decide to impose a penalty such as preventing you from playing in an important match, but you cannot be taken to court for breaking the rule.

When millions of people live together in a society, it is inevitable that laws will be broken and disputes will arise. The legal system decides criminal cases and civil disputes so that people are dealt with by a final authority in a fair way. Laws have consequences for people who break them, and this can also discourage other people from acting the same way. For example, if you text a friend while driving a car and you accidentally injure a pedestrian who is crossing the road, you may be charged with breaking the law, and receive a penalty (known as a **sanction**). Sanctions are imposed by the courts and may include paying a **fine** (for minor breaches) or a prison sentence (for more serious breaches).



Source 1 When millions of people live together in a society, it is inevitable that laws will be broken and disputes will arise. The legal system is designed to rule on cases so that these disputes are resolved in a peaceful and fair way.



Source 2 Laws are enforceable rules made by legal authorities (such as parliament or the courts). Breaking the law may result in action being taken against you. For example, if you use your mobile phone while driving and accidently injure a pedestrian, you may receive a sanction in the form of a fine or – in more serious cases – serve time in prison.



Source 3 Non-legal rules are made and enforced by private individuals, groups or clubs (such as parents, sporting clubs and schools) rather than legal authorities. For example, your local cricket club may have a rule that requires you to wear the correct uniform. If you break this rule, the club may decide to ban you from playing, but they cannot take you to court for failing to comply with the rule.

2.1 CHECK YOUR LEARNING

Define and explain

1 What are laws?
2 Describe two aims of laws.
3 What is meant by the term 'social cohesion'?
4 How are laws different from non-legal rules? In your answer, give two examples of laws, and two examples of non-legal rules.

Check your obook assess for these additional resources and more:

- **Student book questions**
  2.1 Check your learning
- **Video tutorial**
  Introduction to Unit 3
- **Video**
  What is law?
- **Video worksheet**
  What is law?

2.2 THE AUSTRALIAN CONSTITUTION

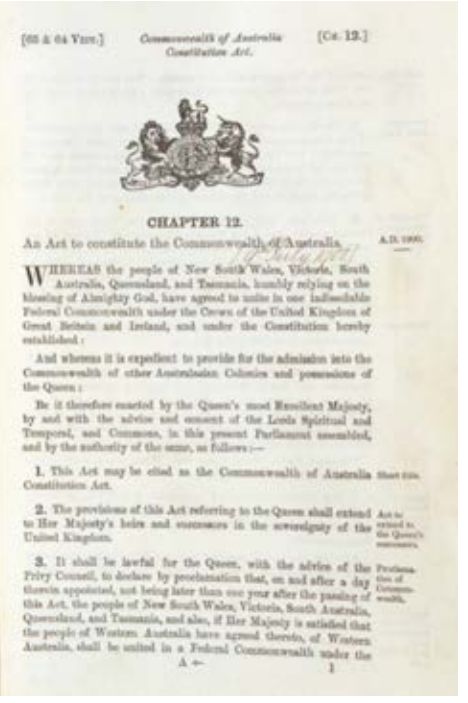
Before 1901, the Commonwealth of Australia did not exist. Instead, there were six separate British colonies in Australia, each with its own parliament. Each colony made laws for its own residents.

By the late 1800s, many colonists felt it was time to unite as one nation to strengthen Australia's defence and to simplify immigration, rail transport, tariffs (i.e. taxes) and trade issues.

The colonies held a series of constitutional conventions (meetings) to reach agreement on the wording of an **Australian Constitution**. They agreed to be a federation of states within the new Commonwealth of Australia.

The formal title of the Australian Constitution is the *Commonwealth of Australia Constitution Act 1900* (UK). It came into operation on 1 January 1901, the date of **Federation**. The Constitution is the most important document in Australia's history, as it created what we now know as the Commonwealth of Australia, and established the framework for our parliament and its law-making powers.

The **High Court** of Australia was also established by the Australian Constitution. One of its roles is to settle disputes about the interpretation of the Constitution.



[63 & 64 VICT.] Commonwealth of Australia Constitution Act. [CH. 12.]

CHAPTER 12.

An Act to constitute the Commonwealth of Australia. A.D. 1900.

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Commonwealth of Australia Constitution Act. Short title.

2. The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom. Act to extend to the Queen's successors.

3. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the Provisions of Commonwealth.

A 4 1

Source 1 The preamble (opening statement) of the Australian Constitution, which records the agreement of the colonies to unite. This resulted in Federation.



Source 2 The High Court of Australia was established by the Australian Constitution. The High Court building in Canberra was opened by the Queen in 1980.

Australian Constitution, the
a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

Federation of Australia
the union of sovereign states that gave up some of their powers to a central authority to form Australia

High Court
the ultimate court of appeal in Australia and the court with the authority to hear and determine disputes arising under the Australian Constitution

Constitutional monarchy

Australia is a **constitutional monarchy**, which means that the monarch (i.e. the Queen) is our head of state and our parliamentary system is governed by the terms of the Australian Constitution. Australia is also described as a **democracy** because our parliaments consist of members who have been elected (voted into office) by the people and given the responsibility to make laws on their behalf. Members of parliament usually belong to a **political party**.

If Australia were to become a republic, an appointed Australian person (possibly called a president) would replace the Queen as our head of state. In a republic, the head of state is elected or chosen by the people. In a monarchy, the monarch inherits the position.

constitutional monarchy
a system of government in which a monarch (i.e. a king or queen) is the head of state and a parliament makes the laws under the terms of a constitution

democracy
a system of government in which members of parliament are voted into office by the people, and represent the wishes of the people

political party
an organisation that represents a group of people with shared values and ideas, and which aims to have its members elected to parliament



Source 3 Australia is a constitutional monarchy, meaning that the British monarch – currently Queen Elizabeth II – is our head of state. Queen Elizabeth has occupied this position since her coronation in 1953. That's more than 60 years!

2.2 CHECK YOUR LEARNING

Define and explain

1. When did the Australian Constitution come into operation in Australia?
2. What is the main purpose of the Australian Constitution?
3. Did the High Court of Australia and the Commonwealth Parliament exist before the Australian Constitution? Explain your answer.
4. What is meant by the term 'constitutional monarchy', and how is this different from a republic?
5. Why is Australia described as a democracy?

Check your obook assess for these additional resources and more:

- **Student book questions**
  2.2 Check your learning
- **Weblink**
  The Australian Constitution

2.3 LAW-MAKERS IN AUSTRALIA

statute law
law made by parliament; also known as legislation or Acts of Parliament (as opposed to common law)

common law
law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

government
the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

Act of Parliament
a law made by parliament; a bill which has passed through parliament and has received royal assent (also known as a statute)

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

royal assent
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or the governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)

secondary legislation
rules and regulations made by secondary authorities (e.g. local councils, government departments and statutory authorities) which are given the power to do so by the parliament. Also referred to as delegated legislation

Within our legal system, a large body of law regulates the activities of society. The main types of law in Australia are **statute law** made by parliament and **common law** (developed gradually by courts, also called case law or judge-made law).

Parliament

Parliament is the law-making institution of **government**. Parliaments debate and pass laws for the peace, order and good government of the community.

There are nine parliaments in Australia: one Commonwealth Parliament, six state parliaments, and two territory parliaments. Each parliament is the supreme law-making body within its area of power (jurisdiction), meaning that each parliament can make, change or abolish laws whenever it wants to, as long as it does not go beyond its law-making powers.

Australia's parliamentary system is based on Britain's Westminster system. Under the Westminster system, the parliament is bicameral, meaning it consists of two separate houses, referred to as the upper house and the lower house. These houses are made up of members who have been democratically elected by the people and should represent their views and values. In Australia today, all parliaments are bicameral except for those in Queensland, the Northern Territory and the Australian Capital Territory.

Parliament also includes the Queen's representative: the Governor-General at the Commonwealth level and the governor at state level, who act on behalf of the Queen.

The political party that has the majority of members in the lower house forms government. The main political party other than the government forms the opposition. Other political party members and independent members are called crossbenchers.

		COMMONWEALTH PARLIAMENT	VICTORIAN PARLIAMENT
		The Queen's representative (Governor-General of Australia)	The Queen's representative (Governor of Victoria)
BICAMERAL SYSTEM	upper house	Senate	Legislative Council
	lower house	House of Representatives	Legislative Assembly

Source 1 Both the Commonwealth Parliament and the Victorian Parliament are bicameral parliaments.

Statute law

A statute (also known as an **Act of Parliament** or legislation) is a law passed by a state parliament or the Commonwealth Parliament. Parliament's main role is to pass legislation to regulate the community. This involves drawing up a **bill** (a proposed law) and having it debated and passed by a majority of members in both houses of parliament. After both houses of parliament have passed a bill, it must also receive **royal assent** or approval by the Queen's representative before finally becoming an Act of Parliament.

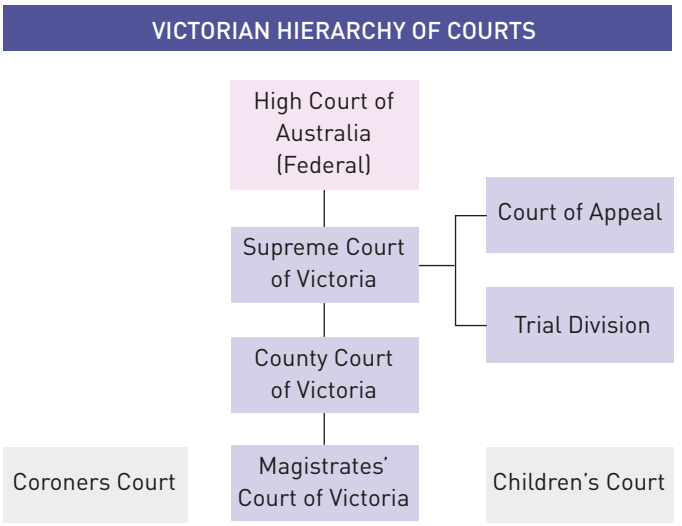
Statutes will have the word 'Act' in their title and will also show when the act was made and which parliament made it. For example, the *Marriage Act 1961* (Cth) is a statute passed by the Commonwealth Parliament in 1961.

Secondary legislation

Secondary legislation or delegated legislation is made by people or bodies who have been given powers, and are generally supervised by parliament, to make regulations or rules. Examples include parking laws made by local councils and court rules made by the court.

Courts

Courts play an important role in the legal system. Courts are formal legal institutions that interpret and apply the laws made by parliament. In Australia, the courts operate independently of parliament and the government. Courts are presided over by judges (and magistrates). When courts interpret and apply laws made by parliament, they can broaden or narrow the meaning of a word or phrase in a statute. Once the meaning is decided, it can become a principle of law (**precedent**) that is to be followed in the future.



Source 2 The Victorian court hierarchy

Judges can also develop law when deciding on a new issue where no existing legislation applies, or where a previous principle of law requires expansion to apply to a new situation. Judges are therefore also law-makers; their law is called case law or common law.

In Australia, some courts are Commonwealth (federal) courts and some are state courts. Generally, each court deals with issues that arise under its jurisdiction. The Commonwealth courts are the High Court of Australia, the Federal Court, the Federal Circuit Court and the Family Court. The Victorian courts are the Supreme Court (divided into the Trial Division and the Court of Appeal), the County Court, the Magistrates' Court, the Children's Court and the Coroners Court.

The courts in Australia are ranked in a hierarchy, with the higher courts hearing the more serious and complicated cases, and the lower courts dealing with everyday issues. While the High Court is a federal court, it is also the court of appeal from each state's highest court. The High Court only hears **appeals** that raise important points of law. Leave (permission) to appeal to the High Court must be obtained first.

precedent
principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

appeal
an application to have a higher court review a ruling (i.e. decision) made by a lower court

2.3 CHECK YOUR LEARNING

Define and explain

1. How many parliaments are there in Australia?
2. Explain what is meant by the terms 'government' and 'opposition'.
3. What is a bicameral parliament?
4. Distinguish between statute law and common law.
5. What do people mean when they say judges 'make law' when they interpret a statute?

Synthesise and apply

6. Decide if each of the following laws is an Act of Parliament or secondary legislation. If it is an Act of Parliament, identify which parliament made the law.
   - **a** *Paid Parental Leave Act 2010* (Cth)
   - **b** *National Trust Act 2006* (Tas)
   - **c** *Street Numbering State Law*

Check your obook assess for these additional resources and more:

- **Student book questions**
  2.3 Check your learning
- **Worksheet**
  The work of parliament
- **Weblink**
  Victorian Courts and Tribunals
- **Weblink**
  Parliamentary Education Office fact sheets

2.4 CRIMINAL LAW AND CIVIL LAW

criminal law
an area of law that defines a range of behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

civil law
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

civil dispute
a dispute (i.e. disagreement) between two or more individuals (or groups) in which one of the individuals (or groups) makes a legal claim against the other

plaintiff
(in civil disputes) the party who makes a legal claim against another person (i.e. the defendant) in court

remedy
a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

damages
the most common remedy in a civil claim; an amount of money that the court (or tribunal) orders one party to pay to another

In Australia, there are two main areas of law – **criminal law** and **civil law**.

Criminal law

Criminal law is an area of law that protects the community by establishing and defining what crimes are. It also sets down sanctions (i.e penalties) for people who commit them.

A crime is an act or an omission that:

- breaks an existing law
- is harmful to an individual or society as a whole
- is punishable by law.

A criminal case comes into existence when the police (or other investigative agency) investigate a crime that has been committed, and charge a person with that crime.

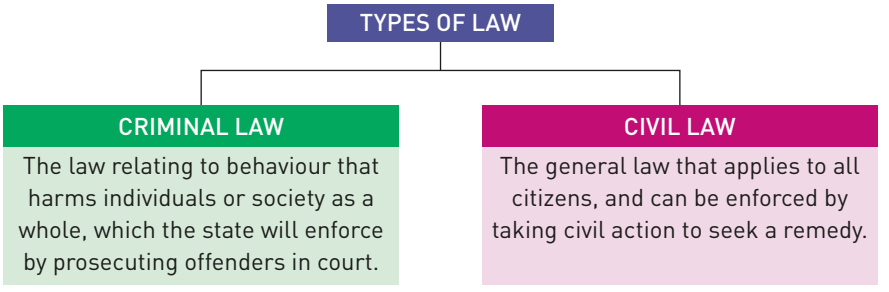
Criminal law is designed to protect members of society and impose sanctions on those who commit offences. In Victoria, many statutes aim to do this. One is the *Crimes Act 1958* (Vic). The result of a successful criminal prosecution is a finding of guilt and the imposition of an appropriate sanction. Courts have a wide range of sentencing options or sanctions, including fines, community correction orders and imprisonment. Sentencing has a number of purposes. One of those purposes is to punish the offender. Another is to reform the offender by treating the underlying causes of the offending.

Civil law

Civil law is a body of law that sets out the rights and responsibilities of individuals, groups and organisations. It also regulates private disputes when these rights have been infringed.

Civil disputes arise when someone believes their rights have been infringed. Civil law regulates those disputes and seeks to enforce rights where some harm has been done to an individual or an organisation. The purpose of a civil action is to ask the court or tribunal for a **remedy** to return that person (known as the **plaintiff**) to the position they were in before their rights were infringed.

The most common remedy is payment of an amount of money to the plaintiff as compensation for their suffering or loss (referred to as **damages**).



Source 1 Criminal law and civil law are the two main areas of law in Australia.

Overlap between criminal law and civil law

There is some overlap between criminal and civil law. Some behaviour, such as assault, can give rise to a criminal prosecution by the state as well as a civil action by the victim. However, the consequences of criminal and civil actions vary.

Where the same behaviour gives rise to both types of 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 case may give the plaintiff a stronger case 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 behaviour. The jury at a trial (or the magistrate if the case was heard in the Magistrates' Court) may have found the accused 'not guilty' because there was a reasonable doubt. However, in the civil case, the judge or jury only has to decide what probably happened, not what happened beyond reasonable doubt, and may therefore find the **defendant** liable. You will learn more about these concepts in Chapters 3 and 6.

The legal case of Sarah Cafferkey below is an example of one incident resulting in both a criminal case and a civil dispute.

accused
a person charged with a criminal offence

defendant
(in a civil case) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

LEGAL CASE

Life in jail for murder

Hunter v The Queen [2013] VSCA 385 (19 December 2013)

In November 2012, Sarah Cafferkey was at the home of Steven Hunter in Bacchus Marsh when he bashed and stabbed her. Her body was found nine days later in a wheelie bin at a home in Point Cook.

Steven Hunter's parole had only just expired when he murdered her. He had been in and out of prison for more than 20 years, and his prior convictions included the murder of an 18-year-old schoolgirl in 1986, as well as kidnapping and assault offences. After pleading guilty to Ms Cafferkey's murder, Hunter was sentenced to life imprisonment with a non-parole period of 35 years. The High Court refused his application for leave to appeal in 2014.

It has since been reported that Ms Cafferkey's parents have sued the Victorian Government in relation to her death. They have claimed that the government was negligent in releasing Hunter on parole.



Source 2 Sarah Cafferkey was murdered by Steven Hunter in November 2012. Her parents have taken civil action against the Victorian Government.

2.4 CHECK YOUR LEARNING

Define and explain

1 What is a crime?
2 What does criminal law aim to do?
3 What is a civil dispute?
4 What is the most common way for a party to be compensated in a civil dispute?

Synthesise and apply

5 Which parliament passed the *Crimes Act*? Access this statute from the Victorian Legislation website and identify three types of crimes. A link is provided on your obook assess.
6 Read the legal case *Hunter v The Queen*.
   a What crime was committed in this case?
   b What sanction did the court impose?
   c Does the outcome in Steven Hunter's criminal case affect the outcome in Ms Cafferkey's parents' case? Why or why not?

Check your obook assess for these additional resources and more:

- **Student book questions**
  2.4 Check your learning
- **Worksheet**
  The differences between criminal law and civil law
- **Weblink**
  Crimes Act 1958 (Vic) (AustLII)

2.5 THE MEANING OF THE RULE OF LAW

rule of law
the principle that everyone in society is bound by law and must obey the law and that laws should be fair and clear (so people are willing and able to obey them)

One of the central foundations of Australian society is the concept of the **rule of law**. It means that everyone – individuals, groups and the government – is bound by the law and must obey the law. The rule of law also means that laws should be such that people are willing and able to abide by them. That is, no matter what a person's authority or position, they must comply with laws. This includes members of parliament, leaders of government, judges and public officials. Even the people who make the law are bound by it.

The fact that parliaments and governments must obey the Australian Constitution is an example of the rule of law at work in Australia. The Constitution imposes restrictions on the law-making powers of the parliaments so that their powers are restrained.

A number of legal principles combine to uphold the rule of law; for example:

- laws must be clear, understood, known and accessible
- courts and judges must be independent so that trials and hearings can be free from pressure or influence from the other branches of government
- the law must be applied equally and fairly, without favour or discrimination, and no person is above the law
- all people charged with a crime are presumed to be innocent until proven guilty in court
- people are free to criticise and challenge parliament and government, can seek to influence changes in the law, and can demonstrate without fear
- trials and hearings should be conducted openly and in a transparent way to ensure that parties are given the opportunity to present their case, and rebut the other party's case.

Study tip

A useful place for internet research on the rule of law is the Rule of Law Institute of Australia website. A link is provided on your obook assess.

In Units 3 & 4 you will explore various principles that support the rule of law. You will also develop your knowledge about criminal cases, civil disputes, the Australian Constitution, parliament and courts in these units.



Source 1 Under the rule of law, any person charged with a crime is presumed innocent until proven guilty in court.

Former Chief Justice takes on Trump and the rule of law

IN THE NEWS

Melissa Coade, *Lawyers Weekly*, 14 February 2017

Donald Trump's tweets about the credibility of courts from his POTUS Twitter account have been described by retired Chief Justice Robert French AC as a calculated undermining of a fundamental principle of justice.

US President Donald Trump's recent flourishes on Twitter are a useful case study for rule of law proponents. At least, Former High Court Chief Justice Robert French AC (see Source 2) thought so, using his first public oration since retirement to lambast 'calculated' attempts by the White House 'to undermine respect for the rule of law'.

Speaking at a lecture hosted by the Victoria Law Foundation on Friday, the retired judge reflected on Mr Trump's recent dispatches online. In particular, he noted how the language of the President's tweet on 5 February pre-empted the court's appeal process ...

'Such remarks may be seen as calculated to undermine respect for the rule of law.'



Source 2 Former Chief Justice French has spoken about Donald Trump and the rule of law.

President Trump took to Twitter to respond to a decision made by the Ninth Circuit Court of Appeal. The court upheld a decision made by a Seattle-based judge to block a travel ban which the President had signed-off a few weeks prior.

'The opinion of this so-called judge, which essentially takes law enforcement away from our country is ridiculous and will be overruled,' Mr Trump tweeted.

2.5 CHECK YOUR LEARNING

Define and explain

1 Explain the concept of the rule of law.

2 Identify and describe three legal principles that uphold the rule of law.

Synthesise and apply

3 Read the article 'Former Chief Justice takes on Trump and the rule of law'.

a Who is Donald Trump?

b Is America a constitutional monarchy or a republic?

c Is America subject to the rule of law? Why or why not?

d What was the issue in America that the courts had to decide on?

e What did President Trump tweet on 5 February 2017, and why was this tweet criticised? Make reference to the rule of law in your answer.

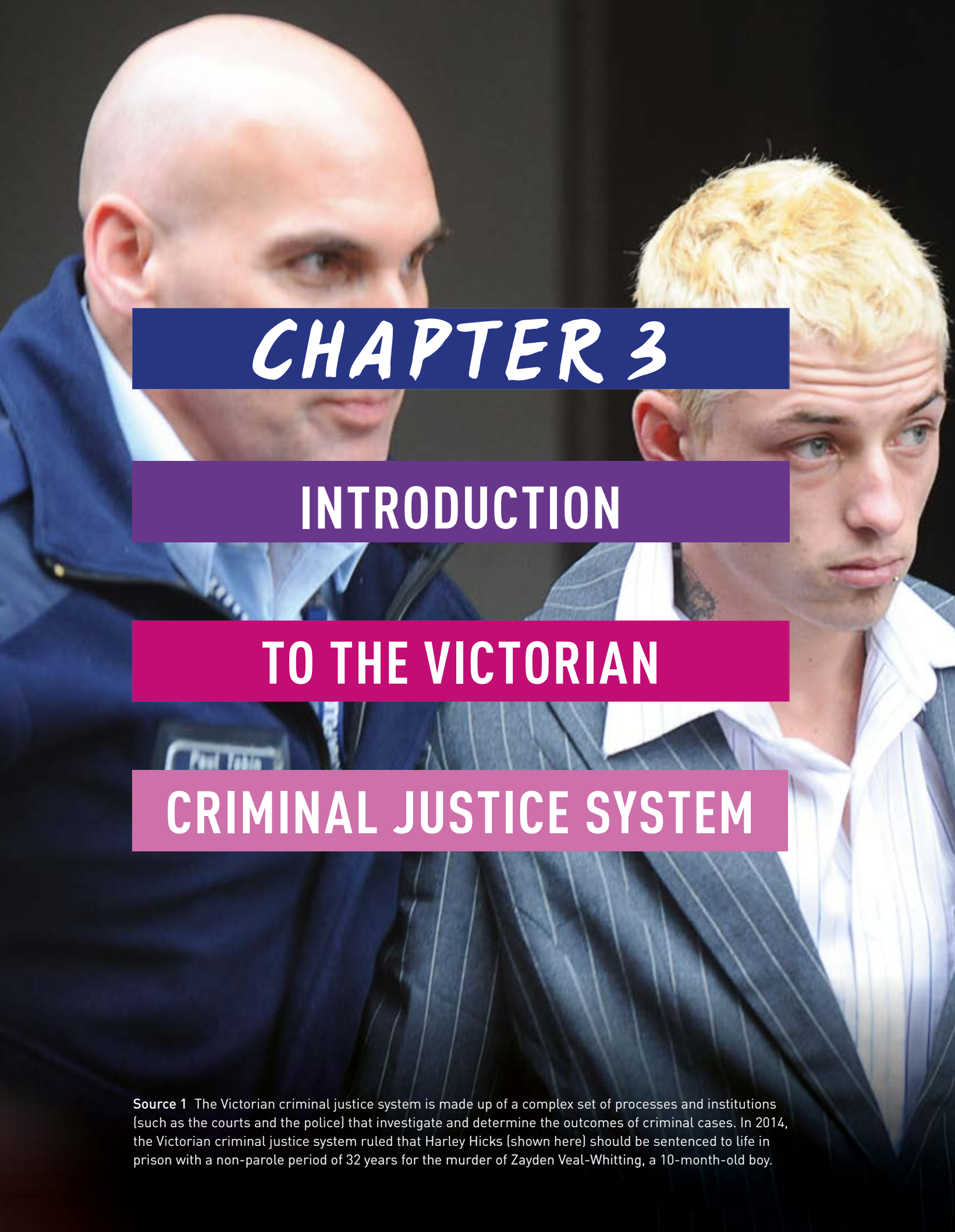
Check your obook assess for these additional resources and more:

» **Student book questions**
2.5 Check your learning

» **Weblink**
Rule of Law Institute of Australia

CHAPTER 3

INTRODUCTION TO THE VICTORIAN CRIMINAL JUSTICE SYSTEM



Source 1 The Victorian criminal justice system is made up of a complex set of processes and institutions (such as the courts and the police) that investigate and determine the outcomes of criminal cases. In 2014, the Victorian criminal justice system ruled that Harley Hicks (shown here) should be sentenced to life in prison with a non-parole period of 32 years for the murder of Zayden Veal-Whitting, a 10-month-old boy.

OUTCOME

By the end of **Unit 3 – Area of Study 1** (i.e. Chapters 3, 4 and 5), you should be able to explain the rights of the accused and of victims in the criminal justice system, discuss the means used to determine criminal cases and evaluate the ability of the criminal justice system to achieve the principles of justice.

KEY KNOWLEDGE

In the chapter, you will learn about:

- the principles of justice: fairness, equality and access
- key concepts in the Victorian criminal justice system, including:
  - the distinction between summary offences and indictable offences
  - the burden of proof
  - the standard of proof
  - the presumption of innocence
- the rights of an accused, including the right to be tried without unreasonable delay, the right to a fair hearing, and the right to trial by jury
- the rights of victims, including the right to give evidence as a vulnerable witness, the right to be informed about the proceedings, and the right to be informed of the likely release date of the accused.

KEY SKILLS

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- explain the rights of an accused and of victims in the criminal justice system
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

KEY LEGAL TERMS

access one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

accused a person charged with a criminal offence

balance of probabilities the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

beyond reasonable doubt the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

burden of proof the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

Director of Public Prosecutions (DPP) the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

equality one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage

fairness one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

Human Rights Charter the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Its main purpose is to protect and promote human rights

indictable offence a serious offence generally heard before a judge and a jury in the County Court or Supreme Court of Victoria

jury an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. verdict)

Office of Public Prosecutions (OPP) the Victorian public prosecutions office which prepares and conducts criminal proceedings on behalf of the DPP

presumption of innocence the right of a person accused of a crime to be presumed not guilty unless proven otherwise

prosecutor the Crown in its role of bringing a criminal case to court (also called 'the prosecution')

sanction a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

standard of proof the degree or extent to which a case must be proved in court

summary offence a minor offence generally heard in the Magistrates' Court

victim a person who has suffered directly or indirectly as a result of a crime

Victims' Charter a charter (i.e. the *Victims' Charter Act 2006* (Vic)) that recognises the impact of crime on victims and provides guidelines for the provision of information to victims

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–viii.

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3.1 INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM

criminal justice system a set of processes and institutions used to investigate and determine criminal cases

accused a person charged with a criminal offence

sanction a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

The **criminal justice system** is a set of processes and institutions used to investigate and determine the outcomes of criminal cases. It involves the police, courts, pre-trial procedures and sentencing. Two of the key purposes of the criminal justice system are to:

- decide whether an **accused** is guilty of an offence
- impose a **sanction** in cases where an accused has been found guilty (or pleaded guilty).

When an individual is convicted and sentenced for committing a crime, a fair process must be followed to ensure justice is achieved.

As shown in Source 1, some of the key stages in a criminal case include:

- investigation of a crime (police investigations)
- charging the accused
- pre-trial procedures (e.g. the parties having to attend hearings before a magistrate or judge)
- determining guilt in a court hearing (i.e. the jury or magistrate has considered all the evidence and decided the accused is guilty beyond reasonable doubt)
- sentencing (i.e. deciding the appropriate penalty)
- managing post-sentencing processes (e.g. the imprisonment of an offender).



Source 1 An overview of some of the key stages in a criminal case. Over the course of Unit 3 – Area of Study 1, you will primarily be learning about the three key stages shown in pink above.

Australian Constitution, the a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

Australia's justice system

There is no single, unified criminal justice system in Australia. This is due to the fact that under the **Australian Constitution**, the Commonwealth Parliament does not have power to make laws about crime in general. Instead, the states have power to maintain public order and protect citizens. As a result, each state and territory in Australia has its own laws that establish:

- what is considered a crime
- the ways of determining criminal cases
- the maximum penalty that could be imposed for each specific crime.

Each state and territory also has its own police force, courts and prison system.

Study tip

At this stage, you only need to understand that each state has law-making powers in relation to crime. You will learn more about law-making powers in Unit 4, Area of Study 1. It's a good idea to come back and review this chapter when you start Unit 4.

Criminal cases in Victoria

In Victoria, the courts that hear and determine criminal cases are:

- the Magistrates' Court
- the County Court
- the Supreme Court.

The Children's Court also hears criminal cases in Victoria, where a child (between the ages of 10 and 17) has been accused of committing a crime.

Although the administration of criminal justice is a power held by the state, the Commonwealth Parliament has the power to pass criminal laws if it relates to its constitutional powers in some way (e.g.

avoiding customs duties, as customs is a Commonwealth power). Commonwealth offences (i.e. offences that break a law passed by the Commonwealth Parliament) have expanded over time and there is now a great deal of overlap. Some crimes, such as drug dealing, could be prosecuted by either Commonwealth or state police.

Many of the Commonwealth offences are contained in the Commonwealth Criminal Code, a statute passed by the Commonwealth Parliament. The Code includes offences such as:

- assisting enemies at war with Australia (a form of **treason**)
- advocating (i.e. promoting or supporting) terrorism
- causing harm to a Commonwealth public official.

These types of offences have the potential to affect the whole of Australia, not just a particular state or territory.

treason
the crime of betraying one's country, especially by attempting to overthrow the government



Source 2 In Australia, drug dealing is a crime that can be prosecuted by either Commonwealth or state police.

Parties to a criminal case

A criminal case involves two parties:

- the state (i.e. the government, represented by a **prosecutor** (also called the 'prosecution') on behalf of the people and with the authority of the Crown)
- the accused (i.e. the person or institution that is alleged to have committed a crime).

The victim is not a party to a criminal case and does not bring the court action. In serious criminal cases the prosecution takes the case to court on behalf of the victim and society.

prosecutor
the Crown in its role of bringing a criminal case to court (also called 'the prosecution')

Office of Public Prosecutions (OPP)
the Victorian public prosecutions office which prepares and conducts criminal proceedings on behalf of the DPP

Director of Public Prosecutions (DPP)
the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

The state

In Victoria, the **Office of Public Prosecutions (OPP)** works with the **Director of Public Prosecutions (DPP)** and the Crown Prosecutors to prosecute serious crime on behalf of Victorians in the County Court or Supreme Court of Victoria. In less serious cases, Victoria Police officers will ordinarily prosecute a case in the Magistrates' Court. Other organisations such as local councils, VicRoads and WorkSafe Victoria also have power to prosecute less serious offences.

The accused

As you have learned, the person charged with a crime is known as the accused. There can be multiple accused persons in a criminal case, depending on the crime that is alleged to have been committed. Companies can also be charged with offences such as taxation fraud, offences relating to workplace health and safety and environmental offences. The below case is an example of a company charged with an offence relating to workplace health and safety.

LEGAL CASE

Company sentenced in relation to workplace injury

DPP v ABD Group Pty Ltd [2016] VCC 1450 (29 September 2016)

On 27 April 2016, a jury found ABD Group Pty Ltd guilty of one charge in relation to a failure to ensure its workplace was safe and free from risk to health. The charge related to an incident that occurred on 9 May 2011 at a workplace where ABD Group Pty Ltd was completing carpentry works. One of its workers slipped on sawdust and fell 2.8 metres to the concrete floor below. He suffered internal bruising, his right arm was in a sling for two days and he was off work for two weeks.

On 29 September 2016 ABD Group Pty Ltd was convicted and Judge Mason of the County Court of Victoria handed down the sentence, a fine of $80 000.



Source 3 In 2016, ABD Group Pty Ltd was found guilty by a jury verdict of one charge in relation to a failure to ensure its workplace was safe and without risk to health. The charge related to an incident that occurred on 9 May 2011 at a workplace at which ABD Group Pty Ltd was completing carpentry works. One of its workers was injured as a result of slipping on sawdust and falling 2.8 metres to the concrete floor.

→ GOING FURTHER

Private prosecutions

In Victoria, private individuals are able to commence and conduct a private prosecution. This means that it is possible for a victim themselves, or another person, to prosecute a case (including where the DPP has decided to discontinue a case). These sorts of prosecutions are rare, mainly because of the expense involved in prosecuting a case and the resources required to do so.



Source 4 Companies can be charged with taxation fraud in the criminal justice system.

3.1 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by the term the 'criminal justice system'.
2 Is there one single unified criminal justice system in Australia? Explain.
3 Identify four persons or organisations that are able to prosecute a case in court.

Synthesise and apply

4 Read the legal case *DPP v ABD Group Pty Ltd*.
   - **a** Who were the parties in this case?
   - **b** Describe the nature of the offence said to have been committed.
   - **c** Did ABD Group Pty Ltd plead guilty? Justify your answer.

5 Visit the Australasian Legal Information Institute (AustLII) website (provided on your obook assess) and locate the page which contains this year's County Court judgments.
   - **a** Find a recent criminal judgment in which a sentence was handed down.
   - **b** Provide a summary of the parties to the case, the charges alleged against the accused, and the sentence.
   - **c** Now write some questions for another student in your class to answer based on your summary of the judgment.

Check your obook assess for these additional resources and more:

- **Student book questions**
  3.1 Check your learning
- **Video tutorial**
  Introduction to Chapter 3
- **Worksheet**
  Types of offences
- **Weblink**
  Australasian Legal Information Institute (AustLII)

3.2 THE PRINCIPLES OF JUSTICE

Justice is a word you often hear when people talk about the law – particularly when it comes to verdicts in criminal cases.

Every day, newspaper articles, news reports, websites, and radio commentators talk about the outcome of certain criminal cases being 'just', while others are seen as 'unjust'. There is even a common saying that 'justice delayed is justice denied'.

So, while most people would agree that the criminal justice system should achieve justice, what does 'justice' actually mean?



Source 1 'Lady Justice' (also known as Justicia) above the entrance to the County Court of Victoria. She is holding the scales of justice in her hand. These scales symbolise the impartial weighing of arguments and evidence for or against a case tried in court.

Defining justice

Justice is difficult to define as it means different things to different people. As a result, there is no single, universally accepted definition of the word. One dictionary definition is 'the quality of being fair and reasonable', but views on what is considered fair or reasonable in a particular case can vary widely between individuals depending on their cultures, political and religious beliefs, community views, personal experiences and personal values. For example, a victim in a criminal case may view a maximum sentence of ten years as being just, while the family and friends of the accused may see the same sentence as unjust.

When considering whether justice has been achieved in a particular case, it is helpful to consider the following three principles of justice:

- **fairness**
- **equality**
- **access**.

The three principles can be used as a way to determine whether the criminal justice system as a whole is achieving its purpose.

In this Area of Study, you will be required to consider whether the criminal justice system upholds the principles of justice, so you should continually revisit these principles when examining aspects of the system.

Did you know?

Court buildings in many countries show images of Lady Justice (see Source 1). In most of them she is wearing a blindfold, to show that 'justice is blind' (not biased by who she sees before her). Sometimes she holds the sword of justice. Her Roman name is Justicia but she was originally the Greek goddess Themis (meaning 'order')

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

equality
one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

Fairness

Fairness is the first principle of justice. A dictionary definition is 'impartial and just treatment or behaviour without favouritism or discrimination'. However, like justice, fairness can mean different things depending on a person's values and perspectives.

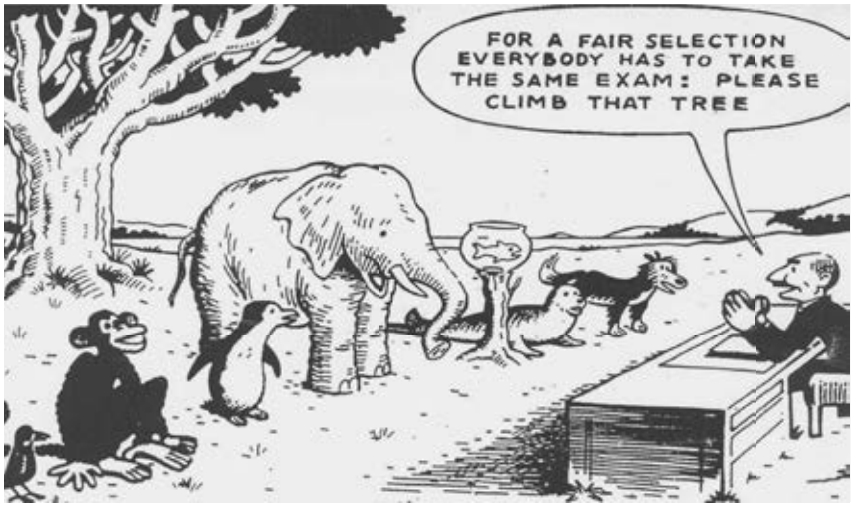
Fairness does not necessarily mean that everyone gets the same thing. It is often the case in society that to treat someone fairly, you have to treat them differently (as shown in Source 2).

In the criminal justice system, fairness means fair processes and a fair hearing. People should be able to:

- have their case heard in an impartial and objective manner and without fear or favour
- understand court processes
- have the opportunity to present their defence
- have the opportunity to rebut (disprove) the prosecution case.

For example, accused persons should know what documents and evidence will be used against them, so they have an opportunity to consider the strength of the prosecution's case. They should also have an opportunity to challenge the evidence, and have their case heard and determined by people who are unbiased, and are perceived to be unbiased.

If laws are properly and fairly applied, and there is procedural fairness in each criminal case, then the **rule of law** will be upheld. Fairness does not necessarily mean the same outcome or the same sentence in a criminal case for every single crime of the same nature – rather, as stated above, fairness may require people to be treated differently to ensure a fair outcome.



Source 2 Some people might argue that it is fair for each of the animals shown above to take the same exam – because they are all being treated equally – but do you think the outcome of this 'exam' will be fair?

The principle of fairness applies not just to the final hearing or trial, but to the whole of a criminal case.

In Chapters 4 and 5, you will consider whether the criminal justice system achieves fairness. Some of the aspects of the criminal justice system that relate to fairness include:

- the time it takes for a criminal case to be heard and completed, and whether any delays have occurred
- the availability of legal representation for an accused and for victims
- the opportunity for the accused to present their case and know the evidence that will be brought against them, and the opportunity to **appeal** (review) a decision made
- whether the accused and victims can understand legal processes and terminology, and have adequate assistance where necessary
- whether laws and court rules have been properly applied
- whether people have been treated impartially and without fear or favour (including victims).

Study tip

The principles of 'fairness', 'equality' and 'access' are central to the criminal justice system in Victoria. Make sure you not only understand each of these principles, but also how features of the criminal justice system achieve, or do not achieve, each of them.

rule of law
the principle that everyone in society is bound by law and must obey the law and that laws should be fair and clear (so people are willing and able to obey them)

appeal
an application to have a higher court review a ruling (i.e. decision) made by a lower court

LEGAL CASE

The right to a fair trial

Jago v District Court of NSW (1989) 168 CLR 23

In *Jago v District Court of NSW*, Jago had been charged on 30 counts of fraud, alleged to have occurred between April 1976 and January 1979. The matter was not listed for a final hearing until 1987. The case went to the High Court on appeal, because Jago argued that the charges should be stayed permanently because of the delay in the time it took for the case to go to trial.



Source 3 A fair trial can help avoid an incorrect guilty verdict.

The High Court dismissed the appeal, but discussed at length the right of an accused to a fair trial. Importantly, the Court held that the right to a fair trial is not limited to just the trial itself. Chief Justice Mason said:

> [The right to a fair trial] is one of several [rights] entrenched in our legal system in the interests of seeking to ensure that innocent people are not convicted of criminal offences ... there is no reason why the right should not extend to the whole course of the criminal process ...

Equality

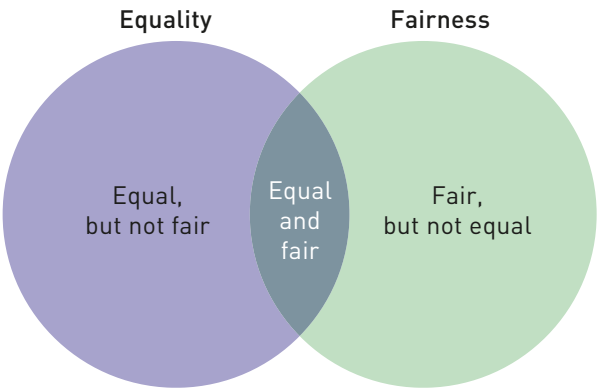
Equality is the second principle of justice. One dictionary definition of equality is 'the state of being equal, especially in status, rights or opportunities'.

In society, equality means that everyone should be treated equally regardless of their different personal characteristics or beliefs (such as age, gender, religion, ethnicity, cultural background, disability or sexuality).



Source 4 In society, equality means that all persons should be treated equally regardless of their different personal characteristics or beliefs (such as age, gender, religion, ethnicity, cultural background, disability or sexuality).

In the criminal justice system, equality means that all people should be treated equally before the law, with an equal opportunity to present their case. This means that no person or group should be treated advantageously, or disadvantageously, because of a personal attribute or characteristic. The processes should be free from bias or prejudice, and the persons who make the decision should be impartial. Equal application of the law, and equality in processes, uphold the rule of law.



Source 5 Equality and fairness can be difficult principles to separate. This diagram is designed to help you do this.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) is a Victorian statute aimed at protecting and promoting human rights. It states that every Victorian is equal before the law and is entitled to the law's protection without discrimination.

While the principles of equality and fairness share some similarities, they are quite different concepts, as seen in Source 5.

In Chapters 4 and 5, you will learn more about the ways in which the criminal justice system tries to achieve equality. Some of the aspects of the criminal justice system that relate to equality include:

- the use of a judge and jury when deciding criminal cases
- the way differences are treated (e.g. cultural differences, socio-economic differences and religious differences)
- whether the system disadvantages certain groups in society (e.g. vulnerable witnesses, people with mental health issues or people who are unable to understand English)
- the availability of legal representation for persons of a low socio-economic background
- the biases that may be inherent when certain groups of the community are confronted by the criminal justice system
- the extent to which laws apply equally to everyone.



Source 6 A court with unbiased and impartial judges is one of the ways in which the criminal justice system in Australia seeks to achieve equality.

Study tip

In your notes, create a page for each principle of justice. Here's how:

- Add the headings 'fairness', 'equality' and 'access' at the end of your notes (leaving a separate page or two for each).
- When you learn about something that upholds one of these principles, make a note of it on the relevant page.
- Do the same thing when you come across something that opposes these principles – in the text, in a case, or anywhere else.

Access

Access is the third principle of justice. In simple terms, access is the ability to approach or make use of something. It is generally accepted that members of society should be able to access education, health, food and shelter. People should also be able to access justice.

Access to the criminal justice system means that all people should be able to understand their legal rights and pursue their case. This includes more than being able to access the institutions that hear criminal cases (i.e. the courts). It also means being able to approach bodies and institutions that provide legal advice, education, information and assistance, and receive from them information about criminal cases, processes and outcomes.

Access to the criminal justice system does not necessarily mean that the person seeking access will get the outcome they want, but it does mean parties should have the opportunity to make use of the processes and institutions within the criminal justice system, and that these are not beyond their reach. For example, individuals who cannot afford the cost of engaging legal representation and advice should have access to free legal aid or assistance. The following scenario about Sally provides an example of the way the criminal justice system can sometimes be inaccessible to some Victorians.



Source 7 Access to the criminal justice system means all people should be able to approach legal bodies and institutions for help.

EXAMPLE

Sally's inability to access the legal system

Sally has a hearing disability, intellectual impairment and a mental illness, and lives in public housing in rural Victoria. She has recently fled her previous housing because of a physically abusive relationship with her ex-partner. She has approached several lawyers to help her, but she is unable to afford their fees.

Sally's impairment, health and her socio-economic status have made it difficult for her to access the justice system. She has limited understanding and knowledge of the rights that are available to her and does not have the money to pay for a lawyer herself. When she has gone to the police station for help and has tried to describe what has happened, she has not been able to communicate the abuse she has suffered.

The right to access the criminal justice system not only applies to accused persons, but also to victims, their families, and the general public.

You will explore in Chapters 4 and 5 how and whether the criminal justice system achieves access to justice. Some of the aspects of the criminal justice system that relate to access include:

- the availability of a range of means used to finalise criminal cases, such as plea negotiations and sentence indications
- the availability of legal advice and assistance to an accused and victims who may not be able to afford legal representation
- the costs and delays associated with defending a criminal case or accessing information about legal rights
- the extent to which members of the community understand legal rights and processes
- the availability of the courts and legal processes
- the formalities associated with a hearing or trial.



Source 8 Access in the criminal justice system can relate to the costs associated with defending a criminal case or accessing information about legal rights.

3.2 CHECK YOUR LEARNING

Define and explain

1 Identify the three principles of justice and provide a brief description of each.
2 Is fairness limited to a fair trial? Explain your answer.
3 Describe what is meant by access to the criminal justice system.

Synthesise and apply

4 Identify three different people who have an interest in the sentence passed on a person found guilty of an offence. How might each of them define a 'fair' sentence?
5 Imagine you are a teacher in a classroom. Describe a situation where you might be seen to be treating students equally, but not fairly.
6 Read the example 'Sally's inability to access the criminal justice system'. Explain how each of the three principles of justice may not be achieved in this case, and what could be done to make sure they are achieved.

Analyse and evaluate

7 Look back at Source 2. With a partner, discuss whether the cartoon depicts fairness or a lack of fairness. Discuss possible alternative 'exams' for the animals that might achieve fairness.
8 Access former Chief Justice Marilyn Warren's speech called 'What is justice?' A link is provided on your obook assess. Your teacher will divide up the paragraphs between you to summarise. Once you have done so, come together as a class and discuss the following questions:
   a Is there a single definition of justice? If not, why not?
   b Whose interpretation of justice is most important in the legal system?
   c What conclusions can you draw from this speech about the meaning of justice?

Check your obook assess for these additional resources and more:

» **Student book questions**
3.2 Check your learning

» **Weblink**
Rule of Law Institute of Australia

» **Weblink**
What is justice?

3.3 KEY CONCEPTS IN THE VICTORIAN CRIMINAL JUSTICE SYSTEM

In this topic you will learn about a number of key concepts in the Victorian criminal justice system. These concepts include:

- the distinction between summary offences and indictable offences
- the burden of proof
- the standard of proof
- the presumption of innocence.

The distinction between summary offences and indictable offences

There are two types of criminal offences:

- **summary offences**
- **indictable offences**.

summary offence
a minor offence generally heard in the Magistrates' Courtt

indictable offence
a serious offence generally heard before a judge and a jury in the County Court or Supreme Court of Victoria

Summary offences

Summary offences are **minor criminal offences** that are generally heard in the Magistrates' Court. The final hearing at which both parties will put their cases before a magistrate is known as a hearing (as opposed to a trial in the County Court or Supreme Court). They are considered to be less serious types of crime, and include offences such as drink driving, disorderly conduct and minor assaults. There is no right to a jury trial for summary offences.

Some summary offences are contained in the *Summary Offences Act 1966* (Vic), but many are listed in various other Victorian statutes and regulations.

Most crimes that are committed in Victoria are summary offences. The number of criminal cases finalised in each of the main Victorian courts for the financial year 2014–15 is set out in Source 1 below. As shown, the vast majority of criminal cases heard each year in Victoria – around 90 per cent – are heard in the Magistrates' Court, which hears summary offences.

Study tip

The *VCE Legal Studies Study Design* requires you to know how to distinguish between summary offences and indictable offences. That means you should be able to point out the differences between the two. In your answers, use words such as 'whereas', 'on the other hand' or 'in contrast' when pointing out their differences.

COURT	NUMBER OF CRIMINAL CASES FINALISED IN 2014–2015
Magistrates' Court	275 552
County Court	2236
Supreme Court (Trial Division)	86
Total	**277 874**

Source: Annual Reports of the Magistrates' Court, County Court and Supreme Court, 2014–15.

Source 1 Number of criminal cases finalised in 2014–15 in the main Victorian courts

Indictable offences

Indictable offences are **serious criminal offences** that are heard by a judge (and a jury if the accused pleads not guilty) in the County Court or Supreme Court of Victoria. Final hearings are known as trials. Examples of indictable offences include homicide offences and drug trafficking.

As a general rule, offences in the *Crimes Act 1958* (Vic) are indictable offences unless the offence is stated in the Act to be a summary offence.

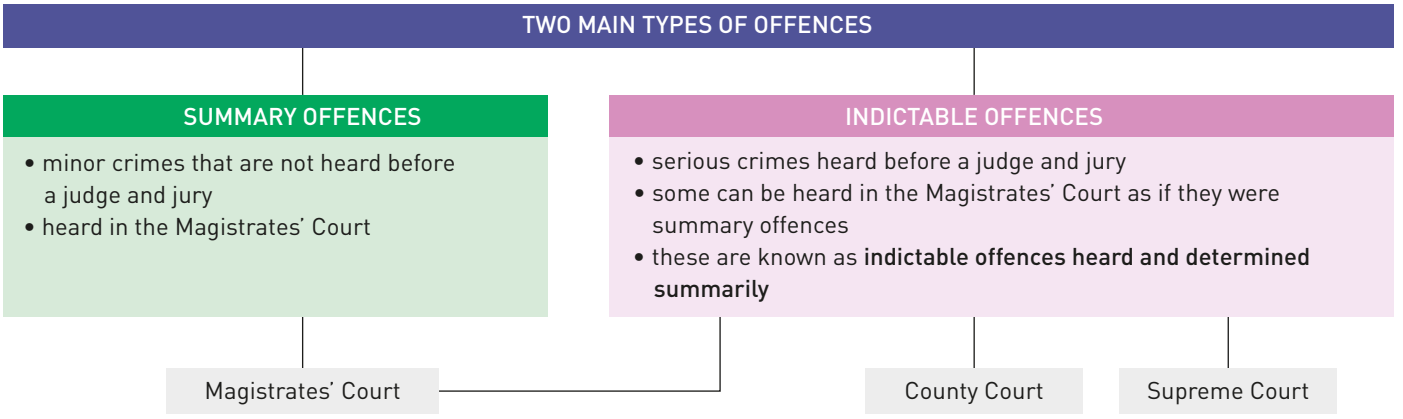
Indictable offences heard and determined summarily

Some indictable offences are known as **indictable offences heard and determined summarily**. These are indictable (i.e. serious) offences, but they can be heard in the Magistrates' Court as if they were summary (i.e. minor) offences (but only if the accused agrees).

indictable offence heard and determined summarily
a serious offence which can be heard and determined as a minor offence if the accused agrees

A number of indictable offences can be heard and determined summarily. For example, the *Criminal Procedure Act 2009* (Vic) states that indictable offences punishable by imprisonment of 10 years or less can be heard summarily. In addition, Schedule 2 of the Act lists a range of offences in more than 30 different statutes that can be tried summarily.

The accused will usually choose to have an offence heard summarily, mainly because it is quicker and cheaper to have a case heard in the Magistrates' Court, and the maximum penalty that can be handed down is far less than if it were heard as an indictable offence. The court, however, must agree that the offence is appropriate to be heard summarily.



Source 2 Two main types of offences: summary offences and indictable offences

The main differences between summary offences and indictable offences are set out in Source 3 below.

	SUMMARY OFFENCES	INDICTABLE OFFENCES
Nature of offence	Minor criminal offences	Serious criminal offences
Courts that will generally hear the case	Magistrates' Court	County Court or Supreme Court
Jury trial	No	Yes (if the accused has pleaded not guilty)
Name of final hearing	Hearing	Trial
Main statute(s) in which the offences are contained	*Summary Offences Act* and other statutes and regulations	*Crimes Act*
How it can be heard	Can only be heard as a summary offence	Some indictable offences can be heard summarily
Examples	Disorderly conduct, drinking offences, minor assaults	Rape, homicide offences, fraud, drug trafficking

Source 3 Key differences between summary offences and indictable offences

The burden of proof

burden of proof
the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

The **burden of proof** refers to the responsibility of a party to prove the facts of the case. The burden of proof lies with the person or party who is bringing the case. In a criminal case, this is the prosecution (i.e. the prosecution has to prove that the accused is guilty).

One of the justifications for this is that if the prosecution is accusing a person of having committed a crime, then the responsibility should be on the prosecution to establish the facts.

In a few cases the burden of proof can be reversed (e.g. if the accused is pleading a defence such as self-defence).

Drug cases are another example. Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) states that a person is presumed to possess a substance if:

- the substance is on their property (owned, rented, used or occupied) and
- the person cannot satisfy the court to the contrary.

In this case the onus (responsibility) will be on the accused to prove the drug was not in their possession.

The standard of proof

standard of proof
the degree or extent to which a case must be proved in court

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

balance of probabilities
the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

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**. Proving someone guilty beyond reasonable doubt does not mean that no doubt at all exists as to the accused's guilt. It only means that no **reasonable** doubt is possible from the evidence presented. The judge or members of the jury may still be able to think of fanciful, imaginary or unreasonable doubts (i.e. doubts that aren't realistic or based on the evidence), but these do not count. To prove guilt in a criminal case all that matters is that no other logical or reasonable conclusion can be reached (based on the facts) except that the accused is guilty.

In a criminal case involving indictable offences, the case is heard in the County or Supreme Court and a jury will decide on guilt (Chapter 4 has more information about juries). In a criminal case involving summary offences, the case is heard in the Magistrates' Court and a magistrate (not a jury) will decide on guilt. If the burden of proof is on the accused (for example, the accused is relying on a certain defence), then the standard of proof is on the **balance of probabilities**, but this is an exception.

The presumption of innocence

presumption of innocence
the right of a person accused of a crime to be presumed not guilty unless proven otherwise

common law
law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

bail
the release of an accused person from custody on condition that they will attend a court hearing to answer the charges.

Every person accused of a crime is presumed to be innocent until they have gone before a court and have been found guilty. The **presumption of innocence** is one of the key principles of the rule of law, and is one of the most important concepts on which the criminal justice system is based. It is a guarantee by the state to its citizens that if they are accused of a crime they will be treated, as far as possible, as innocent (not guilty) until the charge has been proved beyond reasonable doubt.

The presumption of innocence is a very old **common law** right. It is now also guaranteed by the *Charter of Human Rights and Responsibilities Act*.

One of the critical ways in which the presumption of innocence is maintained is by imposing a high standard on the prosecution to prove its case (beyond reasonable doubt), and also imposing the burden of proof on the prosecution. That is, the prosecution has to prove that the accused is guilty. Accused persons do *not* have to prove they are innocent.

The presumption of innocence is also upheld through the system of **bail**. The rule of law requires there to be a balance between the presumption of innocence and the protection of society. Unless there are good reasons why a person should be deprived of their liberty (i.e. be held in custody), they are entitled to receive bail while they wait for their hearing in court.

Bail laws have recently come under scrutiny following an incident in Bourke Street, Melbourne in January 2017 when six people were killed and others were injured. The person accused of having committed the crimes was on bail at the time.

IN THE NEWS

Victoria bail law set to change after Bourke Street Mall attack

Australian Associated Press, 22 January 2017



Source 4 Mourners leave flowers and gifts at the scene of the Bourke Street Mall deaths in 2017.

Victorian bail laws are set to change after the Bourke Street Mall tragedy, in which a man allegedly drove through a crowd just days after being bailed on an assault charge.

The accused was bailed against the wishes of Victoria Police five days before Friday's attack.

Victorian Premier Daniel Andrews admitted he was frustrated with the bail system.

'It's my job, though, to take that frustration and that anger and the deep sadness that I feel, and that every Victorian feels, and to make sure that's put into reform and change,' Mr Andrews told reporters on Sunday.

He foreshadowed changes to the bail system, in which Victoria uses volunteer bail judges for out-of-hours decisions.

'We do have a number of unique features of our system, but ... we have to have a close look at these arrangements,' Mr Andrews said.

If changes need to be made then they should be, and be in no doubt they will be.'

Chief Commissioner Graham Ashton said he could not speak freely about bail, but it would be covered in a coronial review.

'We've expressed frustration over the course of the journey about bail issues. We haven't made a secret of that,' he told reporters.

Opposition Leader Matthew Guy said the whole bail system needed reform.

'The bail system in this state is broken and it needs to be fundamentally reformed,' Mr Guy told reporters.

He said Victoria would likely need to build new facilities to hold more people on remand if bail changes went ahead.

A number of other features of the criminal justice system uphold the presumption of innocence. For example:

- an accused has the right to silence, which means they do not need to answer any questions, and do not need to give evidence in court. A person's silence is not to be taken as a sign of guilt
- police must reasonably believe a person has committed a crime before they can arrest that person
- for indictable offences, the prosecution must prove there is enough evidence to support a conviction before they can take a case to trial (you will explore this more in Chapter 4)
- generally, a person's prior convictions cannot be revealed until sentencing (i.e. after they have been found guilty). This is to avoid the jury leaping to the conclusion that the person must be guilty because of their past record
- an offender has the right to appeal a wrongful conviction (e.g. where the judge applied the wrong law).

3.3 CHECK YOUR LEARNING

Define and explain

1 Outline two differences between summary offences and indictable offences.

2 Who has the burden of proof in a criminal case? What is the reason for this?

3 Define the term 'the presumption of innocence', and explain three ways it is upheld in a criminal case.

Synthesise and apply

4 Two co-accused have been charged with the murder of a young girl. A great deal of forensic evidence has been put to the jury during the trial. Evidence showed:

- the fingerprints of both co-accused were found on the murder weapon
- the blood of the girl was found in one of the co-accused's cars
- neither of the accused had an alibi (i.e. proof they were somewhere else at the time).

a Imagine you are a member of the jury for this trial. Write down as many 'fanciful, imaginary or unreasonable' doubts as you can.

b Describe why each of the doubts you have listed might be considered fanciful, imaginary or unreasonable.

c Now try to think of two or three reasonable doubts you may have based on the evidence provided.

Analyse and evaluate

5 In the 1760s, William Blackstone, an English judge, stated that 'it is better that ten guilty persons escape than that one innocent suffer'. Do you agree with this statement? Give reasons for your answer.

6 Bail seeks to balance the presumption of innocence and the protection of the community.

a Find one article or commentary that argues that the bail system achieves this goal and one article or commentary that argues it does not.

b What arguments are put forward in each article to support the writer's view?

c What is your view? Be prepared to discuss your view with your classmates.

Check your obook assess for these additional resources and more:

- » **Student book questions** 3.3 Check your learning
- » **Video** Criminal intent and the burden of proof
- » **Video worksheet** Criminal intent and the burden of proof
- » **Weblink** Magistrates' Court of Victoria

3.4 THE RIGHTS OF AN ACCUSED

The protection and promotion of human rights is an important part of the Australian legal system. A number of human rights are available to all Australians. These include:

- a right to freedom of political expression
- freedom of movement within Australia
- the right for an individual to enjoy their own cultural and religious practices.

Human rights in Australia also include rights available to people accused of crimes. One of these rights is the right to be presumed innocent until proven guilty. In this topic we will examine a number of others rights available to people accused of crimes.

Charter of Human Rights and Responsibilities

Human Rights Charter the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Its main purpose is to protect and promote human rights

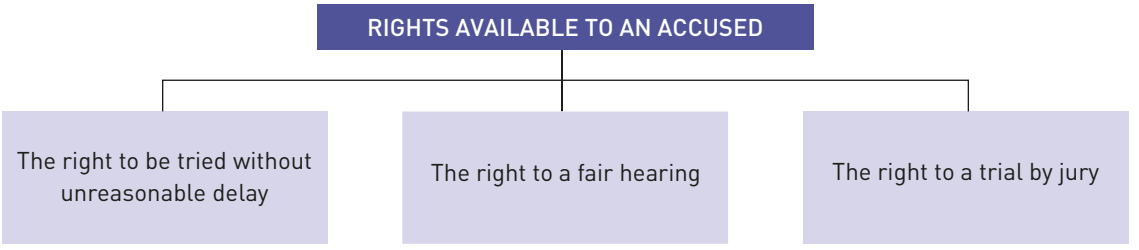
international treaty a legally binding agreement between countries or intergovernmental organisations which is in written form and is governed by international law

In Victoria a number of rights are protected by the *Charter of Human Rights and Responsibilities Act,* otherwise known as the **Human Rights Charter** (or the Victorian Charter of Human Rights). The main purpose of the Human Rights Charter is to **protect and promote human rights**. It is designed to ensure that any statute passed by the Victorian Parliament is compatible (i.e. does not interfere) with the human rights set out in the Charter.

The rights protected by the Human Rights Charter are based on those contained in the *International Covenant on Civil and Political Rights* 1966. This is an **international treaty** to which Australia is a signatory. Many of the rights in the Human Rights Charter mirror those in the Covenant, but a number have been modified slightly to suit Australia's existing laws.

Sections 23 to 27 of the Human Rights Charter contain rights that are available to an accused in criminal proceedings. They are only available to human beings, not to companies.

In addition to the rights contained in the Human Rights Charter, a number of rights contained in other statutes are available to an accused. Three of the rights available to an accused are shown in Source 1.



Source 1 Three rights available to an accused in a criminal case

Study tip

In the end-of-year examination, you may be expected to explain the three rights shown in Source 1.

You should become familiar with, and be able to explain, each of these rights, including the main source of those rights.

The right to be tried without unreasonable delay

The Human Rights Charter states that a person charged with a criminal offence is entitled without discrimination to a guarantee that he or she will be tried without unreasonable delay.

This means that an accused is entitled to have his or her charges **heard in a timely manner**, and that **delays should only occur if they are considered reasonable**. This right is 'without discrimination'. Every accused is entitled to this right regardless of their prior history or personal attributes such as age, breastfeeding, disability, gender identity, marital status or pregnancy.

The right recognises that there may be a delay in the case, but that delay must not be unreasonable. The term 'unreasonable delay' is not defined, but the reasonableness of any delay will depend on factors such as the complexity of the case and the legal issues involved.

Did you know?

So far, Victoria is the only state in Australia to have adopted a formal charter of human rights (in 2006). However, in 2004 the Australian Capital Territory passed a statute to protect many of the same rights contained in the Victorian Charter of Human Rights.



Source 2 The Human Rights Charter states that an accused is entitled to have his or her charges heard in a timely manner, and that delay should only occur if it is considered to be reasonable.

Study tip

You do not need to know the section numbers for the rights given under the Charter, but they are provided so you can locate and read the sections for your own learning.

This right is supported by Section 21(5) of the Human Rights Charter, which states that a person who is arrested or detained on a criminal charge has the right to be brought to trial without unreasonable delay. This is because, under the Charter, people have a basic right to liberty and security, and accused persons are presumed innocent until proven guilty. So people should not be held for an unreasonable amount of time while they are awaiting trial.

The Human Rights Charter also states that an accused child must be brought to trial as quickly as possible. A child is defined as a person under 18 years of age. Having a trial 'as quickly as possible' for an accused child, rather than a trial 'without unreasonable delay', which places a greater burden on the prosecution, is justified because of the impact that a trial may have on a child.

EXTRACT

Charter of Human Rights and Responsibilities Act 2006 (Vic)

21 Right to liberty and security of person

(5) A person who is arrested or detained on a criminal charge

(b) has the right to be brought to trial without unreasonable delay;

25 Rights in criminal proceedings

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees:

(c) to be tried without unreasonable delay;

One of the cases that has considered the right to be tried without unreasonable delay was *Gray v DPP* [2008] VSC 4 (16 January 2008), in which Kelly Gray was charged with a number of indictable offences arising out of an incident which occurred in November 2007. Gray applied for bail, and pointed to the delay that he was likely to experience before the trial was to occur as a reason to be granted bail. Justice Bongiorno of the Supreme Court of Victoria noted that the Human Rights Charter guarantees a timely trial, and the inability of the Crown to provide that trial had an effect on the question of bail. He found that the only remedy that the Supreme Court could provide an accused in this situation, where the Crown had failed to guarantee a timely trial, was to release him on bail.

Human Rights Law Centre

Source 3 The Human Rights Law Centre is an independent, not-for-profit, non-government organisation that aims to protect and promote human rights in Australia.

The right to a fair hearing

The Human Rights Charter entitles a person charged with a criminal offence to **have the charge decided by a competent, independent and impartial court after a fair and public hearing.**

There are two parts to this right:

1. A competent, independent and impartial court must decide the proceeding or charge. That means, for example, that every person has the right to have their case heard by a qualified and experienced judge or magistrate in an unbiased and objective manner.
2. A hearing must be fair, and public. Most court hearings are open to the public. This ensures that the trial and trial processes are transparent and not hidden in secrecy. If criminal cases were conducted in secret and confidentially, there would be no way for the public to know whether laws are applied properly and processes are fair. An open courtroom allows for public and media scrutiny of processes.



Source 4 The right to a fair hearing means that individuals have the right to have their case heard by a qualified and experienced judge, and that the hearing be fair and public.

In some circumstances a court may exclude members of media organisations or the general public from all or part of a hearing. For example, the Magistrates' Court has the power to make an order that proceedings are closed to the public if they will cause undue distress or embarrassment to a victim in a sexual offence case.

EXTRACT

Charter of Human Rights and Responsibilities Act 2006 (Vic)

24 Fair hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

Before the introduction of the Human Rights Charter, the courts recognised that a person is entitled to a fair trial. One important case discussing this right was the High Court case of *Dietrich v The Queen* (1992) 177 CLR 292.

LEGAL CASE

High Court orders retrial

Dietrich v The Queen (1992) 177 CLR 292

Olaf Dietrich was arrested after arriving from Thailand and charged with drug trafficking offences. He applied for legal aid, but was unsuccessful in obtaining representation for his trial. His trial in the County Court lasted approximately 40 days, after which the jury found him guilty. He appealed his conviction, but was refused leave. He appealed again to the High Court. The sole ground of the appeal was that the trial miscarried because he was not provided with legal representation.

The High Court agreed with Dietrich. They found that the trial judge should have delayed the trial until arrangements could be made for him to obtain legal representation, and because that did not happen, he was deprived of his right to a fair trial. The case is important because it establishes that the lack of legal representation when defending an indictable offence may result in an unfair trial.



Source 5 In the case of *Dietrich v The Queen*, Olaf Dietrich successfully appealed his conviction to the High Court on the grounds that he was not provided with legal representation and therefore did not receive a fair trial.

The right to trial by jury

The jury system provides for a trial by others in the community. This right dates back to well before the Magna Carta in England, established in 1215, which 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.



Source 6 Section 80 of the Australian Constitution states that any person who is charged with a Commonwealth indictable offence is entitled to a trial by jury.

The right to trial by jury is not protected by the Human Rights Charter, but rather protected in part by the Australian Constitution, and in part by statute law in Victoria.

Section 80 of the Australian Constitution states that any person who is charged with a Commonwealth indictable offence is entitled to a trial by jury. However, section 80 of the Australian Constitution provides only a limited right to trial by jury, because most indictable offences are crimes under state law, and this section only applies to Commonwealth offences. In addition, the Commonwealth Parliament can determine by statute which offences are 'indictable'.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)

80 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.

Did you know?

The Magna Carta is a document agreed to by the King of England in June 1215. It contains several rights still considered important today. It also upholds the fundamental principle that no one is above the law. No one knows how many copies were distributed, but four copies still survive, all of which are in the United Kingdom.

For Victorian indictable offences, the *Criminal Procedure Act* requires a jury to be empanelled where the accused had pleaded not guilty to the indictable offence. There is no right to a jury trial for summary offences. If a jury trial is required (i.e. an accused has pleaded not guilty to an indictable offence), then the *Juries Act 2000* (Vic) will govern the composition and responsibilities of the jury.

A criminal jury is made up of 12 jurors. The jury will hear the case and will need to reach a verdict on whether the accused is guilty or not guilty. The jurors must make a decision beyond reasonable doubt.

You will learn more about criminal jury trials in Chapter 4.

RIGHT	DESCRIPTION	MAIN SOURCE OF RIGHT
Right to be tried without unreasonable delay	An accused is entitled to have his or her charges heard in a timely manner. Any delay should be reasonable.	Sections 21 and 25(2)(c) of the Human Rights Charter
Right to a fair hearing	A person charged is entitled to have that charge decided by a competent, independent and impartial court, and the hearing must be both fair and public.	Section 24(1) of the Human Rights Charter
Right to trial by jury	A person charged with an indictable offence is entitled to be tried by his or her peers.	Section 80 of the Australian Constitution and Victorian statute law (including the *Criminal Procedure Act*)

Source 7 A summary of three rights of an accused

→ GOING FURTHER

A number of other rights protected by the Human Rights Charter are available to an accused. They include:

1. the right to be informed promptly and in detail of the nature of the charges and the reason for bringing the charges, in a language or type of communication that the accused speaks or understands (Section 25[2a])
2. the right to have adequate time and facilities to prepare a defence and to communicate with a lawyer or advisor of the accused's choice (Section 25[2b])
3. the right to examine witnesses against the accused, or have them examined (Section 25[2g])
4. the right to have the free assistance of an interpreter, if the accused cannot understand or speak English (Section 25[2i])
5. the right not to be tried or punished more than once for the same offence (Section 26).

The last right listed above is also known as the 'double jeopardy rule'. It means that a person who has already been found not guilty cannot be tried again. However, laws were passed in Victoria in 2011, which created exceptions to this rule where there is fresh and compelling evidence, or where the trial has been found to have been tainted.

3.4 CHECK YOUR LEARNING

Define and explain

1 What are human rights?

2 Identify the main source of law protecting human rights in Victoria. What international treaty are these rights based on?

3 **a** Describe three rights that are available to an accused in a criminal proceeding.

b Explain any exemptions or exceptions for each right.

4 How does a right to a trial by jury for an indictable offence uphold equality?

5 What is meant by the term 'unreasonable delay', and what delays may be considered 'reasonable'?

Synthesise and apply

6 Your friend has been charged with drink driving, and believes she is entitled to a jury trial under the Australian Constitution. Is she correct? Justify your answer.

7 In *Gray v DPP*, how did Justice Bongiorno attempt to remedy the fact that there may not be a timely trial?

8 Look back at the legal case *Dietrich v The Queen* and complete the following tasks:

a As a class, write down all the questions that you have about this case on separate sticky notes (or small pieces of paper). For example:

- 'Was there a retrial?'
- 'Where is he now?'
- 'Why should an accused be entitled to legal representation?'

b When the whole class has finished, use a wall or the whiteboard in your classroom to put up all of your questions. If any questions are similar (or exactly the same), group those together.

c Once you are done, choose the top five questions that people most want to know the answers to.

d Form five groups. Your teacher will assign you one of the questions. Spend 10 minutes researching and discussing the answer.

e Share the results of your research with the other groups in your class.

Analyse and evaluate

9 Conduct a debate or engage in a class discussion about one of the following two statements. When conducting the debate or discussion, ensure there is reference made to the principles of justice.

a All criminal trials and hearings should be determined by a jury.

b All people should have legal representation in criminal trials and hearings, regardless of the seriousness of the offence.

10 You have met several people who do not believe that an accused should have any rights. They refer to a number of criminals who have recently been convicted for violent crimes. Create a list of three arguments that you might use to convince those people that rights are necessary for everyone.

11 'There should be a mandatory time by which cases should be determined, and if that time passes, the charges should not be able to proceed'. To what extent do you agree with this statement? Give reasons.

Check your obook assess for these additional resources and more:

» **Student book questions**
3.4 Check your learning

» **Going further**
The right to silence

» **Weblink**
Victoria's Charter of Human Rights and Responsibilities

3.5 THE RIGHTS OF VICTIMS

victim
a person who has suffered directly or indirectly as a result of a crime

Victims' Charter
a charter (i.e. the *Victims' Charter Act 2006* (Vic)) that recognises the impact of crime on victims and provides guidelines for the provision of information to victims

Although the **victim** is not a party in a criminal case, there has been widespread recognition that not only should there be rights for an accused, but victims of crime and their rights should also be recognised in a criminal case.

Victims' Charter

The rights of victims are recognised by a number of statutes in Victoria, including the *Victims' Charter Act 2006* (Vic), known as the **Victims' Charter**. Some of the objectives of the Victims' Charter are to recognise the impact of crime on victims, to recognise that victims should be offered certain information during the investigation and prosecution process, and to help reduce the likelihood of secondary victimisation that may be experienced by the victim as a result of their interaction with the criminal justice system.

The Victims' Charter defines 'victim' broadly. Depending on the crime, a victim can include:

- a person who has suffered injury as a direct result of a criminal offence (often called the 'primary victim')
- a family member of a person who has died as a direct result of a criminal offence
- a family member of a person who is under 18 years of age or is incapable of managing his or her own affairs because of mental impairment, and that person has suffered injury as a direct result of a criminal offence
- a child under the age of 16 years who has been groomed for sexual conduct, as well as that child's family.

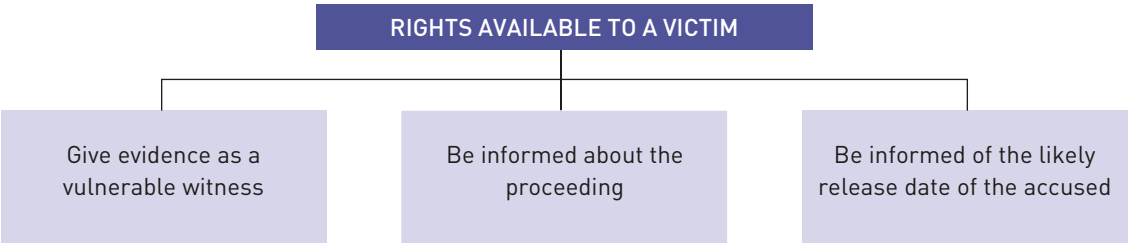
The Victims' Charter sets down principles such as respectful treatment of victims, respect for victims' privacy, and ensuring victims are given information about any criminal case brought to court. However, a breach of those rights does not entitle the victim to take civil action to enforce them.

In addition to the principles contained in the Victims' Charter, a number of other statutes provide some protections for victims, and can be considered to be rights available to victims.

Three of the rights given to victims are listed in Source 1. These will be discussed in more depth in this topic.

Study tip

In the end-of-year examination, you may be asked about the rights of victims listed in Source 1. You should be able to say where the rights come from as well as explain what they are.



Source 1 Three rights available to a victim in a criminal case

vulnerable witness
a person who is required to give evidence in a criminal case and is considered to be impressionable or at risk. This might be a child, a person who has a cognitive impairment, or the alleged victim of a sexual offence

The right to give evidence as a vulnerable witness

In some criminal cases, a victim may be a witness in the criminal case. If so, they will have to give evidence in support of the prosecution's case against the accused.

A number of sections in the *Criminal Procedure Act* aim to protect **vulnerable witnesses**. Why are some witnesses considered vulnerable? The laws recognise that giving evidence in a formal courtroom

in particularly sensitive cases (e.g. cases involving a sexual offence) may make the victim uncomfortable, therefore possibly jeopardising the evidence that they give and adding to the trauma they may have already suffered. These people are particularly vulnerable, impressionable or at risk, and the laws provide some protections to them for when they give evidence.

The protections available under the *Criminal Procedure Act* can be broken down into the following:

- alternative arrangements that can be made for a witness to give evidence in particular cases (e.g. sexual offence cases)
- a declaration that a person is a **protected witness**
- special arrangements that can be made for witnesses under the age of 18 years or with a cognitive impairment.

Further, the *Evidence Act 2008* (Vic) gives the court the power to disallow improper questions put to certain witnesses.

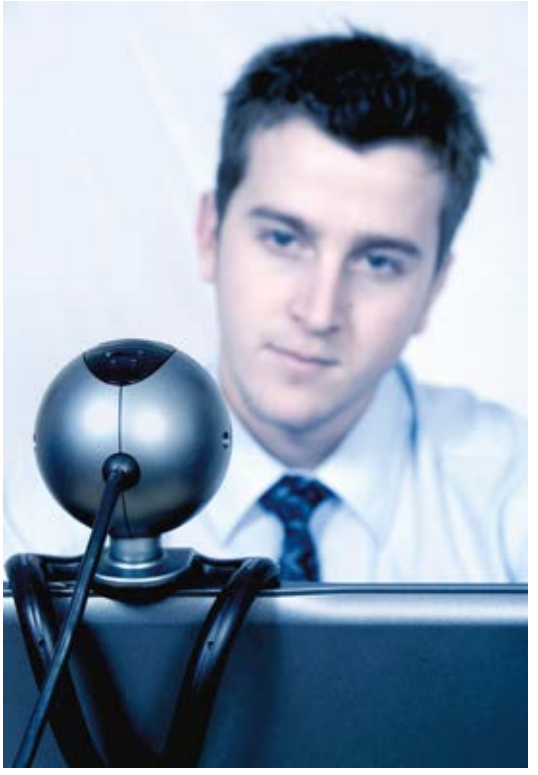
Alternative arrangements

The court can direct alternative arrangements to be made for a witness to give evidence in criminal proceedings for:

- a sexual offence
- a family violence offence
- an offence for obscene, indecent, threatening language or behaviour in public
- an offence for sexual exposure in a public place.

Types of alternative arrangements include:

- the witness may give evidence from a place other than the courtroom by means of closed-circuit television (or other like facilities)
- screens may be used to remove the accused from the direct line of vision of the witness
- a support person may be chosen by the witness to be there while giving evidence
- only certain persons may be allowed in court when the witness is giving evidence
- legal practitioners may be required not to be formally dressed in robes, or may be required to be seated while asking the witness questions.



Source 2 A witness may give evidence from a place other than the courtroom by means of closed-circuit television.

If the witness is the **complainant**, many of the above protections are automatically available, unless he or she does not want them.

The purpose of these arrangements is to ensure that the witness is protected from unnecessary contact with the accused, and is not placed in a position where they are scared or give unreliable evidence because of the trauma they suffer in doing so. This is particularly so in cases involving charges for sexual offences and family violence, where the trauma and injuries sustained may be significant.

Did you know?

Victoria now has a Victims of Crime Commissioner. This role has been created to improve services and systems across Victoria so that they are better able to meet the needs of people who have been the victims of crime. A link to the Victims of Crime Commissioner website is provided on your obook assess.

protected witness
a person who is to give evidence in a sexual offence or family violence offence case and is either the complainant, a family member of the complainant or the accused, or any other witness the court declares to be a protected witness

complainant
a person against whom an offence is alleged to have been committed (a person who has complained to the police)

Protected witnesses

The court is able to declare at any time that a witness is a protected witness in criminal proceedings for:

- a sexual offence
- a family violence offence.

A protected witness may be the complainant, a family member of the complainant, a family member of the accused, or any other witness the court declares to be a protected witness.

Once the declaration is made, the protected witness must not be cross-examined by the accused (which involves questioning the witness about his or her story). Instead, the **cross-examination** must be conducted by the accused's legal representative. If the accused does not have any legal representation (i.e. he or she is self-represented), the court must order **Victoria Legal Aid** (VLA) to provide legal representation for the accused for the purposes of cross-examination.

These measures ensure that the protected witness does not have any direct communication with the accused in court. It avoids the situation where the accused can cross-examine their victim about the evidence they have given.

cross-examination
the questioning of a witness called by the other side in a legal case

Victoria Legal Aid (VLA)
a government agency that provides free legal advice to the community and low-cost or no-cost legal representation to people who can't afford a lawyer

Special arrangements for persons under the age of 18 years or with a cognitive impairment

Special protections are also available to witnesses under the age of 18 years, or with a **cognitive impairment**, in criminal proceedings for:

- a sexual offence
- an indictable offence involving assault on, or injury or threat of injury to a person
- offences involving minor assaults where those assaults relate to one of the above two offences.

These witnesses will be allowed to give their **examination-in-chief** by way of audio or audio-visual recording. That recording may then be provided to the accused, who will have a reasonable opportunity to hear it or view it.

Additional protections are available to a complainant in a proceeding for a sexual offence, where the complainant is under 18 years of age or has a cognitive impairment. The protections include being able to give evidence at a special hearing conducted in a way that:

- the accused is not in the same room as the complainant for the special hearing
- the accused is not entitled to see and hear the complainant while the complainant is giving evidence
- no unauthorised person is to be present in the courtroom while evidence is being given
- the evidence must be given on closed-circuit television
- the complainant is not to be questioned unless the court gives leave (that is, the court must make an order saying that this is allowed).

These protections recognise that children and persons with a cognitive impairment are particularly vulnerable, and as much protection should be afforded to them as possible while they are giving evidence. The protections aim to reduce the exposure of vulnerable witnesses to the accused, to the formality of the courtroom, and to any fear they may feel as a result of giving evidence about a crime they have been affected by.

Legislation was passed in 2017 which will mean that these special arrangements can also be available in cases involving family violence offences.

cognitive impairment
an issue with brain functioning that can affect thinking, memory, understanding or communication (for example, an acquired brain injury or dementia)

examination-in-chief
the questioning of one's own witness in court in order to prove one's own case and disprove the opponent's case

Did you know?

In South Australia, special arrangements for giving evidence are available to a wider group of people than in Victoria. Protected witnesses include victims of serious offences against the person, and witnesses who have been threatened.

Improper questions

In addition to the above protections, the *Evidence Act* gives the power to the court when a vulnerable witness is being cross-examined to disallow improper questions. Improper questions include questions that are confusing, harassing, intimidating, offensive or humiliating. This power is available to the court in any type of cases (not just cases involving sexual offences). Further, a vulnerable witness includes any person under the age of 18 years, a person with a cognitive impairment or intellectual disability, or a witness whom the court considers vulnerable.

A summary of the protections that may be available to vulnerable witnesses is set out in Source 3 below.

TYPES OF OFFENCES	AVAILABLE TO	PROTECTIONS AVAILABLE
• Sexual offences • Family violence offences • Offences for obscene, indecent, threatening language or behaviour in public • Offences for sexual exposure in a public place	• All witnesses, if the court makes an order • The protections are automatically available to the complainant, unless he or she does not want them	Alternative arrangements to give evidence, such as: • by way of closed-circuit television • using screens • allowing a support person to be beside the witness • only allowing certain persons to be present when evidence is given • removing formalities applicable to legal practitioners.
• Sexual offences • Family violence offences	• All witnesses if the court so declares	Declaration that a person is a protected witness, and therefore the accused cannot cross-examine him or her.
• Sexual offences • Indictable offence involving assault on or injury or threat of injury to a person • Offences involving minor assaults	• Witnesses under the age of 18 years • Witnesses with a cognitive impairment	Witnesses are able to give their examination-in-chief by way of audio or audio-visual recording.
• Sexual offences	• Complainants under the age of 18 years • Complainants with a cognitive impairment	Witnesses are able to give their evidence at a special hearing, which means that: • the accused is not in the same room as the witness • the accused is not entitled to see or hear the witness • no unauthorised person is to be present • the witness is not to be cross-examined or re-examined unless the court grants leave.
• All offences	• A person under the age of 18 years • A person who has a cognitive impairment or intellectual disability • A person the court considers to be vulnerable	Court can allow improper questions being put to a vulnerable witness in cross-examination.

Source 3 A summary of protections available to vulnerable witnesses

The right to be informed about the proceedings

The Victims' Charter recognises that persons adversely affected by crime are **entitled to certain information about the proceeding and about the criminal justice system**.

The Victims' Charter requires investigatory agencies, prosecuting agencies and victims' services agencies (which includes police officers, the DPP, and the Victims of Crime Commissioner) to provide clear, timely and consistent information about support services, possible compensation entitlements, and the legal assistance available to persons adversely affected by crime.

In addition, the Victims' Charter requires an investigatory agency (a body which conducts a criminal investigation, such as the Victoria Police) to inform a victim, at reasonable intervals, about the progress of an investigation into a criminal offence. The information does not need to be given if it may jeopardise the investigation, or if the victim chooses not to receive that information.

Once a prosecution has commenced, the Victims' Charter requires the prosecution to give a victim the following information:

- details of the offences charged against the person
- if no offence is charged, the reason why
- how the victim can find out the date, time and place of the hearing of the charges
- the outcome of the criminal proceeding, including any sentence imposed
- details of any appeal.

The victim must also be told that they are entitled to attend any court hearings.

These requirements recognise that victims may wish to be kept informed about a criminal case that has affected them. Often they will want to know what offences the accused has been charged with, the verdict, and the sanction imposed, as they want to see justice done.

IN THE NEWS

Vic victims' families denied compensation

Aneeka Simonis, *news.com.au*, 14 February 2017

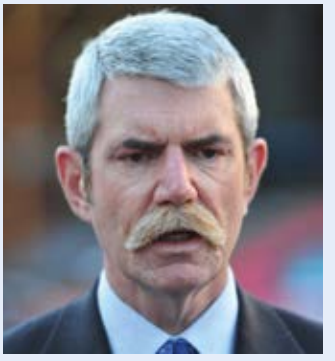
Victoria's government is blocking the release of crucial documents families of murder victims need for compensation claims, their lawyer says.

Ten families are chasing the state government for compensation after their loved ones were murdered or sexually assaulted by offenders who were on parole.

Shine Lawyers' Paula Shelton says parolees' criminal and treatment histories are not being released to families, stalling the claim process.

'We can't get to a point of settlement until we access those documents,' Ms Shelton told AAP on Tuesday.

She said Adult Parole Board and Department of Justice documents are being refused on privacy grounds.



Source 4 Mr Greg Davies is Victoria's first Victims of Crime Commissioner.

'Some of these families have suffered significant psychological injuries as a result of these crimes. Some have never gone back to work,' Ms Shelton said.

The families include those of murder victims Sarah Cafferkey, Dermot O'Toole, Raechel Betts, Joanne Wicking, Evan Rudd, Douglas Phillips, Elsa Janet Corp, and Sharon Denise Siermans.

Ms Shelton says the group are considering legal action.

Victims of Crime Commissioner Greg Davies told 3AW the system needs to be reviewed because it puts violent criminals' rights to privacy above victims' rights.

'I don't think victims should have to try take the government to court to get some sort of reparation, financial or otherwise,' he told 3AW.

'The system needs to be made better. People are dying because it's not good enough.'

Premier Daniel Andrews would not say why the documents were being withheld.

He said he was limited in what he could say because the matters are still before the courts.

'Our thoughts are always with them (the victims' families) and the pain they must endure each and every day,' he told reporters.

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

A person who is a victim of a **criminal act of violence** may apply to be included on the **Victims Register**. The criminal acts of violence are identified in Source 5.

Rape and other sexual offences	Aggravated burglary	Kidnapping
Stalking	Child stealing	Offences involving assault or injury punishable by imprisonment
Culpable driving causing death	Dangerous driving causing death or serious injury	Failing to stop after a motor vehicle accident causing death or serious injury

Source 5 Criminal acts of violence

A person who is registered on the Victims Register may receive certain information about an offender who has been imprisoned, including their likely date of release, and (if applicable) their release on **parole**. The information must be provided at least 14 days before the release of the prisoner.

The offender's release date is likely to be of interest to a victim who has suffered violence from that person.

Other rights may be available to a victim on the Victims Register, including the right to know the length of sentence, the right to be told if the offender escapes from prison, and the right to make a submission if the imprisoned offender may be released on parole.

Victims Register
a register (i.e. database) maintained by the state of Victoria set up to provide the victims of violent crimes with relevant information about adult prisoners while they are in prison (e.g. the prisoner's earliest possible release date)

parole
the supervised and conditional release of a prisoner after the minimum period of imprisonment has been served



Source 6 Christopher Austin, a registered sex offender, escaped from a Melbourne residential treatment facility in November 2016. Victims on the Victims Register would have been entitled to know about this. He was soon captured.

RIGHT	DESCRIPTION	SOURCE OF RIGHT
Right to give evidence as a vulnerable witness	Certain victims who are witnesses may be entitled to be considered vulnerable and therefore able to give evidence by alternative means.	Various provisions of the *Criminal Procedure Act* and the *Evidence Act*
Right to be informed about the proceedings	Victims are entitled to be informed at reasonable intervals about the progress of an investigation into a criminal case (unless they do not want that information, or that information may jeopardise the investigation). Once a prosecution has commenced, victims should be informed about the charges, hearing dates and times, outcomes, sentences and details of any appeal.	Sections 7, 8 and 9 of the Victims' Charter
Right to be informed of the likely release date of the accused	If a person is a victim of a criminal act of violence and are on the Victims Register, they may receive information about the likely release date of the imprisoned offender.	Section 17 of the Victims' Charter

Source 7 A summary of three rights of victims

→ GOING FURTHER

A number of other rights are protected by the Victims' Charter and available to victims. They include:

1. the right to be informed of the outcome of any application for bail by the accused, and the conditions of any bail that are intended to protect the victim or his or her family members (Section 10[1])
2. the right to have exposure to the accused minimised, including contact with defence witnesses and family members and supporters of the accused (Section 12[a])
3. the right to make a **victim impact statement** (Section 13)
4. the right to have personal information kept private (Section 14).

You will find further details about victim impact statements in Chapter 4.

victim impact statement
a statement filed with the court by a victim, and considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

3.5 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by the Victims' Charter, and who is a victim under that charter.

2 Is a victim entitled to receive information about the likely release date of a prisoner? Explain your answer.

3 Will a victim always be entitled to information about an investigation? Justify your answer.

Synthesise and apply

4 Create a poster or visual diagram which shows the various protections that may be available to a witness giving evidence in a sexual offence case. The poster should show whether each protection is available to all witnesses, to a complainant, or to persons with a particular vulnerability.

5 For each of the scenarios below, state whether each of the witnesses is entitled to the protections they seek.

a Darryl saw Alice disturbing a place of religious worship, which is a summary offence. Darryl has been called as a witness and he wants to give evidence by way of closed-circuit television.

b Amanda is a witness for the prosecution in a proceeding where Samantha has been charged with singing an obscene song (the offence of using obscene, indecent, threatening language or behaviour). Amanda wants to be declared a protected witness, and she wants her mother by her side while she is giving evidence.

c Anita has been charged with rape. The complainant is 15 years of age and wants a special hearing at which to give evidence. The complainant also does not want the accused to cross-examine her.

d Anis witnessed a murder, for which Andrew has been charged. Anis does not want any legal practitioners formally robed while he is giving evidence.

e Harriet is the complainant in a family violence case. She agrees to be in the courtroom when she gives evidence, but she doesn't want to see the accused when she does so.

6 Read the article 'Vic victims' families denied compensation'.

a Who are the victims in this case?

b What are they seeking?

c What are the injuries they are alleged to have suffered?

d What is Greg Davies' view?

e Describe some reasons why you think the documents sought might be withheld (you might wish to undertake some further research about this case).

Analyse and evaluate

7 A breach of the Victims' Charter does not entitle the victim to take civil action to enforce those rights. Do you think it should? Discuss with another person in your class.

8 Discuss the extent to which Victoria's laws protect potentially vulnerable witnesses when they give evidence. In your answer, consider whether there are any other types of witnesses who may be vulnerable, but do not have any of those rights available to them.

Check your obook assess for these additional resources and more:

- **Student book questions**
  3.5 Check your learning
- **Going further**
  Victims of Crime Assistance Tribunal
- **Weblink**
  Victims of Crime Commissioner



CHAPTER 3

REVIEW

CHAPTER SUMMARY

> **The distinction between summary offences and indictable offences**
  - Summary offences – minor criminal offences heard before a magistrate in the Magistrates' Court. There is no jury.
  - Indictable offences – serious criminal offences heard before a judge (and a jury if the accused pleads not guilty) in the County Court or Supreme Court.
  - Some indictable offences can be heard in the Magistrates' Court as if they were summary offences.

> **The burden of proof**
  - The burden of proof refers to the party that has to establish the facts of the case.
  - In a criminal case, the burden of proof lies with the prosecution.
  - The burden of proof can be reversed in some circumstances.

> **The standard of proof**
  - 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.
  - The standard of proof applicable to an accused is on the balance of probabilities.

> **The presumption of innocence**
  - A guarantee that an accused will be assumed to be innocent until the charge has been proved beyond reasonable doubt.

> **The rights of an accused**
  - The right to be tried without unreasonable delay.
  - The right to a fair hearing.
  - The right to trial by jury.

> **The rights of victims**
  - The right to give evidence as a vulnerable witness.
  - The right to be informed about the proceedings.
  - The right to be informed of the likely release date of the accused.

REVISION QUESTIONS

1 Define the terms 'burden of proof' and 'standard of proof'.
(2 marks)

2 Distinguish between an indictable offence and a summary offence.
(3 marks)

3 Describe two principles of justice.
(4 marks)

4 Explain the circumstances in which a victim may be entitled to know about the release date of an imprisoned offender.
(4 marks)

5 Micah is the complainant in a criminal proceeding related to a charge for a sexual offence. He is nervous about giving evidence. Explain two possible protections that may be available to Micah when giving evidence.
(4 marks)

6 To what extent is there a right to a trial by jury in Victoria? Justify your answer.
(5 marks)

7 Give two reasons why an accused is entitled to certain rights in a criminal case. In your answer, provide one example of a right available to an accused.
(5 marks)

8 Identify one right available to an accused and one right available to a victim in a criminal proceeding. In your answer, explain how these rights uphold one or more of the principles of justice.
(6 marks)

obook assess

Check your obook assess for these additional resources and more:

» **Student book questions**
Ch 3 Review

» **Revision notes**
Ch 3

» **assess quiz**
Ch 3
Test your skills with an auto-correcting multiple-choice quiz

» **Video tutorial**
How to tackle scenario-based questions

PRACTICE ASSESSMENT TASK

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

SIMON'S TRIAL

Judith, 23, is the victim of a sexual offence. After a lengthy investigation, Victoria Police has charged Simon, 25, with four counts of sexual assault. Simon is Judith's ex-boyfriend, and has pleaded not guilty to all four counts.

The DPP has three witnesses in its case against Simon: Judith, Judith's friend, Andrew, who was at the premises at the time at which Judith alleges the sexual assault occurred, and Judith's mother, Sally, who was the first person to see Judith when she got home. Sally helped Judith get to the local hospital.

Judith was not given any information by the police during the investigation, nor were Sally or Andrew. She is confused about much of the legal terminology, and she is not able to afford legal representation to help her understand what is happening. However, all three witnesses have been provided with significant information about Simon's upcoming trial, including the date and time, and Judith has found staff members at the OPP to be very helpful. Judith is nervous about giving evidence, and is not sure what her rights are when it comes to the way she is to give that evidence. She does not want to see Simon during the trial, or have any direct communication with him. Sally is happy to be in the courtroom while giving her evidence, and she doesn't mind if she sees Simon when doing so, but she is nervous about all the formalities that come with a trial. Andrew wants to have his evidence recorded so that he doesn't have to attend.

Simon is represented by a well-known criminal lawyer in Melbourne, and is aware of his rights to have a fair trial. He has significant funds to defend himself. He wants a closed trial, as he does not want his name smeared any further, and he wants the trial, which will be in the County Court, heard quickly. He is already frustrated by all the delays that have occurred.

Practice assessment task questions

1 Identify in the above case study the complainant, the prosecution, the accused and the primary victim.
(2 marks)

2 Has Simon been charged with summary offences or indictable offences? Justify your answer.
(2 marks)

3 Identify the party that has the burden of proof in this case, and the extent to which that party needs to prove the case.
(2 marks)

4 Simon believes he is entitled to a right to trial by jury because of the Australian Constitution. Is this true? Justify your answer.
(2 marks)

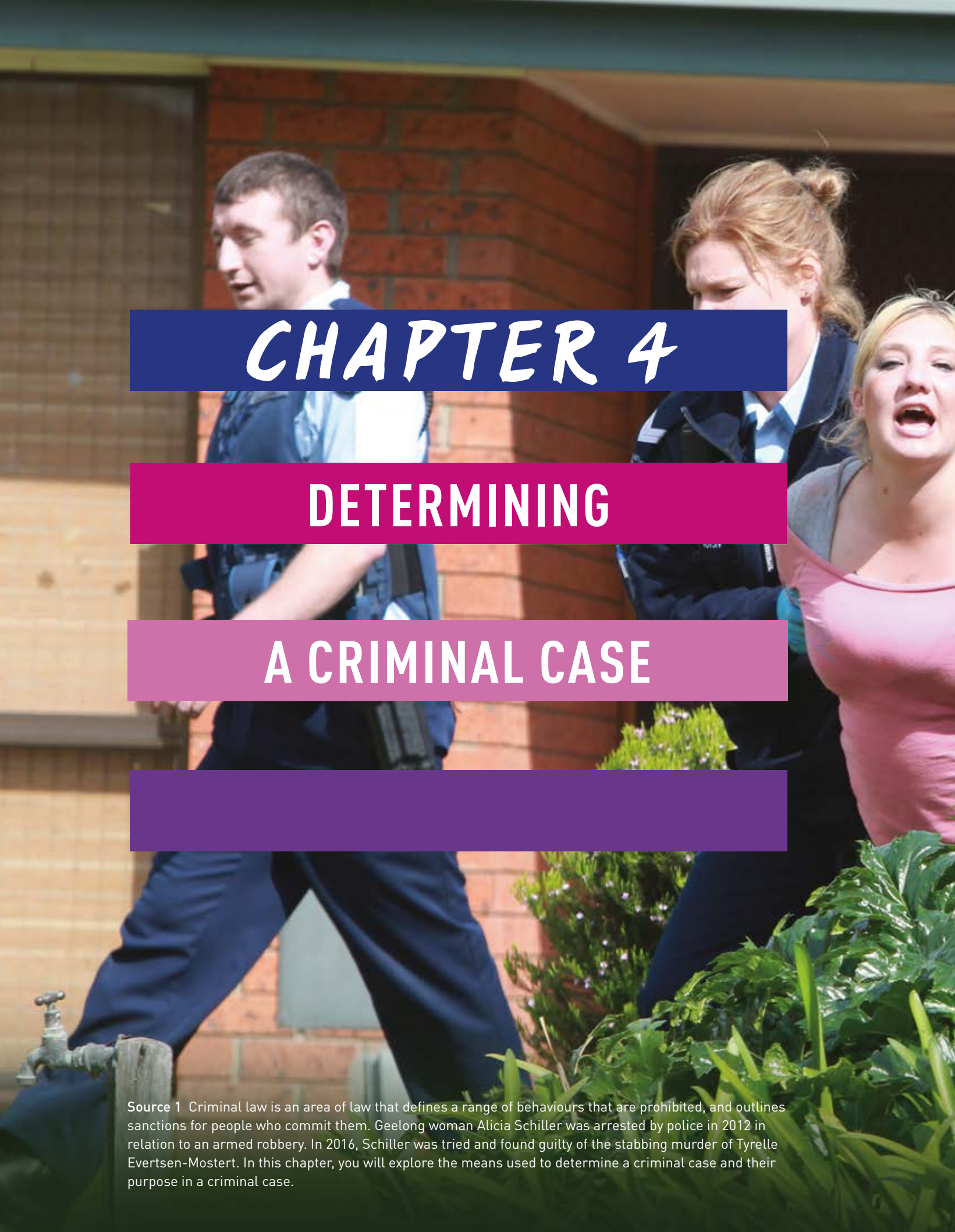
5 Will Andrew be able to give his evidence by way of a recording? Give reasons for your answer.
(3 marks)

6 Simon wants a quick trial which is closed to the public. Explain the extent to which he will be entitled to both those rights under the Human Rights Charter.
(4 marks)

7 Explain whether there are rights available to Sally and Judith to give evidence in a way that alleviates their concerns.
(4 marks)

8 Discuss the extent to which you believe that justice has so far been achieved in this case, having regard to the access that Judith and Simon have to the criminal justice system.
(6 marks)

Total: 25 marks



CHAPTER 4

DETERMINING A CRIMINAL CASE

Source 1 Criminal law is an area of law that defines a range of behaviours that are prohibited, and outlines sanctions for people who commit them. Geelong woman Alicia Schiller was arrested by police in 2012 in relation to an armed robbery. In 2016, Schiller was tried and found guilty of the stabbing murder of Tyrelle Evertsen-Mostert. In this chapter, you will explore the means used to determine a criminal case and their purpose in a criminal case.



OUTCOME

By the end of **Unit 3 – Area of Study 1** (i.e. Chapters 3, 4 and 5), you should be able to explain the rights of the accused and of victims in the criminal justice system, discuss the means used to determine criminal cases and evaluate the ability of the criminal justice system to achieve the principles of justice.

KEY KNOWLEDGE

In this chapter, you will learn about:

- the role of institutions available to assist an accused, including Victoria Legal Aid and Victorian community legal centres
- the purposes of committal proceedings
- the purposes and appropriateness of plea negotiations and sentence indications in determining criminal cases
- the reasons for a Victorian court hierarchy in determining criminal cases, including specialisation and appeals
- the responsibilities of key personnel in a criminal trial, including the judge, jury, parties and legal practitioners
- the purposes of sanctions: rehabilitation, punishment, deterrence, denunciation and protection
- fines, community corrections orders and imprisonment, and their specific purposes
- factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements.

KEY SKILLS

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

- define and use relevant legal terminology
- discuss, interpret and analyse legal principles and information
- explain the purposes of committal proceedings and the roles of institutions available to assist an accused
- explain the reasons for the Victorian court hierarchy in determining criminal cases
- discuss and justify the appropriateness of the means used to determine a criminal case
- discuss the responsibilities of key personnel in a criminal trial
- discuss the ability of sanctions to achieve their purposes
- evaluate the ability of the criminal justice system to achieve the principles of justice
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

KEY LEGAL TERMS

committal hearing a hearing that is held as part of the committal proceeding. At the committal hearing, the magistrate will decide whether there is sufficient evidence to support a conviction for the offence charged

committal proceeding the processes and hearings that take place in the Magistrates' Court for indictable offences

community correction order (CCO) a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

community legal centre (CLC) an independent organisation that provides free legal services to people who are unable to pay for those services. Some are generalist CLCs and some are specialist CLCs

denunciation one purpose of a sanction; a process by which a court can demonstrate the community's disapproval of the offender's actions

deterrence one purpose of a sanction; a process by which the court can discourage the offender and others in the community from committing similar offences

fine a sanction that requires the offender to pay an amount of money to the state

imprisonment a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

legal aid legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

plea negotiations (in criminal cases) pre-trial discussions that take place between the prosecution and the accused, aimed at resolving the case by agreeing on an outcome to the criminal charges laid (also known as charge negotiations)

punishment one purpose of a sanction; a strategy designed to penalise (i.e. punish) the offender and show society and the victim that criminal behaviour will not be tolerated

sanction a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

Victoria Legal Aid (VLA) a government agency that provides free legal advice to the community and low-cost or no-cost legal representation to people who can't afford a lawyer

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–viii.

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4.1 THE ROLE OF INSTITUTIONS AVAILABLE TO ASSIST AN ACCUSED

criminal justice system
a set of processes and institutions used to investigate and determine criminal cases

accused
a person charged with a criminal offence

burden of proof
the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

Victoria Legal Aid (VLA)
a government agency that provides free legal advice to the community and low-cost or no-cost legal representation to people who can't afford a lawyer

community legal centre (CLC)
an independent organisation that provides free legal services to people who are unable to pay for those services. Some are generalist CLCs and some are specialist CLCs

The **criminal justice system** can be difficult to understand without legal assistance. Often an **accused** hasn't had experience with the criminal justice system, doesn't know their rights, and doesn't understand key concepts such as the **burden of proof**.

The High Court has ruled that if a person is charged with a serious indictable offence and, through no fault of their own, is unrepresented, they should be given the opportunity to seek legal representation. This is based on the principle that every accused person has the right to receive a fair trial, and that legal representation is necessary for a fair trial of a serious criminal offence. A court can adjourn a trial if the accused doesn't have legal representation, can't afford a lawyer and won't get a fair trial if they aren't represented.

If an accused can't afford legal representation, government-funded institutions such as **Victoria Legal Aid (VLA)** and Victorian **community legal centres (CLCs)** may be able to help them.

Victoria Legal Aid

VLA is a government agency that provides free legal advice to the community, and low-cost or no-cost legal representation for people who can't afford to pay for a lawyer. VLA helps people with legal problems, and focuses on people who need it the most and can't get legal assistance any other way.

VLA's vision is a **fair and just society where rights and responsibilities are upheld**. Its purpose is to make a difference by resolving and preventing legal problems, and encouraging a fair and transparent justice system.



Source 1 The high cost of the justice system and the need for legal aid has been an issue in Victoria for more than 100 years.

Role of VLA

The objectives of VLA are to:

- provide **legal aid** in the most effective, economic and efficient manner
- manage its resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout Victoria
- provide the community with improved access to justice and legal remedies
- pursue innovative means to provide legal aid to minimise the need for individual legal services in the community.

The most critical role VLA plays is to provide legal aid to accused people. In the 2015–16 financial year, VLA helped 86 847 different clients (i.e. people who accessed one or more legal services). Of these, 48 511 clients were assisted in criminal cases.

'Legal aid' includes legal education and information, legal advice and legal representation. Legal advice is normally limited to advice and information about the law and how it applies to a particular case. It doesn't necessarily mean the lawyer giving that advice formally represents the accused. Legal representation means that VLA will 'represent' the accused in the case (that is, VLA will be on record as the accused's lawyer).

Did you know?

Free legal aid has existed in Victoria for more than 100 years. In 1978, the Legal Aid Commission of Victoria was set up as an independent statutory body (after the Victorian Parliament passed the *Legal Aid Act 1978* [Vic]). In 1995, it changed its name to Victoria Legal Aid.

An accused may be provided with one or more of these forms of legal aid through VLA. 'Legal aid' can include a lot more than just receiving legal representation in court. In fact, a person may be given legal aid in the form of education, advice and information without being formally represented by VLA.

As well as providing legal aid, VLA's other roles are to:

- control and administer the Legal Aid Fund (which contains the money available to VLA)
- in cooperation with government bodies and departments, meet the needs of the community for legal aid
- make recommendations about **law reform**
- design and implement educational programs to promote understanding by the public of their rights, powers, privileges and duties under **laws**
- research legal aid issues.

VLA funding is criticised for not being enough to meet the demands for legal services. Because of a lack of funding, a large part of the community is ineligible for legal aid and people are forced to defend themselves in criminal cases.

legal aid
legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

law reform
the process of constantly updating and changing the law so it remains relevant and effective

laws
legal rules made by a legal authority that are enforceable by the police and other agencies

→ GOING FURTHER

Legal Aid Fund

VLA has two main sources of funding:

- the Victorian and Commonwealth Governments. In the 2015–16 financial year, VLA received $140.7 million in government funding: $91.3 million from the Victorian Government, and $49.4 million from the Commonwealth Government
- the Public Purpose Fund (PPF), a Victorian fund to meet the costs of regulating the legal profession in Victoria and fund the VLA. The funds come from lawyers and legal practices. In the 2015–16 financial year, VLA received $28.3 million in income from the PPF.

Did you know?

Prior to 1928, legal aid in Victoria was only available to prisoners or the very poor (those who owned property worth less than 50 pounds). More than 50 per cent of people were turned away because they were ineligible for legal aid.

IN THE NEWS

Victoria Legal Aid calls for $72 million funding boost

Tom Minear, *Herald Sun*, 11 April 2016

FAMILY violence victims are among tens of thousands of Victorians who are forced to defend themselves in court after being denied legal help.

Victoria Legal Aid says it needs an extra $72 million every year to relieve the 'crushing pressure' on community lawyers to properly help victims of crime and disadvantaged people.

The funding demand underpins VLA's submission to the State Government's Access to Justice review, which has revealed gaping holes in the state's legal system.

The Federation of Community Legal Centres said its lawyers were forced to turn away 32,495 people last year.

CLCs experienced a 329 per cent increase in their family violence workload over the last decade but the sector is facing a 30 per cent federal funding cut from July next year.

VLA is calling for an extra $42 million from the Andrews Government and $30 million from the Turnbull Government.

'Not providing legal aid simply costs taxpayers more in the long run,' VLA Managing Director Bevan Warner said.



Source 2 Bevan Warner, Managing Director, Victoria Legal Aid

Types of legal aid

For criminal matters, some services are available to everyone, but others are available only to people who need it the most and meet VLA's guidelines.

ASSISTANCE	DESCRIPTION	AVAILABLE TO
Free legal information	VLA's website has free publications and resources, information about criminal cases, and a public law library that includes case law and other legal materials. Legal information is also available over the phone.	Everyone.
Free legal advice	Advice is provided in person, by video conference or over the phone.	VLA's focus for in-person advice is on people who need legal advice the most, including those who: • can't afford a private lawyer • have a disability • are homeless • are children • can't speak, read or write English well • are Indigenous Australians • are at risk of family violence • are in custody.
Free duty lawyer services	A **duty lawyer** is a person who is at court on a particular day and who can help people who are at court for a hearing. Duty lawyers can give fact sheets about what happens in court, offer legal advice, and represent an accused in court on that day. Duty lawyers are only available in the **Magistrates' Court** and the **Children's Court**; they are not available for indictable offence trials.	• **Fact sheets** are available to everyone. • **Legal advice** is for people who satisfy the **income test** and are facing a straightforward charge. People in custody are given priority and don't need to satisfy the income test. • For **legal representation** at the hearing, the accused must satisfy the income test, and either be facing a significant charge or be one of the people that VLA prioritises (which includes those with a disability, brain injury or mental illness, homeless people, people who can't speak, read or write English well, and Indigenous Australians).
Grant of legal assistance	VLA may be able to grant legal assistance to people who can't afford a lawyer. This may include legal advice, helping the accused resolve matters in dispute, preparing legal documents and representing the accused in court.	• VLA has strict guidelines about who can get a grant of legal assistance so that money is given to people who need it the most. All grants are capped. Accused people must meet the **means test** to be eligible for a grant. • VLA also considers other matters, such as if helping the accused can **benefit him or her and the public**, and if the matter has **merit**.

income test
the test applied by Victoria Legal Aid (VLA) to determine if a duty lawyer can represent an accused. The test is satisfied when the accused can show they have limited income (e.g. their primary source of income is social welfare provided by government)

means test
the test applied by Victoria Legal Aid (VLA) to determine whether an applicant qualifies for legal assistance or representation in court (beyond the services of the duty lawyer on the day). It takes into account the applicant's income, assets and expenses

Source 3 Legal assistance available from VLA

Duty lawyers – The income test

An accused meets the income test if they produce to the duty lawyer a current Centrelink benefit card (to show that they are receiving welfare benefits from the Commonwealth Government) or pensioner concession card. If they don't have one of these, they may still meet the income test if they sign a declaration which shows they have limited income (e.g. their primary source of income is from welfare, or their weekly after-tax income is less than a certain amount).

Duty lawyers aren't available in the County Court or the Supreme Court. VLA has said its duty lawyer services are stretched, and duty lawyers are often limited in the time they can spend with a client.

Grant of legal assistance – The means test

The means test is not the same as the income test. The income test is for people who need advice or representation from a duty lawyer on a particular day. The means test is for people who are seeking a grant of legal assistance (including legal advice, help with preparing for a case, or representation in court).

The means test takes into account the person's income and other assets (e.g. houses, cars, savings). For example, if the accused person receives more than $360 per week in income, then they aren't eligible under the means test.

If VLA has denied an accused person legal assistance, they can apply to have the decision reviewed by an independent reviewer. A decision made by the independent reviewer can then be appealed to the Supreme Court of Victoria.

Order by the court

The *Criminal Procedure Act 2009* (Vic) gives the courts power to adjourn a trial until legal representation from VLA has been provided. The courts must be satisfied that the accused person would not be able to receive a fair trial without legal representation, and the accused cannot afford to pay for their own lawyer.

The burden of proof is on the accused to establish that they can't afford the full cost of obtaining legal representation. The ability of the court to do so upholds the principle of fairness by making sure that the accused is able to have a fair trial by being legally represented.

Study tip

The deeper your understanding of the topic, the better your assessment answers will be. Try to spot connections between what you are reading and material in earlier chapters. Did you pick up the link between the need for legal representation and the case of *Dietrich v The Queen* in Chapter 3?

EXTRACT

Criminal Procedure Act 2009 (Vic)

197 Order for legal representation for accused

(3) If a court is satisfied at any time that—

(a) it will be unable to ensure that the accused will receive a fair trial unless the accused is legally represented in the trial; and

(b) the accused is in need of legal representation because the accused is unable to afford the full cost of obtaining from a private law practice or private legal practitioner legal representation in the trial—

the court may order Victoria Legal Aid to provide legal representation to the accused, on any conditions specified by the court, and may adjourn the trial until that legal representation has been provided.

The Adrian Bayley case is an example of VLA refusing to provide legal assistance because helping the accused wouldn't benefit the public.

LEGAL CASE

Adrian Bayley's applications for legal aid and appeals

- *Bayley v Nixon and Victoria Legal Aid* [2015] VSC 744 (18 December 2015)
- *Bayley v The Queen* [2016] VSCA 160 (13 July 2016)

On 19 June 2013, Adrian Bayley was sentenced in the Supreme Court to life in prison with a non-parole period of 35 years for the rape and murder of Gillian 'Jill' Meagher. While serving that prison sentence, on 28 May 2015 he was sentenced for several new offences, including rape, in the County Court after three separate trials were held. A new non-parole period of 43 years was imposed on Bayley.



Source 4 Adrian Bayley was successful on appeal in reducing his total sentence for offences not related to Jill Meagher.

Bayley requested leave to appeal to the Court of Appeal against the convictions in two of the three trials and the sentences imposed in all three trials. He applied to VLA for legal assistance.

His application was refused, and he asked for a review of the decision of VLA. The independent reviewer confirmed the decisions to refuse legal assistance, and noted that the public needed to be confident in VLA, and that it was unreasonable to provide Bayley with legal assistance.

Bayley obtained *pro bono* (free) legal assistance and appealed the reviewer's decision to the Supreme Court of Victoria. Justice Bell noted that the provision of legal aid is closely connected with human rights, and that legal aid can be critical for people who are seeking vindication of their rights through the legal process. Justice Bell found that it was unlawful to reject an application for legal assistance on the sole ground that the person is 'a notorious and unpopular individual who has already been convicted of and sentenced to heinous crimes'. He concluded that the review was invalid and that Bayley's application should be heard before a different reviewer.

Bayley filed a second application with VLA, but that application was also refused. *Pro bono* lawyers represented him at his appeal in relation to the sentences and convictions. On 13 July 2016, the Court of Appeal handed down its decision and fixed a new non-parole period of 40 years, reducing Bayley's sentence by three years. In handing down its decision the Court of Appeal said (in 2016):

> We wish to acknowledge the assistance given to the Court by senior and junior counsel who appeared *pro bono* on the applicant's behalf, as did their instructing solicitors. Legal aid was, we were told, declined for the preparation and presentation of the applications in this Court. We were not told why that was so.
>
> In our opinion, that decision was regrettable. The applicant's case required the assistance of experienced and competent counsel. He was in no position adequately to represent himself. Any proper appraisal of the available material would have made it abundantly clear that, at worst, the applicant had a strongly arguable case for acquittal in relation to the convictions that he sustained in the first trial. As regards the third trial, his application, though ultimately unsuccessful before this Court, was at least arguable.

Victorian community legal centres

Community legal centres (CLCs) are one type of legal assistance service provider in Australia. As independent organisations they provide free legal services, including advice, information and representation, to people who are unable to access other legal services. There are two types of community legal centres:

- **generalist CLCs** provide broad legal services to people in a particular local geographical area (e.g. Barwon Community Legal Service Inc and Monash Oakleigh Legal Service are generalist CLCs that serve their respective local areas)
- **specialist CLCs** focus on a particular group of people or area of law (e.g. YouthLaw provides free legal services for people under 25).

There are approximately 50 CLCs in Victoria. The Federation of Community Legal Services Inc. is the peak contact and referral body for people seeking legal advice and assistance from CLCs. Many of the workers at CLCs are volunteers.

generalist CLC
a community legal centre that provides a broad range of legal services to people in a particular geographical area of Victoria

specialist CLC
a community legal centre that focuses on a particular group of people or area of law (e.g. young people, asylum seekers, domestic violence and animal protection)

disability
a total or partial loss of bodily or mental functions, or a disease or illness that affects a person's body, learning or thought processes

victim
a person who has suffered directly or indirectly as a result of a crime

Role of CLCs

CLCs provide people with:

- information, legal advice and minor assistance
- duty lawyer assistance
- legal casework services including representation and assistance.

Like VLA, CLCs focus on people who need legal assistance the most because of their personal circumstances. These include people who have a **disability** or mental health issues, refugees, people in domestic violence situations, the homeless, young people, and those who can't afford a lawyer. CLCs also help **victims** of crime and their families.

ASSISTANCE	DESCRIPTION
Basic legal information	CLCs provide basic legal information on a day-to-day basis. A lot of the information is online.
Initial legal advice	• CLCs provide legal advice and information such as preliminary assistance, and help with writing short letters and completing forms. • CLCs offer a free legal advice service that allows people to visit the CLC without an appointment and get legal information and advice. • Phone advice is also available.
Duty lawyer assistance	Duty lawyers provide advice or representation for urgent matters that will be completed in one day.
Legal casework	Very rarely, a CLC will take on a criminal matter. This involves legal representation and assistance and will require ongoing legal services. Each CLC has its own eligibility requirements, and many will only take on a matter if the person is eligible for a grant of legal assistance from VLA. Many CLCs do not offer representation and assistance for indictable offences.

Source 5 The types of assistance that CLCs can provide

Each CLC has its own eligibility criteria for assisting an accused, and for how much assistance they can provide. CLCs will generally consider the following factors:

- the type of legal matter the person needs help with
- if other assistance is available (e.g. through VLA)
- if the person has a good chance of success
- if the accused is able to manage the case without help
- if the CLC is available to assist.

For accused persons who require legal representation and assistance, it is normally only provided if they meet VLA's eligibility criteria for a grant of legal assistance (i.e. they will be subject to the means test and other criteria).

Many CLCs only help with minor criminal matters. For example, St Kilda Legal Service and the Mental Health Legal Centre can't assist an accused charged with an **indictable offence**.

indictable offence a serious offence generally heard before a judge and a jury in the County Court or Supreme Court of Victoria

Funding of CLCs

CLCs receive their funding from a range of sources: state, Commonwealth and local governments and private donations. A large portion of its funding comes from VLA. In the 2015–16 financial year, VLA provided $28.4 million to CLCs.

Funding to CLCs is an issue in Australia because of the significant demand for legal assistance. In 2016, a Fund Equal Justice campaign was launched. According to the campaign:

- CLCs in Australia provide free legal help to over 216 000 people a year
- CLCs are forced to turn away over 160 000 people every year, largely due to a lack of resources
- it was proposed that in 2017, Commonwealth Government funding to CLCs would be cut by 30 per cent.

The campaign sought a reversal of funding cuts and an injection of funds from the Commonwealth Government so that it could provide legal assistance to disadvantaged people. In April 2017, the Commonwealth Government announced it would reverse the proposed 30 per cent cut and would provide an additional $39 million for CLCs over three years. The Victorian Government in their May 2017 budget also pledged $29.5 million for VLA and CLCs. There still, however, remains a significant gap between the demand for legal aid, and the funding that is provided to meet that demand.

EXAMPLE

Frank and Youthlaw

Frank, 17, was at a house party one night with his friends. The host was a girl from his school. At around 11.30 pm, a group of uninvited boys turned up at the front of the house, calling out drunkenly and hanging around. The girl went outside and insisted that they leave, but the boys refused.

Frank and his friends went outside to help the host. A scuffle broke out between the uninvited boys and Frank's friends. Frank got involved by trying to pull apart some of the boys who were fighting. At about that time, the police showed up and arrested Frank, his friends, and many of the uninvited guests. Frank has now been charged with assault.

Frank and his family have little money to pay for a lawyer. They are unsure about the documents they have received, the charges, and when Frank needs to go to court. Someone tells Frank about community legal centres. He accesses the Federation of Community Legal Centres Victoria website and identifies a legal centre called 'Youthlaw'. Its website states that it provides free and confidential legal information and advice for young people up to the age of 25, and runs a free drop-in legal clinic.

4.1 CHECK YOUR LEARNING

Define and explain

1 Define the term 'legal aid'. Does it always include legal representation? Explain.
2 Identify two organisations that provide legal advice and assistance to people.
3 Explain the role of Victoria Legal Aid (VLA).
4 Explain the difference between generalist community legal centres (CLCs) and specialist CLCs.
5 Provide two similarities and two differences between VLA and CLCs.

Synthesise and apply

6 Read the article 'Victoria Legal Aid calls for $72 million funding boost'.
  - **a** Describe the problem that VLA is facing.
  - **b** What is the impact of funding cuts on VLA?
  - **c** What other options does an accused have if VLA and CLCs can't provide assistance?
  - **d** Research the status of funding to VLA and CLCs for the current financial year. Prepare a short summary.

7 For each of the following scenarios, describe the types of legal aid that VLA could provide to the accused.
  - **a** Anna has been charged with three summary offences. She is quite wealthy, but doesn't know where to start to defend the charges.
  - **b** Homer's court hearing for a summary offence is in three weeks in the Magistrates' Court. He wants to be represented on the day. He has a pension card.
  - **c** Samandar is on welfare benefits. He has been charged with an indictable offence. He can't afford a lawyer, but has been told that he has a good chance of success. He wants to defend the charge.
  - **d** Mary can't speak, read or write English well, and is facing a summary offence in the Magistrates' Court in three weeks. She has a significant income.

8 Go to the Federation of Community Legal Centres Victoria website. A link is provided on your obook assess. Is there a CLC available for the following people?
  - **a** Kirra is an Indigenous Australian and has been charged with a summary offence.
  - **b** John lives in Werribee and wants some free legal advice.
  - **c** Yola lives near Gladstone Park and wants some help to draft a letter.
  - **d** Greta has a hearing disability and has been charged with an indictable offence.

9 Read the legal case *Bayley v Nixon and Victoria Legal Aid*.
  - **a** Was Adrian Bayley's application for legal aid granted? Did he succeed in his appeal? Explain.
  - **b** What did Bayley do after his first application was refused?
  - **c** What is a *pro bono* lawyer?
  - **d** Do you agree with the decision of the Supreme Court in the 2015 case? Why?
  - **e** What did Bayley do following that decision, and what was the final outcome?
  - **f** Read the paragraphs extracted from the Court of Appeal's decision in 2016. Decide if you agree or disagree with the statement of the Court. As a class:
    - separate into two groups: those who agree with the Court, and those who don't
    - debate the paragraphs. Make reference to the principles of justice in your debate.

Analyse and evaluate

10 Why is legal aid from VLA not available to everyone? Should it be? Give reasons for your answer.
11 How does government funding to VLA and CLCs impact the ability of the criminal justice system to achieve the principles of justice? Give reasons for your answer.
12 Evaluate the ability of VLA and CLCs to enable access to the criminal justice system for accused people.

Check your obook assess for these additional resources and more:

- **Student book questions**
  4.1 Check your learning
- **Video tutorial**
  Introduction to Chapter 4
- **Worksheet**
  What assistance am I eligible for?
- **Weblink**
  Victoria Legal Aid

4.2 THE PURPOSES OF COMMITTAL PROCEEDINGS

When a crime has been committed and a person has been charged with committing that crime, various steps are taken on the way to a trial to determine the guilt of the accused and impose a sanction. Some of these steps are known as **pre-trial procedures**.

committal proceeding
the processes and hearings that take place in the Magistrates' Court for indictable offences

One pre-trial procedure is the **committal proceeding**. This takes place in the Magistrates' Court in cases where:

- an accused has been charged with one or more indictable offences and
- the accused has pleaded not guilty.

A committal proceeding is not used for summary offences.

The committal proceeding involves a number of stages and preliminary hearings in the Magistrates' Court. These act as a filtering process to test the strength of the prosecution's case against the accused. They also give the accused an opportunity to understand the case and to cross-examine (ask questions of) prosecution witnesses before trial.

The purposes of committal proceedings are set out in section 97 of the *Criminal Procedure Act*. The purposes are:

- to see whether a charge for an indictable offence is **appropriate to be heard and determined summarily**

evidence
information used to support the facts in a legal case

- to decide if there is enough **evidence** to support a conviction for the offence charged
- to find out whether the accused plans to plead guilty or not guilty
- to make sure there is a **fair trial**. Committal proceedings do this by:
  - making sure the prosecution's case is disclosed to the accused
  - giving the accused an opportunity to hear or read the evidence and cross-examine (question) witnesses
  - allowing the accused to put forward a case at an early stage if they choose to do so
  - allowing the accused to properly prepare and present a case
  - making sure the issues to be argued are properly defined.

The committal hearing

committal hearing
a hearing that is held as part of the committal proceeding. At the committal hearing, the magistrate will decide whether there is sufficient evidence to support a conviction for the offence charged

bail
the release of an accused person from custody on condition that they will attend a court hearing to answer the charges.

The main and final stage of the committal proceeding is the **committal hearing**. At the committal hearing, the accused has the opportunity to question the prosecution's witnesses and make submissions about the charges. After the evidence and submissions, the magistrate decides whether or not to commit the accused (i.e. send the accused to 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** to wait for the trial, or is held in remand.

If the magistrate decides there is not enough evidence (of sufficient weight) to support a conviction, the accused is discharged and allowed to go free. If further evidence is found in the future, the accused can be brought before the court again, because the committal proceeding is not a trial and the accused has not been found guilty or not guilty. The *Stephen Bailey* case on the next page is an example of a magistrate in a committal hearing deciding that there was enough evidence to support a conviction at trial.

Stephen Bailey committed to stand trial

LEGAL CASE

DPP v Bailey [2017] VSC 195 (13 April 2017)

In October 2015, Penny Bailey was murdered at her home in Mont Albert. Her body was found dumped near the Mullum Mullum creek at Donvale. Her son Stephen Bailey was charged with her murder.

At the committal hearing in the Magistrates' Court in 2016, Penny's two daughters gave evidence about their brother's history of poor mental health. Stephen Bailey pleaded not guilty due to mental impairment, but the magistrate found there was sufficient evidence to support a conviction, and committed him to stand trial in the Supreme Court of Victoria.

In April 2017, Stephen Bailey was found not guilty due to mental impairment.



Source 1 Penny Bailey's son, Stephen Bailey, was committed to stand trial for her murder. He was found not guilty due to mental impairment in April 2017.

The article below is another example of a case involving a committal hearing.

Date set for Samantha Kelly murder trial in Bendigo

IN THE NEWS

Adam Holmes, *Illawarra Mercury*, 31 January 2017

TWO housemates accused of murdering Kangaroo Flat mother-of-four Samantha Kelly will stand trial in Bendigo from October 23.

The trial of Christine Lyons, 45, and Ronald Lyons, 44, is set for four weeks in the Supreme Court in Bendigo.

Their matter appeared at a directions hearing in the Supreme Court in Melbourne on Tuesday.

Co-accused Peter Arthur, 45, will appear at a plea hearing in the Supreme Court on April 3 and 4. He gave evidence to the committal hearing of Christine and Ronald Lyons earlier in January.

Arthur admitted to killing Ms Kelly with a hammer. The three were charged with murder as part of a joint criminal enterprise, after it was alleged they had openly discussed killing Ms Kelly.

John Desmond, acting for Ronald Lyons, told the court on Tuesday he will argue his client was not party to an agreement to kill Ms Kelly.

'He had nothing to do with either the drugs and what became the subsequent hammer incident,' Mr Desmond said.

He raised the prospect of a Basha hearing before the trial could go ahead. A Basha hearing allows an accused to cross-examine any new witness for the prosecution brought forward after the committal hearing.

Author's Note: In May 2017, Peter Arthur was sentenced to 16 years' jail and must serve a minimum period of 13 years.



Source 2 Ronald Lyons, Christine Lyons and Peter Arthur

Director of Public Prosecutions (DPP)
the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. verdict)

After the committal proceeding

When the accused person has been committed for trial, the documents are transferred to the **Director of Public Prosecutions (DPP)**. The DPP files an indictment in the Supreme Court or the County Court. The indictment is a written statement of the details of the charge against the accused. The filing of an indictment will commence the criminal proceeding in the higher court and ultimately leads to a trial before a judge and **jury** to determine guilt.

If the accused pleads guilty at any time during the committal proceeding, the criminal case will be listed for a plea hearing in the County Court or the Supreme Court.

Strengths and weaknesses of committal proceedings

Set out below are some strengths and weaknesses of committal proceedings.

Strengths

- Committal proceedings help **to save the time and resources** of higher courts by filtering out the weak cases that are unlikely to succeed because of insufficient prosecution evidence.
- The committal process allows the accused to be **informed of the prosecution's case** against them. This could help them decide whether to plead guilty or not guilty, and also help them to prepare their case without being ambushed by unexpected witnesses.
- 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 they cannot do that, the accused is discharged. This onus supports the principle that the accused is **innocent until proven guilty** and doesn't need to prove anything at this stage.
- The prosecution is given the opportunity to **withdraw some charges or combine charges** after the evidence has been considered. This helps achieve a fairer trial and save the time of the higher court.
- The accused has the opportunity to **test the strength of the prosecution's case**. This includes the opportunity to examine prosecution witnesses. This can lead to the accused pleading guilty or agreeing on some facts or issues with the prosecution, and saves the time and resources of the courts.

Weaknesses

- Committal proceedings are very **complicated**. They can involve **cross-examination** of witnesses and making submissions (arguments) to the court. The committal hearing is one of many hearings that take place in the committal proceedings. Without experience with the processes, and without the aid of a legal representative, the accused can find it hard to understand, which could increase the risk of an unfair outcome. It can also result in inequality between a very experienced prosecutor, and an inexperienced accused person.



Source 3 The DPP files an indictment in the Supreme Court or the County Court after an accused has been committed to stand trial.

Did you know?

The DPP can skip the committal proceeding stage and file a direct indictment. However, this only occurs if the prosecution has a strong case and wants to avoid the distress, expense and time involved in committal proceedings.

Study tip

If you are answering a question about committal proceedings, link the strengths and weaknesses back to the three principles of justice in Chapter 3. For each strength and weakness, you should be able to show how it helps (in relation to strengths) or hinders (in relation to weaknesses) that principle of justice.

cross-examination
the questioning of a witness called by the other side in a legal case

- The services of a legal representative can be **expensive**. This adds cost for the accused, who may not be working if they are in remand, and could increase the risk of an unfair outcome.
- Committal proceedings can add to the **delay** of getting a case to trial, which can reduce access to the criminal justice system and could also increase the risk of an unfair outcome. As a result, some have suggested that strong cases should proceed directly to trial and bypass the committal stage.
- Committal proceedings can contribute to the **stress and trauma** experienced by the accused, the victim and their families. For some victims, this stress and trauma may see them not wanting to give evidence, which can reduce access to justice.
- For stronger cases, the committal proceeding stage is often considered **unnecessary** and a burden, adding extra stress and inconvenience to the parties and to victims and family members.

Study tip

A summary of the strengths and weaknesses of committal proceedings is provided on your obook assess.

4.2 CHECK YOUR LEARNING

Define and explain

1 Define the term 'committal proceeding'.
2 Explain two purposes of a committal proceeding. Link each purpose to one or more of the principles of justice.
3 What is the final hearing called, and what is the main purpose of that hearing?
4 What happens if a magistrate decides there is insufficient evidence? Can the accused be charged again for the same offences? Explain your answer.

Synthesise and apply

5 Read the legal case *DPP v Bailey*. What was the outcome of the committal proceeding, and what was the outcome at trial?
6 Read the article 'Date set for Samantha Kelly murder trial in Bendigo'.
   a What is the allegation in this case?
   b Who will need to go to trial, and who will go to a plea hearing?
   c What benefits, if any, do you think Peter Arthur will receive for pleading guilty early?
7 For each of the following scenarios, state whether the case will proceed any further. Justify your answer.
   a The magistrate is not convinced that there is evidence of a sufficient weight to support a conviction at trial.
   b The magistrate at Wendy's committal hearing has found there is evidence of a sufficient weight to support a conviction at trial.
   c Documents have just been transferred to the DPP following the committal hearing.
8 How would you convince a victim, who does not want to have the trauma of reliving a crime twice (through a committal proceeding and then a trial), that a committal proceeding is critical to achieving justice? Demonstrate your response with arguments that you would put to the victim.

Analyse and evaluate

9 In 2012, there were calls by some members of the Victorian Parliament for committal proceedings to be abolished. Do you think that they should be abolished? Why or why not?
10 Evaluate the ability of committal proceedings to achieve equality.

Check your obook assess for these additional resources and more:

- **Student book questions**
  4.2 Check your learning
- **Summary table**
  Strengths & weaknesses of committal proceedings
- **Going further**
  Various stages of committal proceedings

4.3 PLEA NEGOTIATIONS

civil dispute
a dispute (i.e. disagreement) between two or more individuals (or groups) in which one of the individuals (or groups) makes a legal claim against the other

plea negotiations
(in criminal cases) pre-trial discussions that take place between the prosecution and the accused, aimed at resolving the case by agreeing on an outcome to the criminal charges laid (also known as charge negotiations)

sentence indication
a statement made by a judge to an accused about the sentence they could face if they plead guilty to an offence

Criminal cases are heard and determined only in the courts (unlike some **civil disputes**, which can be resolved by bodies other than the courts). Only the courts have the power to determine if an accused is guilty and sentence an offender.

There are, however, two means that encourage an early determination of a criminal case without the need to go to trial (or hearing in the Magistrates' Court). They are:

- **plea negotiations**
- **sentence indications**.

You will explore plea negotiations in this topic, and sentence indications in Topic 4.4. For each, you will consider their purpose and appropriateness, and their strengths and weaknesses as a means used to determine a criminal case without going to trial (or a hearing).

What are plea negotiations?

Plea negotiations are discussions between the prosecutor and the accused about the charges against the accused. They can take place in relation to summary or indictable offences. Plea negotiations can result in an agreement being reached between the prosecutor and the accused about the charges that the accused will plead guilty to. Other terms for plea negotiations are 'plea bargaining' or 'charge negotiations'.

Plea negotiations usually begin when the accused (or their lawyer) indicates to the prosecution that they are willing to discuss the charges. Negotiations are conducted on a 'without prejudice' basis. This means that any offers made by either party during the negotiations can't be used against them if the negotiations aren't successful. Therefore, the accused is free to negotiate with the prosecutor without fear that whatever they say during the negotiations will be used against them at trial or a hearing if the negotiations fail.

The agreement reached between the prosecutor and the accused following plea negotiations may be that:

- the accused pleads guilty to **fewer** charges, with the remaining charges not proceeding
- the accused pleads guilty to a **lesser charge** (a charge for an alternative offence with a lower maximum penalty). For example, a person charged with culpable driving causing death could negotiate to have this changed to dangerous driving causing death, which carries a lower maximum penalty than culpable driving, on the basis that they plead guilty to that charge.

Plea negotiations do not determine the sentence. Following plea negotiations, the accused will still need to be sentenced by a court. The court will be informed of the charges the accused has pleaded guilty to, and will decide what sanction to impose.

Plea negotiations can happen at any stage, and even before the charges have been laid. Victims should be consulted before the plea negotiations, and the victims' views should be taken into account when deciding to enter into an agreement with the accused. However, the victims' views are not a deciding factor for the prosecutor to enter into such an agreement.

Purposes of plea negotiations

Plea negotiations have two main purposes:

- To **resolve** a criminal case by **ensuring a plea of guilty to a charge that adequately reflects the crime that was committed**. The charges must adequately reflect the accused's wrongdoing.

For example, an accused who is charged with murder may agree to plead guilty to a lesser charge of manslaughter. However, a manslaughter charge must still adequately reflect the conduct of the offender so that the community and the victims do not think that the plea negotiations have resulted in the accused being 'let off'.

- To achieve a **prompt resolution to a criminal case without the cost, time, stress, trauma and inconvenience of a criminal trial (or hearing)**. This benefits the accused, victims, witnesses and the community from the time and cost of going to trial. An early resolution relieves victims and witnesses of the burden and trauma of having to give evidence, and may help victims move on from what has happened. Plea negotiations also provide certainty of outcome.



Source 1 Carl Williams entered into a plea deal. He agreed to plead guilty to three murders so that charges for two other murders would not proceed. He was himself murdered in jail in 2012.

EXTRACT

Why is resolution important?

Resolution is necessary for the effective and efficient conduct of prosecutions. It relieves victims and witnesses of the burden of having to give evidence and may help victims put their experience behind them. It provides certainty of outcome and saves the community the cost of trials.

Source: Director of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (10 August 2017) Office of Public Prosecutions Victoria

Appropriateness of plea negotiations

Plea negotiations may only occur if it is in the public interest. A number of factors are considered when deciding whether plea negotiations are in the public interest and appropriate for a particular case, including:

- whether the accused is willing to cooperate in the investigation or prosecution of co-offenders, or offenders of other crimes
- the strength of the prosecution's case, including the evidence the prosecution has and the likelihood of a conviction
- whether the accused is ready and willing to plead guilty
- whether the witnesses are reluctant or unable to give evidence, which would jeopardise the prosecution's ability to achieve a guilty verdict
- the possible adverse consequences of a full trial, including the stress and inconvenience on victims and witnesses giving evidence
- the time and expense involved in a trial, particularly the prosecutor's cost of running the case
- the views of the victim (the prosecutor should consult the victims and take their views into account when considering plea negotiations)
- the likelihood of a long trial.

The relevance of the factors above will depend on the particular case. On the next page is an example of a case where plea negotiations were found to be appropriate.

IN THE NEWS

Fury after charges against killer drunk driver in Victoria downgraded

Wayne Flower, *Herald Sun*, 11 January 2017

CHARGES against a drunken driver who was more than double the legal limit when he killed his mate and critically injured two other passengers have been downgraded, angering one of the survivors.

Bradley Nicholson, 23, had been charged with culpable driving causing death, which carries a maximum penalty of 20 years' jail.



Source 2 A Victoria Police handheld breathalyser

But the Office of Public Prosecutions accepted his plea to a charge of dangerous driving causing death, which has a maximum of just 10 years.

Charges of negligent driving and recklessly endangering life have also been dropped. Nicholson will plead guilty to dangerous driving and drink-driving instead.

Charlie Robertson, 20, was killed instantly when he was thrown from a station wagon Nicholson was driving.

Passengers Josh Bell, 22, and Monique Kouvaras, 23, were also flung from the vehicle in the April 2015 crash, but miraculously survived.

The Melbourne Magistrates' Court heard the OPP had consulted Mr Robertson's family before accepting Nicholson's plea to the lesser charges. But Mr Bell, who spent two months in hospital after the fatal crash, is angry.

Study tip

A summary of the strengths and weaknesses of plea negotiations is provided on your obook assess.

guilty plea
when an offender officially admits guilt which is then considered by the court when sentencing

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing [or trial] processes should be fair and impartial)

Strengths and weaknesses of plea negotiations

Set out below are some strengths and weaknesses of plea negotiations.

Strengths

- Negotiations provide substantial benefits to the community by saving the **cost** of a full trial or hearing. Many have commented that our criminal justice system would not cope if the parties couldn't negotiate.
- Negotiations help with the **prompt determination** of criminal cases and increase public confidence in the legal system. Delays can lead to unfairness, so justice can be achieved by making sure that determination of guilt happens more quickly.
- Victims, witnesses and their families, and the accused's family are saved the **trauma, inconvenience and distress** of the trial process. Sometimes the trial process makes victims and witnesses relive the crime and hear evidence that may be distressing.
- There are advantages for the accused, who may receive a **reduced sentence** because of a plea of guilty before trial (depending on the sentencing judge and the time the **guilty plea** was entered).
- **Fairness** can still be achieved if the accused is pleading guilty to charges that reflect the gravity and nature of the offence. Negotiations help to make sure that the **agreement reflects the criminality of the offender**.
- Negotiations help to make sure that there is **certainty in outcome** for all parties. Going to trial (or a hearing) can still risk the possibility that the jury or the magistrate (in summary offences) will decide that there is reasonable doubt, and acquit the accused.

Weaknesses

- The community and victims may feel the negotiations have resulted in **the accused being 'let off' or getting a lenient sentence** that does not reflect the crime.
- Self-represented accused people **may feel pressured** into accepting a deal even if the evidence is not strong (though strong safeguards are in place when pleas are negotiated).
- The negotiation process may be seen as the prosecutor **avoiding the need to prove the case beyond reasonable doubt**, which is a fundamental principle of our justice system and upholds the **presumption of innocence** (some people may argue in turn that an innocent person would not enter into negotiations).
- Negotiations **do not need to be disclosed and can be held privately**. This lack of transparency may make some people question the agreement or the reason why the prosecution decided to reduce the severity of the charges.
- If **negotiations do not succeed**, then either party may be advantaged or disadvantaged if the matter proceeds to trial. For example, the prosecution may get an insight into the weaknesses of the accused's case.

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

presumption of innocence
the right of a person accused of a crime to be presumed not guilty unless proven otherwise

4.3 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by the term 'plea negotiations'.
2 Is the court involved in plea negotiations? Explain your answer.
3 Describe two possible outcomes of a plea negotiation.

Synthesise and apply

4 Read the article 'Fury after charges against killer drunk driver in Victoria downgraded'.
   a What was Bradley Nicholson initially charged with?
   b What did he ultimately plead guilty to?
   c What is the difference between culpable driving causing death and dangerous driving causing death?
   d Do you think that justice was achieved in this case? Explain your answer.
5 For each of the following scenarios, decide whether you think plea negotiations are appropriate. Justify your answer.
   a The accused maintains her innocence of the charges laid against her.
   b The DPP is expected to call more than 200 witnesses at trial. Many of those witnesses were physically injured in the incident and are reluctant to give evidence. However, the accused has refused to cooperate so far with the DPP.
   c A rape victim is nervous about giving evidence at trial, but does not agree with the idea that the accused should be able to negotiate his way out of a rape charge.
   d The trial against the three co-accused is expected to take three weeks. The DPP's evidence is strong against two of the co-accused.

Analyse and evaluate

6 Explain the strengths and weaknesses of plea negotiations from the perspective of an accused, and how these points may differ from the perspective of a victim.

Check your obook assess for these additional resources and more:

- **Student book questions**
  4.3 Check your learning
- **Summary table**
  Strengths & weaknesses of plea negotiations
- **Worksheet**
  Is a plea negotiation appropriate?
- **Weblink**
  Director of Public Prosecutions (DPP) Victoria

4.4 SENTENCE INDICATIONS

In 2008, the sentence indication regime was introduced in Victoria. It is another method (other than plea negotiations) used to encourage an early determination of a criminal case.

What are sentence indications?

sentence indication
a statement made by a judge to an accused about the sentence they could face if they plead guilty to an offence

summary offence
a minor offence generally heard in the Magistrates' Court

A **sentence indication** is given by a court to the accused to let the accused know what sanction is likely to be imposed on them. It is intended to give the accused a broad idea of the sentence they are likely to get if they plead guilty to the offence at a particular point in time.

Sentence indications can be given for either indictable offences or **summary offences**. It is a means, other than plea negotiations, that can be used to encourage an accused to plead guilty and possibly finalise a criminal charge without the need for a full trial or hearing. Unlike plea negotiations, sentence indications involve the court, in that the court provides the accused with an idea of the likely sentence that would be imposed.

Sentence indications for indictable offences

imprisonment
a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

The *Criminal Procedure Act* allows sentence indications to be given by the County Court and the Supreme Court for indictable offences. At any time after the indictment is filed, the court (i.e. the judge) may indicate that if the accused pleads guilty to the charge, the court is (or is not) likely to impose an immediate term of **imprisonment**.

A sentence indication can only be given if the accused applies for one and the prosecution agrees. It can only be given once during the proceeding (unless the prosecution otherwise consents). The court can refuse to give a sentence indication; for example, if it considers there is insufficient information about any impact of the offence on victims. The fact that the accused asked for a sentence indication cannot be used against him or her as evidence that he or she is guilty if the matter proceeds to trial.

If the court indicates that it is not likely to impose an immediate term of imprisonment and the accused pleads guilty at the first available opportunity, then the court **must not** impose a sentence of imprisonment.

If the accused asks for a sentence indication but does not plead guilty at the first available opportunity, a different judge must preside over the trial. The sentence indication will not bind the trial judge.

An example of a sentence indication leading to a guilty plea can be seen in the *R v MacKinnon* [2015] VSC 619 case.

LEGAL CASE

Tragic accident in Sorrento

R v MacKinnon [2015] VSC 619 (6 November 2015)

On 13 December 2013, Paul McVeigh went to Sorrento to swim with the dolphins in Port Phillip Bay. McVeigh boarded the vessel with other passengers, and on arrival at the swimming area, he and other passengers entered the water. Torie MacKinnon was in charge of the vessel.

The vessel drifted away from the swimmers and MacKinnon went to reverse the vessel. McVeigh was on the vessel at the time and wanted a crew member to take a photo of him. Without warning he jumped into the water. Almost immediately, McVeigh was pushed underneath the vessel, was struck by a rotating propeller and suffered life-threatening injuries. He passed away as a result of the injuries.

MacKinnon was initially charged with manslaughter and various alternative offences, but was ultimately committed for trial on a charge of culpable driving causing death and an alternative, lesser charge of dangerous driving causing death. On 19 October 2015, the Supreme Court heard an application by MacKinnon for a sentence indication on the charge of dangerous driving causing death. Justice Croucher indicated that he would be unlikely to impose a sentence of imprisonment that commenced immediately. MacKinnon then pleaded guilty to a charge of dangerous driving causing death.

MacKinnon was sentenced to a community correction order (CCO) of 18 months' duration with conditions, including that she perform 200 hours of unpaid community work. Justice Croucher accepted that this was a single unfortunate act in the otherwise blameless life of MacKinnon. Her moral culpability was so low, and the mitigation factors were so compelling, that a term of imprisonment was not appropriate.



Source 1 Torie MacKinnon asked for a sentence indication and pleaded guilty to dangerous driving causing death.

Sentence indications for summary offences

The sentence indication regime is broader for summary offences.

The *Criminal Procedure Act* states that **at any time** during a proceeding, the Magistrates' Court may indicate that, if the accused pleads guilty to the charge for the offence at that time, the court would be likely to impose an immediate term of imprisonment, or a sentence of a specified type.

If the court gives a sentence indication, and the accused pleads guilty to the charge for the offence at the first available opportunity, then the court must not impose a more severe type of sentence than the type of sentence indicated. The indication of sentence will therefore cap the **maximum sentence** that could be imposed, as long as the accused pleads guilty at the first available opportunity.

If the accused asks for a sentence indication but chooses not to plead guilty, then a different magistrate will ordinarily hear and determine the charge, and the different magistrate will not be bound by the sentence indication.

Indictable offences	Summary offences
accused must apply for sentence indication	can be given at any time by the Magistrates' Court
prosecution must consent	no need for prosecution's consent
indication as to whether immediate sentence of imprisonment is likely to be imposed	indication as to whether sentence of imprisonment or sentence of another type is likely to be imposed

Source 2 Sentence indications can be given for indictable offences and summary offences, but there are differences between the two.

Purposes of sentence indications

An accused will often defer a decision to plead guilty because they may be apprehensive about the sentence that may be imposed. The purpose of a sentence indication is to provide the accused with some **clarity about the likely sentence** that will be imposed, so that they can make an early decision to plead guilty and alleviate the fear that they will receive a custodial sentence.

Providing the accused with a sentence indication can also save the **time, costs, resources, stress and inconvenience** of having a contested trial (or hearing) that may result in a higher sentence.

Earlier guilty pleas are also desirable because they help to bring an earlier closure for the victims and their families, signify an accused's willingness to accept responsibility for their 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 by avoiding the need for a trial or hearing.

Appropriateness of sentence indications

A sentence indication may be appropriate to encourage the early finalisation of a criminal case, but whether it is appropriate in a particular case depends on a number of factors:

- whether the accused has applied for a sentence indication
- for indictable offences, whether a sentence indication has already been given. A sentence indication may be given only once during a proceeding for an indictable offence, unless the prosecution consents to another indication being given
- the type of offence and the court hearing the charges. Sentence indications are more likely to be appropriate in the Magistrates' Court and the County Court. Offences heard in the Supreme Court are of such a severity that an accused who is found guilty will usually receive a custodial sentence
- whether there is sufficient information for the judge or magistrate to make an indication, including information about the impact of the offence on the victim. If this information is not available to the judge or magistrate, a sentence indication may not be appropriate
- whether the accused is charged with an indictable offence and the prosecution consents to the sentence indication. A sentence indication cannot be given for an indictable offence if the prosecution does not consent
- the strength of the evidence against the accused, and whether the accused has raised a legitimate defence
- the nature of the offence. The **Sentencing Advisory Council** has said that sentence indications may not be appropriate for sex offence cases, given their sensitivity, but they may be more useful in drug or fraud cases.

The article below is an example of an accused waiting to know a sentence indication before deciding on a plea.

Sentencing Advisory Council
an independent statutory body that provides statistics on sentencing in Victoria, conducts research, seeks public opinion and advises the Victorian Government on sentencing matters

IN THE NEWS

Geelong court: Alleged thief will fight charges

Karen Matthews, *Geelong Advertiser*, 22 April 2015

A BELL Post Hill man will contest multiple charges of burglary and theft after rejecting a sentence indication of 15 months' jail with a non-parole period of nine months.

Shane Bausch, 23, of Ruhamah Ave, appeared in Geelong court facing multiple counts of burglary and theft.

Police prosecutor Leading Senior Constable Kerrie Moroney said that, about 4 am on September 29, 2014, Mr Bausch and a male co-accused drove two cars to the rear of the Batesford Hotel ...

'On October 14, Bausch was arrested on burglary, drug and theft charges and was bailed, but failed to comply with conditions.'

The prosecutor said that, on October 31, a burglary occurred on a property at Sutherlands Creek where a vehicle was stolen.

'A witness saw Bausch drive off cross-country in the stolen vehicle but rolled it when he attempted to cross train lines at Lara,' she said.

'He was identified fleeing from the scene by V/ Line employees'...

Andrew Zingler, for Mr Bausch, said his client wanted a sentence indication from the court on the earlier matters.

Magistrate Tim Bourke said that, on a plea of guilty to all but the latest charges, he would impose a jail sentence of 15 months with a non-parole period of nine months. After discussions with his client, Mr Zingler said Mr Bausch had rejected the indication.

All charges were then adjourned to September 2, for a two-day contested hearing.



Source 3 The allegedly stolen vehicle after it rolled at Lara

Strengths and weaknesses of sentence indications

Set out below are some strengths and weaknesses of sentence indications.

Strengths

- It can result in the **early determination of the case**. This results in prompt justice rather than delayed justice. A prompt determination can benefit everyone involved, including victims, witnesses, the accused, families and the community.
- It can save **money and resources**. Not having to take the case to trial saves the prosecution and the community costs.
- It can be conducted in **open court**. This means there is transparency in the indication that the judge gives, rather than the secrecy that may apply to plea negotiations.
- The accused is **not bound to accept** the indication and plead guilty. This provides procedural fairness to the accused.
- The indication is given by an **experienced and impartial** judge or magistrate who has expertise in the area of law and in sentencing. This may give the accused more confidence about the appropriateness of the sentence.
- The accused has greater **certainty** about what sentence they will receive. This avoids the risk of going to trial and only finding out at the end what sentence will be imposed.
- It can **minimise the trauma, stress and inconvenience** of victims and witnesses if a sentence indication is given early, before they have to go through a full trial or hearing, or have to give stressful evidence.

victim impact statement
a statement filed with the court by a victim, and considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

- Any **victim impact statement** **can be considered** by a judge when giving an indication. This allows the victim a voice in the process.
- If the accused pleads guilty at the earliest possible time after the sentence indication, they **can't receive a greater sentence** than was indicated for a summary offence. They also **can't receive a term of imprisonment** for an indictable offence if the judge indicated that there would be no term of imprisonment.
- If the accused asks for a sentence indication but does not plead guilty, a **different judge or magistrate** will hear the trial or hearing. This means that the accused won't be bound by the sentence indication, the judge or magistrate will not be informed of it, and the trial will be able to proceed fairly. For jury trials, the jury will also not know of the sentence indication.
- Any application for a sentence indication, and the indication given by the judge or magistrate are **not admissible in evidence** if the accused chooses to proceed to trial. This means that the accused can seek a sentence indication and not have to worry about the fact that seeking the indication, or the actual indication, may be used against him or her at the final hearing or trial.

Study tip

A summary of the strengths and weaknesses of sentence indications is provided on your obook assess.

Weaknesses

- The judge **is not obliged to grant the accused's request** for the sentence indication. This may be seen to be unfair if the accused is willing to consider pleading guilty on the basis of the sentence indication.
- In the higher courts, the prosecutor **must consent** to the indication being given, therefore limiting the availability of the regime where the prosecutor, for whatever reason, does not consent. Some defence practitioners have indicated that the regime should be changed so that consent is not required.
- Legislation allows the court to **close a proceeding** to the public when a sentence indication is given. This means there will be a **lack of transparency** about what occurred.
- For indictable offences, the court only needs to give an **indication if it would impose an immediate term of imprisonment.** This means that the accused will not necessarily know what sentence may be imposed (but will know whether a term of imprisonment will be imposed). This provides the accused with less certainty about the type of sentence that he or she will actually receive.
- The sentence indication may be given before all the facts have been **admitted or proved**. This may disadvantage an offender who has pleaded guilty, because it commits them to a particular sentence that might turn out to be different after all the facts are brought out in a trial.
- It may lessen the impact or need for **a victim impact statement** because the court won't need to hear as much evidence to decide on the sentence (i.e. the sentence has already been indicated). However, the court can refuse to give a sentence indication if there is insufficient information about the impact of the offence on any victim. So it can be assumed that a court will determine the impact on victims before giving a sentence indication.
- It denies the victim their **'day in court'**. They may want to see justice occur with a guilty verdict. However, many victims are traumatised by the trial experience, and sentence indications can avert that trauma.



Source 4 Legislation allows the court to close a proceeding to the public when a sentence indication is given.

4.4 CHECK YOUR LEARNING

Define and explain

1 What is a sentence indication?

2 Who gives a sentence indication, when is it given, and who is it given to?

3 Explain two differences between sentence indications for summary offences and sentence indications for indictable offences.

4 Is the court bound by a sentence indication if the accused continues to trial and is found guilty? Justify your answer.

Synthesise and apply

5 Read the legal case *R v MacKinnon*.

- **a** Describe the key facts of the case.
- **b** What was Ms MacKinnon initially charged with, and what did she eventually plead guilty to?
- **c** Describe the sentence that was imposed on Ms MacKinnon. Do you think this was an adequate sentence? Give reasons for your answer.

6 Read the article 'Geelong court: Alleged thief will fight charges'.

- **a** What was the indication of sentence given by the Magistrate?
- **b** What happens now that Mr Bausch has rejected the sentence?

7 Access the website of the Australasian Legal Information Institute (AustLII). A link is provided on your obook assess. Find the County Court decision of *DPP v Charles* [2016] VCC 479 (22 April 2016). Read the decision and fill in the following table.

Name of judge	
Name of accused	
Date the accused was sentenced	
Was the accused represented?	
Was there a jury trial?	
Number of offences	
Names of offences	
Date of offences	
Maximum penalty for each of the offences	
Circumstances of the offender taken into account (e.g. age)	
Was a sentence indication given?	
Did the accused accept the sentence indication?	
Sentence imposed	

Analyse and evaluate

8 Explain two benefits of sentence indications. Link each benefit back to one of the principles of justice.

9 Conduct a debate in class that addresses the following statement: 'There should be a law that requires victims to consent to the accused getting a sentence indication.'

Check your obook assess for these additional resources and more:

- **Student book questions**
  4.4 Check your learning
- **Summary table**
  Strengths & weaknesses of the system of sentence indications
- **Worksheet**
  Is a sentence indication appropriate?
- **Weblink**
  Australasian Legal Information Institute (AustLII)

4.5 THE REASONS FOR A VICTORIAN COURT HIERARCHY

Victorian courts, like courts in other Australian states, are arranged in a hierarchy. They are ranked based on the severity and complexity of the cases they can hear. The Magistrates' Court is at the bottom of the hierarchy and the Supreme Court of Victoria (divided into the Trial Division and the Court of Appeal) is the highest state court. It deals with the most serious (indictable) offences. Each court has its own **jurisdiction** (powers) to hear criminal cases.

jurisdiction the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

original jurisdiction the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

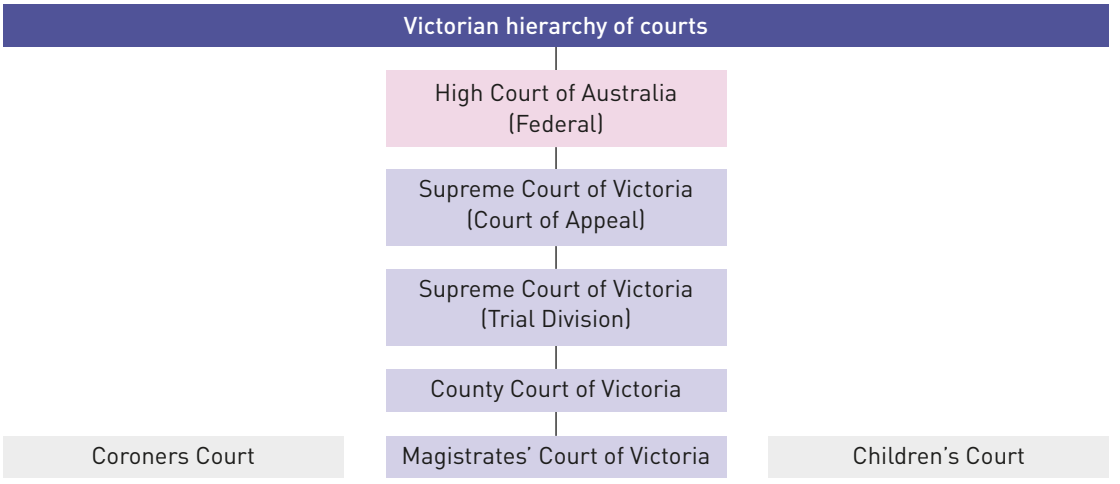
appellate jurisdiction the power of a court to hear a case on appeal

Jurisdiction can be broken down into two types:

- **Original jurisdiction** is the power of a court to hear a case for the first time.
- **Appellate jurisdiction** is the ability of a court to hear a case in which a decision is being reviewed or challenged on a particular ground (i.e. being appealed to a higher court).

As you learned in Chapter 3, the Magistrates' Court hears summary offences. The County Court and the Supreme Court hear indictable offences, with the Supreme Court generally hearing the most serious indictable offences (e.g. murder, manslaughter, attempted murder).

The High Court is a federal court. The High Court hears appeals from the state and territory Courts of Appeal. The High Court needs to give leave (consent) to a party who wants to appeal.



Source 1 The Victorian court hierarchy, including state courts and the High Court (a federal court).

There are many reasons for a court hierarchy, two of which are specialisation and appeals.

Specialisation of courts

Within the hierarchy of courts, the courts have been able to develop their own areas of expertise or specialisation. In relation to criminal cases:

- the **Supreme Court (Court of Appeal)** specialises in determining criminal appeals in indictable offences, and has particular expertise in sentencing principles
- the **Supreme Court (Trial Division)** hears the most serious indictable offences (e.g. murder and manslaughter) and will have developed its own specialisation in those areas of law
- the **County Court** and the **Supreme Court** have developed expertise in hearing more complex cases involving indictable offences (e.g. rape and homicide cases)

Did you know?

The opening of the legal year takes place in February. Judges attend church services wearing formal robes, and there is a breakfast for practitioners in Hardware Lane, Melbourne. In May each year the Victorian legal profession holds Law Week, which includes Courts Open Day with tours, exhibitions and mock trials.

- the **Magistrates' Court** is familiar with cases involving summary offences that need to be dealt with quickly and efficiently (e.g. drink-driving and traffic offences)
- other specialist courts such as the **Children's Court** and **Coroners Court** deal with specialised cases, including where young people have been charged with a crime.

Appeals

If there are grounds for **appeal**, a party who is dissatisfied with a decision in a criminal case can take the matter to a higher court to challenge the decision. A party who appeals is known as the **appellant**, and the other party is the **respondent**. The system of appeals provides fairness and allows for any mistakes made in the original decision to be corrected. If there were no higher courts, there could be no system of appeals, which would create unfairness if a court incorrectly determined a case.

Grounds for appeal in a criminal case can include:

- appealing on a question of law (where some law has not been followed, e.g. the court was allowed to hear inadmissible evidence)
- appealing a **conviction**
- appealing because of the severity (or leniency) of a **sanction** imposed. The prosecution will appeal on leniency, and the offender will appeal because of severity. An offender will usually appeal the sentence on the basis that it was 'manifestly excessive'.

In some circumstances, the appellant will need the leave (consent) of the court. This includes where an offender is appealing a conviction or sentence to the Court of Appeal, or appealing a decision of the Court of Appeal to the High Court.

appeal
an application to have a higher court review a ruling (i.e. decision) made by a lower court

appellant
a person who appeals a ruling or decision (i.e. a person who applies to have the ruling of a lower court reviewed or reversed by a higher court)

respondent
the party against whom an appeal is made

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

Summary of the criminal jurisdiction of Victorian courts

The following table sets out the criminal jurisdiction (both original and appellate) of the main Victorian courts.

	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Magistrates' Court	• All summary offences and indictable offences heard summarily • Committal proceedings, bail applications and warrant applications	• No appellate jurisdiction
County Court	• Indictable offences except murder, attempted murder, certain conspiracies, corporate offences	• From the Magistrates' Court on conviction or sentence
Supreme Court (Trial Divsion)	• Most serious indictable offences	• From the Magistrates' Court on points of law
Supreme Court (Court of Appeal)	• No original jurisdiction	• Appeals from the County Court or the Supreme Court (Trial Division)

Source 2 The main Victorian courts with criminal jurisdiction

Study tip

The *VCE Legal Studies Study Design* requires you to know about the Supreme Court, County Court and Magistrates' Court – make sure you are able to explain these reasons for a court hierarchy in relation to these courts. Knowing how each of them are specialised in criminal cases, and their role in the appeal process, is important.

An example of an appeal on leniency is provided on the next page, where a man's sentence was increased.

IN THE NEWS

Stepfather rapist has jail term tripled on appeal

Adam Cooper, *The Age*, 8 February 2017

A man who raped his stepdaughter has had his jail term tripled after the Court of Appeal slammed a judge's original sentence as 'strikingly out of kilter' with current standards.

The man was last year jailed to serve 720 days and put on a three-year community corrections order after he was found guilty at trial of rape, two counts of attempted rape and two of committing an indecent act with a child under 16 over attacks on his stepdaughter a decade earlier ...

The Director of Public Prosecutions argued the sentence imposed by County Court judge Susan Cohen was manifestly inadequate and failed to reflect the gravity of the man's crimes or the impact on the girl.

On Wednesday, the Court of Appeal agreed, and increased the man's sentence to six years in jail. The man must serve at least four years before he is eligible for parole.

Court of Appeal Justices Mark Weinberg, Simon Whelan and Emilios Kyrou were last week told 720 days represented less than 10 per cent of the maximum penalty for the charge of rape, which is 25 years in jail.

4.5 CHECK YOUR LEARNING

Define and explain

1 What is meant by the term 'court hierarchy'?
2 What is the highest Victorian state court, and what is the lowest Victorian state court?
3 Define the term 'jurisdiction'.
4 Explain two reasons for having a court hierarchy.

Synthesise and apply

5 Which court is specialised to hear the following types of cases in its original jurisdiction?
   - **a** Summary offences
   - **b** Indictable offences
   - **c** Serious indictable offences
   - **d** Committal proceedings
   - **e** Indictable offences heard and determined summarily

6 Read the article 'Stepfather rapist has jail term tripled on appeal'.
   - **a** Which court sentenced the offender?
   - **b** Which court heard the appeal?
   - **c** Which party appealed, and on what grounds?
   - **d** What was the original sentence, and what was the sentence handed down on appeal?
   - **e** No names are mentioned in the article. Why do you think that is so?
   - **f** Access the AustLII website and find the full judgment of the case referred to in this article. Read paragraph 72 and summarise its meaning.

Analyse and evaluate

7 Do you think it would be better for an accused if there were one court that heard all types of criminal cases? Give reasons for your answer.
8 The High Court is the court of last resort for a party to appeal. In your view, should there be another avenue for appeal? Explain.

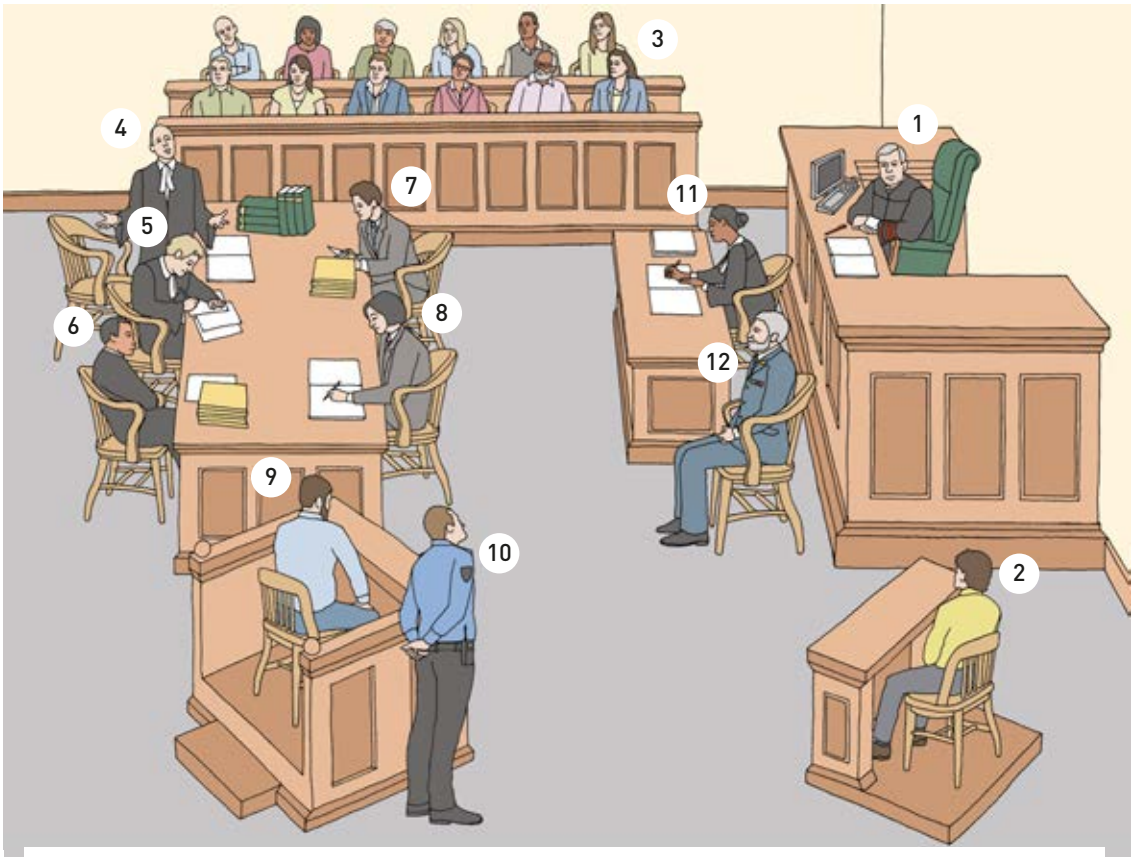
Check your obook assess for these additional resources and more:

- **Student book questions**
  4.5 Check your learning
- **Going further**
  Specialist jurisdictions of the Magistrates' Court
- **Going further**
  Other reasons for a court hierarchy
- **Weblink**
  Court Services Victoria

4.6 THE RESPONSIBILITIES OF THE JUDGE AND THE JURY IN A CRIMINAL TRIAL

If a criminal case is not resolved before trial, and the accused continues to plead not guilty to an indictable offence, their guilt will be determined by the County Court or the Supreme Court.

The four key personnel in a criminal trial are the judge, jury, parties, and legal practitioners. In this topic you will explore the responsibilities of the judge and the jury in a criminal trial, and in the next topic you will explore the responsibilities of the parties and the legal practitioners.



1	Judge	**5**	Prosecution junior barrister	**9**	Accused
2	Witness	**6**	Defence barrister	**10**	Custodial security officer
3	Jury of 12	**7**	Prosecution lawyer	**11**	Judge's associate
4	Prosecution barrister	**8**	Defence lawyer	**12**	Tipstaff

Source 1 Key personnel in a criminal trial. You are required to know the responsibilities of the judge, jury, parties and legal practitioners.

Study tip

When you see the words 'key personnel' used in relation to a criminal trial, you should recall that the key personnel are the judge, the jury, the parties and their legal practitioners. You could be asked about any one of those four.

The judge

The judge is one of the central figures in a criminal trial. He or she acts as an 'umpire' or 'referee' at trial and makes sure that the court procedures are carried out in accordance with the court's rules and that each of the parties is treated fairly. The judge **must act impartially, not favour any side, and must have no connection with the prosecution or the accused**.

Responsibilities of the judge

In a criminal trial, the judge has the following responsibilities:

- **Manage the trial**

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

barrister
a legal professional who is engaged by a party's solicitor. One of the roles of the barrister is to advocate (argue) the party's position at formal hearings

The judge must make sure that correct court procedure is followed so that both parties have an equal opportunity to present their case. This can involve controlling witnesses and legal practitioners.

The judge has powers to give **directions** and make orders during the trial, including how evidence is to be given, what documents the jury should see, and whether there will be separate trials (if there is more than one accused).

The judge might ask occasional questions, recall a witness for a matter to be clarified, or call a new witness with the permission of both sides. However, they are not active participants in the trial, and they do not take sides. They do not take an active part beyond clearing up ambiguities in points that have already been made. They do not try to make up for a **barrister** who is not doing an adequate job.

Cook v The Queen [2016] VSCA 174 is an example of the Court of Appeal considering whether the judge in a criminal case appropriately managed the trial.

LEGAL CASE

Heated exchanges between judge and barrister considered by Court of Appeal

Cook v The Queen [2016] VSCA 174 (25 July 2016)

On 25 March 2015 the applicant was convicted on two counts of armed robbery in the County Court. He appealed against his conviction on various grounds, including that the trial judge repeatedly interrupted cross-examination in both trials, interjected on too many occasions, descended 'to the arena' and 'donned the mantle of the prosecution'. He also appealed on the ground that the judge was biased. The applicant was self-represented at the appeal.

The Court of Appeal considered in detail the transcript of the trial and the dealings between the judge and the barrister for the accused. Some parts of the transcript showed heated exchanges between the judge and the barrister for the accused (after the jury had been sent out). The Court of Appeal noted that 'it clearly emerges that the judge was highly unimpressed by forensic decisions being made by defence counsel'. It stated:

> No matter what view a judge has of the manner in which counsel is running the case, to insult and demean counsel, even in the absence of the jury, is not only likely to offend and embarrass counsel but also to risk impeding counsel in conducting the trial and thus risk giving rise to a miscarriage of justice.

It went on to say that exchanges like those between the judge and the barrister may give rise to an apprehension that the accused is not being treated fairly by the judge.

Ultimately, the Court of Appeal decided that the grounds of appeal had not been made out, and there was no ground for considering that a reasonable apprehension of bias was demonstrated. The Court dismissed the appeal.

- **Decide on admissibility of evidence**

The judge is responsible for deciding which evidence is to be permitted, and can exclude evidence from the trial. The judge will also resolve any other legal issues that arise in the course of the trial.

In trials, there are rules about how evidence can be given, and what evidence is admissible. The *Evidence Act 2008* (Vic) is the main statute that governs the admissibility of evidence.

During a trial, the judge will often need to make decisions about whether evidence is admissible. For example:

- evidence must be relevant to the issues in dispute
- in most instances, **hearsay evidence** is not admissible. Hearsay evidence is when a witness relies on something that someone else said about a situation, but the witness did not actually see what happened. There are some exceptions to the hearsay evidence rule, including where the person who made the statement to the witness is not available to give evidence and certain circumstances exist (e.g. it is highly probable that the representation is reliable)
- **evidence of an opinion** is generally not admissible. If someone 'thinks' that the accused committed the crime, this is not admissible. There are some exceptions to this rule.



Source 2 You can't use something someone told you as proof that what they said was true. That is hearsay evidence, and it is generally not allowed in court. There are some exceptions to this rule.

hearsay evidence evidence given by a person who did not personally witness the thing that is being stated to the court as true

• Attend to jury matters

At the start of a trial, the judge will provide the potential jurors with information about the trial and the accused to make sure that any person can be excused from being a juror if something about the case will affect their ability to act as a juror (e.g. they know the accused or witnesses).

At any time during a trial, the judge may address the jury about the issues in the trial, the relevance of any admissions made, or any other matter that may be relevant to the jury, including giving a direction to the jury about any issue of law, evidence or procedure.

A judge may have to discharge a juror if it appears that the juror is not impartial, is ill, can't continue to act as a juror, or shouldn't continue to act.

• Give directions to the jury and sum up the case

During trial, the judge may need to give directions to the jury to ensure a fair trial. This may include telling the jury that the accused is not required to give evidence, and the jury should not assume the accused must be guilty because he or she didn't give evidence. Legislative changes were made in 2015 to reduce the complexity of jury directions in criminal trials so that they are easier for jurors to understand.

Once trial has concluded, the judge will need to summarise the case to the jury. They must explain the law involved, identify the evidence that will assist the jury and refer to the way the parties have put their cases.

• Hand down a sentence

If a jury finds an accused guilty, or the accused pleads guilty, the case will be set down for a plea hearing and the parties will make submissions about sentencing. Following that hearing, the judge must hand down a sentence. The judge must follow the sentencing guidelines established in the *Sentencing Act 1991* (Vic) and comply with legislation about the sentence that should be imposed.

• Other responsibilities

In addition to these main responsibilities, the judge must also:

- **order that the VLA provide legal representation** – If a judge is satisfied that the court can't provide the accused with a fair trial unless the accused is legally represented, and the accused is unable to afford the full cost of obtaining their own private legal practitioner, the judge may order VLA to provide legal representation. They can then adjourn the trial until that legal representation has been provided.
- **be familiar with technology** – Judges are expected to be able to use technology. As discussed in Chapter 3, this includes closed-circuit television for **vulnerable witnesses** to give evidence.

Study tip

Collect articles about criminal trials. In each article, identify when it talks about key personnel in the trial and what occurred. This will give you practical examples of how the responsibilities play out in a trial.

vulnerable witness a person who is required to give evidence in a criminal case and is considered to be impressionable or at risk. This might be a child, a person who has a cognitive impairment, or the alleged victim of a sexual offence

- **be courteous and not interfere**—The judge should be courteous and civil to the parties, legal practitioners and to witnesses, and not insult or demean other participants in the trial.
- **assist a self-represented party**—To ensure a fair trial, the judge may be required to assist a self-represented party to understand procedural matters or legal terminology. This helps to make sure that the accused is on equal footing with the prosecution as far as possible.

A case in which a judge does not carry out some of these responsibilities may result in an appeal by one or both of the parties as demonstrated below.

IN THE NEWS

Chief Justice rebukes judge for 'inappropriate' comments over 'nubile' girl, 14

Jane Lee, *The Age*, 22 November 2016

Chief Justice Marilyn Warren has rebuked a judge, saying he blamed a child victim for being sexually abused when he commented that the teenager was 'nubile' and that her abuser, a Children's Court security guard, was 'not made of steel'.

County Court Judge Christopher Ryan made the remarks at a pre-sentence hearing, minutes before he sentenced Franco Abad to a two-year good behaviour bond and put him on the sex offenders' register for 15 years for one count of sexual penetration of a child under 16.

The Court of Appeal ruled on Tuesday that Abad's sentence was 'manifestly inadequate' for the seriousness of his crime.

But, despite this ruling, the court dismissed the public prosecutor's appeal and decided not to impose a harsher punishment on Abad, because the prosecutor had initially conceded it was at the lower end of offending.

Abad, then 31, had met his victim outside the Children's Court building last year and was in a sexual relationship with her for some weeks believing she was 17, over the age of consent of 16.

He was charged with having sex with her once more in August 2015, after police told him she was actually 14 and living in a Department of Human Services residential care unit.

When Abad confronted the girl about her age she insisted she was 17 and that her mother had lied to the police.

He indicated the relationship was over but went on to have sex with her.

A jury found him guilty at trial.

Chief Justice Warren said that Judge Ryan 'inappropriately and mistakenly took account of irrelevant matters, namely the attitude, demeanour, conduct and nubility of the victim and the effect she had on the respondent'.

The judge, she said, had also taken the wrong approach in making remarks about these things when deciding on Abad's moral responsibility for his crime.

'The remarks [about the victim] and as to the respondent "not being made of steel" reflected a shift of moral culpability to the victim.'



Source 3 Franco Abad outside the County Court

The jury

The jury system is a trial by peers. It dates back to well before the Magna Carta in England, but the Magna Carta made it a fundamental right. No free man was to be imprisoned 'but by the lawful judgment

of his peers … and by the law of the land'. The jury system provides the opportunity for community participation in the legal process, and for the law to be applied according to community standards.

As you learned in Chapter 3, an accused person has a right to trial by jury where they have pleaded not guilty to an indictable offence. Therefore, criminal trials in the County Court and the Supreme Court of Victoria are generally jury trials. A jury is **not used for sentencing**.

The criminal 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 she said? Did the witness actually see the accused or was the witness mistaken?

Composition of a criminal jury

A criminal jury comprises 12 jurors. They are chosen randomly from people eligible to vote and who are on the electoral roll.

Some members of society are disqualified (e.g. some prisoners) or ineligible (e.g. lawyers and police officers) from being on a jury. Others can be excused if they have a valid reason (e.g. they are significantly unwell). Potential jurors can also be challenged by the prosecution or the defence, with or without a reason (but they are limited in the number of people they can challenge without good reason).



Source 4 Twelve people are needed to form a jury in a criminal trial.

Responsibilities of a criminal jury

The jurors must 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.

In a criminal trial the jury has the following responsibilities:

- **Be objective**

  The jury must be unbiased and bring an open mind to the task, putting aside any prejudices or preconceived ideas. A jury member must have no connection with any of the parties, and must also ensure they decide whether the accused person is guilty or not guilty based on the facts and not on their own biases.

  The case below is an example of a jury being discharged because a jury member had a connection with one of the parties in the case.

Did you know?

In a British murder trial in 1994, four jurors who were staying overnight in a hotel during deliberations conducted a séance to ask one of the victims who committed the murder. A new trial was ordered.

IN THE NEWS

Trial to restart after Vic jury discharged

AAP, *news.com.au*, 6 October 2015

The trial of a former Melbourne Grammar student accused of murdering a homeless man will start again after it was aborted.

Victorian Supreme Court Justice Jane Dixon discharged the jury on Monday, the second morning of the trial of Easton George Woodhead, 20, after one juror raised concerns about links shared with the Woodhead family.

Woodhead is charged with murdering Morgan Wayne 'Mouse' Perry, 42, last year.

He has pleaded not guilty.

Prosecutor Michele Williams applied for the jury to be discharged after the juror raised these concerns.

A new jury is expected to be empanelled on Tuesday.

- ## Listen to and remember the evidence

Evidence is sometimes complicated, particularly in fraud cases, and often presented gradually and in the form of questions and answers. The jury members will need to be able to make sense of all this evidence.

Jurors can take notes if it helps them to remember information, but they must make sure they continue to concentrate on what is taking place in the courtroom. In the past, a jury has been discharged because a jury member fell asleep.

A jury mustn't undertake their own investigations of what happened, conduct any research on the case, or make any enquiries about trial matters. This can include using the internet to search for information. Doing so can lead to penalties and the discharge of the jury.

Did you know?

In a criminal trial, the court can order the empanelment of up to three additional jurors, so that there are up to 15 jurors. However, when it comes to the jury having to decide its verdict, only 12 jurors will be required.

- ## Understand directions and summing up

At the conclusion of a trial, the judge will give directions to the jury about issues or points of law, and will sum up the case. The jury is required to listen to the directions and the summing up given by the judge, and can ask for an explanation about any legal point they don't understand.

For example, in sexual offence cases, the trial judge may give directions to the jury about the meaning of 'consent', including a direction that just because a person did not protest or physically resist the accused before or during the sexual act does not mean they consented.

- ## Deliver a verdict

The jury must take part in the deliberations in the jury room and form an opinion about which party's story or arguments they believe. Deliberations should be undertaken freely and without any coercion of one juror by another to reach a verdict. Deliberations are confidential. Evidence about what happens during deliberations is not generally admissible or allowed to be disclosed, so that jurors can be free to be candid about their views.

unanimous verdict a verdict or decision where all the jury members are in agreement and decide the same way (e.g. they all agree the accused is guilty)

majority verdict a jury verdict where all but one of the members of the jury agree with the decision

The jury must **make a decision on the facts of the case**. In a criminal trial, this means the jury must decide whether the accused is guilty. A criminal jury must aim to reach a **unanimous verdict**. If they are unable to agree on a verdict, the court may accept a **majority verdict** unless the accused is charged with murder, treason or certain drug offences. The court may also accept a guilty verdict for an alternative offence.

An interesting legal case that demonstrates the importance of jury deliberations being undertaken freely and without coercion is provided below.

LEGAL CASE

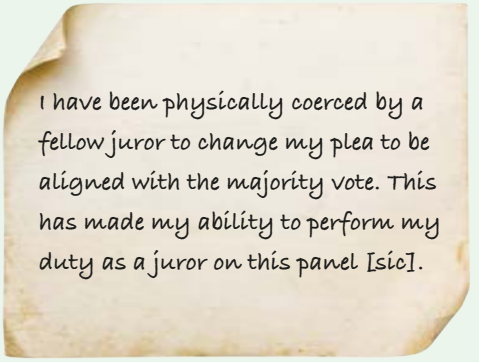
Juror coerced into making decision

Smith v Western Australia (2014) 250 CLR 473

In *Smith v Western Australia*, a note was found in the jury room after the jury had decided the case. The note implied that one juror had been physically threatened to agree with the majority so a decision could be reached. The jury had found the accused guilty on two counts of indecently dealing with a child under the age of 13 years. The foreperson (i.e. the head juror chosen to be spokesperson for the jury) was asked, in accordance with usual practice, if the verdict was the verdict of all the jury, and he said it was.

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 on the basis that the common law rule known as the 'exclusionary rule' applied. That rule 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 2016, the Court of Appeal again dismissed Smith's appeal, having found that it was not satisfied that the juror who wrote the note was coerced.



Source 5 The exact text of the note left in the jury room after Smith's trial

4.6 CHECK YOUR LEARNING

Define and explain

1 Explain two circumstances that are needed for a criminal trial to be heard in the Supreme Court of Victoria.
2 Does the judge have any investigatory powers? Explain.
3 Explain how the responsibilities of the judge uphold the principles of fairness and equality.
4 How many jurors are there in a criminal trial? Do they hand down a sentence?

Synthesise and apply

5 Do you think hearsay evidence might be unreliable? Why?
6 Read the legal case *Cook v The Queen*.
   a Explain how the trial judge may have not acted according to a judge's duties or responsibilities.
   b Which party appealed?
   c Did the Court of Appeal uphold the appeal? Why or why not?
7 Research the conduct of a criminal jury in a case against Bilal and Mohammed Skaf in New South Wales.
   a What did two of the jurors do in that case?
   b Why do you think this was an issue?
   c What did this result in?
   d Do you think the decision by the court was appropriate, given the discovery about what the jurors had done? Explain.
8 Read the article 'Trial to restart after Vic jury discharged'.
   a Explain what it means to discharge a jury.
   b Why was it necessary for a new jury to be empanelled?
   c What principle of justice does this case most demonstrate? Justify your answer.
9 Read the legal case *Smith v Western Australia*.
   a What was the accused charged with?
   b What was the verdict of the jury?
   c What was later discovered in the jury room?
   d What is the exclusionary rule, and why do you think it's important?
   e Why did the High Court decide that the exclusionary rule did not apply in this case?

Analyse and evaluate

10 Do you think jury deliberations should be secret? Give reasons for your opinion, referring to the principle of fairness.
11 Discuss the extent to which the responsibilities of the judge uphold the principles of justice.

Check your obook assess for these additional resources and more:

- **Student book questions** 4.6 Check your learning
- **Going further** Choosing a jury
- **Going further** Rules of evidence
- **Weblink** Roles in court

4.7 THE RESPONSIBILITIES OF THE PARTIES AND LEGAL PRACTITIONERS IN A CRIMINAL TRIAL

In addition to the judge and the jury, the parties and the legal practitioners also have responsibilities in a criminal trial.

The parties

In a criminal trial there are two parties:

- the **prosecution** – the party bringing a criminal case to court
- the **accused** – a person who has been charged with a criminal offence.

Each party has control over the way the case will be run, as long as they comply with their responsibilities and the court's rules, directions and orders. This is known as 'party control'. This is different from the trial system in some other countries, where an external investigator seeks out the truth to determine guilt.

Responsibilities of the parties

In a criminal trial, the parties have the following responsibilities:

• Give an opening address

The prosecution must give a statement to the jury on the prosecution case before any evidence is given in the trial. The prosecutor can only speak to evidence that has been seen by the accused.

If an accused is legally represented, their lawyer must present to the jury a response to the prosecution's opening address. An accused who is not represented does not have to do this.

Like the prosecution, the accused is restricted to relying on evidence set out in materials that have been filed and served.



Source 1 John Champion SC was appointed Victoria's Director of Public Prosecutions in 2011.

Did you know?

'SC' stands for 'Senior Counsel'. It has the same meaning as 'QC' (Queen's Counsel). They are experienced barristers who go to court for clients in the most important cases. They are also called 'silks' because the robes they wear in court (their 'gowns') are made of silk.

• Assist the judge in jury matters

Both parties assist in empanelling the jury (that is, deciding which 12 people will form the jury panel for the trial). Both parties have the ability to challenge potential jurors, with or without a reason. There is a limit on the number of challenges they can make to jurors without a reason, but there is no limit for challenges where there is a legitimate reason.

Either party can also request during the trial that the trial judge give directions to the jury. For example, if the prosecution does not call a particular witness, then the accused can request that the trial judge direct the jury on that fact.

Did you know?

Victoria was the first state in Australia to establish a DPP, in 1983. The first DPP, John Harber Phillips QC, was later made Chief Justice of Victoria. Several DPPs have subsequently been appointed as judges.

• Present the party's case

The prosecution is required to present to a jury all the credible evidence that it considers relevant to the case. This responsibility applies even if the evidence is not beneficial to the prosecution's case.

Each party is responsible for presenting their evidence, and usually through witness evidence. However, unlike the prosecution, which has the burden of proof and needs to present evidence to

prove the facts, there is no obligation on the accused to give evidence or call any witnesses. The accused has complete control and can choose not to say anything.

- ### Give a closing address

The prosecution is entitled to address the jury to sum up the evidence after the close of all evidence, and before the closing address of the accused (if the accused makes one).

An accused is also entitled to address the jury to sum up the evidence after the close of all evidence and after the closing address of the prosecution.

- ### Make submissions about sentencing

The parties may make submissions about sentencing to the court once the accused is found guilty. This usually occurs at a plea hearing that is held after the jury delivers its verdict.

- ### Other responsibilities

  - **Attend trial** – Both parties are expected to attend trial. If an accused is on bail and does not attend, a warrant is usually issued for their arrest.
  - **Research the law** – The prosecution is responsible for finding out the law that is relevant to their case, researching it and determining how it applies to the facts of the case. The prosecutor is expected to make adequate submissions to make sure the law is properly applied to the facts.
  - **No bias** – The prosecution is expected to act in a way that does not seek to bias the court against the accused. The prosecutor must assist the court and impartially present the prosecution's evidence to the court.

The case below highlights a change in the law in relation to an accused who stays silent. Now, the right to stay silent cannot be used against the accused.

The Weissensteiner principle

LEGAL CASE

Weissensteiner v The Queen (1993) 178 CLR 217

In this case, 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.

The *Jury Directions Act 2015* (Vic) abolishes the principle that a judge may give a direction to the jury that an inference of guilt can be drawn when an accused person elects not to give evidence. Section 41 of the *Jury Directions Act* requires that, if the accused does not give evidence or call a particular witness, a judge may direct the jury about that, and must explain certain matters, including that the prosecution has the burden of proof, that the accused is not required to give evidence or call a witness, and the fact that the accused did not do so is not evidence against the accused.


The three lived on board together as they toiled to turn the yacht into a veritable floating fortress.

Source 2 A page from the newspaper reporting the crime that Weissensteiner served jail time for

The legal practitioners

Legal practitioners, on behalf of the parties, undertake the role of preparing and conducting a case. In a criminal trial, prosecutors are legal practitioners.

Legal practitioners are subject to various laws that impose duties and obligations on them. The most important duty is the duty to the court and the administration of justice. Legal practitioners can't mislead or deceive the court, they can't place incorrect facts before the court, and they must be honest about the law set out in previous cases (e.g. they shouldn't argue that the court should follow a particular decision when they know that decision has since been overruled). The legal practitioner's duty to the court is over and above their duty to the client. This means that they must put the court and the law first, even if it means acting against the client's wishes.

There are two types of legal practitioners that an accused is usually represented by at trial: the **solicitor** and the **barrister**. Part of the role of the solicitor before trial is to draft documents, communicate with the other party and the court, prepare the case, research the law and develop the evidence, and instruct the barrister (including at trial). The main role of the barrister at trial is to present the defence evidence and argue the accused's case on their behalf.

barrister
a legal professional who is engaged by a party's solicitor. One of the roles of the barrister is to advocate (argue) the party's position at formal hearings

Responsibilities of the legal practitioners

Legal practitioners in a criminal trial have the following responsibilities:

- ### Be prepared

  Legal practitioners need to be ready to proceed, and be familiar with the documents that are to be admitted into evidence and the witnesses who are to be called.

- ### Comply with their duty to the court

  Legal practitioners owe a duty to the court. This means that they must act ethically and in accordance with the law, even if it means they are going against the client's instructions. This also means a legal practitioner shouldn't twist facts to assist the case.

  Legal practitioners are expected to be courteous, cooperate with each other and with the court, and comply with any directions given by the court.



Source 3 From April 2017, judges in Victoria have been wearing this new style of black robe instead of the traditional red robes.

- ### Present the case in the best light possible

Legal practitioners have a responsibility to present the case in a manner that is in the best interests of their client.

The accused's legal representative must present to the jury a response to the prosecution's opening address. Like the prosecution, the accused is restricted to material already provided to the prosecution. The accused's legal representative will also address the jury to sum up the evidence after the close of all evidence and after the closing address of the prosecution.

The legal practitioner for the accused will also assist in examining and cross-examining witnesses, and make submissions about the appropriate sentence if the accused pleads guilty or is found guilty.

- ### Other responsibilities

In addition to these main responsibilities, legal practitioners must also take special care for some accused persons, advise the accused about their rights, defend the accused irrespective of any belief or opinion and act in a certain manner if the accused has confessed guilt.

In the legal case below, Justices Weinberg, Priest and Mcleish criticised the prosecution for their delay in conceding a wrong verdict.

LEGAL CASE

Brett Whiteley art fraud case has convictions quashed

Gant v The Queen; Siddique v The Queen [2017] VSCA 104 (8 May 2017)

In Australia's biggest art fraud case, a talented art restorer, Mohamed Aman Siddique, and an art dealer, Peter Gant, were accused of selling three fake Brett Whiteley paintings.

The trial before Justice Croucher in the Supreme Court lasted five weeks. The jury found the two men guilty of obtaining a financial advantage by deception, and the judge sentenced them to imprisonment for five years (Gant) and three years (Siddique). However, the judge ordered a stay of the sentences until an appeal was heard. The judge also took the unusual step of writing a report for the Court of Appeal in which he stated that the jury decision was unsafe.

Both men appealed, and briefed counsel to prepare their cases. Late in the afternoon of the day before the hearing of the appeals, the Director of Public Prosecutions told the Court that he would concede the ground of each appeal.

Justices Weinberg, Priest and Mcleish criticised the prosecution's delay in conceding a wrong verdict. They also took an unusual step – issuing an early statement separate from their judgment.

In their statement the Justices said although the Crown's concession was welcome, their work had been disrupted. Beyond inconvenience, it prejudiced the rights of other litigants to have their cases heard in a timely manner:

> it is a matter of considerable regret that this Court was not notified until 4.45pm last night that the Crown proposed to make the concession that the applicants' convictions were unsafe, and should accordingly be quashed.
>
> A vast amount of time has been spent by the members of this Court, their staff and the Registry in preparation for the hearing of this appeal.

On the appeal applications, the Court of Appeal accepted the prosecutor's concession, which they said was made 'with conspicuous fairness'. They pointed out that the Crown's concession was not binding on them, as it was 'the Court itself which must determine whether the convictions should be set aside.' However, they agreed that the prosecutor was correct. The convictions were quashed and verdicts of acquittal were entered by the court.

The judges also stressed that while the jury does not always 'get it right', it usually does:

> Trial by jury is of fundamental importance to both the rule of law, and to our system of criminal justice. It represents perhaps the greatest safeguard that we have of the rights of the individual against the State. There have been literally thousands of criminal trials conducted over the years without anyone being able to demonstrate that the jury, assuming they were properly directed, and the trial was otherwise properly conducted, had wrongly convicted an accused person. This case is a rare and almost unique instance of the system having failed in that regard.
>
> It is fortunate that the mechanism of the appeal to this Court, coupled with the fairness of the prosecuting authorities in recognising that failure, has resulted in a rectification of that error. However, nothing can ever fully restore the applicants to their original position.

Summary of the responsibilities of key personnel

Some of the factors to consider when discussing the responsibilities of the key personnel in a criminal trial are set out in Source 4 below.

KEY PERSONNEL	COMMENTS
Judge	• Acts as an impartial umpire, making sure there is a fair trial and parties are treated equally. However, even judges may have unconscious biases. • Gives directions to juries based on law and fact and not on any biases. However, jury directions may be too complex, risking appeal or mistrial. • Can order VLA to provide legal representation to ensure a fair trial. • Does not overly interfere in the procedure (doing so risks a retrial). • Role doesn't extend to deciding guilt despite being the most knowledgeable in the room. • Cannot overrule a jury verdict even if the judge has a different view. • Is experienced in criminal law and is able to give directions and ensure procedures are followed to ensure a fair trial. • Can assist self-represented accused people in understanding court procedures or consequences of certain actions, but cannot overly interfere, and cannot advocate for the accused person.
Jury	• Randomly picked, and jurors have no connection to the parties. • Only decide on facts before them and can't make their own enquiries, thus ensuring a fair trial without bias, fear or favour. • Must remain objective, but may have unconscious biases. • Reach a shared decision about the accused's guilt. • May inadvertently come across information not presented at trial, risking an unfair outcome. • Must listen, and remember all the evidence, which can be difficult. • Must follow judges' directions, but these can be complex. • Do not give reasons for their decision, which can risk an unfair trial if decision is based on something other than the facts. • Deliberations are secret, ensuring frankness in discussions and without fear that what they will say can be used as evidence.
Parties	• Party control allows parties to make decisions about how to present their case. • Prosecution assists the court to arrive at the truth. • Party control means parties get to choose how they present the case, which depends on their own abilities. However, vital evidence may be missed. • Unrepresented party can cause delays (can be partly alleviated if a judge assists). • The prosecutor must assist the court in reaching a decision and must not seek to bias the court against the accused, which upholds both fairness and equality.
Legal practitioners	• Have responsibilities to present their client's case in best light. • Assist in finding the truth and not mislead the court. • Accused's legal practitioners must defend them regardless of their belief or opinion about guilt. • Can add to the costs of a trial. • Better legal representation may mean a better outcome. • Better legal representation, however, may also mean that jurors are more swayed by the way in which the case is presented rather than the evidence itself. • Not all legal representatives are equally as good, therefore there can be more inequality and unfairness if inexperienced legal practitioners are used.

Source 4 Some points of discussion in relation to the responsibilities of key personnel

4.7 CHECK YOUR LEARNING

Define and explain

1 Identify four key personnel in a criminal trial and briefly describe their roles.
2 Who is responsible for convincing the jury that the accused is guilty? Explain.
3 Explain what is meant by party control.

Synthesise and apply

4 Read the legal case *Weissensteiner v The Queen*.
   - **a** Why was Weissensteiner's evidence so relevant in this case?
   - **b** What was the instruction given to the jury by the trial judge?
   - **c** What was the final decision of the High Court?
   - **d** Do you agree with the abolition of this principle? Why or why not?

5 **Mock court**

As a class, conduct a mock court of a criminal trial. A range of documents are provided on your obook assess to help you stage the mock court. You must:

- **a** decide on a scenario
- **b** decide who will be the accused (or multiple accused), judge, jury members, prosecution, accused's barrister, accused's lawyer, witnesses and members of the public
- **c** decide on a stage of the trial you will play out
- **d** prepare a script
- **e** conduct the mock court, keeping note of the responsibilities of the key personnel in the trial.

Analyse and evaluate

6 For each of the following scenarios, describe one responsibility of the key personnel in bold, and discuss the extent to which fulfilling that responsibility achieves one of the principles of justice.
   - **a** The **prosecution** has evidence that is relevant, but the evidence isn't helpful in obtaining a guilty verdict.
   - **b** The **accused** is the only person in the room that knows what happened on the night of the crime. There is no forensic evidence available. The accused has chosen not to give evidence.
   - **c** The **accused's barrister** believes the accused is guilty. Despite the accused maintaining innocence, in private conversations her story doesn't stack up.
   - **d** A **member of the jury** has realised that she used to date the accused's brother and thinks very fondly of the family.
   - **e** The **judge** is overseeing a trial in which the accused is self-represented, doesn't speak English very well and is having difficulty understanding procedural matters.

7 Conduct a debate in class on the following statement: Once an accused confesses their guilt to the lawyer, but insists on pleading not guilty, then the lawyer should stop acting for the accused.

Check your obook assess for these additional resources and more:

- » **Student book questions**
  4.7 Check your learning
- » **Video tutorial**
  How to answer, identify and describe questions
- » **Going further**
  What if my client is guilty, and I know it?
- » **Weblink**
  Supreme Court of Victoria: admission ceremony

4.8 THE PURPOSES OF SANCTIONS

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

rehabilitation
one purpose of a sanction; a strategy designed to reform an offender in order to prevent them from committing offences in the future

punishment
one purpose of a sanction; a strategy designed to penalise (i.e. punish) the offender and show society and the victim that criminal behaviour will not be tolerated

deterrence
one purpose of a sanction; a process by which the court can discourage the offender and others in the community from committing similar offences

denunciation
one purpose of a sanction; a process by which a court can demonstrate the community's disapproval of the offender's actions

protection
one purpose of a sanction; a strategy designed to safeguard the community from an offender in order to prevent them from committing further offence (e.g. by imprisoning them)

community correction order (CCO)
a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

If the accused is found guilty, or if they have pleaded guilty to the charge(s), the judge or magistrate will decide on the appropriate **sanction** (i.e. sentence). A sanction is a penalty imposed by courts on a person who is guilty of an offence.

The *Sentencing Act* sets out the courts' powers to impose sanctions and establishes various types of sanctions. Two of the purposes of the *Sentencing Act* are:

- to promote **consistency of approach** in sentencing
- to provide **fair procedures** for imposing sanctions.

The nature of criminal sanctions has changed over time, from harsh, inhumane punishments aimed to deter others and seek revenge for society, to a greater realisation of the needs of offenders and the desire to reform and rehabilitate them.

The purposes of sanctions are set out in section 5(1) of the *Sentencing Act*. These purposes are:

- **rehabilitation**
- **punishment**
- **deterrence**
- **denunciation**
- **protection**.

A sentencing judge must take these purposes into consideration when imposing a sentence, but must not impose a sentence that is more severe than necessary to achieve the purposes of the sentence imposed (called the **principle of parsimony**). The purposes often overlap and a sentence can seek to achieve a combination of two or more purposes.

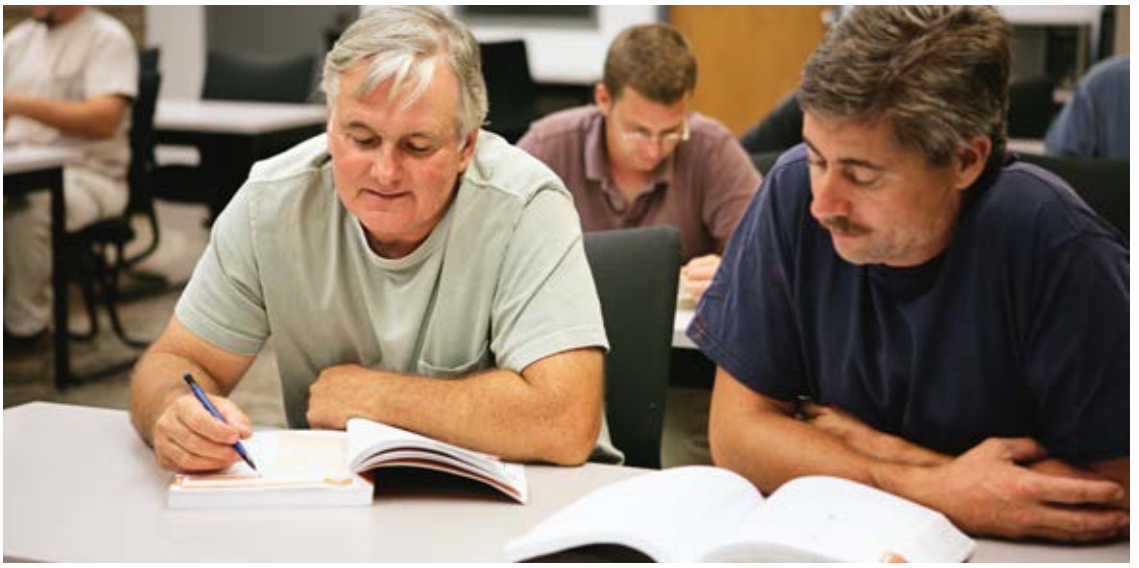
Rehabilitation

One purpose of sanctions is rehabilitation (i.e. the treatment of the offender to address the underlying reasons for the crime).

A court will consider sanctions that could help **treat** the offender and address the underlying reasons for the offender committing the crime. This aims to assist offenders to change their attitudes and behaviour with the goal of preventing them from reoffending in future. This can be achieved by giving a **community correction order (CCO)** to encourage rehabilitation rather than sending offenders to prison. A CCO can also help by requiring offenders to participate in skills training. You will learn more about CCOs in the next topic.

Although prison is the sanction of last resort, rehabilitation programs are carried out within prisons. Prisoners are offered the opportunity to undertake life skills programs such as drug treatment and anti-violence programs (for violent, sexual and drug offenders), and specific employment, education and training programs. For example, on 2 February 2016, the Aboriginal Art Policy Model was launched. It allows Australian Indigenous prisoners to sell their artwork through the prison art program.

An example of a case in which the judge decided the accused had reasonable prospects of rehabilitation is *DPP v England* on the next page.



Source 1 Prisoners are offered the opportunity to undertake education and training programs in prison.

Prospects of rehabilitation for armed robber

LEGAL CASE

DPP v England [2016] VCC 1486 (6 October 2016)

On 6 October 2016, Jade England, 29, was sentenced in the County Court of Victoria at Geelong. Earlier that year England had pointed a sawn-off double-barrelled shotgun at a console operator in a petrol station and demanded that he give her money and cigarettes. She also stole a CD. Two weeks later, England attempted another armed robbery with a co-offender at a gaming venue, but failed after a man threw a computer mouse in the face of her co-offender. Two days later, England and the same co-offender committed an armed robbery at a bank. The robbery failed after a customer grabbed England. England stabbed another customer in the leg with a screwdriver and was eventually restrained.

England pleaded guilty to several charges, including two charges of armed robbery, one charge of attempted armed robbery, one charge of recklessly causing injury and one charge of being in possession of a firearm.

Her Honour Judge Hampel noted that England had three children, had engaged in illicit drug use and came from a loving and supportive family. Judge Hampel found that England had reasonable prospects of rehabilitation, saying:

> You are of average intelligence and on the materials before me it would appear, unimpaired by mental illness or psychological conditions that would hold you back from rehabilitation. Should you choose to give up drugs and negative peer associations, that is to not to mix with bad people anymore, you should be able to turn yourself in to a useful law-abiding person who can live a meaningful and happy life; to have good relationships with family, good relationships with good friends and good relationships with your children. There is nothing in the material before me to suggest that you are not capable of doing that. So, that counts in your favour in terms of an assessment of your prospects for rehabilitation and should, I hope, make you feel a bit better about yourself rather than defeated.

England was sentenced to seven years in prison. She is to serve a period of four-and-a-half years before being eligible for release on parole. The 211 days England had already served in detention was to be counted as part of the sentence already served.

Punishment

Did you know?

In 1788, sentencing options in the colony of New South Wales included execution, flogging with a cat of nine tails whip, and confinement in irons.

Study tip

You must be familiar with each of the five purposes of sanctions because they are listed in the *VCE Legal Studies Study Design*.

Punishment is one of the purposes of sanctions. It gives the community some **revenge** against the offender. When a crime has been committed, an offender has done something unacceptable to society, especially if someone has been hurt, and must be punished so that the victim of the crime and the community feel justice has been done. Offenders should be punished to an extent and in such a manner that is just in all the circumstances so the community can feel it has achieved retribution.

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. But punishment must be appropriate to the offence committed.

More often than not, the purpose of punishment is combined with another purpose such as deterrence.

The heavy punishment handed down in the case below was appropriate because of the nature of the offence.

LEGAL CASE

A grave offence requires a heavy punishment

R v Banek [2017] VSC 11 (1 February 2017)

On 13 March 2016, Abuk 'Jackie' Akek, 20, was murdered in her Melton home. Her killer was her former de facto partner Makeny 'Nelson' Banek, 24. They had a two-year-old son. The murder was callous and horrific. Banek had decided to kill Akek. He beat her mercilessly, punching and kicking her, and then he choked her, took a knife and stabbed her three times in the abdomen. Akek tried to defend herself, but she died within a very short time of the attack.

Banek carried Akek's body to her bed and covered her with a blanket, then covered up his involvement. He later returned to her home and placed a plastic rose on the bed beside her. Banek's mother and brother later found Akek. Police arrested Banek later that evening. He confessed immediately and extensively, and he was charged with her murder. He pleaded guilty at an early stage.

At his sentencing hearing, Justice Croucher of the Supreme Court said:

> This is a grave example of murder. A young mother has been brutally bashed and stabbed to death for no reason other than her killer's judgment that, because she did not want him, she was not entitled to live. It is sickening. General deterrence, curial denunciation and just punishment compel a heavy sentence. The murder occurred against the background of previous instances of violence sufficiently serious to result in prison sentences for a first offender. Thus, specific deterrence also looms large as a sentencing purpose.

In light of Banek's full confession, early plea of guilty and other considerations, Banek was sentenced to 23 years' imprisonment with a non-parole period of 18 years.



Source 2 After the murder Mr Banek returned to Ms Akek's home and placed a plastic rose on the bed beside her body.

Deterrence

Some sanctions are aimed at discouraging other people from committing similar crimes. This is known as **general deterrence** because it is aimed at deterring the entire community from committing similar offences (because they see the severe consequences of committing the crime).

Sanctions are also a **specific deterrence** because they discourage the **offender** from committing the same offence again.

A sentence designed to act as a general deterrence was handed down in the case of *DPP v Keefer* [2016] VCC 1805.

General deterrence for tax evasion case

LEGAL CASE

DPP v Keefer [2016] VCC 1805 (25 November 2016)

Daniel Keefer operated a business in Maidstone, Victoria. He ran into financial difficulties and decided to allow his premises and businesses to be used to assist in the importation of a container of goods that concealed a large amount of tobacco. Concealment of the tobacco would avoid taxes being imposed. The container was said to contain '600 cartons of toilets' and was to be delivered to Keefer's business. Keefer would be provided with a certain sum of money to help with the importation on behalf of someone else.

On 19 August 2013, the container arrived in Australia, was examined, and 17 009 kg of tobacco was found. Customs decided to proceed with a controlled delivery, which meant they removed the tobacco, replaced it with ballast, and delivered the container. In December 2014, Keefer was charged under the *Customs Act* with importing goods (tobacco products) with an intent to defraud the revenue. At his committal hearing Keefer pleaded not guilty and the matter proceeded to trial. Keefer ultimately entered a plea of guilty.

After considering Keefer's circumstances, Her Honour Judge Gaynor noted that his prospects of rehabilitation were excellent, and she doubted that the courts would ever see him again. She said:

> As I doubt that a court will ever see you again, I do not regard the aspects of specific deterrence, punishment or protection of the community to be relevant to the sentencing exercise before me. But the issue of general deterrence, that is, the imposition of a sentence of imprisonment which is designed to deter other people minded to behave in the criminal fashion that you did, is a very live issue in this sentencing exercise. That is, ordinarily I would be expected to impose a sentence upon you which would effectively frighten and deter other persons from behaving in the way you have.

Her Honour decided that the general deterrence purpose could be best achieved by the imposition of a term of 18 months' imprisonment. However, Her Honour immediately released Keefer from prison upon Keefer agreeing to be of good behaviour for two years. If he were not of good behaviour, he would be resentenced.

Denunciation

Denunciation refers to the **disapproval** of the court. A particular sanction 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. This is demonstrated in the case of *DPP v Granata* [2016] VSCA 190 on the next page.

LEGAL CASE

Violent offending results in court's denunciation

DPP v Granata [2016] VSCA 190 (8 August 2016)

In 2012, a 21-year-old female tourist visited Australia. The tourist formed a friendship with Alfio Granata, and they engaged in mutual use of illicit drugs and consensual sexual activity.

The relationship descended into violence and abuse. Over a period of six weeks, Granata kept the victim confined to a hotel room, repeatedly assaulted and raped her, and stole her personal belongings. A medical examination showed that the victim had more than 50 injuries.

In January 2015, Granata pleaded guilty to various charges, including nine charges of rape. Judge Gucciardo in the County Court sentenced him on 25 May 2015 to 17 years' imprisonment, with a non-parole period of 13 years. The DPP appealed against the sentence on three grounds, one of which was that the sentence of imprisonment for the rape offences was manifestly inadequate.



Source 3 Alfio Granata had his sentence increased when the DPP appealed the original sentence.

The Court of Appeal found that there was a need to impose an appropriate punishment, express unequivocally the Court's denunciation of the offending, and impose a sentence that reflected the need for general and specific deterrence. It found that the rape sentences did not adequately reflect the horrific nature of the rapes, and the total sentence 'did not adequately reflect the need to denounce and punish the objective gravity of the offending comprised in quite distinct episodes or give adequate weight to considerations of general and specific deterrence'.

A new total effective sentence of 23 years' imprisonment was imposed, with a non-parole period of 17 years.

Protection

Protection is an aim that seeks to safeguard the community from the offender. Sometimes it is necessary to remove an offender from the community (put them in prison) to achieve this aim, because the offender is physically prevented from reoffending.

A non-custodial sentence (when an offender isn't put in prison), such as a CCO, can also protect the community from offenders because they keep offenders busy when they might otherwise be engaged in criminal activity. However, offenders sometimes abuse CCOs and offend while carrying out community work.

Under section 6D of the *Sentencing Act*, a court can give a **serious offender** a longer sentence that is more appropriate to the gravity of the offence. A serious offender is an arsonist or a drug, sexual or violent offender who has previously been convicted of a similar offence and has served time in prison. Judges and magistrates are encouraged to express their reasons for imposing a longer sentence and what they are seeking to achieve.



Source 4 In October 2016, Bowe Maddigan violated and killed Zoe, aged 11, strangling her in her Wangaratta home. Maddigan was sentenced in the Victorian Supreme Court to life imprisonment. He is not eligible for parole for 28 years. Justice Lasry recognised the need to protect the community when imposing a sentence of life imprisonment.

4.8 CHECK YOUR LEARNING

Define and explain

1 Identify and describe three purposes of criminal sanctions. Provide an example of when each of those purposes might be a relevant consideration when sentencing an offender.
2 Suggest reasons why the community believes there is a need to punish an offender.
3 Explain the difference between general deterrence and specific deterrence.

Synthesise and apply

4 Read the legal case *R v Banek*.
   a What was the crime?
   b What circumstances may have assisted in reducing Banek's sentence?
   c Four purposes of sanctions were identified by Justice Croucher. Explain how the sentence imposed on Banek achieves each of those purposes.
5 Read the legal case *DPP v Keefer*.
   a What was Keefer's role in the crime?
   b Why were punishment and protection of the community not relevant purposes in this case?
   c Why is general deterrence important in this case? Do you think it would have been achieved? Justify your answer.
6 Read the legal case *DPP v England*. Explain the importance of rehabilitation in imposing the sentence given.
7 Read the legal case *DPP v Granata*.
   a Explain what happened in this case.
   b Describe the sanction that was imposed by the County Court.
   c Who appealed the decision, and on what grounds?
   d What was the outcome of the appeal?
   e What were the two key purposes that the sentence was aimed to achieve? Do you think they have been achieved, and were they achieved before the appeal? Give reasons for your answer.

Analyse and evaluate

8 'There should only be one main purpose of sanctions: punishment. The rest of the purposes should come after punishment'. Do you agree? In your answer, make reference to at least two cases.
9 More money should be spent on rehabilitation. It is clear that sanctions aren't achieving their purposes given the number of offenders who reoffend.
   Discuss this statement as a class. Before you do, conduct some research on:
   a the number of offenders who have underlying issues (such as drug addictions or mental health issues) that may need to be addressed
   b the percentage of offenders in Australia who reoffend.

Check your obook assess for these additional resources and more:

- **Student book questions**
  4.8 Check your learning
- **Worksheet**
  The purposes of sanctions
- **Weblink**
  You be the judge

4.9 TYPES OF SANCTIONS – FINES

The sanctions available to courts are set out in the *Sentencing Act*. The Act provides a hierarchy of sanctions. The most severe sanction, and the sanction of last resort, is imprisonment.

	SANCTION	DESCRIPTION
MOST SEVERE ↓	**Imprisonment** with conviction	Record a **conviction** and order that the offender serve time in a prison (jail).
	Court secure treatment order with conviction	Record a conviction and order that the offender be detained and treated in a health facility (such as a hospital)
	Drug treatment order with conviction	Record a conviction and order that the offender undertake 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	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.
	Youth residential centre order with conviction	In the case of an offender aged 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 will be made with certain conditions attached to it.
	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.
LEAST SEVERE ↑	**Dismissal** without conviction	Without recording a conviction, order the dismissal of the charge for the offence.

Source 1 The hierarchy of sanctions set out in the *Sentencing Act*

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

fine
a sanction that requires the offender to pay an amount of money to the state

Fines

A **fine** is a sanction that can be imposed by the court. It is an amount of money ordered to be paid by the offender to the state of Victoria. A fine can be imposed as the only sanction, or it can be imposed with any other sanction.

The amount of the fine will often depend on the maximum penalty that may be imposed for a certain offence, which is normally prescribed in the statute setting out that offence. An example is provided in the extract that follows for offences relating to bomb hoaxes. There is similar federal legislation which also makes bomb hoaxes illegal.

EXTRACT

Crimes Act 1958 (Vic)

317A Bomb hoaxes

(1) A person must not —

(a) place an article or substance in any place; or

(b) send an article or substance by any means of transportation –

with the intention of inducing in another person a false belief that the article or substance is likely to explode or ignite or discharge a dangerous or deleterious matter.

Penalty: Level 6 imprisonment (5 years maximum) or a level 6 fine (600 penalty units maximum) or both.

Study tip

The *VCE Legal Studies Study Design* lists fines, community correction orders and imprisonment as sanctions. You must learn these three sanctions and their purposes, as well as the ability of these sanctions to achieve their purposes. It is possible that you will be asked to demonstrate your understanding of these sanctions in your assessment tasks.

The *Sentencing Act* expresses fines in levels (1–12). Level 2 is the highest level, and level 12 is the lowest level. Each level refers to a number of penalty units. Level 2 attracts a fine of 3000 penalty units, whereas level 12 attracts a fine of 1 penalty unit. The court cannot order a fine at level 1 (very serious offences such as murder).

The use of 'penalty units' instead of fixed monetary fines allows the government to increase all fines by increasing the value of a penalty unit each year without changing all statutes. Using the example for a bomb hoax offence, setting the fine to a maximum of 600 penalty units will mean that the maximum fine that can be imposed will increase annually, because the value of penalty units will increase.

Did you know?

A fine is not paid to the victim of a crime. Instead, it is paid to the state of Victoria. However, a court can make a restitution order or compensation order which may involve a payment to the victim.

Under the *Sentencing Act*, 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 to the offender as a result of the offence.

If a fine is not paid, the offender can be imprisoned or ordered to undertake community work.

The case below is an example of the court imposing a fine as a general deterrence against employers failing to address safety risks.

Company found guilty and fined

LEGAL CASE

DPP v Bilic Homes Pty Ltd [2016] VCC 810 (14 June 2016)

In March 2014, Bilic Homes, a registered company, was engaged to build two units on a site in Brighton East. Construction began in early May 2014.

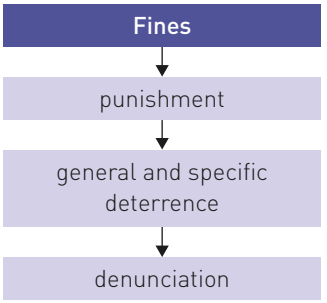
On 23 June 2014, a freestanding brick wall collapsed at the building site, fatally injuring Michael Klanja, a carpenter who was contracted to work on-site. Bilic Homes entered an early plea of guilty.

The Court accepted that general deterrence was an important sentencing consideration. In sentencing, the judge referred to a previous judgment which noted that sentences in such cases draw attention to the importance of workplace safety, and there was a need to send a message to employers that failure to address safety risks will attract significant punishment. The company was convicted and fined $300 000.



Source 2 In 2014, a brick wall in Brighton East collapsed during strong winds, killing Michael Klanja.

Sentencing purposes of fines



Source 3 What fines are designed to achieve

Fines serve to **punish** offenders by requiring them to pay money to the state. Therefore the circumstances of each offender are important when a magistrate or judge is deciding on an appropriate sanction. The financial circumstances of the offender are important because the amount of the fine needs to be high enough to act as a punishment.

Fines can act as a **specific deterrence** to discourage an offender from reoffending, but they can also act as a **general deterrence** to other members of the public who know they will have to pay a fine if they are caught committing a similar act.

Finally, fines can also act as a form of denunciation (i.e. a clear public declaration that certain acts and behaviours are unacceptable). A court may give a very high fine to a person or organisation as a way of denouncing certain actions and showing strong disapproval.

The ability of fines to achieve their purposes

No single sanction will be able to achieve the purposes of all sanctions. Some factors to consider when determining whether a fine can achieve its purposes include:

- the wealth of the offender – For example, if the offender has significant wealth, then the fine may not punish them or act as a specific deterrent
- the ability to denounce the crime – For example, a level 2 fine (the highest level) is just over $460 000, which may not send a strong enough message to some of the community about the court's disapproval
- whether a fine is sufficient to act as a general deterrent for the whole community – For example, a fine that is too small may only deter people without much money
- whether there is a more appropriate sanction – For example, a sanction that protects the community or rehabilitates the offender might be more useful to the community.

These are not the only factors you could take into account when determining if a fine is able to achieve its purposes. Other factors may also be present when you consider a particular case.

4.9 CHECK YOUR LEARNING

Define and explain

1 What is a conviction?

2 Why are fines expressed in penalty units and not dollar amounts?

Synthesise and apply

3 Find out the current financial year's penalty units. What would a level 4 fine amount to? How does this compare to a level 2 fine?

4 Read the legal case *DPP v Bilic Homes Pty Ltd*.

- **a** Was there a jury trial in this case? Explain.
- **b** What sentence was imposed?
- **c** What was the main purpose of this sanction, and why?
- **d** Would imprisonment have been an appropriate sanction? Give a reason for your answer.

Analyse and evaluate

5 In your view do fines adequately punish an offender? Give reasons for your answer.

Check your obook assess for these additional resources and more:

» **Student book questions**
4.9 Check your learning

» **Going further**
Other types of sanctions

4.10 TYPES OF SANCTIONS – COMMUNITY CORRECTION ORDERS

Did you know?

In 2017, the Victorian Parliament introduced legislation creating a new sanction called a 'Youth Control Order' for young offenders. The Youth Control Order operates similarly to a CCO.

Study tip

In 2017, the Sentencing Advisory Council released 'A Quick Guide to Sentencing' on its website. You should get a copy of the guide – it is a useful summary of sentencing laws in Victoria written in plain English (with glossary terms and summaries of sanctions and the sentencing process). A link is provided on your obook assess.

A community correction order (CCO) is a **supervised sentence served in the community** that includes special conditions, such as treatment of the offender and unpaid community work for a number of hours. A CCO is a non-custodial sentence. It can be used as a sanction for a range of offences.

CCOs give offenders the opportunity to stop 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 convicted or found guilty of an offence punishable by more than 5 penalty units, the court has received a pre-sentence report, and the offender consents to the order.

The court must also be satisfied that the CCO is **appropriate for the particular offender**. If the offender doesn't comply with the order, it can be cancelled, and the offender will be resentenced for the original offence. This could mean a tougher sentence because the offender has failed to comply with the CCO.

A CCO can be imposed for up to two years in the Magistrates' Court for a single offence, and no more than five years in any of the Victorian courts.

A CCO can be combined with a fine or up to one year in prison. When combined with a prison sentence, the CCO will commence on the offender's release from jail.

In 2016, Victorian legislation was passed to restrict the use of CCOs for offences committed after March 2017:

- a CCO cannot be a sanction for 'category 1 offences'. Category 1 offences include murder, causing serious injury intentionally or recklessly, rape, incest and some drug offences
- a CCO cannot be a sanction for 'category 2 offences' unless in certain circumstances (e.g. where the offender is over the age of 18, but under 21 at the time of the offence, or where the offender has a mental impairment). Category 2 offences include manslaughter, child homicide, kidnapping, arson causing death and some drug offences.



Source 1 Unpaid community work is one of the conditions that may be imposed as part of a Community Correction Order (CCO).

Conditions attached to CCOs

Every CCO made in the court includes core conditions. The offender:

- must not commit another offence punishable by imprisonment during the term of the order
- must report to a specified community corrections centre within two working days of the order coming into force
- must report to and receive visits from a community corrections officer
- must notify an officer of a change of address
- must not leave Victoria without permission
- must comply with any directions of community corrections officers.

The court is also required to attach at least one special condition. These are listed in the *Sentencing Act* and set out in below.

SPECIAL CONDITION	DESCRIPTION
Unpaid community work	The offender must perform a number of hours of community work, as 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 must undergo treatment and rehabilitation ordered by the court, designed to address the causes of the offending.
Supervision	The offender is supervised, managed and monitored by a community correction officer.
Non-association	The offender must not contact or associate with a person, or people, specified in the order.
Residence restriction or exclusion	The offender must live at some place (or not live there), as specified in the order.
Place or area exclusion	The offender must not enter or remain in a specified area or venue (e.g. a particular sporting venue, the central business district of Melbourne, or a licensed premises). This condition is for people who have a habit of committing crimes in certain places.
Curfew	The offender must remain at a place specified in the order between specified hours of each day (e.g. staying at home between 9:00 pm and 6:00 am).
Alcohol exclusion	The offender must not enter or remain in licensed premises, or a major event, or consume liquor in any licensed premises.
Bond	The offender must pay an amount of money as a bond which will be forfeited if they fail to comply with the CCO.
Judicial monitoring	The offender must be monitored by the court (which may involve appearing before the court for a review of their compliance).
A condition set out in Part 3BA of the *Sentencing Act*	A condition set out in Part 3BA of the Act, such as a condition that the offender be of good behaviour.

Source 2 One of the above special conditions must be attached to the CCO.

In the below legal case the judge imposed a CCO with a special condition of unpaid community work.

LEGAL CASE

Difficult childhood and circumstances lead to CCO

DPP v Harrison [2016] VCC 1763 (17 November 2016)

On 22 April 2016, Shardey Harrison was at home with her then de facto partner, Mr Hutchins. During the day Hutchins had been violent towards Harrison, beating her and making her frightened. They were both intoxicated, and during the night, Hutchins went outside and Harrison went after him with a kitchen knife. At the same time, Mr Webb was riding his bike up the footpath. He stopped and asked Harrison if she was okay. Harrison had trouble getting off the ground. Webb went to help her, and Harrison, thinking she was at risk, stabbed him.

Webb was injured and has suffered emotionally as a result of the attack.

Harrison pleaded guilty to one charge of recklessly causing injury, which carries a maximum penalty of five years' imprisonment. In sentencing Harrison, His Honour Judge Smallwood noted that she was only 22 and had had some difficulties in her childhood. He also noted that there was a long history of domestic violence in her relationship. His Honour imposed an 18-month CCO with a conviction. A special condition of performing 125 hours of community work was imposed.

Sentencing purposes of CCOs

One of the purposes of a CCO is to **punish** the offender. Conditions such as requiring the person to receive visits from a community corrections officer, obtaining permission before leaving Victoria and complying with directions by community corrections officers can be a limitation on the freedom of the offender.

Conditions such as an alcohol exclusion and treatment and rehabilitation aim to **rehabilitate** the offender by treating the underlying causes of the offending.

The findings of a South Australian study suggest that positive self-image is the most important factor in predicting lower **recidivism**. This was relevant to the offender's perception of the sanction and the setting in which it was imposed. CCOs, supported by programs designed to assist the offender, emphasise the 'good citizen' aspects of the sanction and help the offender's self-image. In contrast, a custodial sanction (e.g. imprisonment) tends to emphasise fear and remorse.

recidivism
re-offending; returning to crime after already having been convicted and sentenced

A CCO can also act as a **specific deterrence.** Having to do unpaid community work and comply with burdensome conditions may discourage the offender from committing the same crime again.

The ability of CCOs to achieve their purposes

Some factors to consider when determining whether a CCO is able to achieve its purposes include:

- whether there is a condition that will achieve the right purpose for the particular type of offending
- the most appropriate condition to be imposed, and whether the court imposes that condition
- whether the offender will comply with the conditions
- whether a CCO properly protects the community where protection is a relevant purpose
- whether there is another or better sanction that will achieve the necessary purposes.

As with fines, these are not the only factors you should take into account when considering whether a CCO is able to achieve its purposes. Other factors may also be present in particular cases.

4.10 CHECK YOUR LEARNING

Define and explain

1 Explain why a CCO is considered to be a 'tailor-made' type of sanction.

Synthesise and apply

2 For each of the following offenders, comment on the most appropriate condition(s) that should be imposed as part of a CCO.

- **a** Jarrod pleaded guilty to harassing people at the MCG on a regular basis.
- **b** Maria was sentenced for harassing her ex de-facto partner.
- **c** Winona has significant mental health issues.
- **d** Bradley is a Chief Financial Officer who pleaded guilty to assaulting his best mate.
- **e** Vera was an alcoholic who committed five separate offences while out partying late at night.

Analyse and evaluate

3 The Victorian Government is limiting the use of CCOs for certain offenders. Discuss the extent to which you agree with this approach. Refer to at least two purposes of sanctions.

Check your obook assess for these additional resources and more:

» **Student book questions**
4.10 Check your learning

» **Weblink**
'A quick guide to sentencing' – Sentencing Advisory Council

4.11 TYPES OF SANCTIONS – IMPRISONMENT



Source 1 The Melaleuca unit, HM Barwon Prison, Victoria. Barwon was the first new prison in Victoria to be designed specifically for unit management (management of small groups of prisoners by a permanent staff team).

People who have been convicted of a crime can be sentenced to **imprisonment** for a time, which means they will be **removed from society** and they will lose their freedom and liberty.

Prison terms are expressed in levels from one to nine, one being the most serious (life imprisonment) and nine being for six months. These levels are shown in Source 2.

If a court sentences an offender to imprisonment for 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 Adult Parole Board reviews the prisoner's suitability for **parole**. Parole is the conditional release of a prisoner after the minimum period has been served. Conditions can be attached to a period of parole. If there is no non-parole period or parole is rejected, prison sentences are served in full.

imprisonment
a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

parole
the supervised and conditional release of a prisoner after the minimum period of imprisonment has been served

The Magistrates' Court is limited in the length of imprisonment it may impose. The maximum term of imprisonment for a single offence is two years and 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 the term of the prisoner's natural life, however, a court can set a minimum non-parole period.

If an offender has been held in custody (e.g. on remand) before sentencing, any time spent in prison may be taken into account as part of the sentence to be served.

LEVEL	MAXIMUM TERM	SAMPLE OFFENCES
Level 1	Life imprisonment	Murder Trafficking in a drug of dependence (large commercial quantity)
Level 2	25 years	Rape Sexual penetration of a child under 12 years Armed robbery Aggravated burglary Arson causing death
Level 3	20 years	Manslaughter Intentionally causing serious injury Culpable driving causing death
Level 4	15 years	Recklessly causing serious injury Handling stolen goods Trafficking in a drug of dependence (not a commercial quantity) Arson
Level 5	10 years	Threats to kill Indecent assault Theft Negligently causing serious injury

Did you know?

Of the 14 prisons in Victoria, two are female-only. The Dame Phyllis Frost Centre is a maximum security women's prison located at Deer Park. It was the first privately designed, financed, built and operated prison in Victoria. Tarrengower, near Maldon, is a minimum security women's prison that used to be a farm.

LEVEL	MAXIMUM TERM	SAMPLE OFFENCES
Level 6	5 years	Recklessly causing injury Knowingly possessing child pornography Possession of a drug of dependence (for the purpose of trafficking)
Level 7	2 years	Going equipped to steal
Level 8	1 year	Cultivation of a narcotic plant (not for the purpose of trafficking) Possession of a drug of dependence (not for the purpose of trafficking)
Level 9	6 months	Obstructing a police officer

Source: Sentencing Advisory Council, 'Maximum penalties'

Source 2 Examples of offences ranked according to the penalty scale

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 in prison 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 is served straight after another sentence. In the above example, the offender would serve two years and six months. A cumulative sentence must be given:

- for certain serious offenders (as defined, and which includes offenders who commit arson, and certain drug, sexual and serious violent offences)
- where the imprisonment is in default of payment of a fine or sum of money
- for an offence by a prisoner or an escape offence
- for an offence committed by a person released on parole or on bail.

Aggregate sentences

If 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. For example, a judge may hand down a sentence of three years in prison for all of the offences, and may not specify how much of that sentence is with respect to each individual 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. Aggregate sentences are not available for serious offences where there is a presumption that sentences will be served cumulatively.

An aggregate sentence cannot exceed the total effective sentence that would have been imposed if a separate sentence were imposed for each offence.

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 them to an indefinite term of imprisonment. Serious offences include murder, manslaughter, child homicide, threats to kill, rape, kidnapping, armed robbery and sexual offences with children under 16.



Source 3 Kevin John Carr is one of a few prisoners in Victoria serving an indefinite sentence. He is a serial rapist, considered to be a continuing danger to the community.

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:

- their character, past history, health, age or mental condition
- the nature and gravity of the serious offence
- any special circumstances.

The court will review the indefinite sentence periodically. 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 OPP may appeal against a decision to discharge or not discharge an indefinite sentence.

Recidivism

In Victoria, the recidivism rate for the return of released prisoners back to prison within two years is about 40 per cent. This means that about 40 per cent of prisoners in Victoria have been imprisoned before as highlighted in the article below.

IN THE NEWS

Victoria's prisoner return rate soars

Royce Millar, *The Age*, 24 January 2015

Pressure on Victoria's overcrowded jails is being compounded by prisoners returning at the highest rates since the early 2000s, triggering warnings of riots, and calls for Labor to reform sentencing and rehabilitation.

Unpublished state government figures obtained by The Saturday Age reveal the recidivism rate for 2013–2014 is at a 10-year high of 40 per cent, up from a low of 34 per cent four years ago.

The figures raise questions about the merits of the Baillieu/Napthine government's zero-tolerance approach to law and order, and the spending priority given to prisons over education, housing and rehabilitation and post-release programs.

Victoria's prisoner return rate is nudging the current national average, which is just over 40 per cent. The state's target is to remain under the national average, which it did for the last decade.

The recidivism rate is based on the number of prisoners who return to jail, under sentence, within two years of release. The figures will be published next week as part of the Productivity Commission's annual, state-by-state report on government services.

Purposes of imprisonment

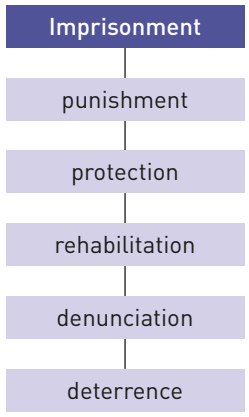
Imprisonment is seen as the sanction of last resort, as it results in a loss of liberty and freedom. Some would argue that more offenders should be kept in jail and that sentences should be harsher. Others argue that the most significant aim of criminal sanctions should be to rehabilitate offenders so that they are more likely to lead a useful and productive life within the boundaries accepted by society.

Imprisonment 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.

There is a chance that 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** for a particular offender who does not want to go to prison again.



Source 4 What imprisonment is designed to achieve

The ability of imprisonment to achieve its purposes

Some of the factors to consider when determining whether imprisonment is able to achieve its purposes include:

- the rate of recidivism and whether imprisonment is effective
- the availability of drugs in prisons (Corrections Victoria has acknowledged that nearly 10 per cent of prisoners selected for urine tests in a six-month period in 2016 returned a positive result)
- the exposure of offenders to negative influences
- whether the offender will be offered appropriate opportunities to rehabilitate, and whether they will take advantage of those opportunities
- whether there are other sentences, like CCOs, which are better focused on rehabilitation
- the extent to which the community is protected if short prison terms are given.

As with fines and CCOs, these are not the only factors you should take into account when determining whether imprisonment is able to achieve its purposes. Other factors may also be present when you consider a particular case study.

4.11 CHECK YOUR LEARNING

Define and explain

1. What is the most severe sanction? Why is it considered the sanction of last resort?
2. Identify and describe three types of sanctions. For each sanction, explain one of its purposes.
3. Define the term 'non-parole period'.

Synthesise and apply

4. Conduct some further research on Kevin John Carr (see Source 3).
   - **a** What was Carr convicted of?
   - **b** Has he sought to be released from prison? When?
   - **c** What was the view of the court in determining whether he should be released?
   - **d** In your view, are indefinite sentences appropriate? Share your views with the class.
5. Create a scenario in which a term of imprisonment was imposed on an offender. In the scenario, include whether the sentence was cumulative, concurrent, aggregate and/or indefinite. Exchange your scenario with another class member, and work out the type of sentence imposed.

Analyse and evaluate

6. Evaluate the ability of imprisonment to address the underlying causes of offending.

Check your obook assess for these additional resources and more:

- **Student book questions**
  4.11 Check your learning
- **Going further**
  Standard sentencing regime
- **Weblink**
  Corrections, Prison and Parole

4.12 SENTENCING FACTORS

When deciding the appropriate sanction to be imposed on an offender, the *Sentencing Act* requires a court to take a number of factors into account. Four of these factors include:

- **aggravating factors**
- **mitigating factors**
- guilty pleas
- victim impact statements.

You should become familiar with each one of these types of sentencing factors, and be able to identify them when looking at a particular case study.

aggravating factors circumstances considered in sentencing that can increase the seriousness of the offence or the offender's culpability (i.e. responsibility) resulting in a more severe sentence

mitigating factors circumstances considered in sentencing that reduce the seriousness of the offence or the offender's culpability and lead to a less severe sentence

Aggravating factors

Aggravating factors are circumstances about the offender or the offence that can increase the seriousness of the offence, or the offender's culpability. If they are present, a higher sentence should be imposed. Examples of aggravating factors include:

- the use of violence, explosives or a weapon when committing the offence
- the nature and gravity of the offence (e.g. if the victim suffered a particular type of brutality or cruelty, or the offence was unprovoked, or the crime was pre-planned)
- any vulnerabilities of the victim (e.g. having a disability or being very young, or old and frail)
- the offender being motivated by hatred or prejudice against a group of people with common characteristics
- the offence taking place in front of children, or seen by them
- a breach of trust by the offender towards the victim (e.g. the offender was in a position of trust such as a parent who has abused a child)
- the offence occurred while the offender was on a CCO or on bail.

Which aggravating factors will be relevant to sentencing depends on the circumstances of the offending.

In the below case of *DPP v Bennison* [2016] VSC 686 the judge took into account the use of violence as well as the nature and gravity of the murder in the sentencing of Bennison.

LEGAL CASE

Nature of offending part of aggravating factors

DPP v Bennison [2016] VSC 686 (29 November 2016)

Timothy Bennison had never met Jason Stone before the night he agreed on a plan to assault him. He had also never met one of his co-offenders, Terry Mitchell, until that night, and had only met the other co-offender the night before.

On 8 November 2014, Bennison was told that Stone owed Mitchell a drug debt. He agreed with Mitchell and another co-offender to go to Stone's girlfriend's house so they could 'touch him up'. When Stone arrived at the house, Bennison punched him in the face.

Justice Elliott described what happened next as 'truly abhorrent'. The three offenders repeatedly punched and kicked Stone. They bound his wrists and feet with adhesive tape and put a sock in his mouth. Stone was then put into the boot of a car. Bennison and his co-offender

drove to a car park in Beaumaris and disposed of Stone's body in bushes on the foreshore, attempting to conceal it.

Bennison handed himself in to police two weeks later, but denied full involvement. It was not until 22 March 2016 that he agreed to plead guilty to murder.

In sentencing Bennison, Justice Elliott pointed to a number of aggravating factors, including the use of adhesive tape to bind Stone's legs and arms together, the use of a sock and tape to gag him, putting him in the boot of the car, and the way his body was disposed of. The judge sentenced Bennison to a term of imprisonment of 21 years, and fixed a minimum non-parole period of 18 years.



Source 1 Tim Bennison will spend at least 18 years in prison for his part in the violent murder of Jason Stone.

Mitigating factors

Mitigating factors are circumstances that a court should consider when determining the appropriate sentence. They can be circumstances relevant to the offender, the victim or the crime itself. They **reduce the seriousness** of the offence or the offender's culpability. Examples of mitigating factors include:

- the offender was provoked by the victim
- the offender showed remorse
- the offender has no record of previous convictions
- the offender was acting under duress
- the offender has co-operated with the police and made full admissions
- the offender has shown efforts towards rehabilitation while awaiting sentencing, or has prospects of rehabilitation
- the offender was under personal strain at the time
- the injury or harm caused by the offence was not substantial, or there was no risk to any people
- the offender was young, or had some disability that made them not fully aware of the consequences
- the offender pleaded guilty early.

Study tip

Each of the four sentencing factors discussed in this topic are specifically listed in the *VCE Legal Studies Study Design*. This means each of them is examinable – either in your assessment tasks or on the end of year examination. Take particular care to learn and understand each of them.

As shown in the case below, a judge can take into account a number of different mitigating factors when sentencing an accused.

LEGAL CASE

Various factors considered in sentencing offender

DPP v Smith [2016] VCC 1419 (16 September 2016)

Drew John Smith pleaded guilty in the County Court of Victoria to several charges, including theft, arson, attempted theft, handling stolen goods and reckless conduct endangering a person. He also pleaded guilty to five summary charges, including three charges of driving while disqualified.

Her Honour Judge Campton sentenced Smith to three years and eight months in prison, with a non-parole period of two years. He had already served 155 days in prison, which was taken off his sentence. His licence was also cancelled for a period of 12 months. In sentencing Smith, her Honour stated the following in relation to mitigating factors:

> The offences were committed during a period of your life when you were suffering considerable personal strain and had recommenced using drugs in the context of the still birth of your daughter, Phoebe, in December 2012. You had pleaded guilty and expressed remorse for your offences. You suffered from autism spectrum and the court should take into account the principles in *R v Verdins*.
>
> You are still a relatively young man and have some prospects of rehabilitation. You continue to enjoy the support of your partner, Tess Edwards, and she was a positive influence on you. The birth of your son was submitted to have been a stabilising influence on you and to have given you motivation to rehabilitate.
>
> Counsel also relied on the short period when you were on bail where you demonstrated some ability to lead a positive lifestyle. She referred to the courses that you had completed while you were in prison, in addition to the terms of imprisonment that you had served in Queensland and then in Victoria which were of a recent time.
>
> In a letter to the court, your partner, Tess Edwards, urged the court take into account that you are making a real effort to complete courses while in custody to help with your prospects of rehabilitation. She also mentioned that you were engaging with the psychologist at Fulham Correctional Centre who helped you organise ongoing help and treatment.
>
> With respect to the charge of arson, your counsel urged the court to take into account that it was unsophisticated and involved little planning. It involved an uncompleted house in an unoccupied housing estate and, therefore, did not pose a risk to the safety of any people. It was submitted that it was not motivated by revenge, malice or anger, which were aggravating features frequently seen in cases of arson.

Guilty pleas

One of the factors a court must take into account when sentencing an offender is whether the offender **pleaded guilty** to the offence and, if so, how far into the case. A guilty plea at an early stage before trial (or hearing) or at the start of the trial can result in a less-severe sentence.

The *Sentencing Act* allows the court to take into account a guilty plea when sentencing an offender for a number of reasons. First, if the offender knows that an early guilty plea is taken into account in sentencing, it may encourage them to plead guilty rather than going to trial. Second, an early guilty plea can have significant benefits to the criminal justice system, including the prosecution, the victims, society, the accused and his or her families, by avoiding the time, expense and stress of a trial. Criminal trials can

be particularly traumatic for victims and their families, and an early guilty plea will spare them that trauma. A reduction in sentence as a result of an early guilty plea will therefore reward the offender for admitting to the crime that he or she has committed.

Generally, the earlier the guilty plea is made, the greater the reduction the court is inclined to give.

If a court imposes a less-severe sentence because the offender pleaded guilty, and the sanction is either a custodial sentence, a fine exceeding 10 penalty units or an aggregate fine exceeding 20 penalty units, the court must state how much 'discount' it gave for the guilty plea.

In the below case, the sentence was reduced in part because the accused entered a guilty plea.

IN THE NEWS

Hamlyn Heights woman Teegan Kelly jailed for five years

Claire Martin, *Geelong Advertiser*, 20 October 2016

A Hamlyn Heights woman will spend at least the next three years behind bars with her baby after causing horrific injuries to a women's leg during a jealous rampage.

Teegan Kelly was sentenced in a County Court on Wednesday to five years and nine months jail, with a non-parole period of three years and three months.

Kelly, 31, had pleaded guilty to one count of intentionally causing serious injury and two counts of criminal damage.

The court was told, that in the early hours of July 1 last year, Kelly had parked her car outside her ex-partner Dylan Hartwick's home.

When asked to move it by a female friend of Mr Hartwick, Kelly drove at the woman, crushing the victim's leg with her car before kicking and punching her as she called for help...

Following advice received from Victoria Corrections, Kelly will be able to take her 5½-month-old baby with her to prison, while her 11-year-old son will live with his grandmother.



Source 2 Teegan Kelly's sentence was reduced in part because of an early guilty plea. She saved about three years of prison time as a result.

He commended her for entering an early plea of guilty. 'You have saved the community the expense of a criminal trial,' he said.

Had she pleaded not guilty, Mr Grant said he would have imposed a sentence closer to eight years with a minimum of six years' non-parole.

Victim impact statements

When sentencing an offender, the court must take into account the impact of the offence of any victim, and the personal circumstances of the victim. More often than not, the court will learn about the impact and personal circumstances of the victim through victim impact statements.

A victim impact statement contains particulars of any injury, loss or damage suffered by the victim as a direct result of the offence. Its purpose is to assist the court when it is deciding on the sentence.

A victim may make the statement to the court if a person is found guilty of an offence. A copy must be filed with the court a reasonable time before sentencing. Victims can also give the court 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. This may be done by the victim, or a person whom the victim requests read the statement (and the court approves of that person). The court may give directions as to which parts of the statement are in fact admissible and which may be read in court.

Victim impact statements are used widely by the courts to allow victims to have their say in the sentencing process.

This is evidenced in the below case where the judge was moved by the victim impact statement.

IN THE NEWS

'No remorse, just self-pity': Ex-nurse gets 11 years' jail for killing cyclist

Adam Cooper, *The Age*, 13 September 2016



Source 3 A cyclist was killed when a woman with a history of drug use crashed her car into him.

A woman with a history of drug use who killed a cyclist when she crashed her car into him and then fled the scene has been jailed for 11 years.

The devastation Stephanie Maher caused when she hit Julian Paul on a stretch of the Nepean Highway in Brighton East was underlined on Tuesday when County Court judge David Parsons became emotional when recalling a victim impact statement read by Mr Paul's wife.

Janine Paul told the court in July how she had lived 'a merry-go-round-of-hell' since her husband's death and that life for her felt 'over'.

On Tuesday, Judge Parsons paused during the sentence and cleared his throat several times when he recalled her words.

'We can only grieve with her and trust that her pain and the pain her family feels will diminish over time,' he said.

Judge Parsons said Maher acted in a manner that was 'morally reprehensible' by failing to stop after hitting Mr Paul about 9.30 pm on November 26, 2013, and then abandoning her car.

4.12 CHECK YOUR LEARNING

Define and explain

1 Which party would want to demonstrate to the court that there were significant aggravating factors, and which party would want to demonstrate to the court that there were significant mitigating factors? Why?

2 Explain why an early guilty plea is beneficial to the courts, the victims and the accused.

3 What is a victim impact statement, and why is it useful for the court in sentencing?

4 Decide whether the scenarios listed below are examples of aggravating factors or mitigating factors:
- **a** Mary-Lou committed an offence while on bail
- **b** Hugo has significant prospects of rehabilitation
- **c** Jacques used a home-made bomb when committing the crime
- **d** Belinda was 16 when she offended
- **e** Luca committed the offence because he hates people with white hair
- **f** Rebecca assaulted her sister in front of her children
- **g** Kylie pleaded guilty within hours of being charged

Synthesise and apply

5 Read the legal case *DPP v Bennison*.
- **a** Identify the aggravating factors in this case.
- **b** What sentence was imposed?
- **c** Conduct some research to find out what sentences were imposed on Bennison's co-offenders. What did you find? How does this compare with Bennison's sentence?

6 Read the legal case *DPP v Smith*.
- **a** What offences did Smith plead guilty to?
- **b** Would there have been a jury trial? Justify your answer.
- **c** How many days will Smith have to serve in prison before he is eligible for parole?
- **d** Identify at least five mitigating factors that were taken into account in sentencing Smith. What did you think when you were reading each of those mitigating factors?

7 Devise a hypothetical scenario in which a person has committed a crime and has either pleaded guilty or been found guilty. Write out the scenario and the sentence imposed. In doing so, include as many aggravating and mitigating factors as you can. Give your scenario to another person in their class and ask them to identify those factors.

8 Read the article 'Hamlyn Heights woman Teegan Kelly jailed for five years'.
- **a** What benefit did the judge see in Kelly pleading guilty early?
- **b** Do you think that early guilty pleas should be taken into account during sentencing? Give reasons for your answer, referring to the principles of justice.

Analyse and evaluate

9 Do you think that the case of Stephanie Maher demonstrates the positives of victim impact statements? Give reasons for your answer. In doing so, prepare an argument to rebut what a person might say are the negatives of victim impact statements.

10 Evalute the extent to which rewarding early guilty pleas achieves justice.

Check your obook assess for these additional resources and more:

- **Student book questions**
  4.12 Check your learning
- **Sample**
  Victim Impact Statement
- **Weblink**
  Guilty pleas and sentencing

CHAPTER 4

REVIEW

CHAPTER SUMMARY

- Institutions available to assist an accused
  - Victoria Legal Aid (VLA)
  - Community legal centres (CLCs)
- The purposes of committal proceedings
  - To determine whether a charge is appropriate to be heard and determined summarily
  - To determine whether there is evidence of a sufficient weight to support a conviction for the offence
  - To determine how the accused proposes to plead
  - To ensure a fair trial
- Plea negotiations
  - Without prejudice discussions between the prosecutor and the accused about the charges against the accused may lead to an agreement
- Sentence indications
  - Suggestion given by a court as to the sanction that is likely to be imposed on the accused at that time
- Reasons for a Victorian court hierarchy
  - Specialisation
  - Appeals
- Responsibilities of key personnel
  - Judge and jury
  - Parties and legal practitioners
- Purposes of sanctions
  - Punishment
  - Deterrence
  - Rehabilitation
  - Denunciation
  - Protection
- Types of sanctions
  - Fines
  - CCOs
  - Imprisonment
- Sentencing factors
  - Aggravating factors
  - Mitigating factors
  - Guilty pleas
  - Victim impact statements

REVISION QUESTIONS

1 Describe one reason why a court hierarchy is needed for criminal cases. (2 marks)

2 Distinguish between denunciation and punishment as purposes of criminal sanctions. (3 marks)

3 Explain one responsibility of the judge in a criminal trial. (3 marks)

4 Identify and explain two ways in which the criminal justice system seeks to uphold the principle of fairness. (4 marks)

5 Discuss the extent to which sentence indications and plea negotiations enable greater access to the criminal justice system for an accused. (8 marks)

6 For each scenario below, identify one factor that may be considered in sentencing, and one sanction that is unlikely to be appropriate. Justify your answer.

a Denis was charged with the murder of his brother in a reserve in Ivanhoe. He pleaded guilty upon arrest at the reserve and told police that he is willing to do community work. He has significant mental health issues after being abused as a child.

b Carrie pleaded not guilty to drug trafficking after 10 kg of heroin was found in her house. A jury found her guilty after the prosecution led evidence that she had made the drug in front of her two young children. (6 marks)

Check your obook assess for these additional resources and more:

» **Student book questions**
Ch 4 Review

» **Revision notes**
Ch 4

» **assess quiz**
Ch 4
Test your skills with an auto-correcting multiple-choice quiz

PRACTICE ASSESSMENT TASK

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

Call for lone L-plater who 'got into strife' and killed driver to be spared jail

Adam Cooper, *The Age*, 21 November 2016

An L-plate driver who killed another motorist when he crossed a double white line to overtake and caused a head-on crash should be spared jail, a court has heard, because his moral culpability was low.

Sukhuinder Singh, 23, was illegally alone in his Holden Commodore when he overtook two cars in Bridge Inn Road in Wollert on July 31 last year, and ploughed into the car driven by John Voss at more than 110km/h.

Mr Voss, 30, was remembered in the County Court on Monday as a caring, loving and responsible son, brother and friend.

During victim impact statements read to the court, Mr Voss' girlfriend and one of his friends called on Singh to face the consequences of his actions.

But defence counsel Gideon Boas told the court his client should not be jailed and instead serve a community corrections order, as his moral culpability was 'quite low', as he made a 'grave error' in overtaking, was remorseful and took responsibility for his actions.

Singh pleaded guilty to dangerous driving causing death and was last week found not guilty by a jury of the more serious charge of culpable driving causing death. ...

Prosecutor Andrew Grant said the court had to 'send a message' that dangerous driving by young motorists would not be condoned, and called for Singh to be jailed given his actions put many drivers at risk. ...

Singh's case was a serious example of the offence, the prosecutor said, and not an example of low-level culpability. Judge Wilmoth extended Singh's bail and will sentence him later this week.

Practice assessment task questions

1 Referring to this case, explain one reason for a court hierarchy.

(3 marks)

2 Would a committal proceeding have been required in this case? Give reasons.

(3 marks)

3 If Mr Singh was not legally represented, but did not satisfy Victoria Legal Aid's (VLA) income test, describe two types of assistance that he may have been provided by VLA.

(4 marks)

4 Describe two factors likely to have been considered in sentencing Singh.

(4 marks)

5 Was either a plea negotiation or a sentence indication used to determine the charges? Justify your answer.

(5 marks)

6 Explain one responsibility of the jury and the prosecution at trial. Refer to Singh's case in your answer.

(6 marks)

7 Describe two purposes of sanctions that may be relevant in this case, and discuss the extent to which one sanction may be able to achieve those purposes.

(7 marks)

8 How has each of the principles of justice sought to be achieved in this case? Give reasons for your answer.

(8 marks)

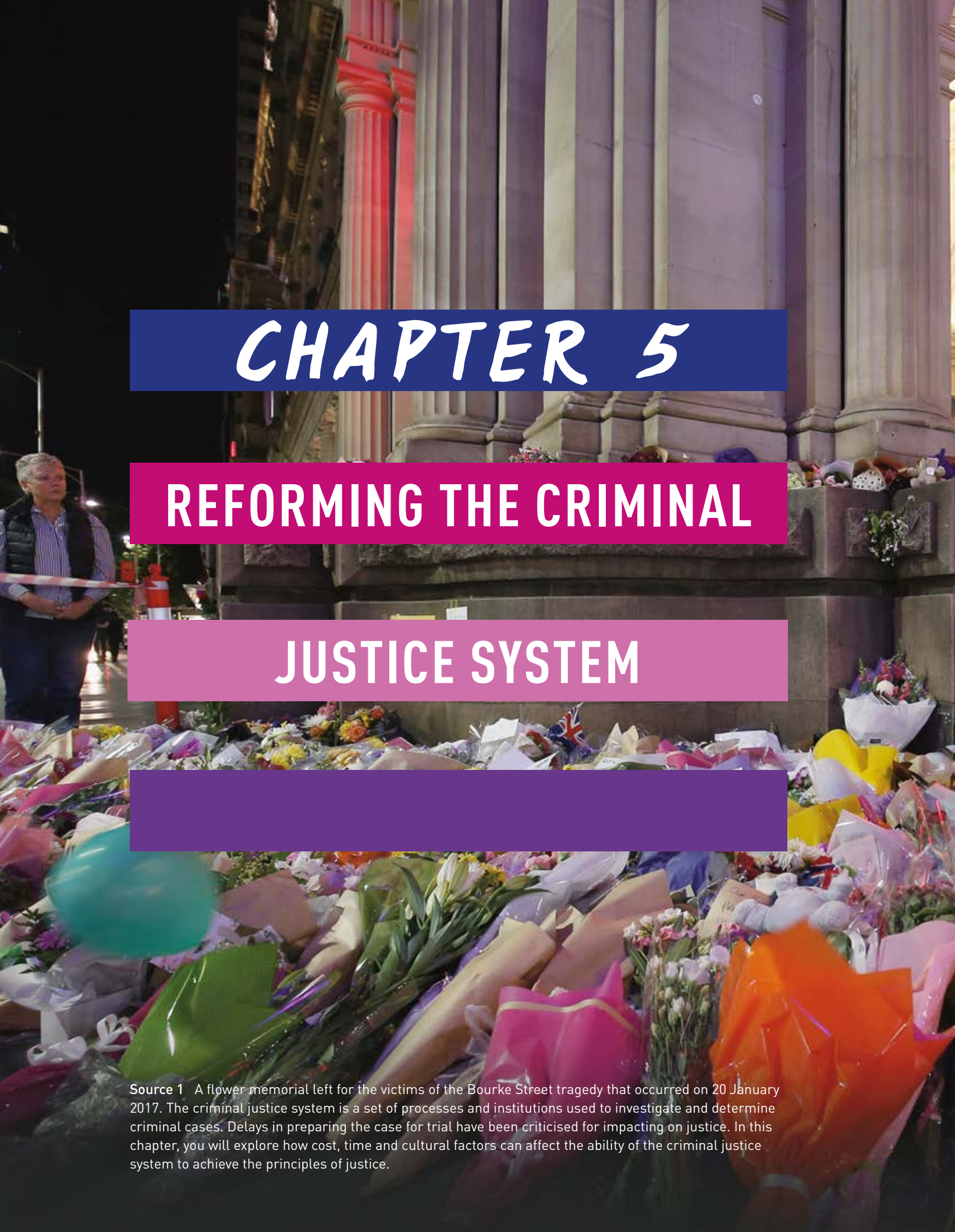
9 'This case shows that justice is for the accused and not for the victim or the victim's family. There should be no right for an accused to negotiate charges or for any mitigating factors to be considered in sentencing'. Do you agree? Give reasons for your answer, referring to Singh's case.

(10 marks)

Total: 50 marks

CHAPTER 5

REFORMING THE CRIMINAL JUSTICE SYSTEM



Source 1 A flower memorial left for the victims of the Bourke Street tragedy that occurred on 20 January 2017. The criminal justice system is a set of processes and institutions used to investigate and determine criminal cases. Delays in preparing the case for trial have been criticised for impacting on justice. In this chapter, you will explore how cost, time and cultural factors can affect the ability of the criminal justice system to achieve the principles of justice.



OUTCOME

By the end of **Unit 3 – Area of Study 1** (i.e. Chapters 3, 4 and 5), you should be able to explain the rights of the accused and of victims in the criminal justice system, discuss the means used to determine criminal cases and evaluate the ability of the criminal justice system to achieve the principles of justice.

KEY KNOWLEDGE

In this chapter, you will learn about:

- factors that affect the ability of the criminal justice system to achieve the principles of justice including in relation to costs, time and cultural differences
- recent reforms and recommended reforms to enhance the ability of the criminal justice system to achieve the principles of justice.

KEY SKILLS

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- discuss recent reforms and recommended reforms to the criminal justice system
- evaluate the ability of the criminal justice system to achieve the principles of justice
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

KEY LEGAL TERMS

Australian Bar Association (ABA), the the main organisation that represents barristers in Australia. It aims to promote the rule of law and advocates for fair and equal access to justice for all

disability a total or partial loss of bodily or mental functions, or a disease or illness that affects a person's body, learning or thought processes

Koori Court a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Aboriginal people

Law Council of Australia the peak national representative body of the Australian legal profession. It advocates on behalf of the legal profession at a national level about issues such as access to justice

Law Institute of Victoria (LIV) the legal body which represents lawyers in Victoria and provides professional development relating to their practice

legal aid legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

plea negotiations (in criminal cases) pre-trial discussions that take place between the prosecution and the accused, aimed at resolving the case by agreeing on an outcome to the criminal charges laid (also known as charge negotiations)

self-represented party a person with a matter before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

sentence indication a statement made by a judge to an accused about the sentence they could face if they plead guilty to an offence

Victorian Access to Justice Review an inquiry conducted by the Victorian Government's Department of Justice and Regulation about access to justice. The final report was released in October 2016

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

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Please note

Aboriginal and Torres Strait Islander readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of people who have died.

5.1 COSTS FACTORS

criminal justice system
a set of processes and institutions used to investigate and determine criminal cases

In this chapter we will explore three factors that can affect the ability of the **criminal justice system** to achieve the three principles of justice. These include:

- costs factors
- time factors
- cultural factors.

We will then consider recent reforms (and recommended reforms) to the criminal justice system that are designed to enhance its ability to achieve the principles of justice.

Introduction to costs factors

The costs associated with the criminal justice system can be significant, particularly for an accused who cannot afford legal representation. They can also be significant for a victim of a criminal case who needs legal assistance and advice.

In this topic you will explore the way the following costs factors affect the criminal justice system:

- costs of legal representation
- availability of **legal aid**
- assistance given to self-represented parties.

The first two factors restrict the criminal justice system's ability to achieve justice, while the third factor to some extent enhances it.

Study tip

Chapters 3 and 4 explored various ways that the criminal justice system can be expensive. Draw up a table in your notes and write down each time costs were mentioned in Chapters 3 and 4. Can you make connections between what's in the table and what is contained in this chapter regarding costs?

legal aid
legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

The costs of legal representation

The main costs a person is likely to incur in a criminal case are the costs of engaging a lawyer to provide legal services such as legal advice or representation. The greatest impact tends to be on the accused, who is likely to need legal representation to navigate the criminal justice system. Victims can also be impacted, as they may require legal assistance to assert their rights, make contact with investigative and prosecution agencies and understand procedures such as giving evidence.

While everyone has the right to legal representation, not everyone can afford it. This can be particularly damaging for an accused person, because our criminal trial system relies on the parties presenting their own case before the decider of facts (the judge, magistrate or jury). The **Law Council of Australia** has previously stated that access to legal advice is essential to upholding the rule of law:

> Access to adequate legal advice is an internationally recognised human right and a fundamental pillar of the rule of law. It is something that the Law Council considers should be available to everyone, particularly those people who face criminal charges or other potential restrictions on their liberty.



Source 1 The Law Council of Australia is the peak national representative body of the Australian legal profession. Fiona McLeod SC was elected its president in 2017.

Did you know?

The first female senior counsel (SC) in Australia was Dame Roma Mitchell of South Australia. The Victorian barrister Joan Rosanove had applied to 'take silk' (become a QC) earlier, but she was repeatedly refused by the Chief Justice at the time. She was granted silk later, when a new Chief Justice was appointed.

Law Council of Australia
the peak national representative body of the Australian legal profession. It advocates on behalf of the legal profession at a national level about issues such as access to justice

In March 2017, the **Law Institute of Victoria (LIV)** provided the Department of Justice and Regulation an indication of the range of fees payable to engage a solicitor in certain criminal matters as part of the **Victorian Access to Justice Review**. These are summarised in Source 2.

MATTER TYPE	RANGE OF FEES	AVERAGE FEES
Magistrates' Court plea	$1100–$3850	$2370
Magistrates' Court contest	$2000–$8450	$3884
Bail application (Magistrates' Court)	$1100–$4400	$2821
County Court plea	$3000–$10 756	$6145
County Court 5 day trial – solicitor/client costs only	$6500–$19 500	$11 290

From: Law Institute of Victoria

Source 2 The range of fees likely to be payable for criminal matters

These estimates are from 2008, so it is likely that they have significantly increased. Even if the fees were to stay at this rate, many members of our society would be unable to afford them.

An accused who cannot afford legal representation can seek legal aid through institutions such as **Victoria Legal Aid (VLA)**, or obtain free legal services from a **community legal centre (CLC)**. They might also be able to obtain *pro bono* legal representation from a private legal practitioner or *pro bono* institution. However, those who cannot get assistance through these institutions will have to represent themselves.

Every accused person has the right to a fair hearing. This right is now enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Human Rights Charter), and has been recognised by a number of courts, including the High Court in *Dietrich v The Queen* (1992) 177 CLR 292.

The courts have recognised in the past that for a person to receive a fair trial, legal representation may be necessary. Most recently, the Supreme Court of Victoria in *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 (28 February 2017) recognised the right to a fair trial and that the lack of legal representation can inhibit a fair trial. Information on the case is provided below.

Law Institute of Victoria (LIV)
the legal body which represents lawyers in Victoria and provides professional development relating to their practice

Victorian Access to Justice Review
an inquiry conducted by the Victorian Government's Department of Justice and Regulation about access to justice. The final report was released in October 2016

Victoria Legal Aid (VLA)
a government agency that provides free legal advice to the community and low-cost or no-cost legal representation to people who can't afford a lawyer

community legal centre (CLC)
an independent organisation that provides free legal services to people who are unable to pay for those services. Some are generalist CLCs and some are specialist CLCs

Unrepresented mother and daughter unable to understand hearing

LEGAL CASE

Matsoukatidou v Yarra Ranges Council [2017] VSC 61 (28 February 2017)

A mother and daughter were charged with various offences by Yarra Ranges Council because they failed to secure and demolish their home after an arsonist burnt it down. Both the mother and daughter were self-represented at the hearing in the Magistrates' Court. They were ultimately fined. When they appealed to the County Court, the appeals were struck out because they did not appear. They sought an application to reinstate the appeals, and again they were self-represented at the hearings. Their applications were dismissed.

The mother was a disability pensioner with a learning disability. Her daughter, whose first language was not English, was her carer. They struggled to explain themselves to the judge and were given limited assistance. They did not fully understand what was going on at the hearing. They sought a review of the decision in the Supreme Court, arguing that they did not get a fair hearing, and their rights to equality were not ensured.

In the Supreme Court, Justice Bell found in favour of the mother and daughter, and made orders that their appeal be reinstated and heard by a different judge. The judgment is an important and useful summary of the rights to a fair hearing and to equality before the law.

Justice Bell in particular stated the following in relation to a fair hearing and the ability to achieve one without legal representation:

> Participation by self-represented parties in criminal or civil legal proceedings, including but not only where the other party is represented, gives rise to human rights challenges. Their lack of legal representation creates serious risk of unfairness by reason of ineffective participation in the proceeding or participatory inequality between the parties. This risk arises because self-represented parties lack the professional skill and ability and objectivity usually necessary for effective participation in legal proceedings and adequately to respond to other parties who are represented.

The principles of justice

The cost of legal representation can affect the principles of justice. A summary is set out in Source 3.

Study tip

The tables in this chapter provide you with some points you can make when evaluating the criminal justice system. Remember, however, that your answers to assessment tasks will need to be more fulsome to get full marks.

PRINCIPLE	COST OF LEGAL REPRESENTATION
Fairness	If an accused person can't properly participate in a hearing, it may lead to an unfair result. In particular, the following can have an impact: • lack of familiarity with the language of criminal trials • lack of objectivity and emotional distance from what is happening in the case • lack of knowledge of courtroom facilities • lack of understanding of procedure.
Equality	If parties can't afford representation, they are at risk of not being treated as equal before the law. For example, they might come up against skilled and experienced prosecutors who understand the law and its procedures, formalities and language. This places an unrepresented accused at risk of not being able to perform at the same level as their opponent.
Access	An accused who cannot pay for legal representation may have trouble accessing the courts and mechanisms that are used to determine the criminal charges. This may result in an accused person having to plead guilty to a crime they may not have committed because they do not have the means or ability to defend the case.

Source 3 The cost of legal representation and the principles of justice

The availability of legal aid

When VLA was first established, its aim was to repair an unjust system that provided greater opportunities to those who could afford legal services. But due to a lack of funding, a large part of the community is not eligible for legal aid, and CLCs are stretched in their ability to offer legal aid to people affected by crime.

As a result, these people can be denied access to legal services. The extract on the next page is from a campaign called Legal Aid Matters which provides some indication of the number of people eligible for legal aid.

EXTRACT

So if you can't afford a lawyer you can access legal aid?

In short, probably not.

Every year, one in four Australians will experience a legal problem substantial enough to require a lawyer.

In 2014, 2.5 million Australians were living below the poverty line. At current funding levels, however, many people living below the poverty line cannot access legal aid. Fewer than 74 000 legal aid grants were offered in 2014.

So that's 25 per cent of the population with serious legal problems. 10 per cent living below the poverty line. 0.3 per cent granted legal aid.

It's not just the restrictive means tests: because of the legal aid funding crisis perpetuated by the Federal Government's funding model, legal aid just isn't available for many types of legal problems.

Source: Law Council of Australia, *So if you can't afford a lawyer you can access legal aid?* Legal Aid Matters <http://www.legalaidmatters.org.au/facts>.

Productivity Commission
the Australian Government's independent research and advisory body, which researches and advises on a range of issues

disability
a total or partial loss of bodily or mental functions, or a disease or illness that affects a person's body, learning or thought processes

A lack of funding for legal aid has been a problem for decades. Even though a 2014 **Productivity Commission** report recommended that an extra $200 million a year be given to legal assistance services, this amount has not yet been met.

The lack of adequate funding for legal aid agencies such as VLA and CLCs can result in those agencies tightening their criteria as to who is eligible for legal aid. This leaves many accused persons in a vulnerable position because they can't pay for a lawyer and won't receive legal aid. In 2014–15, CLCs in Australia turned away more than 159 220 people because they did not have the resources to help them. This is likely to impact vulnerable and disadvantaged people who rely on legal aid for help, such as those with a **disability** and those who are homeless. Legal aid is currently available to less than 8 per cent of Australia's population.

Some of the most vulnerable people who are disadvantaged by a lack of funding and availability of legal aid services are domestic violence victims and their children. These victims often reach out to legal aid services, and if they are turned away it means they are left in unsafe situations, or risk being put into financial difficulty by having to borrow money to be able to help them through the criminal justice system. Rosie Batty, the 2015 Australian of the Year and family violence campaigner who lost her son in 2014 after he was murdered by his father, has spoken publicly about the need for adequate funding for these people.



Source 4 Rosie Batty, the 2015 Australian of the Year, wrote to the prime minister about proposed funding cuts. She was delighted when the cuts were reversed in the May 2017 federal budget.

The principles of justice

The availability of legal aid can affect the principles of justice. A summary is set out in Source 5 .

PRINCIPLE	AVAILABILITY OF LEGAL AID
Fairness	• Legal aid can assist a person to understand the criminal justice system, obtain legal advice and legal representation. This helps to ensure an accused receives a fair trial or hearing, as they are assisted with presenting the case before the judge, jury or magistrate. • Limits on access to free legal services can impact an accused's ability to present their case in the best possible light and receive a fair hearing. Lack of legal aid may result in people having to represent themselves. • The lack of legal aid can also impact on victims and their families who want to assert their rights in the criminal justice system, understand criminal processes and need information about matters such as giving evidence. This can particularly hurt the most vulnerable such as domestic violence victims, Indigenous and Aboriginal Torres Strait Islander people and people with mental health issues.
Equality	• Legal aid aims to ensure that an accused is not disadvantaged because of their lack of legal representation. • An accused who is not eligible for legal aid is at risk of not being treated the same as the prosecution. It is usually the most vulnerable in our society who need legal aid, and therefore the ones most likely to be denied legal aid. • A victim or their families who cannot afford legal representation may also be at a disadvantage by not being able to assert or understand their legal rights at the same level as someone who has private representation.
Access	• Victoria Legal Aid (VLA) and community legal centres (CLCs) aim to ensure that there is access to justice. • A party who can't get any form of legal aid through these institutions is at risk of not being able to access information, legal help, advice, assistance or representation, and may not be able to understand the processes involved.

Source 5 The availability of legal aid and the principles of justice

Assistance to self-represented parties

self-represented party a person with a matter before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

The criminal and civil justice systems are seeing growing numbers of **self-represented parties**. Some choose to self-represent, while others have no choice – that is, they cannot afford a lawyer, and they are not eligible for legal aid.

According to the Victorian Access to Justice Review Report, the Chief Magistrate of the Magistrates' Court estimates that up to 50 per cent of all accused persons in criminal matters are now self-represented.

This can create challenges for the courts and for the parties, because a self-represented party often finds law unfamiliar and lacks understanding of the law and its formalities, procedure, evidence and language.

As a result of the rise in self-represented parties, courts and judges have to adapt by changing their processes. Court personnel, judges and magistrates can provide assistance to self-represented accused persons in a criminal trial, which may enhance their ability to achieve justice.

By way of example, in the Magistrates' Court for the hearing of a **summary offence**:

- when an accused person arrives at court, court staff will normally be available to find out whether he or she has obtained legal advice
- the accused may be able to see VLA's duty lawyer for that day
- volunteers are also available in the Magistrates' Court to offer practical and non-legal advice and support (this is particularly helpful for people who are nervous about the hearing).

In the County Court and the Supreme Court, court personnel can provide advice to self-represented parties on procedural matters and can provide referrals to legal service providers and *pro bono* schemes.

The duty to ensure a self-represented party is assisted is not limited to court staff. Judges and magistrates are also able to assist a self-represented party – and have a responsibility to do so – to ensure a fair hearing and **equality** before the law. However, assistance does not mean that judges or magistrates should represent the accused, gather **evidence** or overly interfere.

In *Matsoukatidou v Yarra Ranges Council*, Justice Bell of the Supreme Court of Victoria found that if a party is self-represented, the judge is obliged to ensure the hearing is conducted fairly and the party is seen to be equal before the law. Justice Bell referred to *Tomasevic v Travaglini* (2007) 17 VR 100 (see page 146) in finding that a judge has a duty to provide due assistance to self-represented parties.

summary offence
a minor offence generally heard in the Magistrates' Court

equality
one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage

evidence
information used to support the facts in a legal case



Source 6 Justice Connect helps people who are ineligible for legal aid and cannot afford a lawyer to access free legal assistance.

LEGAL CASE

The duty of a judge

Tomasevic v Travaglini (2007) 17 VR 100

While this was a civil case, it is an important case which highlights the duty of the judge when faced with a self-represented party. Justice Bell of the Supreme Court, when faced with a self-represented litigant, stated:

> But Mr Tomasevic was equally dependent on the trial judge to exercise his judicial powers to ensure his application was fairly heard, which required to the judge to give him due assistance as a self-represented litigant.
>
> The right of every person to a fair criminal or civil trial, and the duty of every judge to ensure it, is deeply ingrained in the law. Expressed in traditional terms, the right is inherent in the rule of law – indeed, 'in every system of law that makes any pretension to civilisation' – and in the judicial process. Expressed in modern human rights terms, the right to a fair trial is important for promoting and respecting equality before the law and access to justice.



Source 7 Justice Kevin Bell of the Supreme Court of Victoria has given some important judgments about the need for self-represented parties to be provided with a fair hearing.

The principles of justice

Assistance given to self-represented parties can affect the principles of justice. A summary is set out in Source 8.

PRINCIPLE	ASSISTANCE TO SELF-REPRESENTED PARTIES
Fairness	• The ability and responsibility of court personnel, including judges and magistrates, to provide assistance may decrease some problems associated with self-representation. Although it may be limited to procedural matters, such assistance can reduce the possibility of an accused being denied the right to a fair hearing. • A judge can stay a trial until an accused obtains legal representation if there is a risk that there will not be a fair trial.
Equality	• Where a party is self-represented, the judge or magistrate must ensure the hearing is conducted so that equality before the law is promoted. • If there is something about the self-represented party that means they could be discriminated against – such as a disability or mental illness – it is the responsibility of the judge or magistrate to make necessary accommodations to ensure those people can participate in proceedings.
Access	• The fulfilment of the responsibilities of the judge and the magistrate to ensure a self-represented accused receives assistance goes some way towards helping the accused understand legal jargon or legal procedures, or his or her rights. • The assistance cannot extend to the judge or magistrate acting for the accused or giving legal advice. This means the accused will still need to navigate his or her way through complex and difficult procedures, understand aspects such as cross-examination and make decisions about how to conduct the trial.

Source 8 Assistance to self-represented parties and the principles of justice



Source 9 The ability of court personnel to provide assistance may decrease some problems associated with self-representation.

5.1 CHECK YOUR LEARNING

Define and explain

1. Identify and describe two types of cost factors that may affect the ability of the criminal justice system to achieve justice.
2. How does access to legal advice uphold the rule of law?
3. Identify two ways in which the right to a fair trial is recognised in Victoria.
4. What is legal aid, and why is it not available to everyone?
5. What sort of assistance can be given by the courts to self-represented parties? What sort of assistance cannot be given by the courts?

Synthesise and apply

6. Explain why the assistance given to self-represented parties is characterised as a cost factor.
7. Prepare a mind map which shows the connection between the three different costs factors explored in this topic.
8. Read the legal case *Matsoukatidou v Yarra Ranges Council*.
   - **a** What offences were alleged in this case?
   - **b** What were the vulnerabilities of the accused persons?
   - **c** What were the difficulties faced by the accused persons in the County Court?
   - **d** Do you agree with Justice Bell's view about the right to a fair hearing? Discuss with another person in your class.
9. Imagine a County Court trial in which an accused person is unrepresented, and has inadequate knowledge of and experience in legal processes. Construct a way in which the criminal justice system would be able to assist that person, while still maintaining impartiality and fairness in the process.

Analyse and evaluate

10. 'The cases of *Matsoukatidou v Yarra Ranges Council* and *Tomasevic v Travaglini* show that fairness and equality cannot both be achieved. If a self-represented accused person needs help, then this might ensure equality, but it means there is unfairness'. Do you agree? Give reasons.
11. 'The right to a fair trial requires legal representation. It should be a rule that no accused person should be unrepresented in a hearing or trial before the court'. Discuss the extent to which you agree with this statement.

Check your obook assess for these additional resources and more:

- » **Student book questions** 5.1 Check your learning
- » **Video tutorial** Introduction to Chapter 5
- » **Weblink** Law Council of Australia
- » **Weblink** Justice Connect

5.2 TIME FACTORS

Human Rights Charter the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Its main purpose is to protect and promote human rights

plea negotiations (in criminal cases) pre-trial discussions that take place between the prosecution and the accused, aimed at resolving the case by agreeing on an outcome to the criminal charges laid (also known as charge negotiations)

sentence indication a statement made by a judge to an accused about the sentence they could face if they plead guilty to the offence

appeal an application to have a higher court review a ruling (i.e. decision) made by a lower court

Office of Public Prosecutions (OPP) the Victorian public prosecutions office which prepares and conducts criminal proceedings on behalf of the DPP

As examined in Chapter 3, an accused has a right under the Victorian **Human Rights Charter** to be tried without unreasonable delay. Where possible, delays should be avoided and parties should work with practical speed to ensure an accused is tried within a reasonable time. What is considered a reasonable time will, however, depend on the case.

The motto 'justice delayed is justice denied' is just as relevant today as it was when the idea was expressed in the Magna Carta in 1215 (in which it is stated 'to no one will we sell, to no one will we refuse or delay, right or justice'). Delays in having a trial heard and determined can affect the ability of the criminal justice system to achieve justice. In this topic you will explore the following four time factors:

- the delays in preparing a case for trial
- court delays
- the use of **plea negotiations** and **sentence indications**
- **appeals** in the Court of Appeal.

The first two factors listed restrict the ability of the criminal justice system to achieve justice, while the third and fourth factors enhance the ability of the criminal justice system to achieve justice.

Delays in preparing a case for hearing or trial

Most criminal cases involve a range of tasks such as gathering evidence, locating and interviewing witnesses, determining what happened, and determining what charges should be laid against an accused. How long these tasks take to complete will be different from case to case.

The more complicated the case is, the greater the resources that the **Office of Public Prosecutions** (OPP) needs to invest in preparing the matter for trial. The 2015–16 annual report of the Director of Public Prosecutions (DPP) and the OPP stated that the average time taken to complete criminal matters was 19.2 months.

An example of delays in a criminal case can be seen in the charges laid against Dimitrious Gargasoulas in relation to the Bourke Street incident that occurred in January 2017.

CASE STUDY

Bourke Street tragedy

On 20 January 2017, six people were killed and at least 30 people were injured after a car drove into pedestrians in Bourke Street, Melbourne during lunchtime. Dimitrious Gargasoulas was charged with six counts of murder and 28 attempted murder charges, and was remanded in custody following the incident.

In February 2017, Justice Lex Lasry of the Supreme Court asked the prosecutors to provide an update on the progress of the case. This was an unusual step, as the Supreme Court's involvement in



Source 1 A complex criminal case is difficult to bring to court without delay. The case against Dimitrious Gargasoulas in relation to the Bourke Street killings in January 2017 involved multiple crime scenes, several victims and many witnesses.

such a case will ordinarily commence once the committal proceedings are concluded in the Magistrates' Court and an indictment is filed in the Supreme Court.

The prosecutors indicated that the complexity of the case meant there would be a delay in having the matter heard. Thousands of witnesses were expected to be interviewed, and over 420 witness statements had been taken. DPP John Champion SC indicated this was the biggest investigation they had ever had to manage, and that the trial would not start until 2018. Justice Lasry expressed concern that this was a very long time.

Many, however, see the delays in preparing a case for trial to be a result of the nature of our justice system, which relies on the **prosecution** gathering evidence, an over-reliance on hard copy documents, and the need for **committal proceedings** in what may be seen to be straightforward cases.

prosecution the Crown in its role of bringing a criminal case to court (also called 'the prosecution')

committal proceedings the processes and hearings that take place in the Magistrates' Court for indictable offences

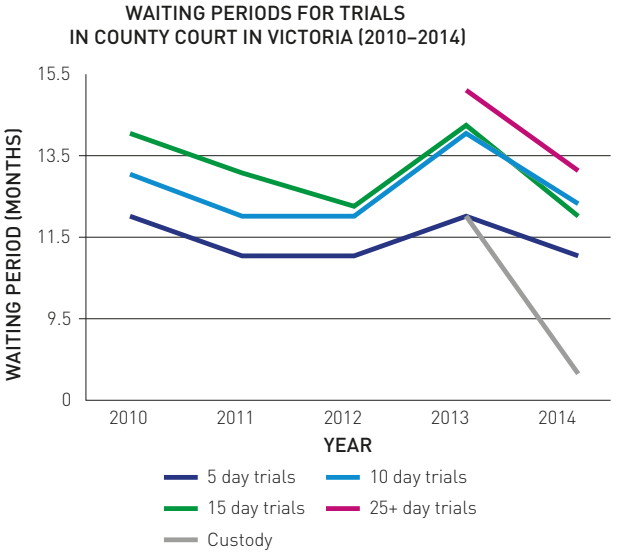
In May 2017, the family of murdered mother Kylie Blackwood expressed dismay at the fact that they would have to wait an additional seven months for her alleged murderer to face a committal proceeding. Scott Murdoch, the accused, was granted additional time to gather evidence. His legal representatives agreed that the delay was unacceptable, but it was due in part to the fact that Murdoch had changed legal representatives three times. These delays can be particularly frustrating to a victim, a victim's family, and society, who all have an interest in the outcome of a case.

The principles of justice

Delays in preparing a case for trial can affect the principles of justice. A summary is set out in Source 2.

PRINCIPLE	DELAYS IN PREPARING A CASE FOR TRIAL
Fairness	• Delays in criminal cases can result in emotional strain for the accused and his or her family, the stigma of being charged with a crime, the possible loss of a job, and disruption of family life. The impact on the victim and his or her family can be just as significant – victims have to wait for the case to be heard, and may not be able to move on until it is over. • 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. This can reduce the likelihood of a fair outcome.
Equality	• Delays can impact on those who are most vulnerable, putting them at risk of not being treated equally before the law. For example, delays can be particularly distressing for people with a mental illness or disability, those who are aged, or victims who have suffered significant trauma. Delays can therefore place someone in a more disadvantageous position than they otherwise would have been.
Access	• The greater the wait in having a case heard and determined, the less the courts become accessible to the parties. The negative impact of delays can be particularly difficult for victims of trauma or sexual offences. • On the other hand, a timely and speedy determination of a criminal case can ensure that the courts remain accessible to people, and people have confidence in the criminal justice system.

Source 2 Delays in preparing a case for trial and the principles of justice



Source: County Court Annual Report 2014–15

Source 3 Trial waiting period in the County Court 2010–14

Court delays

In addition to delays in getting a case ready for trial, parties often have to wait for a hearing date in court. The court system is often said to be stretched and unable to handle the increasing number of criminal cases that are before them.

In recent years the courts have tried to reduce the delays in finalising criminal matters so that justice can be delivered quickly for victims, accused persons, and the community generally. However, courts have had to deal with an increasing number of self-represented parties, more complex matters, and some pockets of society demanding a 'tough on crime' approach, which can lead to more cases brought before the courts.

The graph in Source 3 shows the length of time that an accused will wait to have a trial heard in the County Court. The waiting time depends on the length of trial and whether the accused is in custody. It can range between 8 months and over 12 months.

The legal community are concerned about the long wait times for hearings in the Victorian court system as demonstrated in the article below.

IN THE NEWS

Long wait for court dates 'sad indictment' on system, Victorian magistrate says

Nicole Asher, *ABC*, 31 January 2017

Members of the Victorian legal fraternity are concerned wait times for hearings at Magistrates' Courts will increase under plans by the State Government to reform the bail system.

One of the state's top magistrates has criticised the level of overcrowding on court lists, after a two-hour hearing was delayed to the end of the year — a problem insiders expect to worsen.

Premier Daniel Andrews last week announced sweeping bail reforms that would include the establishment of a night Magistrates' Court.



Source 4 Delays at the Latrobe Valley Magistrates' Court have been criticised.

During a hearing at the Latrobe Valley Magistrates' Court in Gippsland, magistrate Franz Holzen slammed the state of the court list after he was forced to adjourn a matter for more than 10 months.

Mr Holzen labelled the situation 'woeful' when told by a court bench clerk there was no space to schedule a two-hour hearing until December.

The principles of justice

Court delays can affect the principles of justice. A summary is set out in Source 5.

PRINCIPLE	COURT DELAYS
Fairness	• A fair hearing includes the right to be tried without unreasonable delay. Court delays in setting a matter down for trial or hearing can be considered unfair given the strain it can have on the accused, victims, families and society. • Long delays can also impact on evidence. For example, witnesses lose their memory over time, and victims often find it traumatic to have to wait so long for justice.
Equality	• Delays can impact on those who are most vulnerable, putting them at a potential disadvantage in comparison to those who are not as vulnerable. Delays can therefore place someone in a more disadvantageous position than they otherwise would have been.
Access	• The greater the wait in having a case heard and determined, the less accessible the courts are to the parties. This can cause parties to compromise in order to finalise the case early, when there might otherwise be a strong case for or against the accused. • The negative impact of delays can be particularly difficult for victims who suffer trauma from violence or sexual offences.

Source 5 Court delays and the principles of justice

Plea negotiations and sentence indications

The use of plea negotiations and sentence indications have helped significantly in addressing the delays faced by the courts and the prosecution in criminal matters.

Plea negotiations can reduce delays by achieving an early **guilty plea** in a case. This ensures a quicker determination of the case and allows resources to be used elsewhere. Sentence indications can also reduce delays by providing an accused with an opportunity to plead guilty once they know what sentence is likely to be imposed.

guilty plea when an offender officially admits guilt which is then considered by the court when sentencing

In their 2015–16 annual report, the DPP and OPP stated that guilty pleas were achieved in 77 per cent of matters (see the extract below).

EXTRACT

Early resolution

The resolution of matters through guilty pleas contributes to effective, economic and efficient prosecutions. OPP solicitors assess each matter as early as possible for a potential guilty plea to appropriate charges – that reflect the accused's criminality, based on what can be proved beyond reasonable doubt, and that allows for a sentence that adequately reflects the criminality ...

As well as achieving fair and just outcomes in an efficient way, guilty pleas relieve victims and witnesses of the burden of giving evidence before a trial, and provide certainty of outcome. In 2015/16, 77 per cent of prosecutions were finalised as a guilty plea – the highest level recorded at the OPP since comparable records began 20 years ago. Efforts were also made to achieve guilty pleas as early as possible in the prosecution process to save resources being diverted to trials that did not ultimately proceed.

Source: Office of Public Prosecutions, 'Annual Report 15/16 Director of Public Prosecutions, Office of Public Prosecutions', (Annual Report, 13 October 2016)

The principles of justice

The use of plea negotiations and sentence indications can affect the principles of justice. A summary is set out in Source 6.

PRINCIPLE	PLEA NEGOTIATIONS AND SENTENCE INDICATIONS
Fairness	• An accused person is given the opportunity to negotiate a plea, or seek a sentence indication. The accused does not have to accept any negotiation or sentence indication. He or she has an opportunity to decide whether to plead guilty. • Plea negotiations are intended to ensure that the charges reflect the accused's criminality, ensuring that there is fairness in what is being negotiated. Similarly, sentence indications are based on the information available to the judge or magistrate. • Plea negotiations and sentence indications avoid the burden of trial for victims and witnesses. • Victims and members of society may see both of these methods as unfair in that the accused is seen as being 'let off'.
Equality	• Plea negotiations and sentence indications are generally available to all accused persons, therefore everyone has an equal opportunity to negotiate with the prosecution or seek a sentence indication. • Victims may feel they are themselves disadvantaged because an accused does not have to face trial (though equally they may avoid the trauma and stress involved in a trial).
Access	• Guilty pleas avoid the trauma, stress and inconvenience of trial, which enables better access to parties and victims to the criminal justice system. • In plea negotiations, victims are often consulted about their views, ensuring the prosecution considers their views when negotiating charges. The victim's views, however, do not determine plea negotiations.

Source 6 The use of plea negotiations and sentence indications and the principles of justice

Expedition of appeals in the court of appeal

Since 2011, criminal appeals in the Court of Appeal of the Supreme Court have been conducted under reforms known as the Ashley-Venne reforms. These reforms include:

- the filing of grounds of appeal and supporting arguments early in the process of applying for leave
- having more detailed and uniform paperwork.

Since the Court of Appeal hears most of the criminal appeals in Victoria, the reforms have greatly assisted in reducing backlogs in courts and delays in having a criminal appeal finally determined. In its 2014–15 annual report, the Supreme Court has said that it has been able to reduce the time taken to finalise an appeal to just six months – in 2010–11 this was 12.5 months.

The principles of justice

The time taken to have an appeal heard in the Court of Appeal can affect the principles of justice. A summary is set out in Source 7.

PRINCIPLE	EXPEDITION OF APPEALS IN THE COURT OF APPEAL
Fairness	• Appeals can add to the trauma of victims and other parties involved, as they involve additional steps in the final determination of a case. Having the appeal heard quickly can reduce that trauma. • Hearings should be heard without unreasonable delay, so the reforms assist in ensuring a fair hearing.
Equality	• The reduction in time can reduce the stress, trauma and inconvenience involved, thus ensuring equality before the law, particularly for those who are more vulnerable to delays.
Access	• Reducing the time it takes for a matter to be finally determined can increase access to justice – if appeals took years and an accused was wrongly found to be guilty it would significantly decrease access to a final determination and the chance to establish an accused's innocence, or have a sentence reviewed.

Source 7 The expedition of appeals in the Court of Appeal and the principles of justice

5.2 CHECK YOUR LEARNING

Define and explain

1 How do delays in a criminal case impact on fairness, equality and access?

2 How do plea negotiations enable access to justice for victims?

3 Other than plea negotiations, describe two other ways in which the criminal justice system seeks to ensure the swift determination of criminal cases.

Synthesise and apply

4 Read the case study 'Bourke Street tragedy'.
   - **a** What reasons were given for the delay?
   - **b** Having regard to the size and complexity of the case, do you think the delays are reasonable?
   - **c** Which members of society do you think are most impacted by this delay? Give reasons.

5 If you had a trial that lasted 30 days, what length of time should you expect to wait until trial? What impact does this have on:
   - **a** the victims
   - **b** the accused
   - **c** society?

6 Imagine you are a lawyer representing a victim of a domestic violence case. The accused person is on remand, and your client is nervous about the possibility of his getting bail at any point in time, and continues to relive the trauma of the violence. You have just been told that trial will not occur for at least 10 more months.
   - **a** Discuss with another class member the feelings your client would have about this.
   - **b** Which principle of justice most resonates with you when you hear about the delay in trial. Why?

Analyse and evaluate

7 'Delays in the hearing of criminal cases occur in part because of committal proceedings. They are not necessary, particularly for straightforward cases'. With reference to at least one case you have studied or heard about this year, discuss this statement.

Check your obook assess for these additional resources and more:

- **Student book questions**
  5.2 Check your learning
- **Video tutorial**
  How to answer questions about the principles of justice
- **Worksheet**
  The Bourke Street tragedy and delays

5.3 CULTURAL FACTORS

Koori Court
a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Aboriginal people

The community in general is becoming more aware of the need to ensure that all people have access to the justice system, and that all people are treated equally and fairly. But this is not always the case, particularly for different cultural groups in society. These include people for whom English is not their first language and Aboriginal and Torres Strait Islander peoples.

Culturally-based difficulties include lack of knowledge of the legal system, lack of understanding of English, legal system failures to account for differences, and cultural misunderstandings.

In this topic you will explore the following four factors relating to cultural differences:

- difficulties faced by Aboriginal and Torres Strait Islander peoples in questioning and giving evidence
- the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system
- the use of the **Koori Court** in sentencing Aboriginal and Torres Strait Islander peoples
- the use of translators.

The first two factors listed inhibit or restrict the ability of the criminal justice system to achieve justice, whereas the third and fourth factors enhance the ability of the criminal justice system to achieve justice.

Study tip

The *VCE Legal Studies Study Design* requires you to know factors that affect the ability of the criminal justice system to achieve justice, including in relation to cultural differences. The factors explored in this topic are not the only factors that you can consider. You should read more widely and identify other cultural differences that may also be relevant to the criminal justice system.

Problems during questioning and giving evidence

Aboriginal and Torres Strait Islander peoples have a complex system of law and customs, handed down from generation to generation. Those from traditional areas 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 made worse by cultural or language barriers, embarrassment and fear.

The following are some of the difficulties faced by Aboriginal and Torres Strait Islander peoples:

- **language barriers** – There are subtle differences in the way language is used by Indigenous people that can cause misunderstandings. 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.



Source 1 Aboriginal and Torres Strait Islander peoples can face difficulties in the criminal justice system, which may make incorrect, culturally based assumptions about them.

- **direct questioning** – The question and answer method of obtaining evidence, which is often the way evidence is obtained in criminal matters, can be inappropriate for Aboriginal and Torres Strait Islander witnesses who are not used to this method. In many Indigenous cultures, group agreement through long, sometimes roundabout discussion and telling with stories is the polite way to settle differences, and directness is impolite. The criminal justice system, with its forced yes/no answers, sets Aboriginal people up to look evasive or dishonest when they are actually being respectful.
- **body language** – Direct eye contact is seen as disrespectful to some Aboriginal and Torres Strait Islander peoples, who try to avoid it by looking down or to the side. This may make them appear uninterested or unreliable to those who do not understand Indigenous customs.
- **shyness and submissiveness** – Indigenous people answer questions posed by non-Indigenous people in the way in which they think the questioner wants, rather than necessarily what actually happened. Some may also be submissive to authority even to the extent of admitting guilt, without realising the consequences and implications of the admission.
- **cultural taboos** – Within some Indigenous cultures 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 gender-based knowledge in front of the other gender. These traditional laws can cause difficulties and misunderstandings for Indigenous people who have been charged with an offence.
- **lack of understanding of court procedures** – Some Aboriginal and Torres Strait Islander peoples may not understand why they have to tell the same story over and over, such as during **examination-in-chief** and then **cross-examination**. In an attempt not to offend the authorities, they may think 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 evidence-in-chief, but they do badly in cross-examination because they do not understand its purpose.

Some of the difficulties that Aboriginal and Torres Strait Islander peoples may face in their involvement with the criminal justice system are highlighted in the case below.

Did you know?

In a famous 1932 High Court case, a guilty verdict was overturned because of the behaviour of participants in an all-white, prejudiced trial. The facts became a case study in legal ethics and the focus of an award-winning film, *Dhakiyarr v The King* (2004). Descendants of the accused and the victim met to reconcile in 2003.

examination-in-chief the questioning of one's own witness in court in order to prove one's own case and disprove the opponent's case

cross-examination the questioning of a witness called by the other side in a legal case

Miscarriage of justice in short trial

LEGAL CASE

R v Kina [1993] QCA 480 (29 November 1993)

This case, involving an Aboriginal woman (who has now passed away and should not be named), illustrates the problems of Indigenous people confronted with the criminal justice system.

A woman was charged with murdering her sadistic de facto partner on 20 January 1988 by stabbing him with a knife. Her partner had subjected her to physical and sexual torture and was about to rape her niece.

The accused did not give or call evidence at trial, which lasted less than a day. She 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.

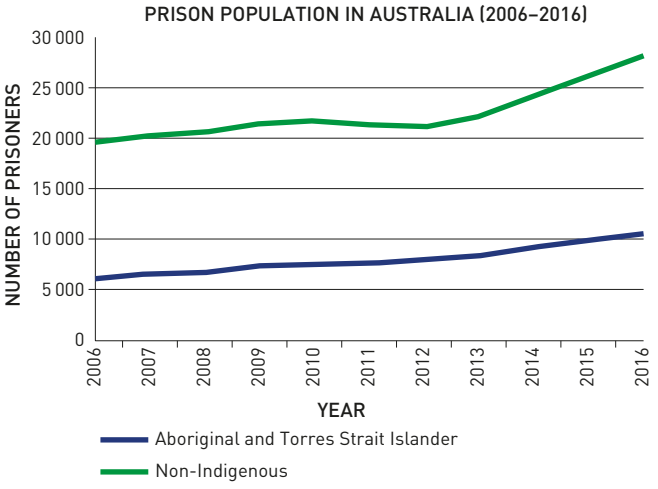
The jury took 50 minutes to reach a guilty verdict. The defendant appealed to the Queensland Court of Appeal on the basis that she did not receive a fair trial. The Court of Appeal held that there was a miscarriage of justice, noting there were a number of interacting factors which presented difficulties of communication between the woman and her legal representatives.

The principles of justice

Problems during questioning and giving evidence can affect the principles of justice. A summary is set out in Source 2.

PRINCIPLE	PROBLEMS DURING QUESTIONING AND GIVING EVIDENCE
Fairness	• The way questions are asked and answered may risk the accused person making confessions or admissions he or she may not otherwise make. • An Indigenous person's different customs and lack of understanding of court processes can leave them at risk of procedural unfairness, as they may not be able to present their case as required by the criminal justice system. They may therefore be treated unfavourably.
Equality	• Cultural differences can significantly impact on the ability of a party to be seen to be equal before the law, and have an equal opportunity to present their case. Aboriginal and Torres Strait Islander peoples, charged with a crime that they have pleaded not guilty to, have to adapt to a system that is different from their own. • Unfamiliarity with the justice system and cultural differences can impact on a person being able to equally present their case.
Access	• Inability to understand legal processes and terminology, legal rights and the court system can impact on a person's ability to access the system without some adaption of processes or assistance.

Source 2 Problems during questioning and giving evidence and the principles of justice



Source 3 Prisoner population from 2006 to 2016 (from Australian Bureau of Statistics data)



Source 4 Federal Court judge Matthew Myers was appointed as the ALRC Commissioner to lead the inquiry into the incarceration rates of Aboriginal and Torres Strait Islander peoples.

Over-representation of Aboriginal and Torres Strait Islander peoples

For some years now, there has been a significant over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. According to the Australian Bureau of Statistics on Prisoners in Australia as at June 2016, the total Aboriginal and Torres Strait Islander population aged 18 years and over was approximately 2 per cent of the Australian population, yet Aboriginal and Torres Strait Islander prisoners accounted for 27 per cent of the total Australian prisoner population.

The prisoner population varies across states. In Victoria, 8 per cent of the prison population identifies as Aboriginal or Torres Strait Islander, whereas in the Northern Territory, the rate was 84 per cent.

The over-representation is not limited to offenders. Research in 2002 by Gardiner and Takagaki showed that Indigenous women in Victoria are two to four times more likely to be the victim of certain types of crime than non-Indigenous women.

The reasons for the over-representation have been the subject of academic debate and research. In October 2016, the Federal Government announced an Australian Law Reform Commission (ALRC) inquiry into the factors leading to over-representation in order to make recommendations for reform. The inquiry was criticised by some who saw it as a waste of time and money, given the previous inquiries on the same issue.

EXTRACT

ALRC inquiry into incarceration rate of Indigenous Australians

Joint media release by Attorney-General and Leader of the Government in the Senate, Senator The Hon George Brandis QC and Minister for Indigenous Affairs, Senator The Hon Nigel Scullion, 27 October 2016.

Today we announce that the Turnbull Government will ask the Australian Law Reform Commission (ALRC) to examine the factors leading to the over-representation of Indigenous Australians in our prison system, and consider what reforms to the law could ameliorate this national tragedy.

It has been 25 years since the final report of the landmark Royal Commission into Aboriginal Deaths in Custody, but Indigenous Australians are still over-represented in Australia's prisons. In 1991, Indigenous Australians made up 14 per cent of our nation's prison population; by 2015, this had increased to 27 per cent.

Other worrying statistics include the fact that Indigenous children and teenagers are 24 times more likely to be incarcerated than their non-Indigenous peers, while Indigenous women are 30 times more likely to be incarcerated.

The ALRC's inquiry is a critical step for breaking through these disturbing trends. The terms of reference will be subject to consultation, particularly with Indigenous Australians, state and territory governments who have primary responsibility for our criminal justice frameworks, as well as the broader legal profession.

The Turnbull Government is committed to reducing Indigenous incarceration and has committed $256 million in 2016–17 through the Indigenous Advancement Strategy for activities to address the drivers and improve community safety.

Source: Attorney-General's Department, 'ALRC inquiry into incarceration rate of Indigenous Australians' (Media Release, 27 October 2016) <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FourthQuarter/ALRC-inquiry-into-incarceration-rate-of-indigenous-australians.aspx>.

The principles of justice

The over-representation of Aboriginal and Torres Strait Islander peoples can affect the principles of justice. A summary is set out in Source 5.

PRINCIPLE	OVER-REPRESENTATION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES
Fairness	• Language and other issues can lead to misunderstandings between Aboriginal and Torres Strait Islander peoples and their lawyers and court personnel, resulting in unfair processes and a possible unfair trial or hearing.
Equality	• The over-representation of Aboriginal and Torres Strait Islander peoples demands greater attention by courts and those involved in the justice system to the complexity of their legal needs. If courts fail to understand these needs and take them into account, they risk denying them equality before the law.
Access	• The lack of legal resources and legal aid for some Aboriginal and Torres Strait Islander peoples faced with the criminal justice system can result in poorer access to justice. Since they are some of the most vulnerable, and are over-represented, they often have the least access to legal services and assistance.

Source 5 Over-representation of Aboriginal and Torres Strait Islander peoples and the principles of justice

The Koori Court

The Koori Court is a division of the Magistrates' Court, the County Court and the Children's Court (Criminal Division). It was first established in 2002 to provide fair, equitable and culturally relevant justice services to the Indigenous community, as well as to provide the Indigenous community with greater protection and participation in the sentencing process for criminal offences.

Before the Koori Court can be used for sentencing, the following conditions must be met:

- the accused must be an Aboriginal person
- the offence must be within the **jurisdiction** of the relevant court (but the Koori Court is not used for certain offences such as sexual offences)
- the accused must consent to the matter being dealt with in the Koori Court
- depending on which court is involved, the accused must plead guilty or intend to plead guilty (in the Children's Court, the accused may have been found guilty but can still participate in the Koori Court for sentencing).

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases



Source 6 The above conditions must be met before the Koori Court is made available to an accused person.

The Koori Court is therefore not a trial court, and is only used for sentencing.

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 and Regulation) can advise the Court on Aboriginal cultural issues. The accused sits with his or her family, rather than in the dock.

The Koori Court system has expanded since it was introduced into the Magistrates' Court in 2002, with the first Koori Court opening in Shepparton. There are now 11 adult Koori Courts and 12 Children's Koori Courts in Victoria.



Source 7 A sitting of the Koori Court in the Children's Court. The informality and equality shown in the design reflect the strengths of Aboriginal ways of communicating and the importance of the role of elders.

The case below was heard in the Geelong Koori Court and two Indigenous elders were present at the sentencing of the accused.

IN THE NEWS

Geelong Koori Court, Lara: 44yo Michael Watts pleads guilty to 116 carpark thefts and driving offences

Bethany Tyler, *Geelong Advertiser*, 10 January 2017

A LARA man used credit cards he'd stolen in a beach carpark theft spree to buy alcohol, a court has heard.

Michael Watts, 44, was sentenced to an extra two months behind bars after pleading guilty in the Geelong Koori Court on Monday to 116 theft and driving-related offences ...

Watts' lawyer Stephanie Mawby said her client had a difficult upbringing and struggled with substance abuse, and that he now wanted to prove himself as a role model for his three children and stepchildren.

Two Indigenous elders were present at the sentencing, including Boon Wurrung elder Aunty Fay Stewart Muir who said she was disappointed in Watts' crimes.

'I'm really sad all this has happened to you (in your past) but it all comes down to you as well,' she said.

'You need to remember all the people you have hurt in doing all these break-ins. If they did that to you how would you feel?'

Watts told the court what he had done was 'horrendous' and that he realised his children and stepchildren were among the victims of his offending.

'I'm sorry for what I did,' Watts said.

'I'm more remorseful today than any other court case I've ever been to, it has really hit home this time.'

Magistrate Anne McGarvie sentenced Watts to an aggregate prison term of eight months, meaning he will serve an extra 2½ months behind bars.

The principles of justice

The use of a Koori Court can affect the principles of justice. A summary is set out in Source 8.

PRINCIPLE	THE KOORI COURT
Fairness	• Koori Courts can help limit the possibility of an unfair trial by ensuring that people can communicate in a way that is familiar to them. • The informality and layout of the courtroom will be more familiar for an offender, enabling them to actively participate in the hearing with elders present.
Equality	• The Koori Courts help to overcome some of the problems arising from the cultural differences of the Indigenous community. The differences and values of the Indigenous community are recognised in sentencing, which upholds equality. The informality and equality shown here reflect the strengths of Aboriginal ways of communicating and the importance of elders. • The Koori Court is limited to sentencing, and so does not address equality issues that may exist in a hearing or trial to determine guilt.

cont.

PRINCIPLE	THE KOORI COURT
Access	• The informality of the Court, the requirement that the offender 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. • The Koori Court provides access to only guilty offenders, and not to those who wish to defend the charges.

Source 8 The Koori Court and the principles of justice

The use of interpreters

Many members of our community were born overseas, and many have a language other than English as their first language. This can affect an accused being able to understand court documents, court processes and the language used in criminal cases.

lawyer
a general term used to describe somebody who has been trained in the law and is qualified to give legal advice (a barrister or a solicitor)

indictable offence
a serious offence generally heard before a judge and a jury in the County Court or Supreme Court of Victoria

Under the Human Rights Charter, one of the rights guaranteed to a person charged with a criminal offence is the right to have the assistance of an interpreter (at no cost) if he or she cannot understand or speak English. Interpreters can help accused people who cannot speak English to speak with their **lawyer** and to court personnel.

The Magistrates' Court will arrange and pay for an interpreter for an accused in a criminal matter. For an **indictable offence**, the OPP solicitor will arrange and pay for an interpreter. The provision of an interpreter can greatly assist an accused with language difficulties to understand legal procedures, ensuring a fair outcome. However, access to an interpreter can vary greatly from court to court. This is an area for possible reform to ensure enough interpreters are available, as demonstrated in the article below.

IN THE NEWS

Court interpreter pay dispute left Vietnamese clients waiting in custody

Jane Lee, *The Age*, 27 December 2016

Non-English-speaking Vietnamese people facing criminal charges waited in custody for more than a month for interpreters who were involved in an almost year-long pay dispute with Melbourne's busiest court.

About 17 Vietnamese court interpreters stopped accepting bookings from the Melbourne Magistrates' Court for about eight months from March, after the court made changes to their hiring practices that effectively lowered the amount of money it paid them.

Interpreters allow culturally and linguistically diverse defendants to speak to their lawyers and magistrates about their case. Court staff are responsible for hiring translator services to help such defendants when they appear for court hearings.

Trieu Huynh, head of indictable crime at Victoria Legal Aid, said clients were left wondering why their cases were continually being adjourned. 'Imagine if you were in a system you didn't know and in an environment where your liberty has been deprived (though) there's a presumption of innocence.'

Frustrated magistrates had indicated in court the absence of translators at hearings constituted a 'breach of human rights', Mr Huynh said. He was most concerned about cases where a client could have been denied the opportunity to be freed, either on bail or released on a community sentence without a translator present.

The principles of justice

The use of interpreters can affect the principles of justice. A summary is set out in Source 9.

PRINCIPLE	THE USE OF INTERPRETERS
Fairness	• People from non–English-speaking backgrounds can find it difficult to present their case well. Legal processes and language are unfamiliar. This increases the likelihood of an unfair outcome. This is equally the case for victims and other parties whose first language is not English. • The use of interpreters can bridge the language gap by ensuring that what the person wants to say is communicated.
Equality	• A person who cannot communicate well in a court setting may risk being treated differently, or may not be able to perform as well as an experienced prosecutor who does not suffer the same issues, thereby jeopardising the right to equality before the law. • The use of interpreters can help people who are not familiar with the English language to communicate with their lawyers and with the court, and to present their case in a way that ensures they are not discriminated against, making them more equal in the process.
Access	• Unless information and advice is presented in a different language or an interpreter is available, people of a different cultural and linguistic background will find it difficult to understand processes and their legal rights. People may also come from different legal systems and therefore not understand our own processes. • Interpreters can help people access legal advice and information in a way that they understand.

Source 9 The use of interpreters and the principles of justice

5.3 CHECK YOUR LEARNING

Define and explain

1 In what way do court processes create problems for Aboriginal and Torres Strait Islander peoples?
2 How is a victim who does not speak English impacted by the ability to access justice?
3 Explain how the use of an interpreter can enable greater fairness in the criminal justice system.

Synthesise and apply

4 Read the legal case *R v Kina*.
  a What were the problems faced by the accused?
  b Why do you think the trial lasted less than a day, and the jury took 50 minutes to reach a guilty verdict?
  c Why was there a miscarriage of justice?
  d What changes would you suggest to ensure this type of situation does not happen again?
5 Read the article 'Geelong Koori Court, Lara: 44 yo Michael Watts pleads guilty to 116 carpark thefts and driving offences'.
  a Why was the accused able to use the Koori Court?
  b Who would have been at Watts' hearing, and what were their roles?
  c What impact do you think having Indigenous elders present at the hearing has on an accused?
6 Conduct some research on the Koori Court system.
  a What was the latest Koori Court to open in Victoria?
  b Have any studies indicated whether it has assisted Aboriginal and Torres Strait Islander peoples and their ability to be seen as equal before the law? Write a short summary of your findings.

Analyse and evaluate

7 Go to the Australian Bureau of Statistics website. A link is provided on your obook assess. Find the latest statistics on the prison population. Have the statistics improved in relation to the representation of Aboriginal and Torres Strait Islander peoples in prison? Discuss as a class.
8 To what extent should traditional Indigenous customs be recognised in the administration of Australian law? Discuss.

Check your obook assess for these additional resources and more:

- **Student book questions** — 5.3 Check your learning
- **Going further** — Other factors
- **Worksheet** — ALRC enquiry
- **Weblink** — Koori Court

5.4 RECENT REFORMS

Study tip

You may be required to discuss 'recent reforms' in your assessment tasks. Make sure you use reforms that have been introduced in the past four years.

The criminal justice system is always in a state of reform. Some reforms are major; others minor. Over time the criminal justice system has faced various issues and difficulties, and there is often a need to reform the ways in which criminal cases are heard and determined.

Recent reforms are those which have occurred in the past four years. For each of the recent reforms, you should consider the extent to which they will be able to improve the ability of the criminal justice system to achieve the principles of justice.

Some recent reforms are discussed below.



Source 1 An artist's impression of the new courthouse in Shepparton, Victoria. The building is designed to improve access to justice and reduce delays for people living in the Hume/Goulburn region. Built at a cost of $73 million, it includes new information technology, is environmentally sustainable and utilises changing justice delivery models.

Recent reforms addressing costs factors

- **Greater access to legal services in the Hume/Goulburn region** – In December 2016, the Victorian Government opened a new VLA office in Shepparton. The office includes seven lawyers and support staff with specialist skills in criminal and family law, including family violence and child protection matters. The office is intended to serve a significant population in the Hume region including Shepparton, Cobram, Wangaratta, Wodonga and Myrtleford. A new courthouse has also been designed as the headquarters for the Hume/Goulburn region for delivery of justice and to reduce court delays, provide more accessible and responsive services for regional Victoria and offer a safe, secure environment.

pro bono
a Latin term meaning 'for the public good'; a term used to describe legal services that are provided for free (or at a reduced rate)

- **Free online tool** – In 2016 lawyers Doogue O'Brien George, as part of their ***pro bono*** work, released a free online tool called Robot Lawyers, designed to help people who cannot afford a private lawyer and do not qualify for legal aid. It is aimed at filling the gap in the legal services industry by helping people who cannot afford a lawyer to represent themselves if required. The online tool has a number of 'robots' – assault robot, drug robot and theft robot as examples – which are specifically designed to help accused people face particular charges.

practice note
a document issued by a court which guides the operation and management of cases

unanimous verdict
a verdict or decision where all the jury members are in agreement and decide the same way (for example they all agree the accused is guilty)

majority verdict
a jury verdict where all but one of the members of the jury agree with the decision

Recent reforms addressing time factors

- **Increase in use of court technology** – The County Court and the Supreme Court are increasingly aiming to become paperless, or increase their use of digital processes to ensure they are more efficient in dealing with cases. The County Court re-released its criminal division **practice note** in February 2017, requiring particular documents to be filed electronically. The County Court is also now recording evidence in a format that allows it to be played if there is a retrial to avoid the cost, time and inconvenience of witnesses having to give evidence again.
- **Removal of time limit for jury deliberations** – Previously, it was mandatory for jurors to take six hours in a criminal trial to get to a unanimous verdict before a majority verdict was accepted. The *Juries Act 2000* (Vic) was amended in 2017 so that the mandatory six-hour timeframe (the previous minimum time required to get to a **unanimous verdict**) was removed and a **majority verdict** could be accepted earlier. This is intended to help reduce delays and deliver shorter trials.

Recent reforms addressing cultural differences factors

- **Expansion of Koori Court** – In August 2016 a new Koori County Court opened so that Aboriginal and Torres Strait Islander peoples in the Mildura region have access to the sentencing court. This followed the introduction of the hearing of Koori Court matters in Geelong from June 2016, which will be for both Magistrates' Court and Children's Court matters.
- **Funding for Aboriginal prisoners' programs** – In 2017 the Victorian Government announced grants worth almost $2.5 million to support programs designed to rehabilitate Aboriginal prisoners by focusing on cultural strengthening, tackling family violence, healing, parenting and women's programs. The aim is to help drive down the over-representation of Aboriginal people in Victorian prisons.



Source 2 The opening of the County Koori Court in Mildura in October 2016

Recent reforms addressing other factors

- **Changes to bail laws** – The Victorian Parliament in 2016 and 2017 made changes to the *Bail Act 1977* (Vic). The changes mean that persons charged with certain offences, including murder and aggravated home invasion, can only be granted bail in exceptional circumstances. The changes reverse the presumption of bail for people charged with certain offences.
- **Changes to jury directions in sexual offence cases** – The Victorian Parliament amended the *Jury Directions Act 2015* (Vic) in 2017. Judges are now required to direct a jury that victims in sexual offence trials do not remember all the details of a sexual offence, may describe it differently at different times, and that does not mean that the witness is being untruthful. This is aimed at helping ensure that the jury acts fairly and equally in relation to victims of sexual offences giving evidence.

The ability of recent reforms to achieve the principles of justice

For each of the recent reforms, you should be able to discuss them in light of their ability to achieve the principles of justice, and the extent to which they have overcome the factors that affect the achievement of justice.

To do so, you should consider the following questions for each recent reform:

- What problem, difficulty or issue is it designed to overcome?
- Is it a short-term or long-term solution?
- What principles of justice is the reform achieving?
- Are there any statistics, data or evidence to show that the reform has improved the criminal justice system?
- What else needs to be done in addition to the reform, or is it a 'total solution' to the problem, difficulty or issue it is trying to overcome?

A summary of some of these issues for each of the recent reforms explored in this topic is provided in Source 3.

RECENT REFORM	COMMENTS
Greater access to legal services in the Hume/Goulburn region	• Provides greater access to legal aid and courts in this rural area • Focuses on most vulnerable people, including those suffering from family violence • Does not address limited funding issues currently faced by VLA • Does not alter the strict tests imposed by VLA which are still in place • More reforms required to fill gaps left by lack of legal aid • Contemporary design for new justice delivery models, capability to accommodate future service demands in the region
Free online tool	• Accessible online and to everybody • Easy to use online tool • Can provide preliminary information to people charged with a crime • Does not provide substantive legal advice or representation • May be inaccessible for some people such as those without computers or those who require an interpreter • Does not address all the gaps in the criminal justice system
Increase in use of court technology	• Greater speed in dealing with cases • Avoids the use of paper, which can clog up the system • Witnesses are saved the trauma of having to give evidence again if their evidence is recorded • Currently the courts use different court filing systems • The technology experience differs from court to court – some are better than others • Substantial improvements still required for technology to get up to speed
Removal of time limit for jury deliberations	• Ensures fairness by not locking juries into having to reach a unanimous verdict • Allows speed of verdict if majority verdict is able to be accepted earlier • Does not apply where unanimous verdict must be accepted • May reduce verdict by only a short period – hours or days
Expansion of Koori Court	• Enables greater access to sentencing court • Opened in areas where there is likely to be greater Indigenous Australian population • Emphasises importance of Koori Court as a way to ensure fairness and equality • Does not address all of the over-representation issues • Sentencing court only • County Koori Court does not exist in many areas of Victoria still
Funding for Aboriginal prisoners' programs	• Helps address over-representation, thus aiming to achieve fairness and equality • Specifically focused on Aboriginal prisoners, who may be more vulnerable • Limited funding, and is not a long-term funding solution • Greater focus needed on addressing over-representation
Changes to bail laws	• Reduces risk of serious offenders offending while on bail • Made to protect the community • Risks presumption of innocence and rule of law not being upheld • Prisons are already stretched and there is a suggestion they do not help in rehabilitation
Changes to jury directions in sexual offence cases	• Attempt to improve reporting of sexual offences and experience of sexual offence victims of the criminal justice system • Aims to avoid trauma and stigma suffered by sexual offence victims • Is not a 'whole system' solution • As juries don't give reasons for decision, no evidence to know whether directions improve fairness in outcome

Source 3 Some of the factors that may be taken into account when discussing recent reforms

5.4 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by the term 'recent reform'.

2 Identify the way a recent reform responds to each of the following factors:
   - **a** over-representation of Aboriginal and Torres Strait Islander peoples in prisons
   - **b** delays in court
   - **c** assistance to self-represented parties
   - **d** access to justice for people in rural areas.

Synthesise and apply

3 Choose two recent reforms that you want to study in more detail. These may be reforms in this topic, or other reforms. Use Prezi, PowerPoint or another presentation application or software to prepare a discussion of the reform. The presentation should address the following.
   - **a** When the reform was introduced.
   - **b** The nature of the reform.
   - **c** Which factor(s) the reform address(es).
   - **d** The extent to which the reform will address each of the principles of justice.
   - **e** Further reforms that may be required to address the factor(s) and to achieve the principles of justice.

4 For each of the following scenarios, identify at least one recent reform that may assist in improving the person's experience with the criminal justice system. Explain which principles of justice are addressed in each scenario because of the reform.
   - **a** Matty Richie Blake has been charged with stealing roses from a florist. Matty's case is being heard in the Magistrates' Court. He has no idea what a theft charge is and wants to know more about it.
   - **b** Jon Snow has been charged with killing three walkers in the You Yangs. Jon lives in Shepparton and has no money for a lawyer.
   - **c** Manny has just had a trial heard in the Supreme Court for culpable driving. The evidence was complex, and the jury may take a while to reach a verdict.

Analyse and evaluate

5 Get into groups of three or four in your class.
   - **a** Each group is to choose one recent reform.
   - **b** Write the recent reform in the middle of an A3 piece of paper.
   - **c** Your group is to discuss the strengths and weaknesses of the reform. Write down the strengths at the top of the A3 piece of paper, and the weaknesses at the bottom of the A3 piece of paper. Make sure you address at least one of the principles of justice when writing down each strength or weakness.
   - **d** Walk around the class and look at the other A3 pieces of paper. Consider the strengths and weaknesses of each of the reforms. Write down one thing on each of the other A3 pieces of paper that relates to the strengths and weaknesses, remembering to place strengths at the top of the page and weaknesses at the bottom.
   - **e** Once finished, put the A3 posters up on the wall and look at them as a class. Are there any trends? Are there any obvious strengths or weaknesses missed? Discuss as a class.

6 Discuss the extent to which the expansion of the Koori Court addresses the issues faced by Aboriginal and Torres Strait Islander peoples in the criminal justice system.

7 Evaluate one recent reform that has been introduced to address delays in the criminal justice system.

Check your obook assess for these additional resources and more:

- **Student book questions**
  5.4 Check your learning
- **Weblink**
  Robot lawyers
- **Weblink**
  Victorian Law Reform Commission (VLRC)

5.5 RECOMMENDED REFORMS

A number of reforms have been recommended by various bodies, institutions and individuals but have not yet been made. Some of the recommended reforms are discussed here. For each of the recommended reforms, you should consider the extent to which it will be able to improve the ability of the criminal justice system to achieve the principles of justice.

Study tip

In your exam, you cannot make up or invent reforms. You should only use reforms that have been recommended by a formal law reform body such as the VLRC, a formal inquiry, a professional organisation such as the LIV or a professional advocate, spokesperson or individual, or a recommended reform which is receiving media attention.

Recommended reforms addressing costs factors



Source 1 The push for an increase in legal funding is supported by many of the major industry bodies, including the Law Institute of Victoria, the Law Council of Australia and the Victorian Bar.

- **Increase in funding for legal assistance** – The Victorian Access to Justice Review Report recommended that additional state funding be provided for legal assistance, with priority for duty lawyer services, family violence-related services and Aboriginal legal services. It also recommended that the proportion of Commonwealth funding for legal assistance be increased, and that a transparent funding model with the Commonwealth Government be entered into which takes into account population growth and service demand. Although the Commonwealth and Victorian Governments have agreed to increase funding, that funding is unlikely to meet demand for legal aid.
- **Improving the availability of *pro bono* services** – The Victorian Access to Justice Review Report recommends that the Victorian Government, Justice Connect and the legal profession work together to improve *pro bono* services, which includes developing an online tool or website portal on which community legal centres or other organisations that require *pro bono* assistance can advertise their need and be matched with lawyers who can assist. The Victorian Government in May 2017 agreed to implement this recommendation.
- **Alternative funding options** – The **Australian Bar Association (ABA)** and other organisations are considering and investigating sources of funding other than government funding. This is to ease the pressure of the growing need for legal services. The ABA is considering alternatives such as legal assistance funds that build up money from special levies, such as a 'speeding fines levy'.

Australian Bar Association (ABA), the the main organisation that represents barristers in Australia. It aims to promote the rule of law and advocates for fair and equal access to justice for all

Recommended reforms addressing time factors

- **Abolition of committal proceedings** – In 2012, it was reported that the Victorian Government was considering abolishing committal proceedings, saying they were causing backlogs because of an unnecessary examination of cases. Some people believe that committal proceedings remain a problem and add to delays in the criminal justice system. Committal hearings were abolished in New Zealand in 2011 and there remains some support for their abolition, but it is not currently a government priority.
- **Case management by Supreme Court** – In a 2017 discussion paper on reforms to criminal procedure, the Victorian Government sought public submissions on flexible early case management. It proposed reforms for some indictable offence cases to allow the Supreme Court to manage those cases from the time a person is charged through to trial. The proposal would reduce delays, for example, by eliminating the need to revisit issues in different courts and resolving issues early in proceedings.

case management a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (such as an order that the parties attend mediation)

Recommended reforms addressing cultural differences factors

- **Formal recognition for communication services** – In its 2014 inquiry, the Australian Human Rights Commission (AHRC) recommended formal recognition of the need for an interpreter service, a communication support worker or hearing assistance when dealing with Aboriginal and Torres Strait Islander peoples.
- **Improving access to interpreters** – The Victorian Access to Justice Review has recommended adequate availability of interpreters in all courts. The Victorian Government has accepted this recommendation and has committed additional funds for interpreter services, but it is unclear whether this funding will be adequate.
- **Continued focus and expansion of Koori Court system** – There continues to be calls for the Koori Court to be expanded into other areas of Victoria. It is expected that the County Koori Court will expand so that it sits in additional parts of Victoria.

Did you know?

In 2017 the Law Council of Australia commenced an inquiry into access to justice and has appointed former Chief Justice of the High Court, Robert French, to lead the enquiry. You should find out the status of that enquiry and what recommendations were made for law reform in that enquiry.

Recommended reforms addressing other factors

- **Trials by judge alone** – In 2017, following the charging of Cardinal George Pell for historic sex offences, it was reported that two senior barristers had questioned whether there should be an option for trials by judge alone in high-profile cases. They suggested that jurors might be unable to act impartially at Cardinal Pell's trial, and that Victoria should adopt a model that allowed a judge to determine guilt in some trials.
- **Appointment of professional intermediaries** – The Victorian Law Reform Commission recommended that a scheme be established to appoint professionals who would assist in obtaining evidence from child victims and victims who have a disability. A similar scheme operates in England and Wales. In May 2017, the Victorian Government announced that it would invest money to introduce intermediaries who will work with victims to help them give evidence.



Source 2 Cardinal George Pell was charged in 2017 for historic sex offences.

Study tip

Before your exam, you should check to find out whether these recommended reforms have been implemented. Are they now the law? You will get better marks if your discussion is current, and you will ensure that you are not discussing recommended reforms that have since been implemented.

The ability of recommended reforms to achieve the principles of justice

You should be able to discuss each of your recommended reforms in light of their ability to achieve the principles of justice, and the extent to which they can overcome the factors that affect the achievement of justice.

To do so, you should consider the following questions for each recommended reform:

- What problem, difficulty or issue is it trying to overcome?
- Is it a short-term or long-term solution?
- What principles of justice is the reform intended to achieve?
- Are there any criticisms of the recommended reform?
- What else needs to be done in addition to the reform, or is it a 'total solution' to the problem, difficulty or issue it is trying to overcome?

Study tip

You can find a practice assessment task for Unit 3 – Area of Study 1 at the end of Unit 3 on page 246.

A summary of some of these issues for each of the recommended reforms explored in this topic is provided in Source 3.

RECOMMENDED REFORM	COMMENTS
Increase in funding for legal assistance	• Significant funding will be required to fill the needs of legal aid • Funding has been an issue for years, but governments seem to reduce it rather than increase it • The most recent increases in funding are unlikely to meet demand • Alternative options may be required to fill the gap
Improving the availability of *pro bono* services	• Will enable greater communication between individuals and organisations • Can ensure people's needs are met and greater accessibility to a lawyer acting *pro bono* • Requires the participation of lawyers willing to act at no charge • Unlikely to completely fill the gap that exists
Alternative funding options	• May relieve pressure from governments to increase funding • Unlikely to deliver funding that is a 'total solution' • There is no deadline for delivery of this possible alternative source of funding
Abolition of committal proceedings	• Adds to delays where the cases are straightforward • Adds to stress, inconvenience and costs of parties and victims • Abolishing them will deny the accused the right to test the evidence • May risk rule of law and presumption of innocence not being upheld if matters go straight to trial • May result in backlog in higher courts
Case management by Supreme Court	• May assist in reducing delays • Draws on expertise of Supreme Court early • Is limited to only some indictable offence cases • May require significant resources of Supreme Court • Unclear whether it will improve delays substantially
Formal recognition for communication services	• May streamline access to interpreters for Aboriginal and Torres Strait Islander peoples • Will ensure equality and fairness by providing support worker and hearing assistance • Recommendation not yet adopted despite the inquiry taking place some time ago • Does not address over-representation issues or issues around access to legal aid
Improving access to interpreters	• May ensure equal access to interpreters in all courts (the service can be inconsistent) • Recommendation has not yet been adopted • Interpreter does not act as legal representative • Is likely to be costly to introduce, and current funding commitment may not meet demand
Continued focus and expansion of Koori Court system	• Given success of Koori Court, will help ensure equality in sentencing • Allows greater access to sentencing court in other areas of Victoria • Is only a sentencing court and not a trial court • Does not address over-representation issues
Trials by judge alone	• Avoids possible juror biases that may influence verdict • Ensures fair trial and impartial decision-making • Not certain that a different outcome will result • Removes involvement of peers in deciding guilt • No evidence that a jury trial would be unfair • Likely to be limited to high-profile cases, resulting in different treatment for some people
Appointment of professional intermediaries	• Would reduce trauma and stress involved for these victims • May enable greater fairness in trial and greater ability to obtain conviction at trial • May be expensive to implement

Source 3 Some of the factors that may be taken into account when discussing recommended reforms

5.5 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by a recommended reform.

2 Describe one recommended reform which is aimed to lessen cost, and one recommended reform aimed to overcome cultural disadvantage.

Synthesise and apply

3 Choose two recommended reforms described in this chapter that you are most interested in, and conduct some further research on them. Create a visual or multimedia presentation which shows the following:

- **a** Who made the recommendation.
- **b** What issues in the criminal justice system it is aiming to overcome.
- **c** Whether further or additional reforms are required to address these issues.
- **d** The status of its implementation.
- **e** Whether you think it is likely to be introduced in the next 12 months.

Analyse and evaluate

4 Choose one of the following bodies:

- Victorian Law Reform Commission
- Law Council of Australia
- Australian Human Rights Commission

- **a** Identify any current or recent enquiries or reviews they have undertaken in relation to the criminal justice system.
- **b** What issues have they looked at, or are they looking at?
- **c** For completed enquiries or reviews, describe two recommendations they have made for reform to the justice system.
- **d** Discuss the extent to which you think the recommendations, if implemented, will improve the criminal justice system.

5 Do you think that there is a need to completely overhaul the criminal justice system, or does it need tweaking only? Discuss in light of what you know about the criminal justice system.

6 Extended task

You have now completed your study of the Victorian criminal justice system. One of the key skills you are expected to demonstrate is your ability to evaluate its ability to achieve the principles of justice.

- **a** On an A3 piece of poster, in your notebook, or in an online document, write down the headings 'fairness', 'equality' and 'access'.
- **b** Under each heading, write down all of the aspects or features of the criminal justice system that help achieve those principles (e.g. 'impartiality of the jury' under equality, or 'ability to negotiate a plea' under fairness). Some aspects or features may fall under more than one principle.
- **c** Draw a line under these aspects or features. Now write down all of the aspects or features of the criminal justice system that may hinder those principles (e.g. 'delays in having a trial heard' under fairness, or 'cultural differences' under equality). Again, some aspects or features may fall under more than one principle.
- **d** For at least one of those aspects or features that hinder those principles, identify and write down at least one recent reform, or one recommended reform.
- **e** Share your findings with your class. Add things to your own notes that you find useful from your class discussion. Discuss any differences in opinion.

Check your obook assess for these additional resources and more:

- **» Student book questions**
  5.5 Check your learning
- **» Going further**
  Trials by judge alone
- **» Weblink**
  Victorian Access to Justice report



CHAPTER 5

REVIEW

CHAPTER SUMMARY

Factors that affect the ability of the criminal justice system to achieve the principles of justice

- Cost factors
  - Cost of legal representation
  - Availability of legal aid
  - Assistance to self-represented parties
- Time factors
  - Delays in preparation for hearing or trial
  - Court delays
  - The use of plea negotiations and sentence indications
  - Expedition of appeals
- Cultural differences factors
  - Problems during questioning and giving evidence
  - Over-representation of Aboriginal and Torres Strait Islander peoples
  - The Koori Court
  - Use of interpreters

Recent reforms

- New VLA office and court complex in Shepparton
- Free online tool
- Increase in court technology
- Removal of time limit for jury deliberations
- Expansion of Koori Court
- Funding for Aboriginal prisoners' programs
- Changes to bail laws
- Changes to jury directions in sexual offence cases

Recommended reforms

- Increased funding for legal assistance
- Improving of *pro bono* services
- Alternative funding options
- Abolition of committal hearings
- Case management of Supreme Court
- Recognition for communication services
- Trials by judge alone
- Appointment of professional intermediaries

REVISION QUESTIONS

1 Describe the nature of the Koori Court system, and how it aims to achieve equality. (5 marks)

2 Explain how cultural differences can lead to people experiencing difficulties in receiving justice in a criminal case. (6 marks)

3 Explain two reforms recently introduced that aim to improve access to justice. (6 marks)

4 Identify one recommended reform to the criminal justice system, and discuss the extent to which it is likely to achieve two of the principles of justice. (6 marks)

5 Explain how delays in the hearing of criminal cases can impact on the accused and on victims. How do both committal hearings and plea negotiations impact on the time in which a criminal case is heard? Discuss. (8 marks)

6 To what extent can the high cost of being involved in the criminal justice system limit its ability to achieve justice? Briefly describe two recent or suggested improvements to the criminal justice system. Explain how these improvements will make the criminal justice system more effective. (8 marks)

7 Evaluate the ability of the criminal justice system to recognise victims in a criminal case. (8 marks)

Check your obook assess for these additional resources and more:

- **Student book questions** Ch 5 Review
- **Revision notes** Ch 5
- **assess quiz** Ch 5 Test your skills with an auto-correcting multiple-choice quiz
- **Video tutorial** How do I evaluate?

PRACTICE ASSESSMENT TASK

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

JUNE'S TRIAL

June, 30, is a recently arrived migrant from Vietnam. She has limited English communication skills and lives in Mildura. June has been the subject of violent beatings from her ex-husband, from whom she separated 3 months ago. They have no children.

One night, June's ex-husband arrived at her house drunk. He pushed his way into the house and started beating her. After he finished he sat down on her couch and turned on the TV. June managed to get up, walked to the coffee table where there was a large ornament she had bought on a recent trip to Daylesford, and hit her ex-husband over the head. He fell and was unconscious. June called the police. She has been arrested for attempted murder after her ex-husband survived. He has suffered significant brain injuries as a result.

June does not have a lawyer, and has been relying on people around her to tell her what her options are. One of her friends told her that there is a new Koori Court that has opened up in Mildura which will enable June to be sentenced there. Another friend told her that she's sure that June will have to give evidence via closed-circuit television because she's a victim. Another friend has told her that she's heard that June can access legal aid and it's pretty easy to get a lawyer.



Source 1 After beating her, June's ex-husband sat down on her couch and turned on the TV.

Practice assessment task questions

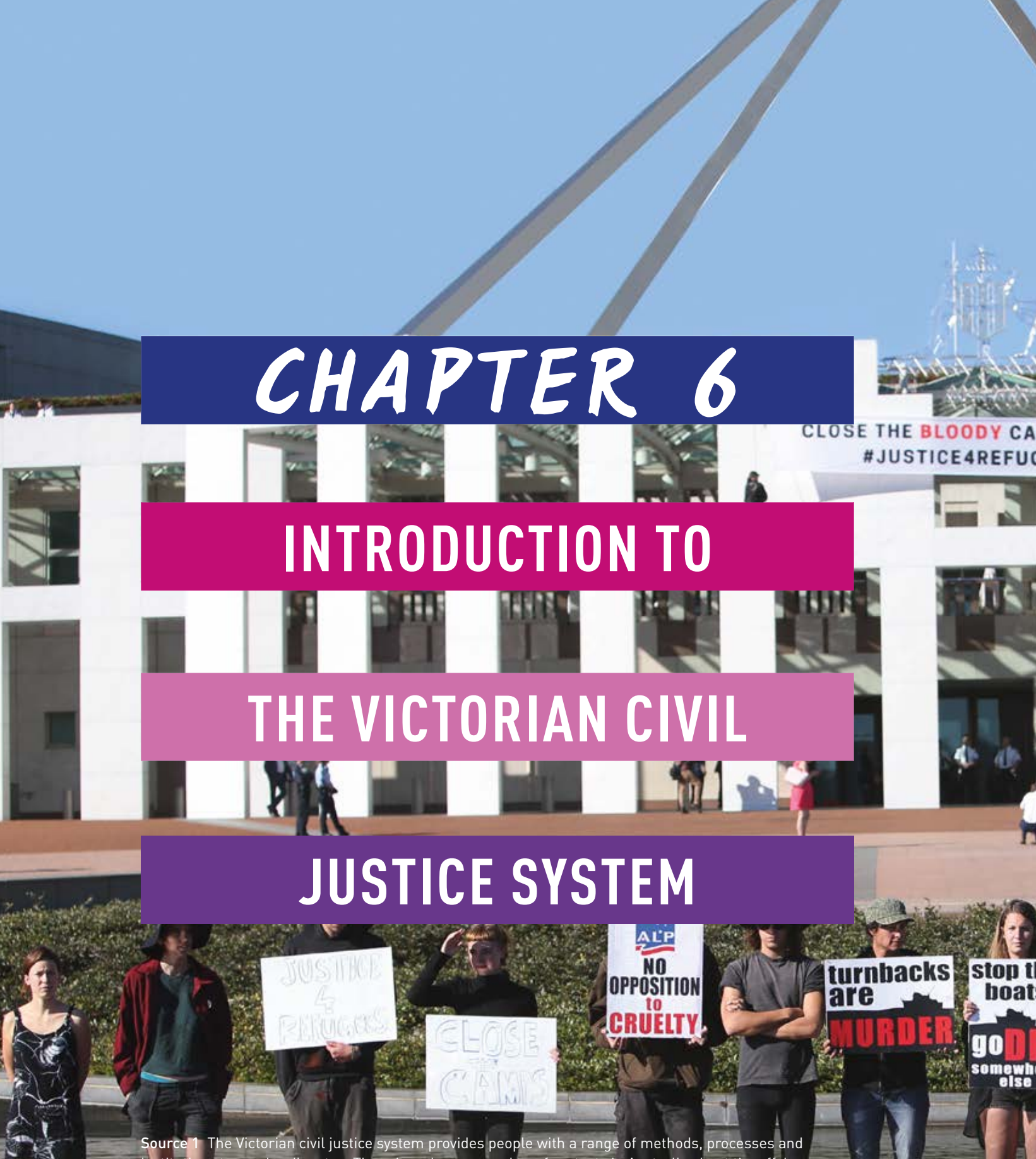
Prepare a paper which addresses the following issues:

1. An explanation to June about who the main parties in the trial are, including who she will be known as. (3 marks)
2. Whether or not each of June's friends is right in their suggestions, and the reason for your answer. (6 marks)
3. The two difficulties that June will most likely face during her trial, the reason why you say these are most likely, and how they will impact on the achievement of justice. (8 marks)
4. Two aspects of the criminal justice system that may address those two difficulties, and the reasons why you say that is so. (4 marks)
5. The extent to which one recent reform or recommended reform to the criminal justice system may assist in achieving justice in June's trial. (4 marks)

Total: 25 marks

CHAPTER 6

INTRODUCTION TO THE VICTORIAN CIVIL JUSTICE SYSTEM



Source 1 The Victorian civil justice system provides people with a range of methods, processes and institutions to resolve disputes. There have been a number of protests in Australia about the offshore detention centres for asylum seekers on Manus Island and Nauru. Pictured here is a group of protestors who scaled Parliament House and lined up in the pond to protest the existence of the camps. A class action was eventually commenced in relation to the treatment of asylum seekers on Manus Island. In this chapter, you will explore the principles of justice, the burden of proof and standard of proof. You will also learn about some relevant factors when initiating a civil claim.



OUTCOME

By the end of **Unit 3 – Area of Study 2** (i.e. Chapters 6, 7 and 8), you should be able to analyse the factors to consider when initiating a civil claim, discuss the institutions and methods used to resolve civil disputes and evaluate the ability of the civil justice system to achieve the principles of justice.

KEY KNOWLEDGE

In this chapter, you will learn about:

- the principles of justice: fairness, equality and access
- key concepts in the Victorian civil justice system, including:
  - the burden of proof
  - the standard of proof
  - representative proceedings
- factors to consider when initiating a civil claim, including negotiation options, costs, limitation of actions, the scope of liability and enforcement issues.

KEY SKILLS

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- analyse factors to consider when initiating a civil claim
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

KEY LEGAL TERMS

access one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

accessorial liability a way in which a person can be found to be responsible or liable for the loss or harm suffered to another because they were directly or indirectly involved in causing the loss or harm (for example, encouraging another person to cause that harm)

balance of probabilities the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

burden of proof the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

civil dispute a dispute (i.e. disagreement) between two or more individuals (or groups) in which one of the individuals (or groups) makes a legal claim against the other

civil law an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

class action a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person; also called a representative proceeding or a group proceeding

damages the most common remedy in a civil claim; an amount of money that the court (or tribunal) orders one party to pay to another

defendant (in a civil case) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

group member a member of a group of people who are part of a representative proceeding (i.e. class action)

mediation a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

mediator an independent third party who does not interfere or persuade but helps the parties in a mediation as they try to reach a settlement of the matter

negotiation informal discussions between two or more parties in dispute, aiming to come to an agreement about how to resolve that dispute

plaintiff (in civil disputes) the party who makes a legal claim against another person (i.e. the defendant) in court

remedy a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

representative proceeding a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person; also called a class action or a group proceeding

standard of proof the degree or extent to which a case must be proved in court

sue to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

tribunal a dispute resolution body that resolves civil disputes and is intended to be less costly, more informal and a faster way to resolve disputes than courts

vicarious liability the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

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6.1 INTRODUCTION TO THE CIVIL JUSTICE SYSTEM

civil dispute
a dispute (i.e. disagreement) between two or more individuals (or groups) in which one of the individuals (or groups) makes a legal claim against the other

complaints body
an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

tribunal
a dispute resolution body that resolves civil disputes and is intended to be less costly, more informal and a faster way to resolve disputes than courts

remedy
a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

civil law
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

The civil justice system is a set of methods, processes and institutions used to resolve **civil disputes**. It includes dispute resolution bodies and processes such as:

- pre-trial procedures (such as providing documents to the other side which are relevant to the dispute)
- dispute resolution methods (such as mediation)
- dispute resolution bodies, such as **complaints bodies**, **tribunals** and courts
- the ordering and enforcement of **remedies**.

Some of the key purposes of the civil justice system are to enable a person to enforce their legal rights or take action over legal wrongs, determine whether the defendant is liable to that person, and award a remedy where the defendant has been found liable.

As in the criminal justice system, the resolution of a civil dispute has a number of key stages. However, because there are different ways to resolve a civil dispute, the stages can be different from case to case. An example of the stages that a civil dispute resolved in a court may go through is provided in Source 1.



Source 1 The most common stages of a civil dispute resolved in court. Over the course of Unit 3 – Area of Study 2, you will primarily be learning about the five stages coloured in light pink above.

Civil cases in Victoria

The law-making power in **civil law** is generally held by the six states and two territories of the Commonwealth of Australia. This means that each state and territory has:

- its own system of resolving civil disputes
- its own civil laws
- its own rules for determining civil disputes
- its own courts and other dispute resolution bodies.

→ GOING FURTHER

Commonwealth laws

The Commonwealth does have law-making powers in some areas of civil law, and there are some Commonwealth laws that can give rise to civil disputes. For example, the Australian Consumer Law is a law passed by the Commonwealth Parliament and adopted as state legislation, so it operates at both Commonwealth and state levels to provide for fair trading and consumer protection. Civil disputes may arise because the Australian Consumer Law has not been complied with (for example, if a person makes a representation about the quality of goods sold, which is found to be false). The Commonwealth Parliament also has some law-making powers in relation to industrial disputes (employee disputes) that are beyond the limits of any state.

Parties to a civil dispute

Every civil dispute involves two parties:

- the **plaintiff** – i.e. the party who commences a civil action. The plaintiff is also known as the aggrieved party.
- the **defendant** – i.e. the party who is alleged to have infringed the rights or caused wrongdoing.

Sometimes there can be multiple plaintiffs, and multiple defendants, in a civil action. For example, if two people both own a property that has been damaged, they both may be plaintiffs. Similarly, if two people have damaged another person's property, they both may be defendants.

A party who has a valid legal claim can bring a civil action against the defendant, also known as **suing** or litigating. The aim of a civil action is to obtain a remedy that will compensate the plaintiff if they are successful (e.g. by restoring them to the position they were in before the breach occurred, or ordering the defendant to do something). When a defendant has done something that can't be reversed (e.g. if a finger was cut off in an accident they caused), the only legal solution may be compensating the person whose rights have been infringed, and who has suffered loss or injury as a result, by paying an amount of money. This is the civil remedy known as **damages**.

The parties to a civil dispute can be one of the following:

- an individual suing or being sued in their own name, or a group of individuals suing or being sued together
- a corporation, otherwise known as a company – a separate legal entity from the directors or individuals who run the company, which can sue and be sued
- a government body (e.g. the state of Victoria, a local council or a statutory authority such as Victoria Police).

Children

A child under the age of 18 can sue another person or group through a litigation guardian, often known as a 'next friend'. This is usually a parent or guardian. The action they bring on behalf of the child is called a representative action.

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 person may be able to sue the employer. This is because of the concept of **vicarious liability** (responsibility for the actions of another person). The reason for making the employer liable is that employers have a right, ability and duty to control the activities of their employees. For example, if an employee chef is negligent in the preparation of food, which then poisons someone, the employer is likely to be sued. The important fact that must be established is that the employee was acting 'in the course of employment'.

You will learn more about vicarious liability in Topic 6.4 of this chapter.



Source 2 A child under the age of 18 can sue another person or group through a litigation guardian.

plaintiff
(in civil disputes) the party who makes a legal claim against another person (i.e. the defendant) in court

defendant
(in a civil case) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

sue
to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

damages
the most common remedy in a civil claim; an amount of money that the court (or tribunal) orders one party to pay to another

Did you know?

In some dispute resolution bodies, words other than 'plaintiff' and 'defendant' are used to describe the parties involved. For example, in the Victorian Civil and Administrative Tribunal, 'applicant' is used to describe the person bringing a civil action, and 'respondent' is used to describe the person defending the action.

liability
legal responsibility for one's acts or omissions

vicarious liability
the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

Types of civil disputes

A number of laws deal with civil disputes. Some of the more common disputes involve claims in relation to negligence, trespass, defamation, nuisance, wills and inheritance, breach of contract and family law. These are explained in Source 4.

The article below is an example of a plaintiff being awarded damages in her civil dispute.

IN THE NEWS

$1.3 million for harassment victim subjected to repeated assaults, rape threats at building firm

Rania Spooner and Cameron Houston, *The Age*, 17 December 2015

A Victorian worker will be paid $1.36 million after being subjected to daily sexual harassment and abuse for years, including threats of rape and violence, while working for a major building company.



Source 3 In 2015, Kate Mathews was awarded damages in a Supreme Court case against her former employer.

The Supreme Court of Victoria has awarded damages for economic loss, pain and suffering to Kate Mathews, 42, over shocking abuse at the hands of co-workers and sub-contractors at Winslow Constructors. The company specialises in large civil engineering projects and housing developments.

The payout is believed to be one of the largest of its kind in Victoria.

Speaking after the judgement Ms Mathews said: 'It's never been about the money. It's been about being able to work wherever I want to work and they've taken that away from me.'

Ms Mathews, who has been diagnosed with several psychiatric conditions, including depression and post traumatic stress disorder, said her cries for help were ignored or laughed off by her employer.

'I'm happy with the outcome but sad that it has had to come this far,' she said, describing her time at the company as 'a filthy experience everyday'.

She left the company in 2010 after one male colleague threatened to 'follow you home, rip your clothes off and rape you'.

Dispute resolution bodies

Different dispute resolution bodies are available to help resolve civil disputes in Victoria. The three main types are:

- complaint bodies, such as Consumer Affairs Victoria
- an **ombudsman**, such as the Public Transport Ombudsman
- tribunals, such as the **Victorian Civil and Administrative Tribunal** and the Mental Health Tribunal
- courts, which are either Victorian courts (Magistrates' Court, County Court and Supreme Court) or federal courts (including the Federal Court and the Family Court).

Whether or not those dispute resolution bodies are able to resolve a particular dispute will depend on their jurisdiction and their powers. Generally, dispute resolution bodies have a restriction or limit on the types of disputes they can hear.

You will explore some of these dispute resolution bodies as part of Unit 3 – Area of Study 2, and in particular in Chapter 7.

ombudsman
an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

Victorian Civil and Administrative Tribunal (VCAT)
a tribunal that deals with disputes relating to a range of civil issues heard by various lists (sections), such as the Human Rights List, the Civil Claims List and the Residential Tenancies List

TYPES OF CIVIL DISPUTES	
Family law deals with the legal side of relationships between parents, children and other family members and carers. For example, when parents get a divorce or separate, they will need to sort out the way they will share property and arrange for the care of children.	**Breach of contract** actions arise where someone has failed to do something they promised in a legally binding agreement. For example, you might pay in advance for a new car, but when the time comes for delivery you find out the dealer sold it to someone else for more money, in breach of your contract.
Defamation relates to saying or publishing material which causes damage to another person's reputation. For example, a newspaper article might falsely report that a business owner has committed fraud, which drives customers away.	**Nuisance** claims are made by people that have lost enjoyment or use of property (either public or private). For example, a stench coming from a nearby factory is a legal nuisance because it interferes with a person's ability to enjoy their home.
Trespass occurs when someone goes onto another person's land without permission. For example, a news photographer who refuses to leave your home when asked to go is trespassing on the property.	**Negligence** occurs when someone owes a duty of care to another and breaches that duty, causing harm or loss to them. For example, a doctor might carelessly cut an artery during a medical procedure.

Source 4 Various types of civil law can give rise to disputes

6.1 CHECK YOUR LEARNING

Define and explain

1. Identify two purposes of the civil justice system.
2. Identify two institutions that resolve disputes, and briefly describe what they do.
3. Explain the purpose of bringing a civil action in a court.
4. Who are the parties to a civil dispute?

Synthesise and apply

5. Look at the different types of civil disputes in Source 4. Search for newspaper articles and find three recent disputes that have occurred between individuals or groups relating to three of those types of disputes. Provide a brief summary of each.
6. Read the article '$1.3 million for harassment victim subjected to repeated assaults, rape threats at building firm'.
   - **a** Who was the plaintiff in this case and who was the defendant?
   - **b** What did the plaintiff allege happened?
   - **c** Explain why the plaintiff was suing the building firm and not the co-workers and sub-contractors who abused her.
   - **d** Describe the injuries the plaintiff suffered.
   - **e** Describe the remedy that was awarded in this case.
   - **f** Do you think that the remedy will achieve its purpose in this case? Give reasons for your answer.

Analyse and evaluate

7. What issues might arise in a civil dispute if a minor was not allowed a litigation guardian or next friend, but had to sue without any assistance?

Check your obook assess for these additional resources and more:

- **Student book questions**
  6.1 Check your learning
- **Video Tutorial**
  Introduction to Chapter 6
- **Video**
  Civil justice
- **Video worksheet**
  Civil justice

6.2 THE PRINCIPLES OF JUSTICE

In Unit 3 – Area of Study 1 you studied the principles of justice when looking at the criminal justice system, and evaluated the ability of the criminal justice system to achieve the principles of justice. The principles of justice are:

- **fairness**
- **equality**
- **access**.

A brief overview of the three principles of justice, and how they relate to the civil justice system, is provided below.

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

equality
one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

mediation
a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

Fairness

In the civil justice system, fairness means fair processes and a fair hearing (or trial). This means that:

- both parties should know the case against them and be given the opportunity to present their case
- the dispute resolution processes should operate so that neither party is disadvantaged, and that people are treated impartially without fear or favour
- the parties should be able to understand court processes and be able to participate in the hearing or trial.

For example, if the plaintiff claims that the defendant signed a contract and breached that contract, the defendant should have an opportunity to know what documents and evidence support those claims. They should also have an opportunity to present their side of the story.

Fairness in a civil case does not mean that every plaintiff should have the same outcome or remedy for every dispute of the same nature. As in the criminal justice system, 'one size fits all' can lead to an unfair outcome. For example, if a famous young concert violinist loses a finger, the impact on their career will be much worse than the impact on a retired postal worker with the same injury. Therefore, it is possible that the remedy awarded for the violinist will be greater than that given to the postal worker.

Fairness in a civil dispute also means that there should be a fair hearing or trial, and that the processes involved at every step should be fair. This includes any pre-trial procedures or **mediation** before the final hearing. Judges, magistrates and juries should be impartial and decide on the basis of facts, not on any bias. People should be treated impartially.

In Unit 3 – Area of Study 2, you will learn about the civil justice system and make judgments about whether or not it achieves fairness in civil disputes. Some of the aspects of the civil justice system that relate to fairness include:

- the time it takes for a civil dispute to be resolved, and whether any delays have occurred
- the availability of legal representation for the parties
- whether procedures are in place to ensure the parties have the opportunity to be fully informed of the case put against them, and have the opportunity to present their case
- whether the parties are able to understand legal processes and terminology, and have the appropriate assistance where necessary
- whether procedural rules and laws have been properly applied
- whether the accused and victims have been treated impartially and without any bias towards them
- the role of the parties in resolving a civil dispute.



Source 1
Is justice accessible to everybody?

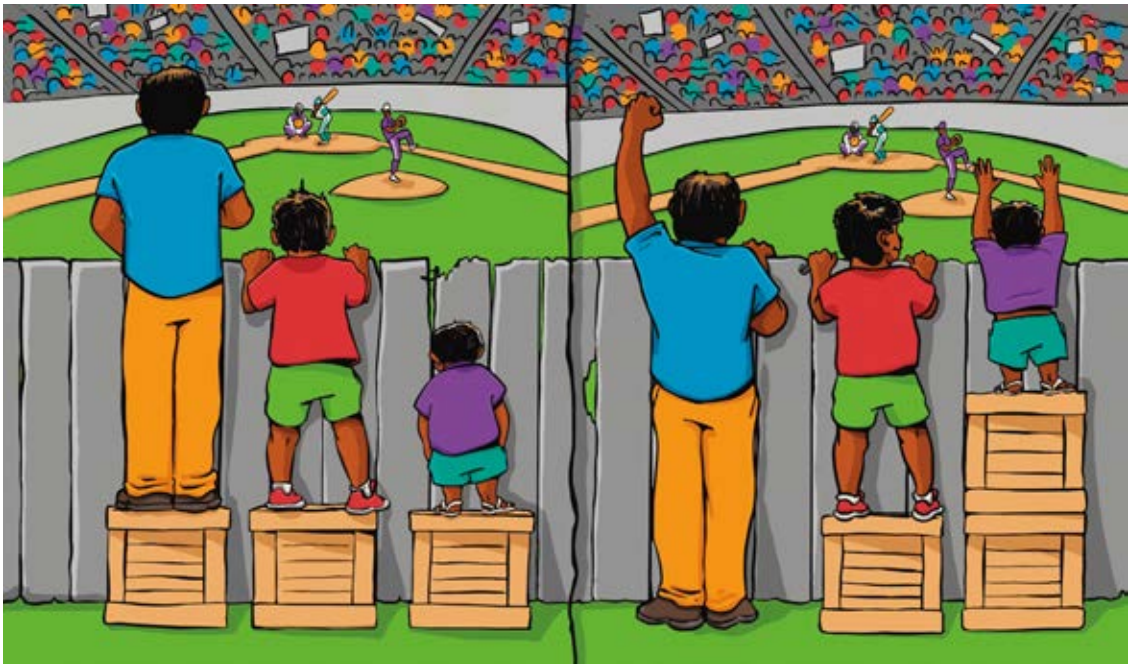
Equality

In the civil justice system, equality means that all people should be treated equally before the law, with an equal opportunity to present their case. No person or group should be treated favourably or unfavourably because of a certain attribute or characteristic.

That is, the processes should be free from bias or prejudice, and the people who help to resolve a civil dispute, or make orders in a case, should be impartial. They should not be deciding for reasons that are not relevant to the case. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that every Victorian has the right to be equal before the law and the right to equal protection of the law without discrimination.

In Unit 3 – Area of Study 2, you will learn about the civil justice system and make some assessments about whether it achieves equality for parties in civil disputes. Some of the aspects of the civil justice system that relate to equality include:

- the impartiality of a judge and jury when resolving civil disputes
- the extent to which the civil justice system is available to everyone
- the disadvantage that particular groups in society may suffer because of features of the civil justice system (such as Aboriginal and Torres Strait Islander peoples, vulnerable witnesses or people with disabilities)
- the extent to which the availability and skill of legal representation impacts on people being treated equally before the law
- the ability of people to be equally represented and able to present their case
- the availability of legal representation to individuals who have little or no money.



Source 2 Fairness and equality are sometimes the same thing – but not always

Study tip

In Unit 3 – Area of Study 2, you are required to evaluate the ability of the civil justice system to achieve the principles of justice. Throughout Chapters 6, 7 and 8, you should keep these principles in mind when considering whether the civil justice system achieves justice. Make notes when you identify aspects of the civil justice system that achieve or do not achieve one or more of these principles.



Source 3 People should be able to get information about their rights, when those rights have been infringed, and what remedies may be available to them.

Access

In the civil justice system, access means that people should be able to understand their legal rights, and should be able to pursue their claims (whether they are the plaintiff or the defendant).

People should be able to get information and use the procedures, methods and institutions that resolve a civil dispute. This includes the courts, tribunals, and bodies and institutions that provide legal advice, education, information, assistance and representation. People should also be able to get information about their rights, when those rights may have been infringed, and what remedies may be available to them.

A growing problem for the civil justice system is the number of people who don't have a **lawyer**. These people are known as **self-represented parties** or self-represented litigants. They run their own case without legal assistance. Usually this is because they can't afford to pay legal fees.

lawyer
a general term used to describe somebody who has been trained in the law and is qualified to give legal advice (a barrister or a solicitor)

self-represented party
a person with a matter before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

In Unit 3 – Area of Study 2, you will learn about the civil justice system and consider whether it achieves its goal of providing access to all parties in civil disputes. Some aspects of the civil justice system that relate to access include:

- the availability of a range of methods and bodies that can be used to resolve civil disputes, such as complaints bodies, tribunals and courts
- the costs and delays associated with having a dispute resolved
- the complex nature of procedures involved in having a dispute resolved
- the availability of legal advice and assistance to parties
- the extent to which members of their community understand legal rights
- the formalities associated with a hearing or trial.

EXTRACT

Access to justice

The Australian Government is dedicated to making our federal civil justice system less complex and more accessible.

Access to justice is about ensuring Australians receive appropriate advice and assistance, no matter how they enter our justice system.

The Attorney-General's Department is responsible for coordinating government policy and projects that improve access to justice.

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

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

Source: Attorney-General's Department, *Access to justice* <https://www.ag.gov.au/LegalSystem/Pages/Accesstojustice.aspx>.

6.2 CHECK YOUR LEARNING

Define and explain

1 What are the three principles of justice? Describe each one briefly.

2 Is 'access to justice' limited to access to courts? Explain.

3 Why is there an increase in self-represented parties?

4 Explain one way a person who is being sued for breach of contract might be able to find out about the case that is put against them.

Synthesise and apply

5 Identify two individuals or groups in Australia that may have more difficulty accessing the courts to resolve a civil dispute than others. Explain why this might be so.

6 Two different plaintiffs have sued two different defendants in two different proceedings. Explain why a different remedy may be awarded in each of the proceedings, but the outcome may still be considered fair.

7 Look at the picture in Source 2. Consider the following:

- **a** Does either picture achieve both fairness and equality? Give reasons.
- **b** Create another visual diagram or picture, or write a scenario, where a person may be treated differently to create fairness.
- **c** Come together as a class and share your views and your diagrams, pictures or scenarios.

Analyse and evaluate

8 Choose one rural and remote town in Victoria, and imagine that a person in that town has a civil dispute that needs resolving.

- **a** Go to the Magistrates' Court, County Court and Supreme Court websites. Links are provided on your obook assess. Find out the closest location of those courts to the town you have chosen.
- **b** Using a map of Victoria, plot your chosen town, and the closest location of the above courts to that town.
- **c** Use the website to find out whether there are any local lawyers in that town who specialise in resolving civil disputes. Write their names down next to the map.
- **d** Conduct some research to find out whether there are any community legal centres, legal education centres or any other centres nearby that offer free legal assistance, education or information.
- **e** Prepare a short report on your findings about the accessibility of the civil justice system to a person living in your chosen town.

9 If you were a plaintiff, write down three expectations you would have about the civil justice system when resolving your dispute (for example, the ability to resolve your dispute cheaply). For each expectation, which principle of justice does it most relate to, and do you think it likely that those expectations will be met? Discuss your answer with a member of your class.

10 Conduct some research and find out the top three reasons why sometimes the Victorian civil justice system is criticised as being inaccessible. Provide a summary of your findings.

Check your obook assess for these additional resources and more:

- **Student book questions**
  6.2 Check your learning
- **Worksheet**
  What is justice?
- **Weblink**
  What is justice? by Former Chief Justice Warren

6.3 KEY CONCEPTS IN THE VICTORIAN CIVIL JUSTICE SYSTEM

There are three key concepts in the Victorian civil justice system that you need to become familiar with. They are:

- the **burden of proof** – which side has to prove the case
- the **standard of proof** – the level of certainty the judge, magistrate or jury must have in deciding the dispute
- **representative proceeding** – a proceeding in the name of one person, on behalf of a group.

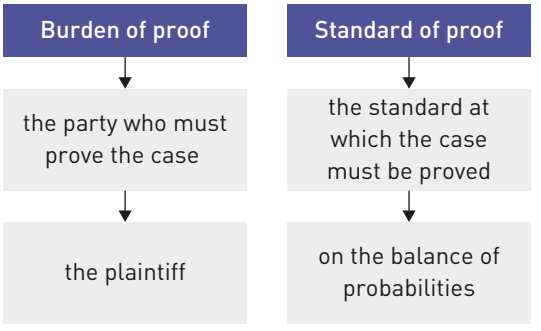
The burden of proof

As you learnt in Chapter 3, the burden of proof refers to the onus or responsibility that one party has to prove the facts of the case. The burden of proof lies with the person or party who is bringing the case. In a civil dispute, this is the plaintiff. When a plaintiff sues a defendant, it is the plaintiff who has to show that the defendant was in the wrong. This follows the principle that the party who brings the case has to satisfy the court (or tribunal) that their claim is supported by the facts they can prove.

There are times when the defendant has the burden of proof in a civil dispute. This is normally when the defendant makes a **counterclaim** against the plaintiff. The defendant is then making a direct claim against the plaintiff, and will have the onus of proving that claim. Further, if a defendant raises a particular defence (e.g. the defence of contributory negligence in a negligence claim, claiming that the plaintiff contributed to the harm suffered), then the defendant will also be responsible for proving that defence.

The standard of proof

The standard of proof refers to the strength of evidence needed to prove the case. In a civil dispute, the plaintiff must prove the case (or the defendant must prove the counterclaim or a certain defence) on the **balance of probabilities**. This means that the party must prove that they are most probably or most likely in the right, and the other party is most probably in the wrong. This is a less strict standard of proof than '**beyond reasonable doubt**' in criminal cases.



Source 1 The burden and standard of proof in civil disputes

Representative proceedings

If a group of people all have claims against the same party, they may be able to join together to commence a civil action known as a **class action**. A class action is the main type of representative proceeding, which is brought in the name of one person on behalf of someone else. It can be commenced if:

- seven or more people have claims against the same person
- those claims relate to the same, similar or related circumstances, and
- the same issues need to be decided (e.g. whether the defendant owed a duty of care to those plaintiffs).

If those three things apply, a representative proceeding may be commenced by a person who is part of the group. They will 'represent' the group in the proceeding. That person is known as the **lead plaintiff**. The persons who are part of the group are known as **group members**.

burden of proof
the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

standard of proof
the degree or extent to which a case must be proved in court

representative proceeding
a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person; also called a class action or a group proceeding

counterclaim
a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

balance of probabilities
the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

class action
a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person; also called a representative proceeding or a group proceeding

An example of a class action was one commenced in the Supreme Court of Victoria on behalf of asylum seekers on Manus Island in Papua New Guinea. They claimed negligence against the Commonwealth of Australia and two other defendants. The plaintiff named in the case to represent the group was Majid Karami Kamasaee. The class action was settled before trial commenced in June 2017.

One person in a group is named as the plaintiff on behalf of the group (see the Jack River bushfire class action case study below for an example of how the class may be described). The lead plaintiff does not need the consent of the group members and does not even need to know who they are or where they live. Once the group is described, every person in that group is assumed to be part of the representative proceeding unless they decide to 'opt out' of it by filing a notice with the court in a specified form. However, the group may be described in a way that requires people to 'opt in' rather than 'opt out'. If a person 'opts out', then they will not be bound by the decision or settlement, and they may be able to pursue the defendants in separate legal proceedings.

lead plaintiff
the person named as the plaintiff on behalf of the group members in a representative proceeding (i.e. class action)

group member
a member of a group of people who are part of a representative proceeding (i.e. class action)

Jack River bushfire class action

LEGAL CASE

Ramsay v AusNet Electricity Services Pty Ltd, [2016] VSC 725 (2 December 2016)

In 2014, a class action was commenced in the name of Irwin James Ramsay, on behalf of a group of people who sued two defendants in relation to a bushfire that occurred between Jack River and Madalya on 9 February 2014. The parties have agreed to settle the class action for $10.5 million.

The group members included:

- all those persons who suffered personal injury as a result of the Jack River bushfire
- all those persons who suffered loss or damage to property as a result of the bushfire
- all those persons who at the time of the Jack River bushfire resided in, or had real or personal property in, the Jack River bushfire area and who suffered economic loss, which loss was not consequent upon injury to that person or loss of or damage to their property, and
- the legal personal representatives of the estates of any deceased persons who fall within any of the above three categories at the time of the Jack River bushfire.



Source 2 The spread of fire by ember attacks from Jack River was a constant challenge during bushfires.

Types of representative proceedings

Types of representative proceedings (class actions) include:

- shareholder class actions, where shareholders of a company may make a claim about being misrepresented about the state of the company's affairs
- product liability class actions, where consumers who have purchased a good or service have all suffered the same loss or damage
- natural disaster class actions, where the group members have suffered loss or damage as a result of a natural disaster.

Study tip

The Supreme Court of Victoria has a page on its website dedicated to class actions. You can view video and audio webcasts from class actions on their website, which will provide you with an insight into a class action trial. A link is provided on your obook assess.

Study tip

In this chapter the term 'class actions' is generally used to describe representative proceedings, but you must be familiar with both terms. 'Representative proceedings' may be specifically referred to in your assessment tasks.

Australia's first successful class action 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 (a type of product liability class action). Other well-known representative proceedings include business owners suing Esso as a result of the Esso Longford gas explosion in 1998; claims in relation to the bushfires that occurred in Victoria in 2009; and a series of bank fee class actions for repayment of fees charged by banks to their customers.

Benefits of representative proceedings

There has been a significant increase in the number of representative proceedings in recent years in Victoria and in Australia. Class actions (representative proceedings) are seen to have a number of benefits:

- the group members can share the cost (though see point below about litigation funders)
- it is a more efficient way of the court dealing with a number of claims, saving court time and the time of court personnel
- people can pursue civil actions that they might not be able to afford in an individual case, and this gives them access to the courts to resolve their disputes
- in certain circumstances, a **litigation funder** (a third party that agrees to pay the legal costs associated with the action) may be prepared to fund the class action on behalf of the people who have suffered loss. They do this in return for a percentage of any settlement or damages awarded, thus increasing the ability of the group members to pursue a claim even when they don't have the funds themselves.

  A recent example of a Victorian class action was in relation to Bonsoy soy milk (see below).

litigation funder a third party who pays for some or all of the costs and expenses associated with initiating a claim in return for a share of the proceeds. Litigation funders are often involved in representative proceedings

LEGAL CASE

Bonsoy class action settles

Downie v Spiral Foods Pty Ltd [2015] VSC 190 (7 May 2015)

A class action was commenced in the Supreme Court of Victoria against the Victorian-based distributor of Bonsoy, Spiral Foods Pty Ltd and two other defendants.



Source 3 Erin Downie, the lead plaintiff in the class action related to soy milk.

A recall of the Bonsoy soy milk occurred before Christmas in 2009 after it was discovered that the product contained excessive iodine. A significant number of people developed thyroid and other health problems after consuming the soy milk. A class action was issued in the Supreme Court of Victoria.

In 2015, settlement of the class action was approved by the Court. The settlement amount to be paid was $25 000 000.

However, there has been recent pressure for the class action regime to be reformed, as they are seen to be a risk for businesses, and the costs involved in a class action can be significant. At times, a significant percentage of any damages awarded or settlement amount will be paid out in legal fees and expenses before the group members receive any funds. This is explored more in Chapter 8.

Another example of a Victorian class action relates to a fire at the Coolaroo Recycling Plant.

Fire at recycling plant results in class action

CASE STUDY

On 13 July 2017, a fire broke out at Coolaroo Recycling Plant in Melbourne's north. The fire burned for several days, resulting in toxic smoke and ash over the city. A number of nearby residents had to seek medical treatment and sleep elsewhere.

Following the fire, it was reported that over 70 residents and business owners had joined a class action, alleging that the operators of the recycling plant had acted negligently.

6.3 CHECK YOUR LEARNING

Define and explain

1 Explain when the plaintiff will have the burden of proof in a civil dispute, and when the defendant may have the burden of proof.
2 What is the difference between beyond reasonable doubt, and on the balance of probabilities?
3 Describe what a class action is, and give two other names for a class action.
4 What does it mean to say the lead plaintiff has to 'describe the group'? Provide an example.
5 Explain the difference between a lead plaintiff and a group member in a representative proceeding.

Synthesise and apply

6 Read the case study 'Fire at recycling plant results in class action'.
  - **a** What type of class action is this?
  - **b** Who will be the group of people that make up the class, and who is the defendant?
  - **c** What type of claim is this?
  - **d** Conduct some more research on this case. What is the current status of the class action?

7 Conduct some research and find a class action that has been commenced in the Supreme Court of Victoria in the past two years. Prepare a summary showing:
  - **a** The names of the lead plaintiff and defendants.
  - **b** The nature of the claim.
  - **c** The remedy sought.
  - **d** Whether there is any information about a litigation funder or third-party funder in this case.
  - **e** The current status of the class action.

8 Read the legal case *Downie v Spiral Foods* (the Bonsoy class action).
  - **a** What type of representative proceeding was this?
  - **b** What was the issue in this case?
  - **c** Did this matter go to trial? Justify your answer.
  - **d** Will all of the settlement amount go to the group members? You might need to do some additional research to find out.
  - **e** What role did Erin Downie play in this case?

Analyse and evaluate

9 Do you think that the standard of proof in a civil dispute should be beyond reasonable doubt? Give reasons for your answer.
10 'Representative proceedings are not good for our civil justice system. All they do is clog up the courts, and cost money for businesses'. Do you agree with this statement? In justifying your answer, provide two advantages and two disadvantages of representative proceedings.

Check your obook assess for these additional resources and more:

- **Student book questions**
  6.3 Check your learning
- **Weblink**
  Supreme Court of Victoria – class actions
- **Weblink**
  Class actions in the Federal Court

6.4

RELEVANT FACTORS WHEN INITIATING A CIVIL CLAIM – NEGOTIATION AND COSTS

Study tip

These five factors are specifically listed in the *VCE Legal Studies Study Design*. You should be familiar with each of these five factors, and you should be able to analyse them. Try and think of and use as many scenarios as you can in which one or more of these factors may be a consideration for a plaintiff in deciding whether or not to sue a defendant. This will help you analyse any series of facts in which these factors are present.

There are many reasons why a party may decide to initiate or commence a civil claim against another. Usually the main reason is that the party wishes to be compensated for the wrong they have suffered.

Other reasons could be:

- a desire to stop the defendant from engaging in certain conduct; for example, a person wishes to stop another person from trespassing on his or her land
- the plaintiff wants to force another party to act in a certain way, such as perform their obligations under a contract
- the plaintiff wants to send a message to the defendant, or to society as a whole, about the protection of individuals' rights.

Initiating a civil claim is also known as 'issuing proceedings', 'bringing a civil action' or 'suing'.

However, initiating a civil claim is risky. A person or group who does so might not win the case, and the legal fees may be expensive. It can also be time-consuming and stressful, and might lead to negative publicity. It is therefore important for a person initiating a civil claim to consider factors such as who they should sue, whether they are restricted from suing, and whether they can try and resolve the claim before doing so.

Someone deciding whether to initiate a civil claim may consider the following five factors before doing so:

- **negotiation** options
- costs
- **limitation of actions**
- the scope of liability
- enforcement issues.

negotiation
informal discussions between two or more parties in dispute, aiming to come to an agreement about how to resolve that dispute

limitation of actions
the restriction on bringing a civil claim after the allowed time

One or more of these factors may impact on whether a party decides to sue, and if so, who they sue. A consideration of the first two factors is set out in this topic. The last three factors are explored in Topic 6.5.

Negotiation options

One of the considerations for a plaintiff is whether the dispute can be resolved out of court or tribunal. In some circumstances, it may be available to the plaintiff to try and **negotiate a resolution of the dispute directly with the defendant** without initiating a claim, or the parties may be able to agree on what the issues are during negotiation.

Negotiation normally involves the parties interacting directly with each other to try and resolve the dispute. This may be with or without legal representation, and normally involves informal discussions between themselves about the issues in dispute, what the plaintiff is seeking, and what the other party is prepared to do to resolve the dispute.

However, other possible negotiation options may include:

- arranging between themselves, with or without legal representation, an independent third party, such as a **mediator**, to help resolve the dispute. The independent third party or mediator is neutral and impartial and will help the parties come to their own agreement about how to resolve the dispute. This is often known as a 'facilitated negotiation'.

mediator
an independent third party who does not interfere or persuade but helps the parties in a mediation as they try reach a settlement of the matter

- arranging a negotiation or other dispute resolution service through a body such as the Dispute Settlement Centre of Victoria (which offers some free services to help resolve general disputes), or FMC Mediation and Counselling Victoria (which offers dispute resolution services for family conflicts and other disputes).

When negotiation may not be an option

There are a number of reasons why negotiation may not be an option. Though this depends on the case and the parties involved, some of those reasons include:



Source 1 Negotiation may not be the best option if there is a significant power imbalance.

- one or both of the parties does or do not want to resolve the dispute, or is or are not interested in negotiating
- there have already been attempts to negotiate the dispute, and they have failed
- one of the parties has been harmed or threatened by the other party, there has been violence involved, or there is distrust or fear among the parties
- there are no issues or dispute to be negotiated (for example, a neighbour is annoyed by a one-off event when his or her neighbour played loud music, and that neighbour has now moved)
- it is unlikely that negotiation will result in a successful outcome (for example, the claim made by the plaintiff is unreasonable)
- there is an urgency in having the matter resolved through court (for example, a construction company is about to destroy a local heritage site and the plaintiff wants an urgent court order stopping that from happening)
- there is a significant power imbalance between the parties, and so the parties are not on an equal footing to be able to negotiate (for example, a young employee who has a claim against his or her employer who has significant legal representation).

These reasons will need to be considered when determining whether a party should try and negotiate before initiating a claim.

Some of these reasons why negotiation may not be an option are demonstrated in the below example about Mary's dispute with her neighbour.

EXAMPLE

Persistent abusive messages

Mary's neighbour has set up a music studio in his backyard shed. Between midnight and 3 am every morning, he plays loudly on the drums and other musical instruments. Mary has been unable to sleep at night, and her work is suffering as a result.

On at least five occasions, Mary has approached her neighbour and asked that he stop. Her neighbour laughs every time and asks Mary 'who does she think she is' and insists that he has a right to play music on his own property. On the last occasion, Mary told her neighbour she would go and see a lawyer.

Since that time, Mary has received abusive messages from her neighbour. Her lawyer has advised her not to approach him again, and that she is not to try and negotiate any resolution.

Sometimes, it might be necessary to show to a court that there have been steps taken to try and resolve the dispute. For example, the Federal Court of Australia requires a person to take genuine steps to resolve a dispute before issuing a claim. One of the steps that could be taken is attempting to negotiate

other party. A party must file a statement with the Federal Court which sets out the steps that have been taken to resolve the issues in dispute or, if no steps were taken, why not.

There is currently no such requirement to do so when commencing a claim in the Victorian courts.

The benefits of negotiating

There are a number of advantages for parties in resolving disputes through negotiation and before they have commenced a civil action. They include:

- the costs, time and the stress involved in commencing a formal civil action may be avoided
- the parties have control over the outcome, as opposed to it being decided for them by a third party. For example, parties can choose how to negotiate, in what setting, and what they are prepared to accept as an outcome
- the parties may be more prepared to accept an outcome that they have helped come to, as opposed to a decision that has been imposed formally by a court or another dispute resolution body such as a tribunal.

→ GOING FURTHER

Genuine steps must be taken to resolve a dispute

The *Civil Dispute Resolution Act 2011* (Cth) provides examples of the types of steps that could be taken by a person as part of taking genuine steps to resolve a dispute. Those steps include:

1 notifying the other person of the issues that are, or may be, in dispute and offering to discuss them
2 providing relevant information and documents to the other person to enable them to understand the issues involved and how the dispute might be resolved
3 considering whether the dispute could be resolved by a process facilitated by another person
4 attempting to negotiate with the other person, or authorising a representative to do so.

These requirements do not apply to claims issued in the Victorian courts, but apply to claims issued in the Federal Court.

disbursements
out of pocket expenses or fees (other than legal fees), incurred as part of a legal case. They include fees paid to expert witnesses, court fees, and other third party costs such as photocopying costs

solicitor
a qualified legal practitioner who will give advice about the law and a person's rights under the law

barrister
a legal professional who is engaged by a party's solicitor. One of the roles of the barrister is to advocate (argue) the party's position at formal hearings

Costs

A party involved in a civil dispute may incur costs in resolving a civil dispute. The costs include fees for legal representation, court costs and other **disbursements** (such as fees paid to expert witnesses), and possible costs to be paid to the other party if he or she is not successful.

Fees for legal representation

Engaging a **solicitor** and a **barrister** is costly, and often in court cases, a party will engage both. The client is paying for a high level of experience and training, and the party may be paying the lawyer on an hourly basis. The cost of legal representation depends on:

- the complexity of the case
- the court in which the matter will be held
- the size 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.

The high cost of legal representation can be prohibitive (act as a barrier) to many people who wish to take a civil issue to court, and is a factor to be taken into account before initiating a civil claim. The plaintiff will also need to consider whether it is worth pursuing. Will the costs be more than the amount the plaintiff is seeking?



Source 2 Jane Needham SC is a 'silk' (i.e. a senior barrister).

Disbursements

Issuing a claim in court (or a tribunal) will incur a number of disbursements ('out of pocket' expenses) including court fees, **mediation** fees and fees for expert witnesses.

mediation
a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

Court fees

If a plaintiff issues a claim in court (and not through some other dispute resolution body), the court will charge certain fees, such as filing fees and hearing fees.

The following are an indication of the relevant fees:

- **court filing fees** – in the Magistrates' Court, the filing fees are between $145 and $680, depending on the amount of damages sought by the plaintiff. The filing fee in the County Court is over $800, and from $1000 to more than $4000 in the Supreme Court, depending on the nature of the claim
- **court hearing or trial fees** – the plaintiff needs to pay for every day of the hearing. These range between $520 per day to $2000 per day, depending on the court and how long the trial goes for
- **jury costs** – if a jury is involved, the party who chooses to have a trial before a jury will incur the cost. In the County Court and the Supreme Court, the daily jury fee is from $550 to more than $1000, depending on how long the jury trial is.

Tribunal costs are generally less than court costs, but usually include application fees and hearing fees.

Mediation fees

When a plaintiff initiates a claim in court, the court will often order the parties to attend mediation to try and resolve the case before trial. They are likely to share the costs of the mediator. Mediators' fees can vary depending on the mediator and the nature of the claim, but can be anywhere between $2000 and $20 000 per day.

Did you know?

Solicitors generally charge clients on a time basis. The Access to Justice Arrangements report found that the hourly rates vary from solicitor to solicitor, but partners in law firms typically charge more than $600 per hour.

Expert witness fees

The plaintiff's claim may require an expert to give an opinion, depending on the nature of the claim. For example, if the plaintiff claims that she has suffered a severe spinal injury, she may need to engage a medical expert to prove this injury.

Adverse costs orders

If the plaintiff initiates a claim in court, and is unsuccessful, then not only will they have to pay for their own legal costs, but they may be ordered to pay for some of the defendant's costs. This is known as an **adverse costs order**.

adverse costs order
a court order (i.e. legal requirement) that a party pay the other party's costs

The general rule in civil disputes is that a successful party should receive an order from the court that his or her costs are paid by the losing party.

Often the fear of having an adverse costs order made against them will deter a plaintiff from initiating a civil claim. However, it is a risk that the plaintiff needs to consider before initiating a civil claim.

The availability of legal aid

Victoria Legal Aid (VLA)
a government agency that provides free legal advice to the community and low-cost or no-cost legal representation to people who can't afford a lawyer

Productivity Commission
the Australian Government's independent research and advisory body, which researches and advises on a range of issues

Victoria Legal Aid (VLA) provides some assistance to people seeking legal advice and representation for some civil disputes. It does, however, focus on people who need it most, and it has limits on the amount of legal aid that can be provided to particular cases. For example, legal aid is not available for business and commercial disputes, employment disputes, disputes on behalf of corporations, internal disputes in organisations and wills and deceased estates. In addition, legal aid provided by VLA largely goes to criminal and family matters, with very little left for those who are defending a civil claim, or want to initiate a civil claim.

Further, the strict tests applied by VLA means that many people are not eligible to receive legal aid. For example, the **Productivity Commission** in 2014 estimated in its Access to Justice Arrangements report that only 8 per cent of households would likely meet the tests for legal aid. See Chapter 4 for further details about the tests applied by VLA.

All of the above means that, before initiating a claim, the plaintiff should consider:

- how much it will cost to have the dispute resolved
- whether they have the money to pay for those costs
- whether they are eligible for legal aid or free legal assistance through other means
- whether they have the money to pay for the costs of the defendant if an adverse costs order is made
- what the risks are if they are ordered to pay the other side's costs and cannot afford to do so (e.g. will they have to sell their assets to pay those costs?).

6.4 CHECK YOUR LEARNING

Define and explain

1 Outline two reasons why a plaintiff may wish to initiate a civil claim.
2 Describe the dispute resolution method of negotiation, and provide two types of cases in which negotiation may not be appropriate.
3 Explain three types of costs or fees that a plaintiff may have to pay as part of resolving a civil dispute.
4 What are the cost risks if a plaintiff loses?

Synthesise and apply

5 For each of the following scenarios, identify at least one cost issue that the plaintiff will need to consider before initiating a claim:
   a Bernard wants to sue his former friend for $6000 because his friend sold him a dud car. His lawyer has given him an estimate of $50 000 to recover the money, and has indicated that Bernard has a 45 per cent chance of winning.
   b Gladys wants to recover $500 000 from her son, being money she lent to him some years ago. She doesn't have any cash but owns her own home. She's prepared to borrow against her home to pay for legal fees.
6 Your friend has a $3 million claim against a former business partner. He has been given a total estimate of $1.5 million in legal fees alone to run the case to trial. Devise a way in which you will convince your friend that he should try and resolve the case through negotiation first.
7 Read the example 'Persistent abusive messages'. In your view, is negotiation appropriate for this claim? Give reasons for your answer.

Analyse and evaluate

8 Do you think the Victorian courts should follow the Federal Court and require parties to show they have taken genuine steps to resolve the dispute before initiating the claim? Give reasons for your answer.
9 'Civil disputes have just as big an impact on society as criminal and family matters, and so 50 per cent of VLA funding should be for civil disputes'. Discuss the extent to which you agree with this statement.

Check your obook assess for these additional resources and more:

- **Student book questions**
  6.4 Check your learning
- **Worksheet**
  Negotiation options
- **Weblink**
  Dispute Settlement Centre of Victoria

6.5 RELEVANT FACTORS WHEN INITIATING A CIVIL CLAIM – LIMITATIONS, LIABILITY AND ENFORCEMENT

limitation of actions
the restriction on bringing a civil claim after the allowed time

social cohesion
a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

statute
a law made by parliament; a bill which has passed through parliament and has received royal assent (also known as an Act of Parliament)

A plaintiff will need to consider three factors other than negotiation options and costs before initiating a civil claim: limitation of actions, the scope of the defendant's liability, and enforcement issues.

Limitation of actions

Plaintiffs have to bring their cases to court within a time limit (called a limitation period). **Limitation of actions** refers to the restriction placed on the time within which a civil action can be commenced. For most types of claims, the plaintiff will need to commence the proceeding within a certain number of months or years. Once that period has passed, the defendant may be able to raise a defence that the plaintiff is out of time and can no longer bring the claim.

The rationale for imposing limitations on the plaintiff is so that:

- the defendant does not have to face an action after a significant amount of time
- evidence is not lost and people can still remember what happened
- disputes can be resolved as quickly as possible, so as to promote **social cohesion**.

In Victoria, the main **statute** that imposes limitations on actions is the *Limitation of Actions Act 1958* (Vic). Source 1 below is a summary of the time limits within which an action for certain types of civil claims must be issued. The date from which the time starts running depends on the type of claim. For example, for a breach of contract claim, the time starts running from the date of the breach.

Did you know?

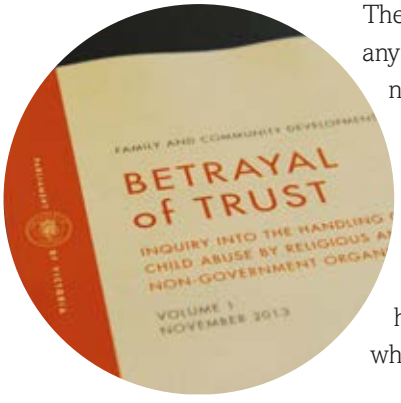
Although there are time limits for commencing most civil claims, there is no time limit for prosecuting an accused for an indictable offence. However, for summary offences, generally, the proceeding must be commenced within 12 months of the offence.

TYPE OF CLAIM	TIME PERIOD
Defamation	1 year
Under tort law where there is personal injury consisting of a disease or a disorder	3 years
An action to recover arrears of rent	6 years
Breach of contract	6 years
Under tort law	6 years
An action to recover land	15 years

Source 1 Examples of the limitations imposed on different types of claims

The effect of the expiry of any limitation period means that the plaintiff will be barred from obtaining any remedy. However, the defendant will be required to raise it as a defence (that is, the defendant will need to say that the plaintiff is time-barred from issuing the claim). In some situations, the limitation period can be extended.

In 2015, Victoria became the first state to remove limitation periods for persons who suffered physical or sexual abuse as a minor, or psychological abuse that arose out of that abuse. The changes to the law followed a Victorian parliamentary inquiry into the handling of child abuse by religious and other non-government organisations which found that time limitations were a major hurdle for victims who wished to initiate civil claims. On the next page is an example of a case where the limitation period was extended.



Source 2 The changes to limitation periods in cases of sexual and physical abuse inflicted on minors came about following a parliamentary committee report into the handling of child abuse by religious and other non-government organisations, which was handed down in November 2013.

LEGAL CASE

Limitations extended in child abuse case

GGG v YYY [2011] VSC 429 (1 September 2011)

In *GGG v YYY*, the plaintiff was a 45-year-old man who claimed damages for sexual abuse allegedly inflicted upon him by the defendant between 1977 and 1979. The defendant was one of the plaintiff's uncles, who was 81 years old in 2011.

One of the issues the Supreme Court of Victoria had to decide was whether the limitation period should be extended. This case was heard before the Victorian Parliament had passed laws which removed limitation periods for persons who suffered physical or sexual abuse as a minor.

The Court found that the claim was statute-barred, but decided to extend the limitation period. Justice Osborn accepted that one of the reasons for the delay was because the plaintiff was not physically able to publicly acknowledge the fact of the abuse, and was not aware of his psychiatric injury, until 2009. Justice Osborn did not consider that the delay had prevented a fair trial and had not resulted in any real prejudice. He ultimately awarded a total of $267 000 in damages to the victim.

The scope of liability

Before initiating a claim, a plaintiff needs to determine:

- who are the possible defendants
- to what extent the defendant may be liable.

Possible defendants

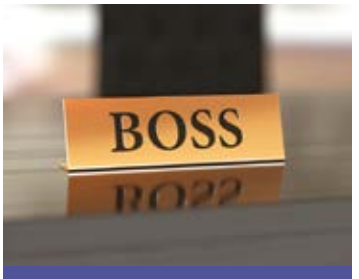
Normally, the defendant is the person who is alleged to have infringed the plaintiff's rights or who has directly caused harm to the plaintiff. In a contract claim, this will be the other party to the contract. In a negligence claim, the defendant will be the person who breached his or her duty of care to the plaintiff.

Sometimes there may be two or more persons who have infringed the plaintiff's rights or caused harm to the plaintiff, and both of them may become liable for loss or damage suffered by the plaintiff.

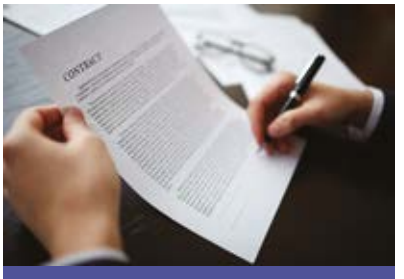
However, there may be a party other than the person who directly infringed the plaintiff's rights who the plaintiff may sue, and may be liable to compensate the plaintiff. Those parties may include:

- an employer (under the principle of vicarious liability)
- an insurer
- a person who was involved in the wrongdoing (under the principle of **accessorial liability**).

accessorial liability a way in which a person can be found to be responsible or liable for the loss or harm suffered to another because they were directly or indirectly involved in causing the loss or harm (for example, encouraging another person to cause that harm)



EMPLOYERS


INSURERS


PERSONS INVOLVED IN WRONGDOING

Source 3 If a person slipped on spilt milk in a supermarket the plaintiff could sue the employer, an insurer and the worker who ignored the spill.

Employers

The principle of vicarious liability means that an employer may become liable for the actions of its employee.

For an employer to be liable, the plaintiff needs to establish that the employee was in fact an employee, and that he or she was acting in the course of employment when the events leading to the claim occurred. This means there must have been some connection between the act and the employment. If the employee was acting in an unauthorised way, then the employer may not be found liable.

As demonstrated in the legal case below, the plaintiff must show that the defendant was acting in the course of employment to sue on the principle of vicarious liability.

A prank gone wrong

LEGAL CASE

Blake v J R Perry Nominees Pty Ltd [2012] VSCA 122 (14 June 2012)

Trevor Blake was a fuel tank driver employed by J R Perry Nominees Pty Ltd. On 16 October 2001, Blake was at the Portland dockyards waiting for a ship which was due to be refuelled, whose arrival had been delayed. Two other employees were also waiting. While Blake was looking out to sea, Jones, one of the other employees, drove his fuel tanker at Blake as a prank, and hit him behind the knees. The blow caused severe damage to Blake's back, and Blake has never recovered from the damage. Blake sued his employer, claiming it was vicariously liable. The judge disagreed, and Blake appealed to the Court of Appeal in the Supreme Court.

Blake lost on appeal. The Court of Appeal stated that if vicarious liability is to arise, there must be some connection between the wrongdoer's wrongful act and his or her employment. In this case, the Court held that the actions of Jones were not authorised by his employer, and were not done to further the employer's interests. It held that it was the spontaneous act of a prankster and the act did not take place within the course of his employment.

In the 2016 case of *Prince Alfred College Incorporated v ADC* (2016) 335 ALR 1, the **High Court** ruled that it is possible for an employer to be vicariously liable for a criminal offence committed by an employee. Whether the employer is liable for a criminal offence will depend on any special role of the employee. For example, if the employee was in a position of authority, power or trust and was able to be intimate with the **victim**, the employer may be vicariously liable. In this case, the victim was a boarder at a college who was sexually abused by Dean Bain, employed by the school as a housemaster. However, the High Court did not find the employer vicariously liable because it held that the victim was out of time to bring his claim.

High Court
the ultimate court of appeal in Australia and the court with the authority to hear and determine disputes arising under the Australian Constitution

victim
a person who has suffered directly or indirectly as a result of a crime



Source 4 Prince Alfred College in South Australia was at the centre of a 2016 High Court decision in relation to vicarious liability.

Insurers

An insurance policy is an arrangement by which an insurer agrees to provide compensation to the insured if the insured suffers some form of loss. There are various types of insurance, such as:

- insurance for directors and officers of companies
- public liability insurance (insurance for injury to a third party or their property)
- workers' compensation (insurance that may be paid to an employer who suffers injury during their employment).

When a plaintiff sues a defendant, that defendant is often insured. The plaintiff can't make a direct claim against the defendant's insurer, but if the plaintiff is successful, the defendant will then claim on the insurer for the loss. Insurers therefore often run cases in the name of the defendant because they will be making the payment in the end.

Persons involved in wrongdoing

A person who is involved in the wrongdoing may also be sued. A person may be involved in wrongdoing if they:

- aided, abetted or procured the wrongdoing
- induced or urged the wrongdoing
- were in any way, directly or indirectly, a party to the wrongdoing
- conspired with others to cause the wrongdoing.

This is known as accessorial liability. A plaintiff may decide to sue somebody else who was involved in the wrongdoing. For example, if a person was harassed at work, and somebody else encouraged or actively influenced the harasser to keep doing it, then the other person may be seen to also be responsible for the harm suffered by the person.

In the below example, Andrew could sue Sally's husband Ian because of accessorial liability.

EXAMPLE

Andrew's bakery's not so scrumptious



Source 5 Andrew recently purchased a bakery business.

Andrew recently purchased a bakery business from Sally. During his research on the business, he was told by Sally that the bakery made $200 000 profit a year. Andrew attended the bakery several times during the course of three months. Every time he attended, Ian, Sally's husband, was working at the bakery and would often rave about how much money they were making. Ian at some time showed Andrew some statements which indicated that the profit was about $200 000 a year.

After a few months of business, Andrew is struggling to make money. He later finds out that Ian's statements were not true, and that Ian's handwritten statements contained false profit numbers. Andrew believes he has been misled about the true value of the bakery.

The extent of the defendant's liability

One of the other issues that may arise for a plaintiff, and which he or she will need to consider before bringing an action, is the extent to which the defendant is liable. That is, the defendant may argue that if they are found liable, then they are only liable for a part or a portion of the plaintiff's loss or damage.

This often arises in negligence claims, when the defendant may claim contributory negligence. This is when the defendant may try to prove that the plaintiff is in part to blame for the harm done. If the

defendant is successful, then the defendant's liability for the loss or damage is likely to be reduced, often significantly.

The defendant may also argue that someone other than the plaintiff was liable, and therefore try to reduce his or her liability. For example, the defendant may argue that somebody else caused the loss suffered by the plaintiff.

In the case of *Kalos v Goodyear & Dunlop Tyres (Aust) Pty Ltd* [2016] VSC 715, the defendant attempted to claim contributory negligence to reduce their liability but was unsuccessful.

Workplace injury results in an award for damages

LEGAL CASE

Kalos v Goodyear & Dunlop Tyres (Aust) Pty Ltd [2016] VSC 715 (29 November 2016)

In July 2010, Ms Kalos was walking along a corridor at her place of employment when she fell and injured her shoulder. Kalos sued her employer and the owner of the premises for negligence, claiming that she fell on a protruding and exposed metal plate on the floor.

One of the defendants claimed that Kalos was contributory negligent because she failed to keep a proper lookout and failed to pay attention to where she was walking. The County Court found that there was no evidence to support a finding of contributory negligence. A total amount of $688 000 in damages was awarded to Kalos against Kalos' employer, but found there was no breach by the owner of the premises.

Enforcement issues

Normally, there are two ways that a plaintiff will obtain a settlement or remedy:

- by settling with the defendant before the court or tribunal hands down a decision
- by obtaining a remedy from a dispute resolution body such as a court.

But what happens if a court orders an amount of money to be paid to a plaintiff, or the defendant agrees to pay a sum of money, but the defendant does not pay? That is, will the plaintiff be able to enforce the remedy they have been awarded?

The plaintiff will need to consider whether the defendant **is able to** pay, and if so, whether or not the defendant **will** pay. Some of the issues that the plaintiff will need to consider are:

- the defendant may be bankrupt, which means that he or she will not have any assets or money to pay anything to the plaintiff
- even if the defendant is not bankrupt, he or she may still be unable to pay
- the defendant may be in jail, particularly if the civil dispute arose out of a criminal action, and the defendant has been found guilty and imprisoned. It will therefore be more difficult to enforce the remedy
- if the defendant is a company, that company may not have any assets
- the defendant may be overseas or uncontactable, in which case it may be difficult to force them to pay any money
- the plaintiff may not even know who the defendant is. For example, the plaintiff may have been harassed in a public park late at night and has suffered anxiety and depression as a result, but the police have not been able to locate the defendant.

Even if the defendant is able to pay, the plaintiff may have to issue enforcement proceedings to force a defendant to comply with a remedy. An example of an enforcement mechanism is obtaining from the court a warrant to direct the court sheriff to seize (take) the defendant's goods and sell them.

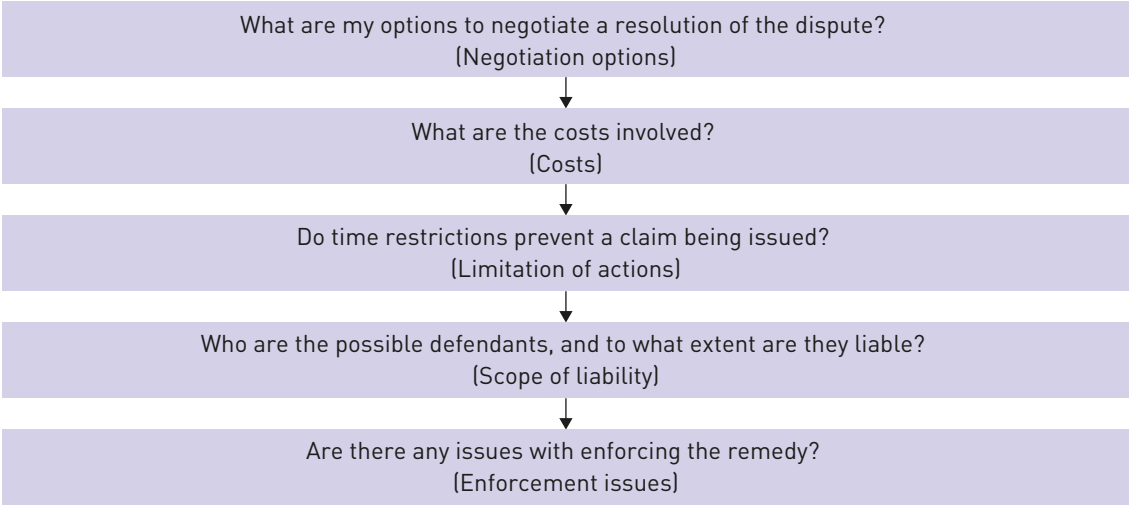
→ GOING FURTHER

Below are some of the procedures that may be used by a plaintiff if the defendant does not comply with an order:

- **warrant of seizure and sale** – Goods or land are seized by the sheriff 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.

Summary of factors to consider when initiating a civil claim

A summary of the factors that a plaintiff should consider when initiating a civil claim is provided in Source 6:



Source 6 The factors to consider when commencing a civil action

EXAMPLE

Harriet and the hole in the footpath

At 8:00 am on 14 August 2015, Harriet was walking along Cobbs Road in Harlem, Victoria on her way to Bairnsville State School. She was in Year 11 at the time. As she walked, she began daydreaming about the previous weekend when she was at the beach with her friends.

All of a sudden, Harriet fell. One of her legs got stuck in a large hole in the footpath. Her laptop and bag went flying and she heard something in her leg snap. She blacked out because of the pain.

The hole had been dug by council workers the night before. John, a local council worker, had created the hole. When he heard about the accident, he was horrified. He was sure that he had arranged for Barriers R Us – a local company often used by the council – to put up barriers around the work site.

Later investigations revealed that Barriers R Us did put up the barriers, but some local boys had removed them the night before Harriet's accident. Barriers R Us were at the site the next morning, but hadn't yet put the barriers back up.

To make matters worse, a local boy managed to film the whole accident and put the video on YouTube. The video now has over 1 000 000 views. Harriet feels like a laughing stock, and now suffers from anxiety. She doesn't want to go out anymore, she has missed a lot of school, and she doesn't see her friends anymore.

Two years after the incident, Harriet goes to see a lawyer. She wants to sue John for leaving the hole in the footpath overnight. She thinks that she has a good case for negligence, and is hoping that the lawyer can take on her case for free.

6.5 CHECK YOUR LEARNING

Define and explain

1 What is meant by a limitation of actions? Why is it relevant to a civil dispute?
2 Is the wrongdoer the only possible defendant in a civil dispute? Give reasons for your answer.
3 What is meant by enforcement? Why is it an issue that the plaintiff will need to consider before initiating a civil claim?

Synthesise and apply

4 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.
   a Your neighbour is suing the company. Explain why she would sue the company and not the driver.
   b Your neighbour later finds out 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?
5 For each of the following scenarios, describe two possible factors that the plaintiff may need to consider before suing:
   a James was defamed by Han in a university article in 1979. He wants to sue Han for the reputational damage he suffered. The article was published by the university.
   b Nhan gets along well with his neighbour, but they have an ongoing dispute about the neighbour's barking dog. The neighbour doesn't seem to see the issue, and has already told Nhan that he has no money to afford a lawyer to defend himself.
   c Marion has gone to see Victoria Legal Aid to get funding for her claim against her employer. She wants to sue the employer after she ate free food given to her by the employer at a work function, which the employer had obtained from a local catering business, and suffered gastroenteritis for 48 hours.
   d Melissa was a minor in 1980 when she was physically abused by her cousin. Her cousin is wealthy and has engaged an army of lawyers, but has most of his assets overseas.

Analyse and evaluate

6 Read the example 'Harriet and the hole in the footpath'.
   a What is the nature of Harriet's claim?
   b Describe the loss that Harriet has suffered as a result of her accident.
   c Who are the possible defendants in Harriet's claim? Why do you think they might be liable?
   d Identify and describe all of the factors that are relevant to Harriet before she initiates her civil claim. After considering each of these factors, do you think that Harriet should issue the claim? Who should she issue against? Give reasons for your answer.

Check your obook assess for these additional resources and more:

» **Student book questions**
6.5 Check your learning

» **Worksheet**
Factors to consider

» **Weblink**
Limitation of Actions Act 1958 (Vic)

CHAPTER 6

REVIEW



Check your obook assess for these additional resources and more:

- » **Student book questions** Ch 6 Review
- » **Revision notes** Ch 6
- » **assess quiz** Ch 6 Test your skills with an auto-correcting multiple-choice quiz

CHAPTER SUMMARY

The principles of justice

- > Fairness
  - Fair processes and a fair hearing. Laws should be properly applied, the parties should have an opportunity to know the case that is put against them and have the opportunity to present their case, and the pre-hearing and trial or hearing processes should be fair and impartial.
- > Equality
  - People should be equal before the law and both have the same opportunity to present their case; that is, they should not be treated advantageously, or disadvantageously, because of a personal attribute or characteristic.
- > Access
  - People should be able to understand their legal rights and be able to pursue their case.

Key concepts in the Victorian civil justice system

- > The burden of proof
  - Plaintiff
  - Can be reversed if defendant makes a counterclaim or raises a certain defence
- > The standard of proof
  - Balance of probabilities
- > Representative proceedings
  - Also known as class actions
  - Can be commenced if seven or more people have a claim against the same person, under similar or related circumstances.

Factors to consider when initiating a civil claim

- > Negotiation options
- > Costs
- > Limitation of actions
- > Scope of liability
- > Enforcement issues

REVISION QUESTIONS

1 Provide one circumstance in which the burden of proof may be reversed in a civil dispute.

(2 marks)

2 Distinguish between the standard of proof in a criminal case and the standard of proof in a civil dispute.

(3 marks)

3 Explain what is meant by the term 'representative proceeding'.

(3 marks)

4 Justine issued a claim in the County Court against her employer, claiming it was liable for the actions of its employee. She did not seek to negotiate the dispute before she issued the claim, and has spent all her money on legal fees. She lost the case, and has been ordered to pay her employer's legal costs.

a What is meant by the term 'vicarious liability'? Refer to Justine's case in your answer.

(2 marks)

b Describe two factors that Justine should have considered before initiating a civil claim.

(4 marks)

c Do you think it should be compulsory for all parties to negotiate a civil dispute before taking a civil claim to court? Justify your answer.

(6 marks)

5 'There should be no limitation of actions. Parties should be free to issue claims whenever they want to'. To what extent do you agree with this statement? Give reasons.

(8 marks)

PRACTICE ASSESSMENT TASK

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

Penny's wedding night

On Saturday 29 October 2017, Penny married Javier in Bendigo. They had a lovely ceremony in the Botanic Gardens, followed by a cocktail evening at the local restaurant, Insightful Nights. The local restaurant had arranged catering from a local catering company, Snailed Bottles Pty Ltd. Snailed Bottles Pty Ltd put on a huge spread of food and drink. One of the signature dishes of the night was a warm chocolate mousse served in a chocolate nest, which was created by a local dessert chef, Andrea McChock.

The next day, Penny felt awful and was diagnosed with gastroenteritis. She vomited all day and all night, and was eventually hospitalised due to severe dehydration and a high fever. She spent five days in hospital. She discovered a few weeks later that at least five other guests of hers also suffered the same thing, and with the same severity. They worked out that they had all eaten the chocolate mousse. Penny is not sure whether there is anyone else who also got sick from her wedding, but hasn't yet contacted everyone. One of the guests who did fall sick was a pregnant woman who has since suffered issues with her pregnancy, and an elderly male who has suffered from anxiety when eating food since the incident.

Penny goes to see a lawyer. As a result of the gastro, she has suffered ongoing health problems and has lost her job, due to her time off work. Penny's lawyer tells her that she has a good case and that he is happy to help her issue a claim in court at a fee of $350 per hour. He estimates that Penny will need to pay $45 000 in legal fees, for him and a barrister, for Penny to take the matter to trial. Penny doesn't have that sort of money saved. She's also concerned because she's recently heard that the local restaurant has gone out of business, and nobody knows where the owner is. However, she has been told that both Snailed Bottles Pty Ltd and Andrea McChock's businesses are thriving. She has also been told that Andrea doesn't have any assets in Australia and spends most of her time in New Jersey, USA. Penny feels like there's no choice but to abandon her claim.

Practice assessment task questions

1 What is meant by the phrase 'limitation of actions'? Is it an issue in this case? Justify your answer.

(2 marks)

2 Identify the person who has the burden of proof in this claim, and describe the extent to which that person needs to prove the facts.

(3 marks)

3 Other than fees for her barrister and solicitor, describe two other types of expenses that Penny may have to pay.

(4 marks)

4 What is meant by the term 'representative proceeding'? Is it possible for a representative proceeding to be issued for this claim? Justify your answer.

(5 marks)

5 Identify three possible defendants in this proceeding. In your view, who should Penny initiate a claim against? Justify your answer.

(5 marks)

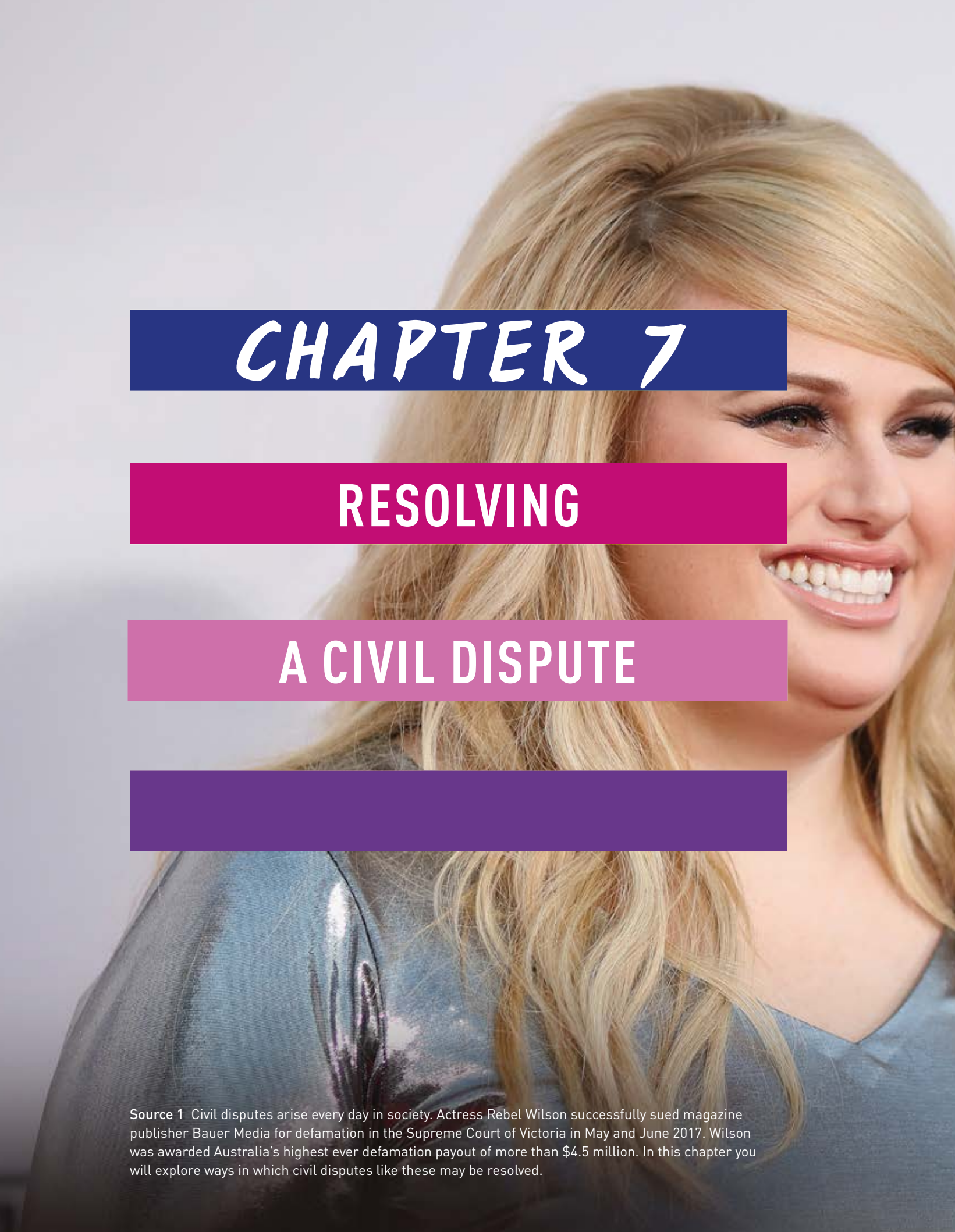
6 'This is not a claim that is appropriate for negotiation. The best way to resolve this dispute is for Penny to spend all of her money to have this go to court. These types of things should be aired in public'. Do you agree with this statement? Give reasons for your answer, referring to at least one of the principles of justice.

(6 marks)

Total: 25 marks

CHAPTER 7

RESOLVING A CIVIL DISPUTE



Source 1 Civil disputes arise every day in society. Actress Rebel Wilson successfully sued magazine publisher Bauer Media for defamation in the Supreme Court of Victoria in May and June 2017. Wilson was awarded Australia's highest ever defamation payout of more than $4.5 million. In this chapter you will explore ways in which civil disputes like these may be resolved.

OUTCOME

By the end of **Unit 3 – Area of Study 2** (i.e. Chapters 6, 7 and 8), you should be able to analyse the factors to consider when initiating a civil claim, discuss the institutions and methods used to resolve civil disputes and evaluate the ability of the civil justice system to achieve the principles of justice.

KEY KNOWLEDGE

In this chapter, you will learn about:

- the purposes and appropriateness of Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT) in resolving civil disputes
- the purposes of civil pre-trial procedures
- the reasons for a Victorian court hierarchy in determining civil cases, including administrative convenience and appeals
- the responsibilities of key personnel in a civil trial, including the judge, jury, the parties and legal practitioners
- judicial powers of case management, including the power to order mediation and give directions
- the methods used to resolve civil disputes, including mediation, conciliation and arbitration, and their appropriateness
- the purposes of remedies
- damages and injunctions, and their specific purposes.

KEY SKILLS

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- analyse factors to consider when initiating a civil claim
- explain the purposes of pre-trial procedures, using examples
- explain the reasons for the Victorian court hierarchy in determining civil cases
- discuss and justify the appropriateness of institutions and methods used to resolve a civil dispute
- discuss the responsibilities of key personnel in a civil trial
- discuss the ability of remedies to achieve their purposes
- evaluate the ability of the civil justice system to achieve the principles of justice
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

KEY LEGAL TERMS

alternative dispute resolution methods ways of resolving or settling civil disputes that do not involve a court or tribunal hearing (e.g. mediation, conciliation and arbitration); also known as appropriate dispute resolution

arbitration a method of dispute resolution in which an independent person (known as an arbitrator) is appointed to listen to both sides of a dispute and make a decision that is legally binding on the parties. The decision is known as an arbitral award

case management a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (such as an order that the parties attend mediation)

conciliation a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution

directions instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

expert evidence statements of fact given by an independent expert about an area within his or her expertise

injunction a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

lay evidence evidence given by a layperson (an ordinary person) about the facts in dispute

mediation a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

pleadings a pre-trial procedure during which documents are filed and exchanged between the plaintiff and the defendant and which state the claims and the defences in the dispute

remedy a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

statement of claim a document filed by the plaintiff in a civil case to notify the defendant of the nature of the claim, the cause of the claim and the remedy sought

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

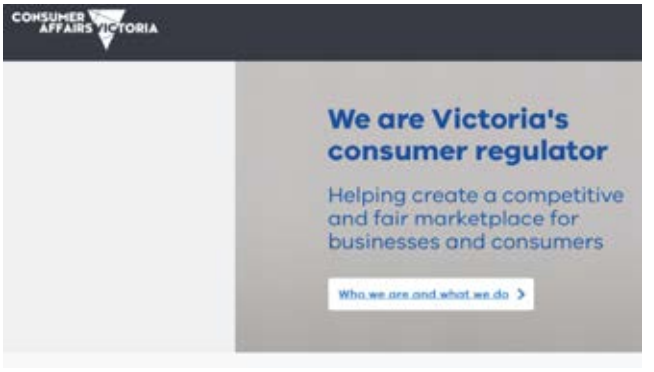
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7.1 CONSUMER AFFAIRS VICTORIA

complaints body
an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

civil dispute
a dispute (i.e. disagreement) between two or more individuals (or groups) in which one of the individuals (or groups) makes a legal claim against the other

A number of organisations in Victoria provide dispute resolution services. These organisations, known as **complaints bodies**, offer dispute resolution services to people who make a complaint about another party. One of these complaints bodies is Consumer Affairs Victoria (CAV), a business unit of the Victorian Government's Department of Justice and Regulation. In this topic you will explore the purpose of CAV, and consider when CAV may be an appropriate body to resolve a **civil dispute**.



Source 1 Consumer Affairs Victoria (CAV) is Victoria's consumer affairs regulator. Its website lists services to help parties resolve different types of civil disputes.

Purpose of Consumer Affairs Victoria

laws
legal rules made by a legal authority that are enforceable by the police and other agencies

CAV is Victoria's consumer affairs regulator. It advises the Victorian Government on consumer legislation (i.e. **laws** about the sale and purchase of goods and services), provides information and guidance to educate people about consumer laws, and enforces compliance with consumer laws. It also **provides consumers and traders, and landlords and tenants, with a dispute resolution process**. People can use CAV to exercise their consumer rights when they may have been infringed.

CAV will help **people settle their disputes efficiently and constructively, without any cost**, and assist them in agreeing on the resolution of the dispute without imposing a decision. Its role is to resolve disputes efficiently and effectively, to ensure that any inappropriate conduct is stopped, and to help any party that has been wronged seek compensation for any loss they have suffered.

CAV only accepts complaints from consumers and tenants, not from businesses and landlords.

Dispute resolution methods used

conciliation
a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution

conciliator
the independent third party in a conciliation who helps the parties reach an agreement that will end the dispute between them. The conciliator can make suggestions and offer advice to assist in finding a mutually acceptable resolution but the parties reach the decision

The main method used by CAV to help parties resolve disputes is **conciliation**. Conciliation involves the assistance of an independent or neutral third party who helps the parties reach a mutually acceptable decision between them.

The third party, known as the **conciliator**, does not make the decision on behalf of the parties, but listens to the facts, makes suggestions and helps the parties come to their own decision. The conciliator can make suggestions and explore possible solutions with the parties. The conciliator is usually someone with specialist knowledge of the nature of the dispute. CAV has teams devoted to the particular types of disputes they can help with.



Source 2 Maree Kelly and Julie Dalton were in a dispute with Stockland, a retirement village operator, about the value of their mother's unit in a retirement village. They took their matter to CAV, which can hear disputes in relation to retirement villages.

If the parties come to a decision, they may sign **terms of settlement** or a deed of settlement, which reflects their agreement about the way they will resolve their dispute. The terms of settlement may then be enforceable through a court if one of the parties does not follow through with the promises they made.

CAV primarily offers dispute resolution services over the phone to try and resolve the dispute. In some cases, more tailored services can be provided such as an in-person conciliation.

terms of settlement
a document that sets out the terms on which the parties agree to resolve their dispute

Power to commence civil proceedings

CAV can also institute proceedings on behalf of a person in relation to a consumer dispute (about the provision of goods and services) in certain circumstances. This will involve CAV commencing a civil action against the business to try and recover the loss suffered by the purchaser on behalf of the purchaser.

→ GOING FURTHER

CAV's power to take enforcement action

In addition to offering dispute resolution services, CAV also has power to take enforcement action against traders. It can institute proceedings against businesses in court if it has evidence that they have acted contrary to their legal obligations. For example, in 2017 CAV took action against various real estate agents for 'underquoting' properties to buyers (giving market estimates well below the price at which they ultimately sold).

Appropriateness of Consumer Affairs Victoria

Not all civil disputes can be resolved by CAV. CAV uses certain criteria to determine whether it is an appropriate dispute resolution body for a particular dispute. Three of those criteria are as follows:

1. Whether the dispute is within CAV's **jurisdiction**.
2. Whether the dispute is likely to settle.
3. Whether there are other or better ways to resolve the dispute (that is, there is another alternative).

In addition to the above criteria, CAV will not conciliate disputes that the courts or the **Victorian Civil and Administrative Tribunal (VCAT)** have already made a decision on, or disputes where there is a case pending (yet to be decided) in the courts or VCAT. It will also only accept complaints if the person complaining has first tried to resolve the dispute themselves, and if the complaint warrants CAV's involvement (for example, it is not a trivial complaint).

jurisdiction
the lawful authority or power of a court, tribunal or other dispute resolution body to decide legal cases

Victorian Civil and Administrative Tribunal (VCAT)
a tribunal that deals with disputes relating to a range of civil issues heard by various lists (sections), such as the Human Rights List, the Civil Claims List and the Residential Tenancies List

Whether the dispute is within Consumer Affairs Victoria's jurisdiction

CAV is limited to assisting in the settlement of disputes that are within its jurisdiction. It obtains its power through Victorian statutes, and it can assist with disputes about:

- the supply of goods and services
- residential tenancies
- retirement villages
- owners' corporations.

A summary of the types of disputes that CAV can advise people about and help to settle is set out in Source 3 below.

TYPES OF DISPUTES	RELEVANT LEGISLATION
Disputes between purchasers and suppliers, or consumers and suppliers, about the supply or possible supply of goods or services in trade or commerce where the amount paid for the goods or services is $40 000 or less.	*Australian Consumer Law and Fair Trading Act 2012* (Vic) and the Australian Consumer Law (Victoria)
Disputes between a tenant and landlord about: • a complaint by a tenant about the repair of rented premises • any other dispute in relation to a tenancy agreement between a landlord and a tenant • rooming house disputes • caravan park disputes.	*Residential Tenancies Act 1997* (Vic)
Disputes in relation to services or goods provided under a contract in relation to a retirement village.	*Retirement Villages Act 1986* (Vic)
Disputes in relation to the operation of an owners' corporation, including disputes between current or former lot owners, purchasers, occupiers or managers of an owners' corporation.	*Owners Corporations Act 2006* (Vic)

Source 3 The kinds of disputes CAV can help to resolve using conciliation

If a party has a civil dispute that does not fall into one of the types shown in Source 3, then CAV has no power to assist. For example, CAV cannot conciliate discrimination disputes, employment disputes or family law matters.

An example of a dispute between a customer and a supplier that CAV might advise about is provided in the article below.

IN THE NEWS

Window delivery dispute sees homeowner threaten manufacturer with Consumer Affairs

Chad Van Estrop, *Geelong Advertiser*, 19 November 2016



Source 4 Queenscliff renovator Geoff Morgan shows a broken window.

A WAR of words has erupted between a window manufacturer and a home renovator, after a window delivered to his work site broke in strong winds.

Geoff Morgan has threatened to take the North Geelong company to Consumer Affairs Victoria in a bid to recoup a $300 window repair bill.

He said one of 16 windows delivered to the Queenscliff property shattered after it was blown over in high winds on October 30.

Mr Morgan said delivery workers should have stacked the windows on top of each other at his Bellarine Hwy property rather than leaning them against a wall.

He is at odds with the window company over instructions he was given during the delivery last month.

A spokeswoman for the window manufacturer said a delivery driver told Mr Morgan it was unsafe to lean the windows against a wall under his carport.

'The driver did advise Mr Morgan that he may need to tie a rope around the windows to secure the items,' she said.

Whether the dispute is likely to settle

CAV will help resolve a dispute if there is a reasonable likelihood that the dispute will settle. The following factors may be taken into consideration to determine whether the dispute may settle:

- there has been no delay in the person complaining to CAV
- CAV's database of complaints does not show that the other party has previously refused to participate in conciliation
- the person complaining has not contributed to the dispute through inappropriate behaviour
- the dispute is not overly subjective (e.g. where the consumer has complained about services which are personal in nature, such as hairdressing, because this would call for opinions about whether something as personal as a haircut was 'good' or not)
- the trader hasn't already made a reasonable offer that was rejected by the consumer.

If none of these factors are present, CAV may consider the matter likely to settle.

Study tip

When you are answering a question about CAV conciliation services, remember that these government agencies are not courts or tribunals. They do not have power to hear cases. They can only help people reach a settlement. Therefore, avoid using language in your answers which suggests that CAV has the power to make a binding decision on the parties.

Ahmad and his landlord

EXAMPLE

Ahmad rents a house in Essendon from Lachlan. He has been renting the property for more than two years now, and he hasn't had many problems with the landlord.

Recently, the house has developed foundation problems. The walls are cracking, the pipes have burst, and Ahmad now has no hot water. He has contacted Lachlan to ask him to repair the house, but Lachlan has told Ahmad he's short of money, so if Ahmad wants the house repaired, he will need to pay for it himself.

Lachlan owns at least 10 other rental properties in Victoria. CAV's database shows that Lachlan has been the subject of complaints in the past from tenants, and has refused every attempt in the past by tenants to try to resolve disputes with him through CAV.

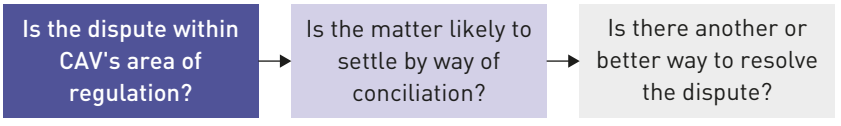
Other or better ways to resolve the dispute

The parties will need to consider whether there are other or better ways to resolve the dispute. Other than determining whether the dispute is within CAV's jurisdiction, and whether the matter is likely to settle, other matters that the parties need to consider include:

- whether they will be able to, or have tried to, resolve the dispute themselves (e.g. through **negotiation**)
- whether the dispute is best resolved by a court or **tribunal** making a binding order on the parties, rather than reaching a resolution themselves
- whether the other party is unlikely to take the conciliation process seriously, or may not show up, so issuing a claim in a court or tribunal is more likely to force them into realising the seriousness of the dispute
- whether one party would prefer the formality of the tribunal or court processes to resolve the dispute
- whether the matter is too big or complex to be appropriate for CAV
- whether resolution of the matter is urgent, so a court is a better option (e.g. an order to stop a trader selling a car to someone else).

negotiation informal discussions between two or more parties in dispute, aiming to come to an agreement about how to resolve that dispute

tribunal a dispute resolution body that resolves civil disputes and is intended to be a less costly, more informal and faster way to resolve disputes than courts



Source 5 Questions that can be asked to decide whether CAV is an appropriate dispute resolution body.

Strengths and weaknesses of Consumer Affairs Victoria

When considering the appropriateness of CAV for a particular dispute you should consider its strengths and weaknesses.



Source 6 CAV helps parties, including tenants and landlords, end a dispute by themselves.

Strengths

CAV has a number of strengths or benefits as a dispute resolution body:

- its conciliation service is **free**, meaning that it remains accessible to all Victorians, regardless of their ability to pay
- the conciliation process is **informal**, and can be conducted over the telephone, which removes many anxieties people have with the formalities of a courtroom
- CAV ensures **procedure fairness** by allowing both sides the opportunity to present their case and rebut the other side's case
- CAV assesses disputes individually, **case by case**, reducing waste of time and resources on disputes that are clearly unlikely to be resolved through conciliation
- CAV aims to conciliate disputes in a **timely manner**, so parties do not have to wait months or years for resolution through a more formal body such as a court
- the conciliation process offered by CAV ensures that parties **reach a resolution themselves**. Parties may be more likely to accept an outcome if it has not been imposed or forced on them.

Study tip

If you are asked to evaluate CAV, you should link each of the strengths and weaknesses to one or more of the principles of justice. That way you can demonstrate how CAV achieves or does not achieve those principles. Can you identify which principle of justice each of the strengths and weakness on this page best achieves or does not achieve?

Study tip

A summary of CAV's strengths and weaknesses can be found on your obook assess.

Weaknesses

Despite its strengths, CAV also has a number of weaknesses:

- CAV's **role is limited** mainly to consumer and landlord disputes, meaning that it has no power to assist with the many other types of civil disputes. CAV will also normally refer a matter which is only partly in its area, and partly in another body's area, to that other body. This narrows the range of disputes it covers even further.
- CAV has **no power to compel parties to undergo conciliation**. A willing party to a dispute may not be able to use CAV's dispute resolution services if the other party is not also willing.
- CAV also has **no powers to enforce any decisions** reached by the parties in conciliation. Unless the parties have entered into a binding agreement at conciliation, then one of the parties may just ignore the outcome. This can leave the parties no better off than they were before conciliation.
- **Not all cases are accepted** by CAV. This is because of CAV's criteria and its prioritisation of cases.
- The informal nature of the conciliation process, and lack of a binding decision, may mean that one or more parties may **fail to take the matter seriously**.
- CAV **is not appropriate** for large and complex disagreements, including those with difficult legal questions or several different parties, which can only be resolved by a court or tribunal which has greater expertise in the law.





Source 7 The CAV conciliation process is informal and can be conducted over the telephone.

7.1 CHECK YOUR LEARNING

Define and explain

1. Explain what CAV is and describe its role in resolving civil disputes.
2. Describe the main dispute resolution process used by CAV.
3. Does CAV have the power to force the parties to attend a conciliation or agree to a resolution? Explain.
4. Describe three types of disputes that CAV can refer to conciliation.
5. Identify three factors that may be relevant to determining whether there is another or better way of resolving the dispute.

Synthesise and apply

6. Look back at Source 2. In your view, would CAV be an appropriate body to help resolve this dispute? Justify your answer.
7. Read the article 'Window delivery dispute sees homeowner threaten manufacturer with Consumer Affairs'.
   - **a** What allegation is Geoff Morgan making?
   - **b** Explain why this dispute is within CAV's jurisdiction.
   - **c** What is the main issue in dispute in this case?
   - **d** Describe the benefits of Geoff Morgan using CAV as a dispute resolution body.
   - **e** What may be some issues that Geoff Morgan confronts when trying to use CAV to resolve his dispute?
   - **f** The article states 'Geoff Morgan has threatened to take the North Geelong company to Consumer Affairs Victoria in a bid to recoup a $300 window repair bill'. Do you think this is an accurate statement? Explain.
8. Read the example about Ahmad and his landlord.
   - **a** In your view, is CAV an appropriate dispute resolution body for this dispute? Justify your answer.
   - **b** What would you advise Ahmad do in this situation?

Analyse and evaluate

9. Evaluate the ability of CAV to resolve small disputes between consumers and traders.
10. 'People don't take CAV seriously. It needs to be given more power to be able to work properly as a dispute resolution body'. Do you agree? Give reasons for your answer.

Check your obook assess for these additional resources and more:

- **Student book questions**
  7.1 Check your learning
- **Video tutorial**
  Introduction to Chapter 7
- **Going further**
  CAV and enforcement action
- **Worksheet**
  Appropriateness of CAV

7.2 THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

The Victorian Civil and Administrative Tribunal (VCAT) is a tribunal (rather than a court). Tribunals are dispute resolution bodies which deal with a limited area of law, and build up expertise in that area. The process of dispute resolution is less formal than the courts, and is intended to be a cheaper and more efficient way of resolving disputes.

Established in 1998, when the Victorian Parliament passed the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), VCAT hears and determines a range of civil and administrative cases in Victoria. VCAT is one of Australia's busiest tribunals, receiving more than 85 000 claims per year.

Structure of the Victorian Civil and Administrative Tribunal

member
the person who presides over final hearings and compulsory conferences at VCAT. Members include the President, vice-presidents, deputy presidents and senior and ordinary members

The governing body of VCAT consists of the President, a number of vice-presidents, deputy presidents, senior **members** and ordinary members. The President is a judge of the Supreme Court, and vice-presidents are judges of the County Court. They are responsible for the management and administration of VCAT.

VCAT is divided into four divisions. Each contains one or more lists, which hears certain types of disputes. The divisions and lists as of 2017 are shown in Source 1 below.

DIVISION	TYPES OF DISPUTES	LISTS
Administrative	Deals with professional conduct inquiries and applications from people seeking a review of decisions made by government and other authorities.	• Legal Practice • Planning and Environment • Review and Regulation
Civil	Deals with a range of civil disputes relating to consumer matters, domestic building works, owners' corporation matters, retail tenancies, sale and ownership of property, and use or flow of water between properties.	• Civil Claims • Building and Property • Owners Corporations
Human Rights	Deals with matters relating to guardianship and administration, equal opportunity, racial and religious vilification, health and privacy information, disability matters and decisions made by the Mental Health Tribunal.	• Guardianship • Human Rights
Residential Tenancies	Deals with tenancy disputes, including disputes between residential tenants and landlords, rooming house owners and residents, caravan park owners and residents, and site tenants and owners.	• Residential Tenancies

Source 1 VCAT's divisions and lists as of 2017

Purpose of the Victorian Civil and Administrative Tribunal

VCAT's purpose is to provide Victorians with a **low-cost, accessible, efficient and independent** tribunal delivering high-quality dispute resolution processes. VCAT provides parties with an alternative to court to resolve certain types of civil disputes through its various lists. Each list deals with a limited area of law and builds up expertise in that area. VCAT uses various dispute resolution methods. If a matter

does not settle, there will be a formal hearing at which a member of VCAT will make a **binding decision on the parties**.

VCAT aims for service excellence by being, among other things, accessible, fair and impartial in order to uphold the principles of justice. How VCAT approaches each of these elements to achieve its purpose is explored further below.

Did you know?

Prior to the establishment of VCAT in 1998, a number of tribunals operated in Victoria. This proved to be inefficient and expensive. The creation of VCAT resulted in the amalgamation of 15 boards and tribunals to offer a one-stop shop dealing with a range of civil disputes.

→ GOING FURTHER

In the 2015–16 financial year, 85 961 claims were lodged with VCAT. The three most popular lists appear in Source 2 below. These cases made up 89 per cent of the cases lodged with VCAT. Residential tenancies disputes (disputes between landlords and tenants) alone made up more than 65 per cent of claims filed with VCAT.

LIST	CASES LODGED IN 2015–2016
Residential Tenancies	56 412
Guardianship	13 771
Civil Claims	6789
Total	**76 972**

Source 2 Most popular lists at VCAT in the financial year 2015–16

Low cost methods of resolving disputes

VCAT provides a low-cost method of resolving disputes in a number of ways:

- generally, the parties need only pay a small amount for **filing their claim**, although costs vary from list to list. VCAT fees generally increase from year to year. Until 1 July 2018, the standard fee was $62.70 for smaller claims. You can access VCAT's website to get up to date information about fees
- from 1 July 2016, VCAT changed its fee structure to create three tiers or levels of fees: corporate (businesses with a turnover of more than $200 000 per year and government agencies), standard (individuals and small businesses) and health care card holders. The aim of this was to make corporate applicants pay higher fees, and to make those who are less able to pay (being health care card holders) pay only nominal fees (or for some type of disputes, no fee)
- there are **no hearing fees for some claims**, such as small civil claims (e.g. a claim of less than $15 000); however, for other disputes a hearing fee is payable
- in many lists, the parties **do not have to go through pre-trial procedures** which can often add to the legal costs incurred by the parties. You will study court pre-trial procedures in the next topic
- costs are further reduced because the **parties can represent themselves**, rather than paying lawyers. More than 80 per cent of people represent themselves at VCAT. In some situations, VCAT may not allow a person to be legally represented, particularly where the other party is not represented.

There has been a decline in the number of civil claims lodged in the Civil Claims List with VCAT since a fee rise in 2013. Further fee changes were made in July 2016. They included additional hearing fees for some matters, as well as creating a three-tiered system of charging fees.

The accessibility of the Victorian Civil and Administrative Tribunal

VCAT conducts hearings in various locations in Victoria. Its main centre is in Melbourne, but it has a number of venues across the state. It is actively aiming to improve its accessibility, using processes such as

telephone and video conferences in place of attending the tribunal, and allowing people to lodge certain documents online. To encourage Koori participation at VCAT, from 2017 there is now a Koori Engagement Project Officer who raises awareness about VCAT among Victoria's Koori community.

VCAT hearings are also less formal than court hearings, which encourages people to feel they can use the tribunal.

Efficiency of the Victorian Civil and Administrative Tribunal



Source 3 VCAT's main office at 55 King Street, Melbourne

VCAT constantly aims to reduce waiting times. Reducing the waiting time for parties to have their disputes resolved makes the process more efficient. The average time for a case to be finalised in VCAT varies from list to list. In 2015–16, the Civil Claims List had a median wait time of 10 weeks, while the Residential Tenancies List had a median wait time of 2 weeks. The Planning and Environment List, however, had a median wait time of around 6 months. Information about current estimated waiting time is available on VCAT's website.

VCAT has also recently focused on technology and upgraded its computer systems to ensure greater efficiency in handling claims.

Independence of the Victorian Civil and Administrative Tribunal

VCAT's members are independent, and will act as unbiased adjudicators. VCAT is also supported by **Court Services Victoria (CSV)**, established in 2014. CSV is independent of **parliament** and **government**.

Dispute resolution methods used at the Victorian Civil and Administrative Tribunal

VCAT uses three main types of dispute resolution methods:

- **mediation**, including a SMAH process for small civil claims
- compulsory conferences
- a final hearing before a member.

Mediation

Mediation is a cooperative method of resolving disputes. It is a tightly structured, joint problem-solving process in which the parties discuss the issues involved, develop options, consider alternatives and reach an agreement through negotiation. Parties may bring support people or legal representatives with them.

The parties attempt to reach an agreement with the help of a **mediator**. A mediator does not interfere, but allows the parties to have control of their dispute, explore the options and attempt to reach an agreement that satisfies the needs of both parties. The role of the mediator is to aid 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 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, and will not offer legal advice.

Although mediation is not legally binding, in most situations a deed or terms of settlement is drawn up once the parties reach a resolution. The deed of settlement is then enforceable through the courts if

Court Services Victoria (CSV)
an independent body that provides services and facilities to Victoria's courts and the Victorian Civil and Administrative Tribunal

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

government
the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

mediation
a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

mediator
an independent third party who does not interfere or persuade but helps the parties in a mediation as they try reach a settlement of the matter

one party does not comply with its terms. In some situations, VCAT may make an order which gives effect to the terms of settlement, so that the terms will become a formal order of the tribunal and be binding.

Most disputes at VCAT will go to mediation before a final hearing. If the matter settles at mediation, then there is no need for a hearing.

Short mediation and hearing

Disputes about goods and services in the Civil Claims List valued at less than $3000 may be listed for a **short mediation and hearing (SMAH)**. A qualified VCAT staff mediator conducts the mediation. If the dispute does not settle at mediation, then the matter will go straight to hearing on the same day before a different VCAT member. In the financial year 2015–16, about half of the cases that went to mediation as part of the SMAH process settled.

short mediation and hearing (SMAH) a dispute resolution process used for small claims about goods and services in the Civil Claims List at the Victorian Civil and Administrative Tribunal (VCAT). Both the mediation and the hearing will be conducted on the same day (if the dispute is not settled at mediation)

Compulsory conferences

Compulsory conferences are confidential meetings during which the parties discuss ways to resolve their dispute in the presence of a VCAT member.

Compulsory conferences use a conciliation process. The VCAT member who assists in the process may suggest forms of settlement, and may explore the likely outcomes of the case if it goes to a hearing. That is, a member may give a view as to the possible decision that may be reached at hearing. The VCAT member who assists in the compulsory conference generally will not hear the case at the final hearing, and will not tell the member presiding over the hearing what happened at the compulsory conference.

compulsory conference a confidential meeting between the parties involved in a dispute (in the presence of an independent third party) to discuss ways to resolve their differences

Final hearing

If the matter has not settled at mediation, compulsory conference or in any other way, then it will be listed for a final hearing before a VCAT member. At the hearing, the parties will be given an opportunity to present their case, which will include giving and hearing **evidence**, asking questions of witnesses and providing documents which support their case. A VCAT member will oversee the hearing and **make a binding decision** on the parties.

evidence information used to support the facts in a legal case

Hearings are intended to be less formal than court hearings or trials. In fact, VCAT has an obligation to conduct each proceeding with **as little formality and technicality as possible**, though it can adopt rules of evidence or procedures if necessary.

Finally, VCAT has an obligation under Section 97 of the *Victorian Civil and Administrative Tribunal Act* to act fairly when resolving disputes.

Increasing numbers of people are turning to VCAT to settled their wedding-related complaints as shown in the article below.

IN THE NEWS

Vegetarian bride takes wedding caterer to VCAT for not serving tofu or vegie patties

Fiona Hudson, *Herald Sun*, 21 January 2017

A VEGETARIAN bride who hired a 'dude food' van to cater for her wedding reception has been awarded $720 compensation because the cook neglected to serve marinated tofu or vegie patties.

The Melbourne bride told a tribunal she starved on her big day because the cook ignored explicit instructions and served only meat and mushroom burgers — neither of which she eats.

The guest list of about 100 included eight vegetarians, two vegans, two coeliacs, and a coeliac who was also lactose intolerant and couldn't eat onion. The newlyweds claimed many of them left the reception to find acceptable food.



Source 4 The lack of vegetarian options at weddings is one of many disputes dealt with regularly by VCAT.

'This not only caused us embarrassment and stress, but meant we had less time to spend with them on our special day,' the bride told the Victorian Civil and Administrative Tribunal.

The unusual case is among hundreds of wedding-related complaints lodged with Consumer Affairs Victoria in 2015 and 2016, case files released to the Sunday Herald Sun under Freedom of Information laws reveal.

Dozens of disgruntled newlyweds seeking to avenge glitches that marred their big day are turning to VCAT...

The vegetarian bride who sued Dude Food Man Pty Ltd at VCAT declined to comment, except to confirm the company had not to date paid the ordered compensation. The caterer wasn't represented at last year's tribunal hearing, and the Sunday Herald Sun was unable to contact the owner.

Did you know?

To be enforceable, a VCAT order was required to be certified by a court first before enforcement procedures were undertaken. In 2017 the Victorian Government agreed to simplify the enforcement of VCAT orders so that the certification was no longer necessary.

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 or 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**, and can be enforced if a party does not comply with the decision.

Appeals

appeal
an application to have a higher court review a ruling (i.e. decision) made by a lower court

Appeals from a decision made by VCAT may only be made on a question of law (also known as a point of law). For example, a party may argue that the law has not been properly interpreted in the case. Leave (permission) is required to appeal a VCAT decision.

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.

In the legal case of *Hoskin v Greater Bendigo City Council* [2015] VSCA 350 an appeal of a VCAT decision was dismissed by the Court because it was not made on a question of law.

LEGAL CASE

Challenge to Bendigo mosque dismissed by the Court of Appeal and High Court

Hoskin v Greater Bendigo City Council [2015] VSCA 350 (16 December 2015)

An application was made to the Greater Bendigo City Council for a planning permit to develop a mosque, sports hall and other facilities on land in East Bendigo. The City Council granted the permit with conditions. An application was made by various persons to VCAT to review

that decision on the basis of a number of objections, including that the character of the area will change. Justice Greg Garde AO RFD, the President of VCAT, presided over the hearing, at which the application was dismissed.

Two of the objectors appealed to the Court of Appeal on the grounds that an error had been made by VCAT in the way it approached the objectors' concerns about the mosque's adverse social effects. The Court of Appeal dismissed the appeal, finding no questions of law were reasonably arguable.

The objectors sought leave to appeal to the High Court. The High Court refused leave.



Source 5 Objectors failed in their attempt to stop a mosque being built in Bendigo.

7.2 CHECK YOUR LEARNING

Define and explain

1 Define the term 'tribunal', and describe two ways that a tribunal is different to a court.
2 Outline the structure of VCAT, and identify one type of matter that each of its divisions can hear.
3 Explain two ways that VCAT ensures that Victorians are provided with a low-cost dispute resolution process.

Synthesise and apply

4 Read the article 'Vegetarian bride takes wedding caterer to VCAT for not serving tofu or vegie patties'.
   a Who was the applicant in this case, and who was the respondent?
   b In which VCAT list would this claim have been issued?
   c What allegation was made in this dispute?
   d What was the outcome of this case?
   e In your view, why would VCAT as opposed to a court have been better to hear this dispute? In your answer, make reference to at least one of the principles of justice.
   f If the respondent wished to appeal the case, on what basis can an appeal be made, and which court would hear the appeal?
5 Read the legal case *Hoskin v Greater Bendigo City Council*.
   a Who were the applicants in this case, and who was the respondent?
   b What was the nature of the objection that was made?
   c Which dispute resolution method was used in this situation to resolve the dispute?
   d Why was the appeal heard in the Court of Appeal, and not the Trial Division of the Supreme Court? What was the outcome of the appeal?
   e Did the High Court have a full hearing of the appeal? Why or why not?
   f What options do the objectors now have in terms of appeals?

Analyse and evaluate

6 Should the short mediation and hearing (SMAH) dispute resolution be used in larger claims at VCAT? Give reasons.
7 In the next topic, you will learn about the strengths and weaknesses of VCAT. Based on what you have learned so far, describe one advantage and one disadvantage of a hearing being conducted with as little formality as possible.

Check your obook assess for these additional resources and more:

» **Student book questions**
7.2 Check your learning

» **Sample**
VCAT order

» **Weblink**
About VCAT

7.3 AN EVALUATION OF THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

VCAT is appropriate for many different types of claims, and its processes have strengths and weaknesses when considering its ability to achieve the principles of justice when resolving disputes.

Appropriateness of the Victorian Civil and Administrative Tribunal

In determining whether VCAT is the most appropriate body to resolve a civil dispute, the following points should be considered:

- whether the dispute is within VCAT's jurisdiction
- whether there are other or better ways to resolve the dispute.

Victorian Civil and Administrative Tribunal's jurisdiction

exclusive jurisdiction the lawful authority or power of a court, tribunal or other dispute resolution body to decide legal cases to the exclusion of all others

VCAT obtains its power to hear cases through statutes made by parliament. Often the parties will have no choice but to bring their disputes to VCAT, because it has **exclusive jurisdiction** to hear certain types of claims. Exclusive jurisdiction means that only VCAT has the power to hear and determine that type of dispute, and not a court.

Where VCAT does not have exclusive jurisdiction, parties can use VCAT or another dispute resolution body such as a court.

The types of claims that can be heard by VCAT include claims about:

- purchases or sales of goods and services (unlike CAV, VCAT accepts claims made by sellers and businesses as well as purchasers)
- disputes between tenants and landlords relating to renting a house, unit or flat, a room in a rooming house or a site or a caravan in a caravan park
- owners' corporations (bodies which manage the shared or common property of a property)
- discrimination, sexual harassment, victimisation or vilification
- domestic building works
- lawyers, lawyers' conduct and the provision of legal services
- the flow of water between properties
- retail tenancies
- the use or development of land, including objections in relation to permits granted for use of land.

review jurisdiction the power of a body to consider a decision made by an agency or authority in order to either confirm, change or set aside (i.e. overturn) that decision

VCAT also has a **review jurisdiction** to revisit decisions made by certain authorities. This means it can affirm, vary or set aside the decision made. This jurisdiction was used to determine the application made by Bendigo residents about the granting of the permit to build a mosque in Bendigo.

Disputes that VCAT cannot hear

There are a number of disputes that VCAT cannot hear, and so it will not be an appropriate body to resolve these types of disputes. Examples include:

- representative proceedings (class actions)
- disputes between employers and employees
- disputes between neighbours (unless it is also a dispute about an owners' corporation)

- disputes between drivers in car accidents
- disputes between tenants and tenants
- disputes involving federal or state law where VCAT has not been given any power to hear the matter.

Below is an example of a dispute that was subject to international rules and could not be heard by VCAT.

Where's the entertainment?

LEGAL CASE

Ivanovic v Qantas Airways Limited (Civil Claims) [2016] VCAT 2202 (23 December 2016)

A passenger on a Qantas flight issued a claim in VCAT seeking, among other things, $100 in compensation because the inflight entertainment system did not operate for the entirety of the flight. Zoran Ivanovic was compensated with 3000 frequent flyer points, but he was not satisfied.

The VCAT member dismissed the claim. VCAT held that it did not have federal jurisdiction that would allow it to hear and determine a claim such as this, because the flight was an international flight and the ticket was subject to international rules. VCAT therefore found that any claim by Ivanovic needed to be brought in a court which had federal jurisdiction, and VCAT did not have jurisdiction in this particular instance.



Source 1 What happens when your inflight entertainment system doesn't work and you've paid money to use it?

Other or better ways to resolve disputes

The parties will need to consider whether there are other or better ways to resolve the dispute. Other than determining whether the dispute is within VCAT's jurisdiction, parties should also consider:

- whether the parties are able to resolve the dispute themselves through negotiation or mediation
- the nature of the fees (for some lists, the fees are just as high as court fees, or even higher)
- whether the parties wish to have greater avenues of appeal (appeals from VCAT decisions are limited to appeals on a question of law)
- whether one or more of the parties are unlikely to take VCAT seriously, and so a court is a preferred dispute resolution body
- whether one or more of the parties would prefer the formality of the courtroom
- whether the matter is of a complexity or size that is not appropriate for VCAT
- whether the party prefers the court to resolve the dispute because of the **doctrine of precedent**. VCAT is not a court, and it cannot make new law: it can only apply law made by parliament or the courts. Its own decisions are not binding on anyone. This means the parties may have no certainty that VCAT will decide their case in the same way as in a previous case.

doctrine of precedent the common law principle by which the reasons for the decisions of higher courts are binding on courts ranked lower in the same hierarchy in cases where the material facts are similar

Strengths and weaknesses of the Victorian Civil and Administrative Tribunal

When you are considering the appropriateness of VCAT for a particular case, and assessing the extent to which it helps the civil justice system achieve the principles of justice, you should consider its strengths and weaknesses.

Strengths

VCAT has a number of strengths in resolving disputes:

- VCAT is **normally cheaper** than courts due to low application fees, usually lower hearing fees, the costs saved by not having to undertake expensive pre-trial procedures and parties being able to represent themselves
- it generally offers a **speedy resolution of disputes** – the average time from application to resolution of disputes in its busiest list, the Residential Tenancies List, is approximately two weeks
- an **informal atmosphere** ensures that parties can put their case forward in their own way, which can make people feel more comfortable with the process
- the **flexibility** of VCAT's hearing processes ensure **fairness** and **equality** for an unrepresented party, because the member can aim to ensure an unrepresented party has an equal opportunity to understand processes and present their case
- each list operates in its own **specialised jurisdiction**, resulting in tribunal personnel developing expertise in resolving disputes in that area of law
- parties are **encouraged to reach a resolution** between themselves, and often VCAT will refer matters to mediation or a compulsory conference before the matter is determined by a final hearing. This saves costs and time, making it more accessible to the parties.
- smaller claims benefit from the **more streamlined process** (court cases have more steps, which can often be complex, time-consuming and expensive)
- a decision made in a final hearing is **binding** on the parties, which means it is enforceable (unlike a decision that may have been reached by the parties themselves).

Below is an example of VCAT's processes ensuring unrepresented parties are treated fairly and equally.

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing [or trial] processes should be fair and impartial)

equality
one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage

LEGAL CASE

Fairness and equality upheld at VCAT hearing

Udugampala v Essential Services Commission (Human Rights) [2016] VCAT 2130 (30 December 2016)

This case involved an applicant who had no legal representation. The VCAT member, in their final judgment, made reference to the role of VCAT in ensuring that both fairness and equality are upheld when a party is not represented. Below is an extract of the member's judgment:

1 The applicant in this matter appeared without representation.
2 The Tribunal is required to ensure that parties are provided with procedural fairness and equality before the law.
3 Where one party is represented and the other is not, it may be necessary during a hearing to provide an unrepresented party with explanation or direction about the processes and procedures of the Tribunal. This cannot be an intervention in the form of advice or guidance in the substance or conduct of the case, and may not put the unrepresented person in a position of advantage.

Study tip

For each of the strengths and weaknesses of VCAT you should identify the principle(s) of justice that it most aligns to.

Weaknesses

VCAT has a number of weaknesses to consider:

- due to increased use of legal representation, the **costs of taking a matter to VCAT** can often be as high as, if not higher than, court costs. 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**, including class actions, VCAT is not an appropriate forum to resolve the dispute (VCAT has no jurisdiction to hear representative proceedings)
- there is a **limited right to appeal** VCAT decisions. Decisions can only be appealed on a point of law, and to the Supreme Court, making it complex and expensive to appeal a case
- **it may be too informal** – some parties may feel uncomfortable or ill-equipped to deal with the lack of formal procedure, or may prefer a formal process of giving evidence
- VCAT members are normally **not judicial officers**, meaning they may be casual, sessional members without as much experience in hearing matters as judges
- VCAT has **suffered long delays** in some of its lists, particularly the Planning and Environment List. Some argue this hurts the economy, as many construction projects are unable to go ahead without the appropriate permits
- because VCAT is not part of the court hierarchy, **it is not bound by precedent**, and its members are not bound by previous VCAT decisions. Over time, inconsistency may develop in the decisions made in similar cases.

Study tip

A summary of VCAT's strengths and weaknesses can be found on your obook assess.

precedent principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

7.3 CHECK YOUR LEARNING

Define and explain

1 Define the following terms:
   - **a** exclusive jurisdiction
   - **b** review jurisdiction.

2 Identify two strengths of using VCAT as a dispute resolution body.

3 Describe three dispute resolution methods used by VCAT.

Synthesise and apply

4 Using the internet, access the article 'Somers community wins VCAT battle against Mornington Council after donations pour in'.
   - **a** Who were the applicants in this case, and who were the respondents?
   - **b** What was the issue in dispute?
   - **c** What was the key problem that almost restricted the applicants from accessing VCAT? What principle of justice was possibly at risk as a result?
   - **d** What was the outcome in this case?

5 Read the legal case *Ivanovic v Qantas Airways Limited*.
   - **a** Explain the complaint made in this case.
   - **b** What was the amount of compensation that the applicant was seeking?
   - **c** Why did VCAT dismiss the case?
   - **d** Would you recommend that the applicant take this matter further? Give reasons for your answer.

6 For each of the following scenarios, consider whether VCAT is an appropriate body to help resolve the dispute. Justify your answer.
   - **a** Jan wants to sue her employer for failing to pay her enough.
   - **b** Matthew is a landlord and is owed rental arrears by his tenant. He wants an order that the tenant pay the arrears.
   - **c** Theo and nine other persons have a similar claim against an underwear maker. They are considering a class action.

Analyse and evaluate

7 Read the legal case *Udugampala v Essential Services Commission*. How does this case demonstrate VCAT upholding each of the principles of justice?

8 Do you think that increasing costs at VCAT are jeopardising people's ability to access the civil justice system? Give reasons.

Check your obook assess for these additional resources and more:

- » **Student book questions** 7.3 Check your learning
- » **Going further** Court Services Victoria
- » **Video tutorial** How to answer questions about 'appropriateness'
- » **Worksheet** Evaluation of VCAT

7.4 THE PURPOSES OF CIVIL PRE-TRIAL PROCEDURES

Courts are the main dispute resolution bodies in Victoria. The courts that resolve civil disputes in Victoria are the Magistrates' Court, the County Court and the Supreme Court of Victoria.

If a plaintiff decides to issue a proceeding in the County Court or the Supreme Court, the parties must complete various pre-trial procedures before the proceeding is ready for trial.

Many of the pre-trial procedures are mandatory, and must be undertaken before the dispute is ready for trial. In other instances, the judge (who has the power to do so) may order that one or both parties undertake a certain pre-trial step.

Pre-trial procedures are set out in the relevant rules of the court:

- Supreme Court civil pre-trial procedures are specified in the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).
- County Court civil pre-trial procedures are set out in the *County Court Civil Procedure Rules 2008* (Vic).

These are referred to as the 'court rules' or 'rules of the court'.

In this Area of Study you are expected to explain the purposes of pre-trial procedures, using examples. It is therefore useful to consider the types of pre-trial procedures, and the purposes of each of them.

pleadings
a pre-trial procedure during which documents are filed and exchanged between the plaintiff and the defendant and which state the claims and the defences in the dispute

discovery of documents
a pre-trial procedure which requires the parties to list all the documents they have that are relevant to the case. Copies of the documents are normally provided to the other party

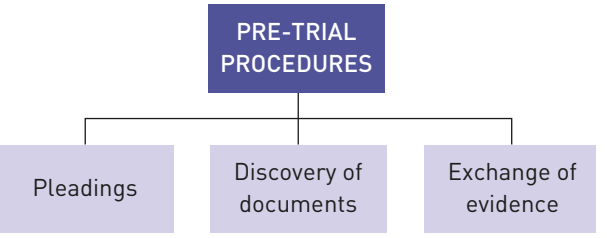
statement of claim
a document filed by the plaintiff in a civil case to notify the defendant of the nature of the claim, the cause of the claim and the remedy sought

remedy
a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

defence
a document filed by the defendant which sets out a response to each of the claims contained in the plaintiff's statement of claim; part of the pleadings stage of a civil disputethe plaintiff's statement of claim. It is a part of the pleadings stage of a civil dispute

Types of pre-trial procedures

A party to a court case may need to undertake a number of pre-trial procedures. Three of these are **pleadings**, **discovery of documents**, and exchange of evidence.



Source 1 Three types of pre-trial procedures

Pleadings

Pleadings are a series of documents filed and exchanged between the parties to a court proceeding. They set out and clarify the claims and the defences of the parties and help to define the issues that are in dispute. The two main documents exchanged during the pleadings stage are:

- a **statement of claim**, which is filed with the court by the plaintiff, and served (formally given) to the defendant. It sets out in detail the claims made against the defendant and the **remedy** sought by the plaintiff. For example, if the plaintiff makes a claim that the defendant has breached a contract, then the statement of claim will set out (in paragraph form) what the contract was, how the defendant breached it, and what loss the plaintiff suffered because of the breach
- a **defence**, which is filed by the defendant. It sets out the defendant's response to each of the plaintiff's claims. In the above example, the defendant may (in the defence) admit that there was a contract, but may deny that he or she has breached that contract.

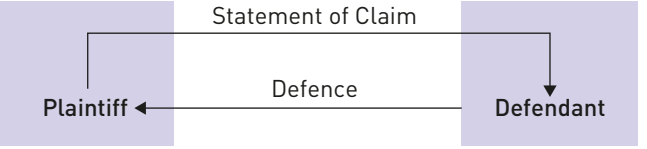
In general, if claims and defences are not included in the parties' pleadings, they cannot make new claims and raise new defences later in court, except with the leave (permission) of the court or with the consent of the other party.

Purposes of pleadings

The purposes of pleadings are to:

- require the parties to state the main claims and defences of their case. This aims to achieve **procedural fairness** by ensuring the other side knows what the claim or the defence is about

- compel each party to state the **material facts** and particulars (details) they are relying on to prove 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
- **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



Source 2 The two main documents exchanged during the pleadings stage.

- set **the limits to the dispute**, which enables other procedures such as discovery to be confined to the issues in dispute
- assist in **reaching an out-of-court settlement** where appropriate. For example, if a claim or defence is so compelling, it might force the other party to pursue a strategy to settle the claim before trial.

The purposes of pleadings are highlighted in Former Chief Justice Mason and Justice Gaudron's statement in the case below.

material facts
the key facts or details in a legal case that were critical to the court's decision

The purposes of pleadings

LEGAL CASE

Banque Commerciale SA, En liquidation v Akhil Holdings Pty Ltd (1991) 69 CLR 279

In the High Court case of *Banque Commerciale SA, En liquidation v Akhil Holdings Pty Ltd*, 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.

Discovery of documents

The discovery of documents stage enables parties to get copies of documents that are relevant to the issues in dispute. Documents which are relevant to the claims and defences are listed in a formal document and the other side is entitled to inspect those documents. For example:

- if the plaintiff claims that there is a written contract, you would expect that the plaintiff will have a copy of that contract
- if the plaintiff claims to have suffered physical injuries, you would expect there to be medical records which show the nature and extent of the injuries
- if the plaintiff claims to have suffered loss because of payment of medical expenses, then they should be able to show invoices and receipts of those medical expenses
- if the plaintiff claims to have suffered abuse and humiliation in a workplace because of emails being sent around, those emails must be made available for the other side.

This is very different from what is often portrayed in TV shows, where a party may for the first time at trial 'reveal' a document or put to a witness a document that the other party has never seen. Instead, the parties will have a copy of each other's documents before trial, and there is now an obligation on the parties to disclose the existence of critical documents at the earliest reasonable time.

Did you know?

The word 'document' is given a broad definition and means any record of information. Not only does it include written documents such as letters, emails, handwritten notes and contracts, but it also includes things such as videotapes, audiotapes, discs, films or other recordings.

Purposes of discovery

The purpose of the discovery stage is to:

- require the parties to **disclose or reveal all relevant documents** to the other side so that all parties have access to the documents, ensuring fairness in the process
- **reduce the element of surprise at trial** and avoid a 'trial by ambush', since the parties have seen the relevant documents well in advance at trial and have had time to prepare their arguments
- allow each party to **determine the strength of the other side's case** and their own likelihood of success
- ensure that the parties and the court have **all the relevant material and documents** required to achieve a just outcome (some of the documents will then be submitted in evidence to support a party's case)
- assist in **reaching an out-of-court settlement** where appropriate. For example, if particular documents are compelling, they might force one party to reconsider their claim or defence.

LEGAL CASE

Predictive coding: A first for Australia

McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1) [2016] VSC 734 (2 December 2016)

In December 2016, Justice Vickery in the Supreme Court of Victoria had to determine how discovery should be managed so that the Court could ensure the just, efficient, timely and cost-effective resolution of the real issues in dispute.

The claim was a large claim involving tens to hundreds of millions of dollars in relation to the design and construction of a natural gas pipeline in Queensland. Approximately 4 million electronic documents had been scanned by the plaintiff, which it estimated could be reduced to 1 400 000 as potentially being relevant. Justice Vickery found that the cost of manually reviewing 4 million or even 1.4 million documents was unrealistic, as it would take over 583 working weeks for one junior solicitor to review them.

Justice Vickery ordered that the use of predictive coding technology, or Technology Assisted Review, was appropriate in this case for the purposes of discovery. Predictive coding technology would involve the use of computer software which would be 'trained' to review documents and identify those that are relevant.

His Honour referred to overseas cases which had recently approved the use of such technology, noting that the use of technology is just as accurate as, and probably more accurate than, a person manually reviewing documents.

Following the decision in this case, the Supreme Court issued new guidelines for technology on 30 January 2017 which state that in larger cases, Technology Assisted Review will be an accepted method of conducting searches of documents for the purposes of completing discovery.

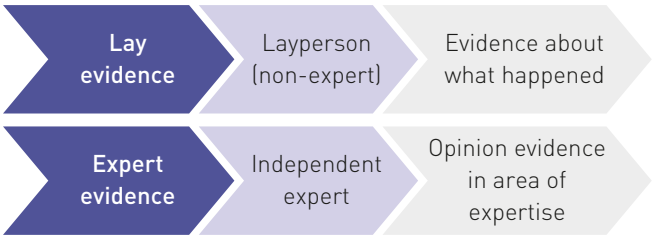


Source 3 When it comes to discovery, will technology replace much of the role of lawyers in the future?

Exchange of evidence

To prove their case, the plaintiff and defendant will generally need to rely on evidence. This is particularly the case where the documents are unable to speak for themselves.

For example, imagine a breach of contract case where the plaintiff has listed in discovery a contract with alterations in pen, marked with the initials 'LJ'. Either party may wish to rely on oral evidence as to who crossed out the contract, and who initialled it, unless they are able to agree on that fact, as the contract itself may not give that information.



Source 4 Types of evidence

There are generally two types of evidence: **lay evidence** and **expert evidence**.

lay evidence
evidence given by a layperson (i.e. an ordinary person) about the facts in dispute

expert evidence
statements of fact given by an independent expert about an area within his or her expertise

Lay evidence

Laypersons or ordinary people give lay evidence. They do not give evidence about their opinion or expertise about a matter, but rather about what they know about the factual circumstances.

The type of evidence from laypersons will depend on the case. For example, in a negligence case in which the plaintiff alleges she slipped and fell on some oil left by the defendant outside her shop, the plaintiff may rely on evidence given by a layperson who saw the plaintiff falling.

Depending on what the court has ordered, laypersons might give evidence as follows:

- **as a witness outline** – An outline is a brief description of the topics the witness will give evidence on when they attend trial. The outline allows the other parties to know in advance what the evidence will be about.
- **by filing a witness statement** – A witness statement is the written form of evidence that the witness would have given orally. A witness who provides a witness statement may only need to attend trial for **cross-examination** (that is, being questioned by the other party) and **re-examination** (that is, being questioned by the party that called that witness following cross-examination).
- **orally** (also known as giving *viva voce* evidence) – The witness will need to attend trial and will be asked questions under oath or affirmation. They will not have to provide a witness outline or statement before giving that evidence. This is the traditional way of giving evidence at trial.

cross-examination
the questioning of a witness called by the other side in a legal case

re-examination
a second round of questioning by one party of its own witness, after the witness has been cross-examined by the other side

There are three types of examination of witnesses. The first is **examination-in-chief**, which is a series of questions put to the witness by the party that has called that witness. This is followed by cross-examination, which is where the other party questions that witness (and tries to point to holes in their evidence), and re-examination (which is where the party calling the witness tries to clarify anything put to the witness during cross-examination).

examination-in-chief
the questioning of one's own witness in court in order to prove one's own case and disprove the opponent's case

Expert evidence

Experts are often called by parties in a civil claim to give an opinion about an issue in the case. Depending on the nature of the case, the person may have expertise in a particular field such as medicine, accountancy, finance, engineering or law.

Expert evidence is often submitted through a written report by an independent expert. Experts must only give an opinion within their area of expertise. Experts, even though engaged by a party, are under oath and have a primary duty to the court. That means they cannot argue the case for the party, but instead must give an opinion within their area of expertise, even if it means that it is not helpful for the party he or she is engaged by. They must ensure they remain independent and help the court resolve the issues in dispute.

Expert evidence is often given in cases involving personal or mental harm (where a medical professional may give evidence about the nature and extent of injury), and in cases involving loss or damage (where an expert may be asked to give an assessment of the amount of loss suffered).

Study tip

For your assessment tasks, you need to know the purposes of pre-trial procedures, and you must explain those purposes using examples. Knowing the purposes only is not enough – you should be able to demonstrate those purposes through using examples of different pre-trial procedures.

Purposes of exchange of evidence

The purposes of exchanging evidence are to:

- **reduce the element of surprise at trial** and avoid a 'trial by ambush', particularly where the evidence is disclosed in writing and before trial
- allow each party to **determine the strength** of the other side's case and determine their likelihood of success by assessing the strength of the evidence
- provide both parties **the opportunity to 'rebut' the other side's expert evidence** by engaging their own expert
- allow the defendant to **understand the amount of damages** that the plaintiff is seeking to enable the defendant the opportunity to consider whether it may be better to settle the matter out of court.

damages
the most common remedy in a civil claim; an amount of money that the court (or tribunal) orders one party to pay to another

An example of expert evidence being called in a civil claim is provided in the article below, where both parties are relying on evidence from financial accountants to prove their case.

IN THE NEWS

Lottery syndicate to square off in court over $16.6 million jackpot

Cameron Houston and Chris Vedelago, *The Age*, 6 November 2016

Retired Geelong courier driver Gary Baron will face off in court with 14 former members of a lottery syndicate, after mediation talks failed to resolve a bitter dispute over a $16.6 million jackpot.



Source 5 Lottery syndicate disputes result in a civil proceeding.

A directions hearing in the Supreme Court last week decided the feud would proceed to a week-long trial in February 2017, which could have major implications for the administration of lottery syndicates across Australia.

Both parties to the dispute are expected to rely on forensic accountants to prove their respective cases, which was approved at the hearing on November 3.

The 14-person syndicate, who all worked with Mr Baron at logistics company Toll Group, claim they are entitled to an equal share of the Powerball draw from October 2014, which equates to more than $1 million each.

They are believed to have been offered $4000 each by Mr Baron's lawyers if they agreed to waive all claims to the massive windfall and sign confidentiality agreements.

However, lawyers for the syndicate claim that a lottery syndicate was similar to a partnership agreement or a joint venture, which imposed a fiduciary duty on Mr Baron who collected $20 from his co-workers before each major draw.

The 50-year-old has previously denied swindling his former co-workers. He claimed he purchased the winning ticket using $46.60 of his own money and then three days later spent $520 on 10 tickets on behalf of the syndicate.

Summary of the purpose of pre-trial procedures

A summary of the purposes of pre-trial procedures is set out in Source 6 on the next page, along with the pre-trial procedures that aim to achieve those purposes. For each of the purposes, you should be able to demonstrate **how** each pre-trial procedure aims to achieve it.

You will consider the strengths and weaknesses of pre-trial procedures in Topic 7.7 when you evaluate courts as dispute resolution bodies.

PURPOSE	RELEVANT PRE-TRIAL PROCEDURE
Ensure procedural fairness by allowing the other side to know what the claim or defence is about, or requiring the parties to disclose all relevant documents	Pleadings Discovery of documents
Avoid taking an opponent by surprise by disclosing material facts, particulars, documents or evidence	Pleadings Discovery of documents Exchange of evidence
Give the court a written record of the case	Pleadings
Set the limits to the dispute	Pleadings
Assist in reaching an out-of-court settlement	Pleadings Discovery of documents Exchange of evidence
Allow a party to determine the strength of the other side's case	Discovery of documents Exchange of evidence
Provide opportunity to another party to rebut the other side's evidence	Exchange of evidence

Source 6 Summary of the purposes of pre-trial procedures

Study tip

A final hearing in the County Court and Supreme Court is known as a trial, whereas a final hearing in the Magistrates' Court or VCAT is called a hearing. The *VCE Legal Studies Study Design* requires you to correctly define and use legal terminology in this course, so aim to correctly use the terms 'trial' and 'hearing' in your answers in assessment tasks.

7.4 CHECK YOUR LEARNING

Define and explain

1 Describe three types of pre-trial procedure.
2 Where will you find the main rules that govern pre-trial procedures?
3 Identify the purpose of one of the pre-trial procedures and expain how it aims to achieve this.

Synthesise and apply

4 Access the Supreme Court of Victoria's website. A link is provided on your obook assess. Does it contain any assistance for unrepresented parties in a civil proceeding about pre-trial procedures? If so, what sort of information is provided?
5 Read the article 'Lottery syndicate to square off in court over $16.6 million jackpot'.
   a Who were the plaintiffs in this case, and who was the defendant?
   b What allegation did the plaintiffs make in this case, and what was the main defence?
   c Identify one pleading that the plaintiffs and the defendant each would have filed and describe the purpose of those documents.
   d Identify two pre-trial procedures referred to in this article, and explain one purpose of each.
   e Conduct some research about the outcome of this case. How was it resolved? What are the benefits of the dispute resolving in this way rather than going to trial?

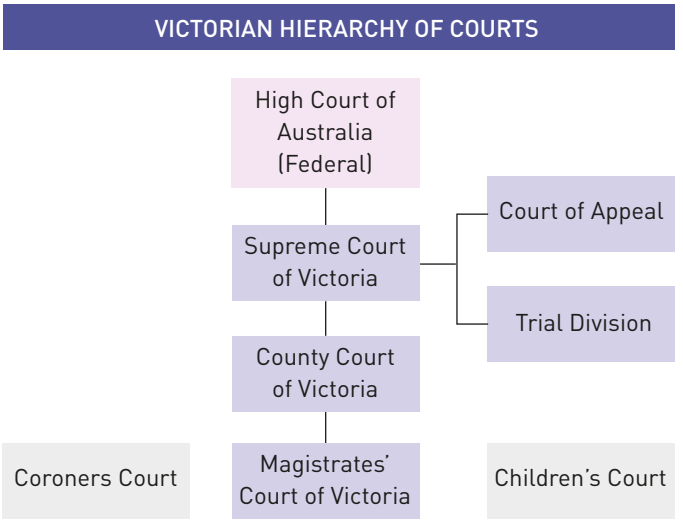
Analyse and evaluate

6 Discuss the advantages and disadvantages of the discovery process in light of the principles of justice.
7 'The recent move towards the use of predictive coding technology in discovery tasks proves that lawyers are redundant, and it is only a matter of time before they are replaced by computers'. Referring to this statement in your answer, provide two benefits and two weaknesses of the use of computers in civil disputes.
8 In your view, do pre-trial procedures overall hinder or enhance the achievement of the principles of justice? Give reasons.

Check your obook assess for these additional resources and more:

- **Student book questions**
  7.4 Check your learning
- **Sample**
  Statement of claim
- **Going further**
  Other pre-trial procedures
- **Weblink**
  Supreme Court of Victoria

7.5 THE REASONS FOR A VICTORIAN COURT HIERARCHY



Source 1 The Victorian court hierarchy

As discussed in Chapter 3, Victorian courts, like those in other Australian states, are arranged in a court hierarchy. This means they are graded or ranked in order of the complexity and severity of cases that they hear. The Magistrates' Court is at the bottom of the hierarchy and deals with less-serious issues. The Supreme Court of Victoria is the highest Victorian court.

The **High Court** is a federal court. It can hear appeals from the Court of Appeal, but a party must first get the High Court's leave (consent) to appeal.

Two of the main reasons for a court hierarchy in the resolution of civil disputes are to ensure administrative convenience, and to allow appeals.

High Court
the ultimate court of appeal in Australia and the court with the authority to hear and determine disputes arising under the Australian Constitution

Administrative convenience

Using a hierarchy for courts means that cases can be distributed according to their seriousness and complexity. Less serious and less complex cases are heard in lower courts, while more serious and more complex cases are heard in the higher courts.

Minor civil disputes (claims where the plaintiff is seeking less than $100 000) can be heard in the Magistrates' Court. These cases can be heard quickly and less expensively in the Magistrates' Court. Because there are a significant number of smaller disputes in Victoria, there are a greater number of magistrates, and there are more Magistrates' Courts across the state. If smaller claims had to be heard in the higher courts along with larger claims, then they would take longer to hear.

The more serious and complex civil disputes are heard in the County Court and the Supreme Court, which have an unlimited jurisdiction. Class actions (representative proceedings) are normally large and complex, and these are heard only in the Supreme Court. They take longer to hear and require judges who are experts in complicated points of law. By being part of a court hierarchy, the County and Supreme Courts can more easily manage the allocation of time for the longer, more complicated cases.

Study tip

The *VCE Legal Studies Study Design* requires you to know these two reasons (administrative convenience and appeals) for a court hierarchy in determining civil cases. These two reasons are different to those that you need to know for Unit 3 – Area of Study 1 in relation to the criminal justice system, which are specialisation and appeals. Make sure you remember which two reasons you need to know for each Area of Study.

Appeals

Someone who is dissatisfied with a decision in a civil trial can, if there are grounds for appeal, take the matter to a higher court.

Grounds for appeal in a civil case can include:

- a point of law (also known as a question of law) – where some law has not been followed; for example, the court was allowed to hear inadmissible evidence
- a question of fact – whether the facts of the case had been applied appropriately to reach the decision
- the remedy awarded – the way in which a court enforced a right, or the order that was made by another court.

If there were no court hierarchy, then there would be no higher court to review a decision that a party believes has been made in error. Therefore, having a court hierarchy ensures there is a system by which a decision can be reviewed by a more superior court.

Most civil disputes now require leave to appeal (i.e. nearly all appeals to the Court of Appeal, and all appeals to the High Court). Getting the court's consent to hear an appeal in a civil case will usually require the party to satisfy the court that there is a reasonable chance of success.

Both the Court of Appeal and the High Court can determine special leave applications 'on the papers', which means that no formal hearing may be required. The aim of hearing applications this way is to streamline processes and to reduce the time and costs involved in a formal hearing.

Summary of the civil jurisdiction of the Victorian courts

The jurisdiction of the Victorian courts is set out in Source 2 below.

COURT	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Supreme Court (Court of Appeal)	No original jurisdiction	With leave, on a question of law, a question of fact or an amount of damages, from a single judge of the County Court or Supreme Court. On a question of law from VCAT when the President or a vice-president made the order
Supreme Court (Trial Division)	Unlimited in all civil claims	On a question of law from the Magistrates' Court and from VCAT
County Court	Unlimited in all civil claims	No appeals, unless given power under a specific Act of Parliament
Magistrates' Court	Claims of up to $100 000	No appellate jurisdiction

Source 2 The civil jurisdiction of the Victorian courts



Source 3 The Supreme Court of Victoria is the highest Victorian court.

The importance of having a court hierarchy system so that a decision can be reviewed by a more superior court is evidenced in the case of *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 333 ALR 384.

LEGAL CASE

From VCAT all the way to the High Court of Australia

Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd (2016) 333 ALR 384



Source 4 An area of the Crown Casino complex in Melbourne was the centre of a dispute which went all the way from VCAT to the High Court.

In July 2010, former tenants of the Crown Casino complex in Melbourne commenced proceedings in VCAT, alleging that Crown (the owner of the complex) represented that they would be given a further lease of five years following expiration of leases already held within the complex.

The proceeding went all the way to the High Court of Australia, after Crown appealed VCAT's decision to the Supreme Court, the tenants appealed the Supreme Court's decision to the Court of Appeal, and then Crown appealed the Court of Appeal's decision to the High Court.

The High Court ultimately ruled in favour of Crown, as the High Court found that the Court of Appeal erred in its finding.

7.5 CHECK YOUR LEARNING

Define and explain

1 Explain how a court hierarchy provides administrative convenience.
2 Why is a court hierarchy a necessary element of a system of appeals?
3 What is meant by 'leave to appeal'?

Synthesise and apply

4 Which court in Victoria would be called the 'intermediate court'? Which would be called the 'superior court'? Why?
5 Why is VCAT not included in the court hierarchy?

Analyse and evaluate

6 Suggest the problems that could arise from having one court that heard all types of cases.

Check your obook assess for these additional resources and more:

- **Student book questions**
  7.5 Check your learning
- **Going further**
  Other reasons for a court hierarchy
- **Weblink**
  Victorian Courts and Tribunals

7.6 THE RESPONSIBILITIES OF THE JUDGE AND THE JURY IN A CIVIL TRIAL

When a civil dispute goes to trial in the County Court or the Supreme Court, four key personnel are involved. They are:

- the **judge**
- the **jury** (if there is one)
- the **parties** (the plaintiff and the defendant)
- the **legal practitioners**.

In this topic you will explore the responsibilities of the judge and the jury in a civil trial, and in the next topic you will explore the responsibilities of the parties and the legal practitioners.



Source 1 Chief Justice Susan Kiefel of the High Court of Australia. Judges are central figures in a civil trial.

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. verdict)

The judge

Did you know?

The current High Court has the most even spread of justices in its history, based on state of origin as well as gender (three women, including the Chief Justice, and four men).

As you learnt in Chapter 4, the judge acts as an impartial and independent 'umpire' or 'referee' in a civil trial, ensuring that the court procedures are carried out in accordance with the court's rules, and that each of the parties is treated fairly. The judge must not favour either side, and must be independent (i.e. have no connection with the parties). Where there is no jury to decide on the facts, the judge must make a decision on the facts as well as the law, and assess damages where necessary.

Responsibilities of the judge

The judge must ensure that justice is upheld in a civil trial. This means ensuring that a trial is conducted fairly, equally, and with both parties having access to the procedures and mechanisms used at trial. The use of an independent and impartial judge ensures that the rule of law is upheld – that is, judges are independent of government and the parties.

Some of the main responsibilities of a judge in a civil trial are as follows.

- #### Manage the trial

  The judge has significant powers of **case management** to ensure the trial is conducted in a just, timely and efficient manner. Generally, a trial will be conducted according to a set procedure (for example, the plaintiff will present the case, followed by the defendant), but the judge has the power to change this procedure.

  The judge also has power to give **directions** and orders in the trial, ask a witness questions to clarify his or her evidence, and hand down rulings throughout the trial where necessary. For example, there may be a need in the middle of trial to decide a point of law, such as whether a particular witness can give **hearsay evidence**. The judge may make a ruling in the middle of trial about whether this is allowed by the rules.

- #### Decide on the admissibility of evidence

  Like a judge in a criminal trial, the judge in a civil trial is responsible for deciding which evidence is to be permitted under the rules, and can exclude evidence from the trial, thus ensuring fairness in the way evidence is allowed.

- #### Attend to the jury (if there is one)

  In most civil trials, there is no jury. However, if there is a jury, the judge may need to address the jury during trial, give directions to the jury, and sum up the case to the jury at the conclusion of trial.

case management
a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (such as an order that the parties attend mediation)

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

hearsay evidence
evidence given by a person who did not personally witness the thing that is being stated to the court as true

- ## Determine liability and the remedy

  If there is no jury in the civil trial, the judge must decide whether the plaintiff has established his or her claim against the defendant, and if so, what remedy, if any, should be awarded. This means that the judge, not a jury, is the decider of facts.

  Judges will generally 'reserve' their decision and deliver it a later time. In doing so, they will normally provide their written reasons for their decision. These written reasons, known as 'judgments', should be delivered in a timely manner and in a way that is accessible and readable. What is timely will depend on the complexity of the case, but parties should not have to wait significant months or years for **judgment**.

judgment
a statement by the judge at the end of case that outlines the decision and the legal reasoning behind the decision

- ## Make a decision on costs

  After each hearing in a civil case the judge will decide which party should bear the costs. The general rule is that working out the costs is left to the end, and the successful party is entitled to costs, but that is not always the case.

  The scenario below is an example of costs in a dispute being decided at a later date.

EXAMPLE

Contractual dispute between a builder and a subcontractor

A subcontractor sued a builder for $2 million in damages in the Supreme Court of Victoria. As soon as the claim was issued by the subcontractor, the builder's lawyers wrote a letter to the subcontractor denying the claim, but offered to pay the subcontractor $1 million in full and final settlement of the subcontractor's claim. The subcontractor ignored the letter and pursued the dispute to trial.

The Supreme Court of Victoria found in favour of the subcontractor, but found that the damages the subcontractor had suffered was only $500 000. Judgment was entered for the subcontractor for $500 000. The judge asked the parties to make submissions about costs, which would be decided at a later date. The builder made submissions that the subcontractor should not be entitled to any costs after the date of the letter, because the subcontractor would have been better off had it accepted the builder's offer of $1 million.

liability
legal responsibility for one's acts or omissions

The article below is an example of a jury determining **liability** and the judge deciding what remedy should be awarded in a civil trial.

IN THE NEWS

Lawyer must pay police officer $150 000 over claim teenager Tyler Cassidy was 'executed'

Mark Russell, *The Age*, 6 May 2016

A police officer has been awarded $150 000 in damages after a Supreme Court jury found he had been defamed by a lawyer who claimed he executed teenager Tyler Cassidy at a Northcote skate park in 2008.

Supreme Court Justice Kevin Bell on Friday said he wanted to demonstrate to the world that the defamatory online comments by Queensland barrister Michael McDonald – who claimed Sergeant Colin Dods should have been charged with manslaughter – were a 'baseless challenge' to the police officer's integrity and public standing.

Justice Bell said Sergeant Dods deserved to keep his good name as a respected member of the community and as a police officer.

He said a jury found Mr McDonald had defamed Sergeant Dods in 2012 by claiming in online posts on a website that the police officer had executed Tyler; shot and killed Tyler without any adequate reason; had gunned down Tyler like he was a monster and dangerous mongrel dog; and had used excessive force out of proportion to any threat posed by Tyler.

Mr McDonald had also claimed Sergeant Dods chose to shoot Tyler, a slightly built, inexperienced and partially blinded boy [after being capsicum sprayed], six times when he knew he and other police could have overpowered Tyler without anybody being harmed; and by shooting Tyler he had committed manslaughter.

Justice Bell described the defamatory comments as 'very grave'.



Source 2 Sergeant Dods was awarded damages in his civil dispute.

The jury

Unlike a criminal case, a civil trial does not usually have a jury. Juries may be used in two situations:

- either the plaintiff or the defendant can specify during the pleadings stage that they wish to have the proceeding tried by a jury, though the court can still direct that the trial be without a jury if it decides a jury is not required. The party who wishes a civil dispute to be tried by a jury must pay the applicable fee
- the court may order that a proceeding be tried with a jury, though this is rare.

Like a criminal jury, the civil jury makes a decision about which facts it believes to be true. For example, 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 jury may also be required to assess damages. However, juries in defamation cases (cases which involve untrue statements made about a person which have damaged that person's reputation) no longer decide on the amount of damages.

Did you know?

Civil juries are far less common than criminal juries. In 2014–15 there were 93 civil jury trials in the County and Supreme Courts, compared with 523 criminal jury trials in the same period.

Did you know?

In a civil trial, the court can order the empanelment of up to two additional jurors, so that there may be up to eight jurors. However, when it comes to the jury reaching its verdict, only six jurors will be required.

Composition of a civil jury

If a civil trial is to be tried by a jury, the jury is made up of only six jurors. The jurors are chosen randomly from persons eligible to vote and who are on the electoral roll, and following a lengthy selection process.

Responsibilities of a civil jury

Many of the responsibilities of a civil jury are the same as those in a criminal jury. The main ones are set out below.

- ### Be objective

  The jury must be unbiased and bring an open mind to the task, putting aside any prejudices or preconceived ideas. Each juror (jury member) must have no connection with any of the parties, and must also be careful to decide on the facts, not on their own biases.

- ### Listen to and remember the evidence

  As you learnt in Chapter 4, evidence can be very complicated. For example, a case about a business valuation may include complicated



Source 3 A civil jury will only have six jurors

Did you know?

In an 1840 case in England, the verdict was decided by the jury picking options out of a hat. The court ordered a new trial because the jurors had not made a decision based on the facts of the case.

balance of probabilities the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

and detailed evidence about how to value a business and what method should be used to get to a value. This can often be complex for ordinary laypeople.

Jurors can take notes if it helps them to remember information, but they must make sure they still concentrate on what is taking place in the courtroom.

A jury must not undertake his or her own investigations of what happened, conduct any research on the case, or make any enquiries about trial matters.

- ### Understand directions and summing up

During the trial the judge will give directions to the jury about issues or points of law, and will sum up the case at the end. The jury must listen carefully to the directions and summing up.

- ### Decide on liability and, in some cases, damages

In a civil trial, the jury must decide who or what to believe, and whether the plaintiff has established their case on the **balance of probabilities**. A civil jury must try and reach a unanimous verdict, but the court may accept a majority verdict in all cases.

7.6 CHECK YOUR LEARNING

Define and explain

1 Describe the responsibilities of the judge in a civil trial in relation to evidence. Refer to the principles of justice in your answer.
2 Why is it essential for the judge be independent and impartial?
3 Describe two circumstances in which a civil jury may be required.

Synthesise and apply

4 Describe two similarities and two differences between a criminal jury and a civil jury.
5 Read the article 'Lawyer must pay police officer $150 000 over claim teenager Tyler Cassidy was "executed".
   a Did this case go to trial or did it settle beforehand? Justify your answer.
   b What was the nature of the dispute?
   c Why was it in this case that the jury decided on liability, but the judge decided on damages?
   d Describe two benefits of using a jury in this type of case.
6 Conduct some research on the 2017 case involving Rebel Wilson in the Supreme Court of Victoria.
   a What allegations was Rebel Wilson making?
   b What was interesting about the composition of the jury in this case?
   c Who decided liability in this case, and who decided damages? Why is this so?
   d In your view, in this type of case is a jury trial better than a trial by judge alone? Give reasons.

Analyse and evaluate

7 'Juries in civil trials should be abolished. They are expensive, the jury members are biased, and they don't understand how to calculate damages.' Do you agree? Give reasons.
8 In your view, should a judge do more than just manage a trial? Give reasons for your answer.

Check your obook assess for these additional resources and more:

» **Student book questions**
7.6 Check your learning

» **Going further**
Who can't be on a jury?

» **Weblink**
Jury service

7.7 THE RESPONSIBILITIES OF THE PARTIES AND LEGAL PRACTITIONERS IN A CIVIL TRIAL

In addition to the judge and the jury, the parties and the legal practitioners also have responsibilities in a civil trial.

The parties

lead plaintiff
the person named as the plaintiff on behalf of the group members in a representative proceeding (i.e. class action)

party control
each party in a civil trial has control over the way the case will run

The main parties in a civil trial are the plaintiff and the defendant. As discussed in Chapter 6, there can be more than one plaintiff and defendant, and in representative proceedings, the **lead plaintiff** will represent the group members.

The trial system in Victoria operates such that each party controls its 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**'. This is different from a system with an external investigator who seeks out the truth to determine liability.

The *Civil Procedure Act 2010* (Vic) was introduced in Victoria to reform and modernise the laws and processes relating to civil proceedings in courts, as well as to impose some **overarching obligations** on the parties and their legal practitioners. These obligations are designed to improve standards of conduct. They include a duty to act honestly and to cooperate in the conduct of the proceeding.

→ GOING FURTHER

The trial system in Australia is often called the adversary system. In this type of system two parties (or adversaries) 'battle' each other to win – much like a duel or a football match. The parties are responsible for deciding how to present their case as they attempt to win.

A different type of system is the 'inquisitorial system', used in some European countries, which involves the judge playing an investigative role in deciding the winner or loser. Parties have less control over the conduct of the case.

Although there are generally two types of systems, they share some features. Many parts of our adversary system are not 'adversarial', and the trend is towards using less adversarial processes overall.

Responsibilities of the parties

burden of proof
the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

counterclaim
a separate claim made by the defendant in answer to the plaintiff's claim (and heard at the same time by the court)

The plaintiff has the specific responsibility of proving the facts of the case, given that he or she has the **burden of proof**. The defendant will have to show that the defence gives a good answer to the claim. A defendant who has filed a **counterclaim** will have to prove the claims it makes. The facts will need to be established on the balance of probabilities.

The parties have a number of other responsibilities in a civil trial. The main responsibilities are set out below.

- ### Make opening and closing addresses

  Both parties will give an opening and closing address, which will outline and summarise the case for the party. The general procedural rules are that the plaintiff will present their case first, and then the defendant will present their case. However, the judge can require something different from these general procedural rules.

OVERARCHING OBLIGATIONS

- Act honestly
- Only take steps to resolve or determine dispute
- Cooperate
- Don't mislead or deceive
- Use reasonable endeavours to resolve dispute
- Narrow the issues in dispute
- Ensure costs are reasonable and proportionate
- Minimise delay
- Disclose existence of critical documents
- Only make claims that have a proper basis

Source 1 The 10 overarching obligations under the *Civil Procedure Act*. The parties and their legal practitioners need to comply with them in any civil proceeding.



Source 2 The Victorian WorkCover Authority is sometimes a party to a civil dispute when a workplace injury is involved. It has responsibilities in a civil trial when it is a party.



Source 3 Barristers and solicitors during a civil trial

- ### Present the case to the judge or jury

  The parties will present their case to the judge or jury (if there is one). Most of the trial is taken up with presenting their case through lay witnesses and expert witnesses. Each witness may give evidence orally, and may be examined about his or her evidence.

- ### Comply with overarching obligations

  There are 10 overarching obligations under the *Civil Procedure Act*. They include the obligations to use reasonable endeavours to resolve disputes, disclose the existence of critical documents at the earliest reasonable time, and act in a way that minimises delay and does not mislead or deceive anyone in relation to the dispute. The parties must comply with these obligations during and before trial.

Legal practitioners

Legal practitioners on behalf of the parties usually undertake the role of preparing and conducting a case. This representation is often necessary in a civil trial, because the legal practitioners are experts who are familiar with civil trials. These experts help to ensure that the parties are able to present their best possible case, and to assist in achieving a just outcome. They are also the ones to ensure that the rule of law is upheld, and that the law is applied equally and fairly.

It is difficult for a party to present their own case in a civil trial without legal representation. They may not know how to present their evidence in the most effective way, or may not know how to cross-examine a witness. They may also be too emotionally invested in the case to be able to make objective decisions about the way they argue their case. Bringing out the truth and showing your case in the best light depends on a party 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 legal arguments and the evidence being presented (for example, by cross-examining the witnesses). If one party is better represented than the other, this could lead to an unfair advantage and possibly an incorrect outcome. A person who is represented by a competent barrister has a better chance of winning than a person whose barrister is less experienced. A competent barrister has greater skill at preparing a case and bringing out the desired evidence.

Legal practitioners have special duties and obligations imposed by statute. Their most important duty is the **duty to the court and the administration of justice**. They cannot mislead or deceive the court, cannot place incorrect facts before the court, and they must be honest about cases they use in argument

(for example, they must not argue that the court should follow a particular decision when they know that decision has been overruled by a higher court). The legal practitioner's duty to the court is over and above their duty to the client. They must put the court and the law first.

Responsibilities of legal practitioners

The main responsibilities of legal practitioners in a civil trial are set out below.

- ### Make opening and closing addresses

  If a party is legally represented, the legal practitioner will ordinarily present the opening and closing addresses (or submissions). The **solicitor** (and **barrister**) will usually prepare the submissions, and the barrister will ordinarily present them orally in court.

- ### Present the case to the judge or jury

  If witnesses give evidence orally, then the barristers will ask the witnesses questions, either through examination in chief, cross-examination or in re-examination. The legal practitioner will also make submissions about matters that come up during trial.

  Legal practitioners have a responsibility of presenting the case in a manner that is in the best interests of their client, however, they must, when doing so, ensure they comply with their overarching obligations.

- ### Comply with overarching obligations

  Legal practitioners are subject to the same overarching obligations under the *Civil Procedure Act* as their clients (for example, acting honestly and cooperatively). They should see their role as assisting the court in resolving a dispute rather than engaging in a battle with the other side.

solicitor
a qualified legal practitioner who will give advice about the law and a person's rights under the law

barrister
a legal professional who is engaged by a party's solicitor. One of the roles of the barrister is to advocate (argue) the party's position at formal hearings

Summary of the responsibilities of key personnel

Some of the factors to consider when discussing the responsibilities of the key personnel in a civil trial are set out in Source 4 below.

KEY PERSONNEL	COMMENTS
Judge	• Acts as an impartial umpire, ensuring a fair trial and parties are treated equally. However, may have unconscious biases • As there is not normally a civil jury, the judge will decide on facts as well as law, ruling on liability and remedies • Has significant powers of case management to ensure the just, timely and cost-effective resolution of issues in dispute • Does not overly interfere in the procedure • May overly interfere, risking a mistrial • Cannot overly assist a self-represented party
Jury	• Randomly picked and has no connection with the parties • Only decide on facts before them and cannot make their own enquiries • Must try to remain objective, although everyone has unconscious biases • Decision-making is shared • May inadvertently come across information not put at trial, risking unfair outcome • Difficult role to listen to and remember all the evidence • Jury directions can be complex • Juries tend to be inconsistent and unpredictable in assessing damages

cont.

KEY PERSONNEL	COMMENTS
Parties	• Party control enables parties to make decisions about evidence to put forward and submissions to make • Party control means parties get to choose how they present the case which depends on their own abilities to do so. However, vital evidence may be missed • Unrepresented party can cause delays (though this can be reduced if a judge assists where possible) • Highly complex procedures which are difficult to understand without legal representation • Parties may feel stressed or inconvenienced because of party control and the way trials are conducted • Are required to comply with overarching obligations, but may be difficult to prove they are not • Party control means they get to choose the evidence to put before the court
Legal practitioners	• Have responsibilities to put client's case forward in its best light • Must not mislead the court, and must comply with overarching obligations • Can add to the costs of a trial • Better legal representation may mean a better outcome

Source 4 Some points of discussion in relation to the responsibilities of key personnel

7.7 CHECK YOUR LEARNING

Define and explain

1 What is the meaning of 'party control'? How are the parties in control of their own case?

2 What are the 'overarching obligations' that apply in a civil trial? Who is required to comply with those overarching obligations?

3 Describe two reasons why it is better for a defendant in a civil trial to engage legal representation.

Synthesise and apply

4 Consider the responsibilities of the parties in a civil trial. What problems would a party face in undertaking these responsibilities without legal representation?

5 You are a defendant in a civil trial after your neighbour sues you for nuisance. Identify two overarching obligations that are imposed on you as a party, and explain how you would fulfil those obligations.

6 Amanda is the plaintiff in a civil trial in the Supreme Court. Halfway through the trial she finds a document that is critical to the dispute, but is detrimental to her case. She tells her lawyer about the existence of the document.

What should Amanda and her lawyer do? Create a 'decision tree' which shows what might happen if they do or do not do these things.

Analyse and evaluate

7 VCAT requires all parties to be self-represented unless in particular circumstances. Do you think that this is a rule that should be adopted for some (or all) civil trials in court? Give reasons for your answer.

8 Do you agree with the concept of party control? Why or why not? Give reasons.

Check your obook assess for these additional resources and more:

- **Student book questions**
  7.7 Check your learning
- **Going further**
  Who else?
- **Weblink**
  Overarching obligations

7.8 JUDICIAL POWERS OF CASE MANAGEMENT



Source 1 The overarching purpose of the *Civil Procedure Act* is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in disputes.

When undertaking the responsibilities we explored in the last topic, judges (and magistrates) have significant powers of case management. That is, the Victorian Parliament has passed laws that give powers to Victorian judges and magistrates to manage civil disputes in Victorian courts.

The two main sources of those powers of case management are:

- the rules of the court, being the *Magistrates' Court General Civil Procedure Rules 2010* (Vic), the *County Court Civil Procedure Rules* and the *Supreme Court (General Civil Procedure) Rules*
- the *Civil Procedure Act*.

The overarching purpose of the *Civil Procedure Act* is to facilitate the **just, efficient, timely and cost-effective resolution of the real issues in dispute**. A court must try to achieve that overarching purpose when exercising its powers. One of the ways that a court does this is through the judges actively managing cases.

Two of the case management powers given to judges actively managing cases are the power to order mediation and the power to give directions.

Power to order mediation

A judge or magistrate has the power to make an order referring a civil proceeding, or a part of a civil proceeding, to mediation. This power is given to a judge by various sections of the *Civil Procedure Act*, including Section 66.

EXTRACT

Civil Procedure Act 2010 (Vic)

66 Court may order proceeding to appropriate dispute resolution

(1) A court may make an order referring a civil proceeding or part of a civil proceeding to appropriate dispute resolution.

3 Definitions

In this Act –

"appropriate dispute resolution" means a process attended, or participated in, by a party for the purposes of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute, including but not limited to –

(a) mediation...

associate judge a judicial officer of the Supreme Court of Victoria who has power to make orders and give directions during the pre-trial stage of a proceeding. Associate judges also have some powers to make final orders in particular types of proceedings

In addition to the *Civil Procedure Act*, the court rules also enable a judge to refer the parties to mediation. For example, Rule 50.07 of the Supreme Court Rules states that at any stage of a proceeding the Supreme Court can order that the proceeding be referred to a mediator.

The court can either order that a court officer (such as an **associate judge**) act as the mediator, or order that the parties arrange the mediation privately, in which case the parties choose a private mediator.

Parties can be referred to mediation at any time of the proceeding, which can include at a very early stage or even during trial (and sometimes even after trial, but before the decision has been handed down). Parties may also attend more than one mediation if there is a prospect that a further mediation may help settle the dispute.

The power to order parties to attend mediation can assist the prompt and economical resolution of a dispute. Often with the assistance of a mediator, the parties may realise that there is a benefit to settling the dispute early and before trial, without spending the costs of going to trial.

Most if not all civil proceedings in the Supreme Court go to mediation before trial, and mediation is considered successful in helping to resolve disputes. Former Chief Justice Marilyn Warren of the Supreme Court has said that the courts would face difficulties if they did not use mediation.

Study tip

Be careful not to confuse directions hearings with committal hearings in criminal cases, which is a common mistake made by students. Committal hearings are only used in criminal cases. There is no equivalent in a civil case; that is, there is no hearing where a judge will determine whether there is enough evidence for a party to be successful at a trial. That decision is up to the parties in a civil case.

Power to give directions

The *Civil Procedure Act* states that the court may give any direction or make any order it considers appropriate at any stage of the proceeding. Judges can therefore actively manage civil proceedings. They can give directions before or during the trial. Sanctions can be imposed on a party who fails to comply with a direction of the court.

The power to give directions is also contained in the relevant rules of the court. For example, Rule 34.01 of the Supreme Court Rules states that at any stage of a proceeding, the Supreme Court can give any direction for the conduct of the proceeding which it believes will assist in the effective, complete, prompt and economical determination of a dispute.

What is a direction?

A direction is an instruction given by the court to one or more of the parties, which imposes an obligation on a party to do something by a certain time or specifies how a civil proceeding is to be conducted. It might be that they have to file a particular document, attend court, or attend mediation by a certain time. Judges maintain control of a proceeding by giving directions along the way, so that delays can be minimised and the parties know what procedures they need to follow.

Directions before trial

The judge has powers to give directions to the parties about:

- the conduct of proceedings
- timetables or timelines for any steps to be undertaken
- participating in any method of dispute resolution, such as mediation
- expert evidence, including directions about limiting expert evidence to specific issues
- the allowance for a party to amend a pleading
- discovery, including relieving a party from the obligation to provide discovery, or limiting discovery.

directions hearing a pre-trial procedure at which the court gives instructions to the parties about time limits and the way the civil proceeding is to be conducted

Directions can be given at any time, but can be given at what are known as **directions hearings**, being a pre-trial hearing before a judge or an associate judge.

In the below example a Supreme Court justice ordered the plaintiff to file and serve an expert report at a directions hearing.

EXAMPLE

Direction given by Supreme Court justice

A plaintiff has filed a Statement of Claim in the Supreme Court of Victoria, and the defendant has filed a Defence in response. The plaintiff is claiming that he has suffered significant injuries as a result of the defendant's conduct. At a directions hearing held in the Supreme Court of Victoria, the Supreme Court justice has ordered that the plaintiff file and serve an expert report about his physical injuries within three months. The Supreme Court justice has also ordered that the parties must attend mediation by a certain date.

Directions during trial

The judge also has the power to make directions during a trial or hearing about the conduct of the hearing. The types of directions that a court can give include directions about:

- the order in which evidence is to be given, or who will go first in addressing the court
- limiting the time to be taken by a trial
- limiting the examination of witnesses, or not allowing cross-examination of particular witnesses
- limiting the number of witnesses that a party may call
- limiting the length or duration of the parties' submissions to the court
- limiting the number of documents that a party may tender into evidence
- evidence, including whether it should be given orally or in writing
- costs, including whether a particular party should bear the costs.



Source 2 A judge can restrict the number of witnesses a party can call to give evidence in their case.

7.8 CHECK YOUR LEARNING

Define and explain

1 Identify two main sources of a judge's powers.

2 What is the overarching purpose of the *Civil Procedure Act*?

3 Identify and explain two powers given to judges in a civil proceeding.

Synthesise and apply

4 For each of the following scenarios, identify the most appropriate direction that the court might consider making. Give reasons for each answer.

- **a** The parties have not yet attended mediation, and the matter is ready to be set down for trial.
- **b** Gary is complaining that the plaintiff's statement of claim is unclear and lacking in detail.
- **c** Jane is late in filing her expert evidence.
- **d** The trial is likely to be very complicated, and the judge wants to ensure it is conducted in the most cost-effective and efficient way.
- **e** The plaintiff has 5 million documents in its possession, and it believes that it will take over three years for them to be produced as part of discovery.
- **f** The defendant wants to call 30 medical practitioners to give expert evidence at trial.

5 Your friend wants his day in court. No matter how much you recommend mediation, he wants the publicity of the trial and wants the newspaper to report every little detail about the trial. What could you say to convince your friend about the benefits of settling before trial?

Analyse and evaluate

6 Do you think that judges should have more or less powers of case management? Give reasons for your answer.

7 What are the risks of a judge limiting the number of witnesses that a party may call?

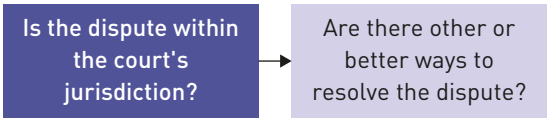
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- **Student book questions**
  7.8 Check your learning
- **Sample**
  Court orders
- **Going further**
  Other judicial powers
- **Weblink**
  Civil Procedure Act 2010 (Vic)

7.9 COURTS AS DISPUTE RESOLUTION BODIES

In Topics 7.4 to 7.8, you learnt about court pre-trial procedures, the reasons for a court hierarchy, the responsibilities of key personnel in a civil trial, and judicial powers of case management. All of these aspects of the civil justice system relate to the way in which courts operate to resolve disputes.

Following a consideration of these aspects of a civil trial, you should be able to consider the appropriateness of courts in resolving disputes, and their strengths and weaknesses.



Source 1 Questions that can be asked when considering the court's appropriateness in resolving a certain dispute

Appropriateness of courts as dispute resolution bodies

In determining whether a court is an appropriate dispute resolution body for a particular type of dispute, you should consider:

- whether the dispute falls within the court's jurisdiction
- whether there are other or better ways to resolve the dispute.

Jurisdiction

Both the County Court and the Supreme Court of Victoria have **unlimited jurisdiction** to hear civil disputes. That is, it does not matter what amount the plaintiff is seeking; both those courts are able to hear the dispute.

The Magistrates' Court jurisdictional limit is $100 000. A plaintiff who is seeking damages of more than $100 000 must issue the claim in either the County Court or the Supreme Court. A plaintiff who prefers to go to the Magistrates' Court can always give up part of the claim to reduce it to below $100 000. This brings it within the Magistrates' Court's limit.

VCAT has **exclusive jurisdiction** over some matters, so courts cannot hear them. Those matters include:

- domestic building disputes
- retail tenancies disputes
- residential tenancies disputes
- planning disputes.

Other or better ways to resolve a dispute

The parties should also consider whether there are other or better ways to resolve the dispute. Some of the things to consider include:

- whether they are able to resolve the dispute themselves through negotiation or mediation
- the costs of taking a matter to court, and whether CAV, VCAT or a private method might be better
- whether they are prepared to accept the risks and uncertainty involved with a third party making a decision on the dispute. This includes the possible risk of an **adverse costs order**
- whether they have access to and are able to afford legal representation, which is likely to be necessary to undertake pre-trial procedures and for trial
- whether they are comfortable with the formalities of the courtroom and the rules of procedure
- the size and complexity of the matter. In particular, more complex and larger claims are best dealt with in the Supreme Court, while smaller claims are best heard in the Magistrates' Court
- whether the proceeding is a **class action** that needs to be determined by the Supreme Court of Victoria

adverse costs order
a court order (i.e. legal requirement) that a party pay the other party's costs

class action
a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person; also called a representative proceeding or a group proceeding

- the time it will take to have the matter heard in court, and possible delays in having the case resolved. If they want a swift resolution, then CAV, VCAT or a private mediation may be better
- whether they are prepared to have their disputes aired in an open hearing where members of the public and the media can be present. If they are sensitive to publicity, an **arbitration** may be better, because the dispute can then be heard in private. You will explore arbitration in the next topic.

arbitration
a method of dispute resolution in which an independent person (known as an arbitrator) is appointed to listen to both sides of a dispute and make a decision that are legally binding on the parties. The decision is known as an arbitral award

Strengths and weaknesses of courts as dispute resolution bodies

The way courts resolve disputes has a number of strengths and weaknesses. The main ones are discussed below, drawing on the information contained in Topics 7.4 to 7.8. The strengths and weaknesses are also relevant to determining whether courts are an appropriate dispute resolution body for a particular type of case.



Source 2 Are courts always the best option to resolve a dispute?

Strengths

Some of the most important strengths are set out below in Source 3.

STRENGTH	EXAMPLES
The court hierarchy allows for administrative convenience.	• The court hierarchy allows for more serious and complex cases to be heard in the higher courts, and lower courts to deal with less complex and minor claims. • The court hierarchy also enables courts to specialise in certain areas of law.
The court provides opportunities to the parties to reach an out-of-court settlement.	• Various pre-trial procedures provide parties with an opportunity to settle the case before trial or before judgment. This saves the costs, time and stress of going to trial, making the system more accessible for people who want their disputes resolved. • The use of the judicial power to order parties to mediation assists in providing opportunities to settle.
The court allows the parties to determine the strengths and weaknesses of each other's case.	• Pre-trial procedures, which are often made at the direction of the judge, help the parties decide if they admit certain facts or issues that are in dispute, which will help speed up the trial. • The parties must disclose critical documents early.
The court seeks to achieve procedural fairness through the way it conducts proceedings.	• The judge can give any directions or orders that he or she wishes to ensure the civil dispute is resolved in a just, efficient, timely and cost-effective way. • The judge is responsible for ensuring the rules of evidence are followed to allow parties to be treated fairly. • The judge is an expert in law, legal processes and cases. • The court hierarchy allows for parties to appeal a case where an error has been made. • The use of the jury safeguards against misuse of power by having the state decide on liability. • Party control means that parties are more likely to be satisfied with the outcome, and the judge is not able to interfere with the way a case is presented. • Parties are not forced into spending money to present their case. They get to choose how much money they spend and how to present their case.

cont.

STRENGTH	EXAMPLES
Procedures and laws apply equally to all.	• The pre-trial procedures apply equally to all the parties and do not discriminate against a particular group or individual. • Judicial powers of case management are applicable to all parties and not just to a select few. • Both self-represented litigants and parties represented by experienced legal practitioners will be subject to the same procedures and laws.
It allows interaction between the court and the parties, which ensures fairness and equality.	• Pleadings provide the court with a written record of the claims and defences, allowing the judge to be across the issues. • Directions hearings provide opportunities for the parties to communicate with the court about issues that need to be resolved or orders that need to be made. • The role of the parties and the judge in a civil trial ensures that they work together to resolve the dispute. • Parties are able to engage legal practitioners who are familiar with the courtroom and trial process, and will enable better interaction with the court.
Parties are given information along the way so they can assess the merits of the case early on.	• Parties are provided with information about the claims and defences, and the relevant documents, before trial. • Parties can determine whether it is worthwhile to proceed with the claim or defence, giving them the opportunity to strategise before trial.
The conduct of the trial includes decision-makers who are impartial and independent.	• The judge acts as an impartial and independent referee, ensuring parties are treated equally and without any favour or discrimination. • The judge will make a decision based on the facts before him or her, and will have no prior connections or links with any of the parties. • The jury members have no connection to either party and must not undertake any research or investigation about the trial.
The use of the jury allows a reflection of community values in the decision-making.	• The jury 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.
The court process engages experts.	• The judge is an expert in law, processes and cases, and will ensure proper procedure is followed and laws are properly applied. • The legal practitioners are also experts and will use their skills to present their clients' cases in the best light possible.
The outcome is certain.	• The courts make a binding decision during trial, which is enforceable. This allows for certainty of outcome, though parties may be able to appeal the decision.

Source 3 A summary of some of the strengths of the ways in which courts resolve disputes

Weaknesses

There are also a number of weaknesses in the way courts resolve disputes. The most important of these are set out below in Source 4, with examples.

WEAKNESS	EXAMPLES
The court system often suffers delays, risking the possibility of unfairness.	• Pre-trial procedures often take a long time to complete. The discovery of documents process in particular is often criticised for adding to delays. • Judges have sometimes been criticised for taking too long to deliver their decision. • Party control means that parties need time to prepare their case, also adding to delays. • If there is a jury, the trial may take longer because things will need to be explained to the jurors.

WEAKNESS	EXAMPLES
The costs in having a dispute resolved in courts may restrict access to the courts to resolve the disputes, and may jeopardise parties being treated equally because of their socio-economic status.	• The costs associated with completing pre-trial procedures can be significant. • The complexity of procedures often means parties have to engage legal representation, adding to costs. • Parties are responsible for their own case and therefore need to spend money in preparing and researching the case. • Legal practitioners are expensive, which can prevent some people from accessing the legal system. • Fees for jurors have to be paid by the party who requests a jury trial.
Many of the procedures are complex and difficult to understand without a lawyer.	• Many of the pre-trial procedures are complex and difficult to understand, and require legal assistance. These include pleadings and directions hearings. • Judicial orders and directions can be complex and difficult to understand.
The way that courts resolve disputes can be stressful.	• The court trial and the rules of procedure may be very stressful for some. • Having to undertake pre-trial procedures and follow directions of judges can also be stressful. • The courtroom has previously been criticised as being inaccessible to some parties based on formalities, including self-represented litigants. • The fact that parties have control of the case means that it can be stressful and time-consuming on a party who will need to gather the evidence, liaise with their legal practitioners and attend trial.
Judges cannot overly interfere or help a party, which may be unfair for some parties.	• Judges are impartial referees and so cannot overly interfere or help a party. • Judges do not have a role in gathering evidence, investigating facts or making claims or defences. This is entirely up to the parties.
Jurors are not experts in the law or evidence, which may jeopardise a fair outcome.	• Jurors might experience difficulty in understanding complicated evidence. • Most jurors would have little knowledge of courtroom procedure. • Jurors could be influenced by emotional elements of the trial. • Juries tend to be inconsistent and unpredictable in assessing damages. • Jurors are expected to concentrate for long periods of time and collate, remember, analyse and interpret the facts of the case. This can be a difficult task.
Jurors do not have to give reasons for their decision, and deliberations are secret.	• The decision could be unjust, but a party would have no way of knowing that. • Jurors do not have to give reasons for their decisions, so a party does not know the basis upon which a juror has made their decision.
There may be unconscious biases.	• Lack of cultural and general diversity of judges is often criticised. • Jurors usually take the task of being on a jury seriously, but they may be biased.
The role and responsibilities of the parties and legal practitioners may mean that the outcome is based on how a party presents their case, and not on who is actually liable.	• The outcome of the dispute can wholly depend on how the parties present their case, the evidence that they lead and the way that they make their claim or defence. • The extent to which the parties are successful may be wholly dependent on the experience and quality of their legal representation.

Source 4 A summary of some of the weaknesses of the ways in which courts resolve disputes

Comparison of different dispute resolution bodies

It is useful to compare the use of CAV, VCAT and the courts in resolving disputes.

	CAV	VCAT	COURTS
THE THIRD PARTY			
Is there a third party who makes a decision?	No	Yes, if the dispute proceeds to a final hearing	Yes, if the dispute proceeds to a final hearing or trial
Role of third party	Facilitates discussion and suggests options and possible solutions. Usually someone with specialist knowledge in the field	Hears all the evidence at a final hearing and makes a binding decision	Hears all the evidence at a final hearing or trial and makes a binding decision
Is the decision binding?	No, though terms of settlement may be enforceable	Yes	Yes
PROCESSES AND PROCEDURES			
Is the resolution of the dispute conducted in private?	Yes	No, unless the parties settle before the final hearing	No, unless the parties settle before the final hearing or trial
Are there rules of evidence and procedure?	No	Generally, more flexible	Yes
Are there pre-trial procedures?	No	Generally, no	Yes
Is there a jury?	No	No	Only if the judge or one of the parties requires it
Do parties need legal representation?	No	No	Generally, yes
TYPES OF CIVIL DISPUTES			
Are there restrictions on jurisdiction?	Yes	Yes	Yes for Magistrates' Court Some disputes fall within VCAT's exclusive jurisdiction
Types of civil disputes heard?	Disputes between tenants and landlords and consumers and traders	Various types of disputes, including small claims, residential tenancies claims and retail tenancies	All types of claims, including complex claims
Appropriate for large complex claims?	No	No	Yes, Supreme Court
Can they hear representative proceedings (class actions)?	No	No	Yes, Supreme Court
DISPUTE RESOLUTION METHODS USED			
Use of mediation?	No	Yes	Yes
Use of conciliation?	Yes	Yes	Generally, no, but could refer parties to conciliation
Use of arbitration?	No	No	Yes, in Magistrates' Court for claims less than $10 000

	CAV	VCAT	COURTS
HIERARCHY AND APPEALS			
Is there a hierarchy?	No	No	Yes
Can appeals be allowed?	No	Yes, on points of law to Supreme Court	Yes

Source 5 A snapshot of ways in which CAV, VCAT and the courts are similar to and different from each other when resolving disputes

7.9 CHECK YOUR LEARNING

Define and explain

1 What does unlimited jurisdiction mean?
2 Can the Supreme Court of Victoria hear a claim for $5 000? Give reasons for your answer.
3 The plaintiff wants to issue his claim in the Magistrates' Court, but the claim is for $120 000. What are the plaintiff's options?
4 What types of matters can the courts not hear?

Synthesise and apply

5 For each of the following, identify the dispute resolution body that the parties are using to resolve the dispute.
   a the parties are required to provide their list of discovered documents by next Friday
   b the claim has been rejected for conciliation by this body because they consider it unlikely that the matter will settle
   c the parties have been ordered to attend a compulsory conference
   d a binding decision has just been made. Only an appeal on a point of law to the Court of Appeal can be made
   e the parties have been ordered to attend a directions hearing
   f conciliation has been unsuccessful, and the consumer has been told that VCAT might be another option
   g trial is set down for next week
   h a member will preside over the final hearing next week.
6 Prepare a visual diagram which shows the similarities and differences between CAV, VCAT and courts as dispute resolution bodies.

Analyse and evaluate

7 Do you think that pre-trial procedures should be abolished? In your answer, make reference to at least two strengths and two weaknesses of pre-trial procedures.
8 In your view, which dispute resolution body is the most effective way of resolving disputes? In your answer, you should consider the following matters:
   a Expertise
   b Powers of the dispute resolution body
   c Large complex disputes
   d Small claims
   e Costs
9 Evaluate the Magistrates' Court as a dispute resolution body.

Check your obook assess for these additional resources and more:

- **Student book questions**
  7.9 Check your learning
- **Video tutorial**
  How to answer a compare question
- **Going further**
  Other dispute resolution bodies
- **Worksheet**
  Evaluating courts

7.10 METHODS USED TO RESOLVE CIVIL DISPUTES — MEDIATION AND CONCILIATION

Parties and dispute resolution bodies can use a range of methods to resolve civil disputes. These include:

- mediation
- conciliation
- arbitration.

alternative dispute resolution methods ways of resolving or settling civil disputes that do not involve a court or tribunal hearing (e.g. mediation, conciliation and arbitration); also known as appropriate dispute resolution

Mediation, conciliation and arbitration are often referred to as **alternative dispute resolution methods** (ADR). However, their use is now so common that the word 'alternative' is becoming less appropriate to describe them.

Mediation, conciliation and arbitration are dispute resolution methods that can be used by the parties without going to CAV, VCAT or the courts. However, these methods are also used by some or all of these dispute resolution bodies to resolve disputes as an alternative to a final hearing or trial.

Very few civil cases initiated in court will proceed to a final hearing or trial; in fact, it is estimated that fewer than 5 per cent of cases will proceed to hearing. Most cases settle before the final hearing or trial, often because the parties have attended mediation.

In this topic you will explore mediation and conciliation as methods of dispute resolution, and in Topic 7.11 you will explore arbitration. For each method, you will consider how it is used by CAV, courts and VCAT, its appropriateness in resolving civil disputes, and its strengths and weaknesses.

Study tip

You should be able to distinguish between dispute resolution bodies (CAV, VCAT and the courts) and dispute resolution methods (mediation, conciliation and arbitration). The bodies are institutions and the others are methods used by those institutions and parties to resolve disputes. Students often get the two (bodies and methods) confused – can you think of a way to remember the difference between them?

EXTRACT

Getting to no: a study of settlement negotiations and the selection of cases for trial

A trial is a failure. Although we celebrate it as the centrepiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavoured one. With some notable exceptions, lawyers, judges and commentators agree that pre-trial settlement is almost always cheaper, faster and better than trial. Much of our civil procedure is justified by the desire to promote settlement and avoid trial. More important, the nature of our civil process drives parties to settle so as to avoid the costs, delays and uncertainties of trial, and, in many cases, to agree upon terms that are beyond the power or competence of courts to dictate.

Source: SR Gross and KD Syverud, 'Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial' (1991) 90 *Michigan Law Review* 319, 320

Mediation

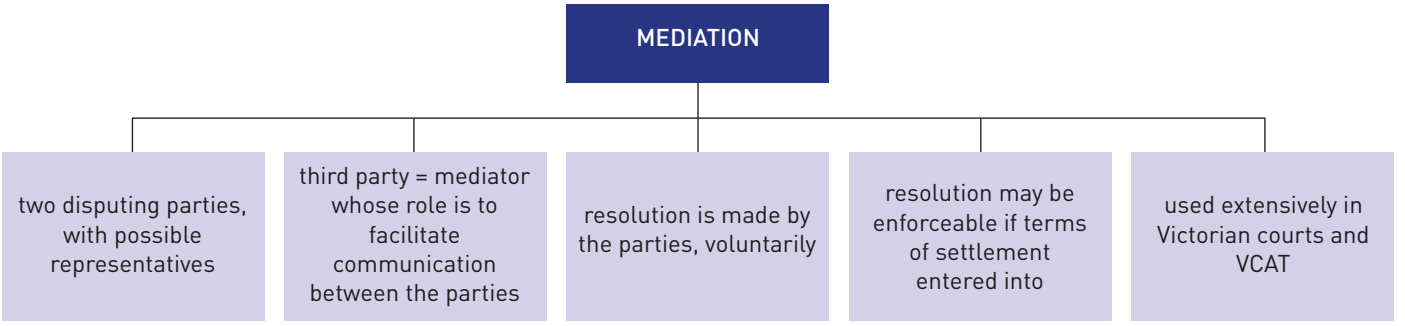
You have already studied mediation in previous topics. Mediation is a **cooperative method of resolving disputes** that is widely used by courts, tribunals and other dispute resolution bodies. It is a tightly structured, joint problem-solving process in which the parties in conflict sit down and discuss the issues involved, develop options, consider alternatives and try to reach an agreement through negotiation. They do this with the help of a mediator.

Courts and VCAT 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.

Former Chief Justice Marilyn Warren of the Supreme Court has noted that mediation and other forms of resolving disputes outside the courtroom help to cut costs for parties and courts alike. In 2014–15, the Supreme Court of Victoria estimated that 985 court sitting days were saved through the use of mediation. This was in addition to savings in litigation costs, courtroom facilities, judgment writing time and reduction in stress on parties who are going through litigation.



Source 1 Mediation is a cooperative method of resolving disputes.



Source 2 The key features of mediation

Use of mediation in resolving disputes

The courts and VCAT actively encourage and use mediation as a method of dispute resolution before a matter goes to a final hearing or trial. Set out in Source 3 below is a summary of how courts, VCAT, CAV and the parties themselves may use mediation.

BODY	HOW MEDIATION IS USED
Courts	• The Magistrates' Court, County Court and Supreme Court can refer civil disputes to mediation. The parties may be ordered to attend mediation at a fixed point before the cases are set down for trial or hearing, or earlier if possible • The parties may externally arrange a private mediator, or the court may refer the dispute to judicial mediation (where an officer of the court will mediate the dispute)
VCAT	• VCAT often refers a claim to mediation before a final hearing • In small civil disputes relating to goods and services, VCAT uses the SMAH dispute resolution method, in which parties attend a brief mediation conducted by a VCAT mediator. If the matter does not settle, the final hearing is scheduled for the same day
CAV	• While CAV does have the power under certain statutes to use mediation as a method of dispute resolution, its primary method to resolve disputes is conciliation
Private use	• Individuals may attempt mediation at any time either before or after they initiate a claim • The parties may contact the Dispute Settlement Centre of Victoria (DSCV) or private mediators (e.g. through the Resolution Institute)

Source 3 How mediation is used by courts, VCAT, CAV and privately

In the legal case below, both of the Black Saturday class actions were referred to mediation by the Supreme Court of Victoria.

LEGAL CASE

Settlement of bushfires class actions

Matthews v AusNet Electricity Services Pty Ltd & Ors [2014] VSC 663

The Black Saturday bushfires were a series of bushfires that occurred in Victoria in February 2009. They resulted in a series of class actions brought on behalf of various people who had suffered loss and damage during the fires. Two of those class actions were known as the Murrindindi Black Saturday bushfire class action and the Kilmore East-Kinglake bushfire class action. Both class actions were issued in the Supreme Court of Victoria, and were ultimately settled through mediation.



Source 4 The Kilmore East-Kinglake bushfire class action was heard in a special courtroom in the William Cooper Justice Centre.

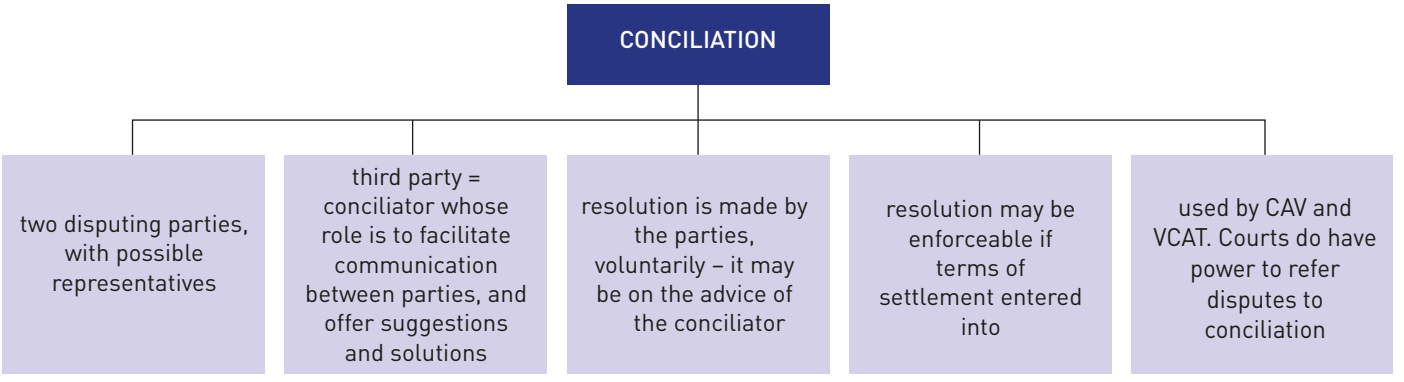
The Supreme Court of Victoria reported that the Murrindindi bushfire class action settled after being referred to court-led mediation, resulting in significant cost and time savings for the community, the legal system and the parties.

Separately, the Kilmore East-Kinglake fire settled through an external mediation process. This class action settled after a 200-day trial before Justice Jack Forrest. The trial involved 40 expert witnesses, and the use of a paperless 'e-trial'.

Conciliation

You have already studied conciliation in previous topics. Conciliation is a process of dispute resolution involving the assistance of an independent third party, with the aim of enabling the parties to reach a decision between them. The third party does not make the decision, but listens to the facts and makes suggestions and assists the parties to a mutually acceptable agreement or decision. The conciliator assists by exploring solutions to the dispute and suggesting possible options.

Conciliation can differ from mediation in that the conciliator has more influence over the outcome. The conciliator, who is usually someone with specialist knowledge, suggests options and possible solutions and is more directive than a mediator.



Source 5 The elements of conciliation

Use of conciliation in resolving disputes

Source 6 below is a summary of how courts, VCAT, CAV and the parties themselves may use conciliation.

BODY	HOW CONCILIATION IS USED
Courts	• The County Court and the Supreme Court of Victoria do not generally use conciliation as a method of dispute resolution, preferring to refer parties to mediation. However, all courts have the power under the *Civil Procedure Act* to order any civil proceeding to conciliation, so it is possible for parties to be ordered to conciliate the dispute prior to hearing or trial • Conciliation is widely used in the Family Court of Australia to help resolve family disputes
VCAT	• The parties may be ordered 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
CAV	• CAV's primary method of resolving disputes is through conciliation.
Private use	• Individuals may attempt conciliation at any time either before or after they initiate a claim

Source 6 How conciliation is used by courts, VCAT, CAV and privately

Appropriateness of mediation and conciliation

Whether mediation or conciliation is most appropriate for a particular civil dispute will depend on the nature of the dispute and the parties. You should consider the following points when determining their appropriateness.

Disputes suitable for mediation and conciliation

Types of disputes suitable for mediation and conciliation include:

- disputes in which a relationship between the parties will continue (e.g. when the dispute is between neighbours or family members)
- disputes in which both parties are prepared to meet in a spirit of compromise and are willing to stick to any agreement reached
- disputes in which a defendant admits liability and the only issue to determine is the amount to be paid
- disputes in which the parties want privacy and confidentiality when resolving the matter
- disputes which call for a combination of remedies to achieve the plaintiff's outcome
- disputes in which a proceeding has been issued in a court, and the court has referred the parties to mediation or conciliation
- disputes in which the parties expect the legal costs will be significant and the matter can be resolved at an early stage.

Disputes unsuitable for mediation and conciliation

Types of disputes unsuitable for mediation and conciliation include:

- disputes in which overwhelming emotions might interfere with the negotiating process
- disputes in which there is a history of broken promises
- disputes in which there is a history of violent and threatening behaviour (e.g. domestic violence)
- disputes in which one or both of the parties are unwilling to try to reach a mutual agreement
- disputes in which there is a gross imbalance of power between the parties
- disputes in which the mental health of a party suggests that the process is unlikely to be effective
- disputes in which a debt is clearly owing by one party (e.g. failure to pay the balance of a car)
- where the matter is urgent.

Strengths and weaknesses of mediation and conciliation

The strengths and weaknesses of mediation and conciliation are set out in Source 7.

STRENGTHS	WEAKNESSES
They are much less formal than courts and VCAT – it is likely to be less intimidating.	The decision may not be enforceable, depending on the terms of settlement.
They may address the parties' needs better.	One party may compromise too much.
They are conducted in a safe and supportive environment, in a venue that is suitable for both parties.	One party may be more manipulative or stronger, so the other party may feel intimidated.
They make use of an experienced third party who has expertise in resolving disputes or in the subject matter.	One party may refuse to attend.
They save time rather than waiting for a final trial or hearing.	The matter may not resolve and so may need to be litigated anyway, thus wasting time and money.
They are generally cheaper than having the matter litigated – pre-trial procedures can be avoided.	Some parties may make claims on principle and want a hearing.
They are private and confidential.	The decision will not form any precedent.
They are voluntary – parties are not forced into doing or saying anything.	One party may feel compelled to reach a resolution and therefore may feel dissatisfied.
There is flexibility in the steps – there are generally few rules as to how mediation is conducted.	The mediation or conciliation may be conducted too early or too late in the proceeding to be effective.
They offer savings for the justice civil justice system.	

Source 7 Strengths and weaknesses of mediation and conciliation

7.10 CHECK YOUR LEARNING

Define and explain

1. Explain what is meant by 'mediation'. Identify two types of disputes that would be suitable for mediation.
2. Describe the differences between the role of the mediator and the role of the conciliator.
3. Describe two ways in which mediation is used by courts or VCAT.

Synthesise and apply

4. Compare mediation and conciliation as dispute resolution methods.
5. A mediator usually starts a mediation by explaining the benefits of mediation. Prepare an adequate speech that you think would be suitable for a mediator to make at the start of a mediation which involves a $5 million claim in the Supreme Court, with the trial expected to take more than three months.

Analyse and evaluate

6. Read the extract 'Getting to no: a study of settlement negotiations and the selection of cases for trial'. Identify the main messages that are conveyed in this extract. Do you agree with those messages? Discuss.
7. Read the legal case *Matthews v AusNet Electricity Services Pty Ltd & Ors*. Discuss the benefits and downsides to both class actions being settled through mediation.

Check your obook assess for these additional resources and more:

- **Student book questions**
  7.10 Check your learning
- **Video**
  Mediation
- **Video worksheet**
  Mediation
- **Weblink**
  Alternative dispute resolution

7.11 METHODS USED TO RESOLVE CIVIL DISPUTES – ARBITRATION

In addition to mediation and conciliation, arbitration is another common method of dispute resolution.

Arbitration is a method of resolving disputes without a formal court process. An independent **arbitrator** (a third party given the task of presiding over the discussion) will listen to both sides and make a decision that is binding on the parties. Unlike mediation and conciliation, in an arbitration the arbitrator makes a final and binding decision. It is known as an **arbitral award**, and it is enforceable.

arbitrator
the independent third party (i.e. person) appointed to settle a dispute during arbitration; arbitrators have specialised expertise in particular kinds of disputes between the parties and make decisions that are legally binding on them. The decision is known as an arbitral award

arbitral award
a legally binding decision made in arbitration by an arbitrator

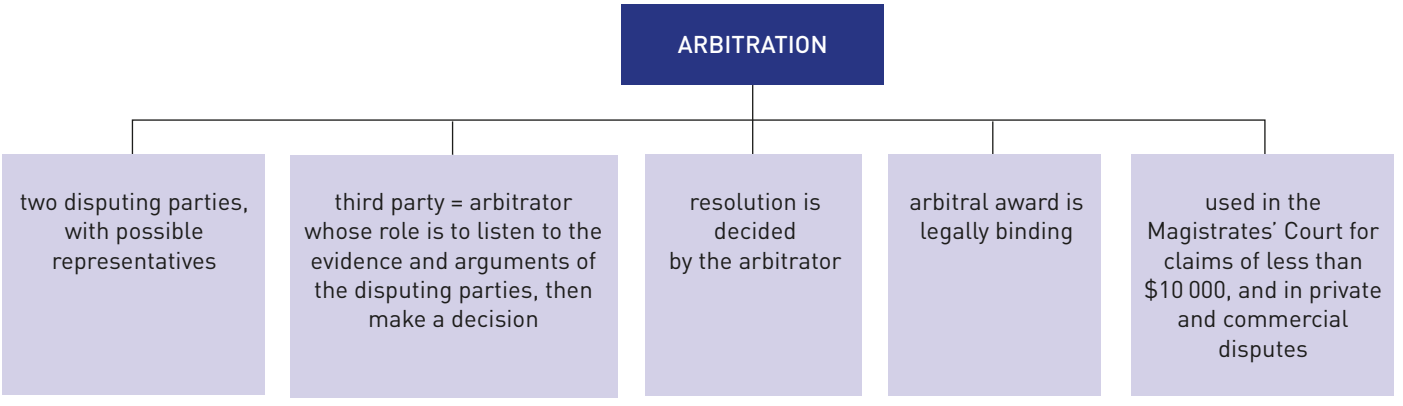
Arbitration is often conducted in private, and it can be less formal and more cost-effective than attending a court hearing or trial. Parties have much more control over the process and are free to agree on the procedure. They may be able to agree on how evidence is to be submitted, or the time by which steps are to be completed.

Generally, the arbitrator:

- is not bound by rules of evidence but may inform himself or herself on any matter as he or she thinks fit
- must ensure that the parties are treated equally and each party is given a reasonable opportunity of presenting their case
- is not required to conduct the proceedings in a formal manner.

In Victoria, arbitration is available when:

- the parties have 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
- the court orders the parties to arbitration (though the consent of the parties is required for this to occur)
- the claim has been filed in the Magistrates' Court and the plaintiff is seeking $10 000 or less, in which case the Court will normally hear the case through arbitration.



Source 1 The key features of arbitration

Use of arbitration in resolving disputes

Source 2 below is a summary of how courts, VCAT, CAV and the parties themselves may use arbitration.

BODY	HOW ARBITRATION IS USED
Courts	• The Magistrates' Court, County Court and Supreme Court have power under the *Civil Procedure Act* to **refer** all disputes to arbitration prior to a final hearing or trial, as long as the parties consent (with the exception of small claims in the Magistrates' Court) • For small claims in the Magistrates' Court (less than $10 000), the Magistrates' Court can refer a dispute to arbitration by a magistrate
VCAT	• VCAT hearings are not arbitrations. However, under Section 77 of the *Victorian Civil and Administrative Tribunal Act*, VCAT is able to refer a matter to arbitration on the basis that it is a more appropriate forum (e.g. the parties may make a request to VCAT for a referral to arbitration because a contract between the parties dictates that disputes are to be resolved by arbitration)
CAV	• CAV does not use arbitration.
Private use	• Parties can arrange their own private arbitration. Arbitrators can be found using institutions such as the Resolution Institute or the Victorian Bar. A recently established Commercial Mediation and Arbitration Centre in Melbourne offers facilities for an arbitration, which can be booked by the parties • The Supreme Court's Arbitration List also offers **support** for parties in arbitration, such as determining discrete questions of law which an arbitrator has referred to the Court

Source 2 How arbitration is used by courts, VCAT, CAV and privately

Appropriateness of dispute arbitration

Whether arbitration is most appropriate for a particular civil dispute will depend on the nature of the dispute, and the parties. You should consider the following points when determining its appropriateness.

Disputes suitable for arbitration

Types of disputes suitable for arbitration include:

- disputes in which the parties have agreed to arbitrate the dispute, or the claim is less than $10 000 and has been issued in the Magistrates' Court
- disputes in which the parties want the benefits of a binding and enforceable award made by an independent third party
- disputes in which the parties want evidence to be presented to a third party, and some rules of evidence to apply
- disputes in which the parties want to avoid the publicity of a courtroom and wish to have their matter resolved confidentially and in private.



Source 3 Arbitration is a common method of dispute resolution for international parties.

Disputes unsuitable for arbitration

Types of disputes that are unsuitable for arbitration include:

- disputes where the parties have not agreed to arbitrate the dispute, and do not want arbitration as a dispute resolution method
- disputes where the parties want greater control over the dispute resolution process and outcome
- disputes where the parties wish to have their 'day in court' and would rather not have the matter conducted in private
- disputes where the parties are more comfortable with formal rules of evidence and procedure, and would rather a court conduct the process.



Source 4 Parties may prefer arbitration if they wish to have their matter resolved confidentially

Strengths and weaknesses of arbitration

The strengths and weaknesses of arbitration are set out in Source 5 below.

STRENGTHS	WEAKNESSES
The decision is binding. This is fully enforceable through the courts.	Arbitrations can be formal if the parties have agreed on a formal method of arbitration, adding to the stress, time and costs.
The arbitration is normally held in private and will be confidential, which can be beneficial for parties wishing to avoid the publicity of a trial	The parties have no control over the outcome, which will be imposed on them by the arbitrator.
The parties have control over how the arbitration is to be conducted, by determining how evidence is to be presented and when steps are to be undertaken.	They can be costly and take a long time depending on the nature of the dispute and the way the parties have decided to resolve it.
The arbitrator is generally an expert on the subject matter.	It is not available if the parties have not agreed to this form of dispute resolution, or if the claim is not a small claim in the Magistrates' Court.
There can be a more timely resolution of the dispute, as there is flexibility in the processes.	The right to appeal is limited.
Costs can often be less than court costs given there is greater flexibility over the process.	

Source 5 Summary of the strengths and weaknesses of arbitration

Comparison of the three methods of dispute resolution

	MEDIATION	CONCILIATION	ARBITRATION
THE THIRD PARTY			
Name of third party	Mediator	Conciliator	Arbitrator
Is the third party independent?	Yes	Yes	Yes
Role of the third party	Facilitates discussion between the parties and ensures all parties are being heard. Does not need to be an expert in the field	Facilitates discussion and suggests options and possible solutions. Usually someone with specialist knowledge in the field	Listens to both sides and makes a binding decision on the parties. Usually someone with specialist knowledge in the field
HOW IT IS CONDUCTED			
Is it conducted in private?	Yes	Yes	Normally, yes
Are parties required to be present personally?	Yes	Yes	Yes, but they may be represented by someone else
Are there rules of evidence and procedure?	No	No	The parties may agree how it is to be conducted
FINAL DECISION			
Who makes the decision?	The parties	The parties	The arbitrator
Is a final order made?	No, unless the terms of settlement are formulated into orders that are then made by the court or VCAT which give effect to the settlement	No, unless the terms of settlement are formulated into orders that are then made by the court or VCAT which give effect to the settlement. CAV does not have the power to make a final order	Yes, called an arbitral award
Is the decision binding?	If the terms of settlement are formulated into orders, yes. If the parties settle the case, the terms of settlement can be enforced (but will require the party to institute proceedings to enforce them)	If the terms of settlement are formulated into orders, yes. If the parties settle the case, the terms of settlement can be enforced (but will require the party to institute proceedings to enforce them)	Yes

Source 6 A comparison of the three methods of dispute resolution

7.11 CHECK YOUR LEARNING

Define and explain

1 What is arbitration? Is it used by VCAT or CAV?
2 How does the Magistrates' Court use arbitration?
3 Describe the difference between the role of the conciliator and the role of the arbitrator.
4 Explain two ways in which arbitration is different from, and similar to, mediation.

Synthesise and apply

5 Create a concept map showing the different types of dispute resolution methods. Use the concept map to show similarities and differences, and how the methods are used by courts, VCAT and CAV.
6 Form small groups. Each group is to create a role play of the resolution of a civil dispute using one of the following:
   - mediation
   - conciliation
   - arbitration
   - a final hearing or trial.

   a Choose the type of civil dispute, the scenario that you will act out, and the dispute resolution method you have chosen. Think about scenarios in which the chosen dispute resolution method may or may not be appropriate. It is up to you whether the method is successful in resolving the dispute.

   b Act out the role play in front of the class. They will need to work out which dispute resolution method you are acting out.

   c Following the role play, engage in a discussion with the rest of the class about the strengths and weaknesses of the dispute resolution method, and the appropriateness of the method for that particular type of dispute.
7 In the following scenarios, choose which dispute resolution method that you would recommend to the parties (other than mediation, conciliation and arbitration, a court hearing or trial can also be used as a response). Justify your answer.

   a Sally is suing her ex-husband for injuries suffered as a result of domestic violence. She fears him, and doesn't want to be near him.

   b Andrew is alleged to have breached his contract with Geraldine. The contract stipulates that the parties must arbitrate the dispute, but Andrew now wants to mediate the dispute.

   c Harriet has issued a $5000 claim in the Magistrates' Court against her former employer.

   d Vicky Roads is suing the Victorian Government for negligence. Vicky wants all the publicity she can get to show the public how negligent the Government has been.

   e Thierry has a dispute against Sally Rockers Pty Ltd. He thinks the dispute is pretty tricky and will require some assistance from a third party who has knowledge of the area of law. Both parties have agreed to try and resolve the dispute prior to court.

Analyse and evaluate

8 Discuss the extent to which dispute resolution methods help parties and the courts save costs and time in resolving disputes

obook assess

Check your obook assess for these additional resources and more:

- **Student book questions**
  7.11 Check your learning
- **Sample**
  Arbitration contract clause
- **Going further**
  Collaborative law
- **Weblink**
  Arbitration – MCAMH

7.12 REMEDIES

remedy
a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

injunction
a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

A **remedy** is the way a court will recognise a plaintiff's right. It is what the plaintiff will seek, and what a court or tribunal may award, to legally end the dispute. Generally, a plaintiff will set out in the statement of claim the remedy sought. Often more than one remedy is sought by the plaintiff.

General purpose of remedies

The general purpose of most remedies is to **restore the plaintiff, as far as possible, to the position they were in before the wrong occurred.** That is, remedies aim to provide the plaintiff with the means to go back to how they were before they were wronged, and before they suffered loss.

Various remedies are available in civil cases. The most common remedy sought is damages. Another common remedy is an **injunction**. Both damages and injunctions have specific purposes.

Damages

Damages is an amount of money awarded to the plaintiff, to be paid by the defendant. Different types of damages can be sought, including compensatory, nominal, contemptuous and exemplary damages.

The purpose of damages is to **compensate the plaintiff for losses suffered**, so as to return them to the position they were in before the defendant caused the harm. The types of losses that may have been suffered include financial loss, physical or mental loss, and reputational loss, the most common of which is financial loss.

In the case below a mother lodged a claim with the Supreme Court seeking damages for pain and suffering as well as financial loss.

IN THE NEWS

Reluctant mother sues health system, doctor over the cost of raising boy she didn't want

Peter Mickelburough, *Herald Sun*, 21 August 2016

A MOTHER is suing the public health system and her doctor for hundreds of thousands of dollars for the cost of raising a child she did not want.

In August 2013, the then 20-year-old, from country Victoria, went to her GP for a termination, following a positive home pregnancy test.

But something went wrong.

In April 2014 the woman, whom the *Herald Sun* has decided not to identify, gave birth to a son, 'Cooper'.

The woman claims that on three occasions after the surgical termination, the hospital and her GP ignored signs she might still be pregnant, and failed to do an ultrasound that would have confirmed this.

In addition to compensation for pain and suffering, she wants compensation for medical expenses associated with the pregnancy and birth and for being 'exposed to the cost of supporting and raising Cooper'.

Costs of raising her son — for feeding, clothing, housing and schooling, out-of-school activities such as sport and music, and medical and transport expenses — will amount to hundreds of thousands of dollars.

In a statement of claim lodged with the Supreme Court she also seeks an unspecified sum for loss and damage she has suffered, including an adjustment disorder with depressed mood, depression and psychological trauma.

She claims that about 2½ weeks after visiting her GP, blood tests having confirmed her pregnancy, she was admitted to her local regional hospital for the surgical termination.

Two days later, a report by the hospital found a pathology sample taken as part of the termination procedure showed no foetal parts or other remnants of the pregnancy.

The woman says that the following month she returned to her GP, reporting a slight tenderness and a prickly sensation in her lower abdomen.The GP referred her for another blood test, but not for an ultrasound. Three days later, she returned, still 'feeling a bit sick'. The blood test showed elevated levels of human chorionic gonadotrophin, a hormone produced by an embryo.



Source 1 In 2016, a mother launched a civil claim for damages after a failed pregnancy termination.

The woman claims that given her history and symptoms, an ultrasound should have been done to 'see if the uterus and surrounding tubes were empty of pregnancy'.

In failing to do so, she says her GP and the hospital were negligent and in breach of the duty of care they owed her.

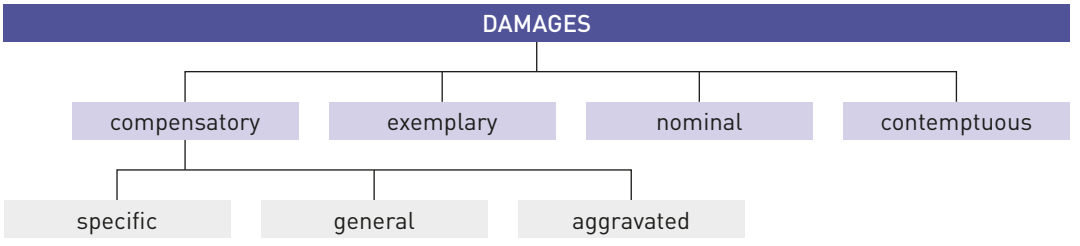
In early December, the woman had a further blood test that showed her levels of human chorionic gonadotrophin were still elevated.

Five days later, she finally had an ultrasound that revealed a 20-week-old foetus.

She claims the negligence of her GP and hospital meant she was unable to terminate her pregnancy.

The most recent Australian modelling in 2012, released in 2014 by AMP and the University of Canberra, put the cost to a middle-income family of raising two children at $812 000.

Source 2 sets out the types of damages available.



Source 2 Types of damages

Compensatory damages

Compensatory damages are the most common damages sought. The aim is to restore the party whose rights have been infringed as far as possible to the position they were in before the infringement, by **compensating them for losses suffered**. It may not be possible to do this where there has been physical loss; 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 and aggravated damages. These are set out in Source 3 on the next page.

Study tip

For the exam, you should know the general purpose of remedies, as well as the specific purposes of damages and injunctions. Make sure you are able to identify specific purposes of damages and injunctions, and how they can achieve those purposes.

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

Source 3 Types of compensatory damages

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 or the court might award nominal damages. Therefore, the purpose of nominal damages **is to uphold the plaintiff's rights without awarding any substantial amount of damages.**

For example, in a defamation case, nominal damages may be awarded when the plaintiff's character has been tainted, but little damage has been done to the plaintiff's reputation.

In the below case nominal damages were awarded for copyright infringement to show that SAI's copyright rights had been infringed but a large sum of money was not sought in compensation.

LEGAL CASE

Copying of information leads to nominal damages

SAI Global Property Division Pty Ltd v Johnstone [2016] FCA 1333 (14 November 2016)

Mr Johnstone was an employee of SAI Global Property Division Pty Ltd (SAI). In October 2015 he resigned. Three days before his resignation, Johnstone copied two computer files containing confidential and highly sensitive information. He commenced employment with a competitor days after his resignation, and used the information that he copied from his former employer. SAI commenced proceedings against Johnstone seeking the delivery up of any information copied from Johnstone.

At the hearing, SAI sought nominal damages of $1 for copyright infringement, plus $4230 for salary paid to Johnstone and additional damages of $5000. SAI could not show that it had suffered any loss or that Johnstone had made any profit as a result of copying the confidential information, and so only sought nominal damages. Johnstone had admitted that what he had done was wrong, and did not oppose the nominal damages amount.

The court ultimately awarded $1 in nominal damages for copyright infringement, damages of $4230 for breach of contract, and additional damages of $5000. Costs were also awarded to SAI.

Contemptuous damages

A court or tribunal 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 as evidenced in the legal case on the next page.

Assault leads to contemptuous damages

LEGAL CASE

Medic v Kandetzi [2006] VCC 705 (13 June 2006)

Roy Medic sued Paul Kandetzi, alleging that on 17 May 2002 in Black Rock, Kandetzi assaulted him. Medic claimed aggravated damages, alleging he was humiliated because the assault took place in a public place. Both the plaintiff and the defendant were self-represented at trial.

Her Honour Judge Hogan of the County Court, in her reasons for judgment, stated that she found the plaintiff to be a volatile personality on the hearing of the dispute, that he often shouted and talked over other witnesses, was prone to exaggeration and inconsistent in his evidence, and went from being loud and bullying in his manner to being apologetic to the Court. Her Honour said that her overall impression of the plaintiff was that he would 'say whatever he thought might help his situation at any given time'. On the other hand, Her Honour found the defendant to be courteous and measured.

After considering all of the evidence, Her Honour found that the proceeding was maliciously brought, and should never have been made. In order to show the Court's disapproval of the plaintiff's conduct, she awarded him contemptuous damages. She stated:

> These damages are appropriate to indicate a technical victory in that the plaintiff has proved that he has been assaulted by being fleetingly put in fear and that, technically, he was the subject of a battery by the defendant placing his hands on the plaintiff's waist, but no injury, loss or damage has flowed from the assault or battery.

Her Honour ordered that the defendant pay to the plaintiff the sum of five cents. She did not award the plaintiff any costs.



Source 4 Her Honour ordered the defendant to pay the plaintiff the sum of five cents as contemptuous damages.

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, and deter others from undertaking the same type of actions. Exemplary damages are also known as punitive damages or vindictive damages (although this latter term is rarely used). The purpose of exemplary damages is to punish and deter the defendant where conduct is wanton, malicious, violent, cruel, insolent or in scornful disregard of the plaintiff's rights. Exemplary damages cannot be awarded to a plaintiff for defamation.

In the case of *Erlich v Leifer* [2015] VSC 499, Justice Rush of the Supreme Court awarded exemplary damages on top of compensatory damages to punish the defendant.

Exemplary damages in sexual abuse case

LEGAL CASE

Erlich v Leifer [2015] VSC 499 (16 September 2015)

The plaintiff claimed that between 2003 and 2006, she was sexually abused by the headmistress of the school that she attended. Her injuries included severe psychiatric injury, and she claimed aggravated and exemplary damages against the headmistress, Leifer, and the school.

The plaintiff was awarded $1 024 428 in compensatory damages. Justice Rush of the Supreme Court, however, did not consider the award of compensatory damages to be sufficient for the purpose of deterrence or to impose a punishment on the school, which had been found to be directly and vicariously liable for Leifer's misconduct. Exemplary damages were awarded against Leifer for $150 000, and against the school for $100 000.

Restrictions on damages

Certain types of claims and certain types of loss have restrictions imposed on damages. For example, for personal injury claims made under the *Wrongs Act 1958* (Vic) (such as personal injuries suffered from a negligent act), claims for non-economic loss, being pain and suffering and loss of quality of life, are limited to $598 360 (as at 1 July 2017 – the amount increases year to year).

In defamation claims, damages for non-economic loss are also limited to $250 000 (thought in some circumstances this can be increased).

Injunctions

An injunction is a court order directing someone to stop doing a certain act, or compelling someone to do a certain act. 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 refrain from undertaking an action (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 **interlocutory** or **final**. 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. This can be seen in the legal case below.

LEGAL CASE

Squatters granted injunction

Bendigo Street applicants (SCV, Croft J, 14 August, unreported)

In August 2016, squatters who were occupying a number of empty homes in Collingwood, Parkville and Clifton Hill were given 48-hour eviction notices. However, a last-minute application was made to the Supreme Court of Victoria, and Justice Croft granted an interim injunction which prevented Victoria Police and the State Government from forcibly removing them from the empty homes.



Source 5 In August 2016, an injunction application involving squatters was heard in the Supreme Court of Victoria.

Evidence was given by some of the squatters about what would happen if they were evicted. They did not have legal representation at the hearing, but were assisted by a barrister.

An agreement was then reached with the State Government which allowed the squatters to remain for three weeks so they could find housing.

At the final trial or hearing, the interlocutory injunction can become a final (permanent) injunction, or it can be dismissed (overturned).

In the case of *Just Group Limited v van Dyk* [2016] VSC 66, the Just Group sought a restrictive injunction against Nicole Peck, to prevent her commencing employment with a competitor.

Just Group seeks just outcome

LEGAL CASE

Just Group Limited v van Dyk [2016] VSC 66 (23 February 2016)

The Just Group, which has a wide portfolio of brands such as Just Jeans, Portmans, Dotti, Smiggle and Peter Alexander, issued proceedings in the Supreme Court of Victoria against its former Chief Financial Officer, Nicole Peck. Peck tendered her resignation on 2 May 2016. Shortly prior to her last day of employment, Peck informed The Just Group that she intended to commence employment with Cotton On.

The Just Group sought an injunction to restrain Peck from commencing employment with Cotton On, including on the basis that Peck had various 'restraints of trade' clauses in her employment contract which sought to stop her from working for 50 different competitor companies, including Cotton On, for up to two years.

The claim was dismissed. Justice McDonald of the Supreme Court declined to grant the injunction because it found that Peck was entitled to commence employment with Cotton On. He had concluded that the restraints in Peck's contract were not reasonable and unenforceable.



Source 6 Ms Peck was successful in challenging an injunction sought by her former employer.

A summary of the purposes of remedies is set out below in Source 7.

REMEDY	PURPOSE
Most 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 stop a person from undertaking an action (restrictive injunction) that is or will cause a wrongdoing • to order someone to undertake a particular act (mandatory injunction) to stop the breach or potential breach of a right • to preserve the position of the parties until the final determination of the matter (interlocutory injunction)

Source 7 Purposes of remedies



Source 8 A company can seek an injunction restricting someone from trespassing on their land.

Remedies and their purposes

To what extent do remedies achieve their purposes? For example, to what extent can money compensate a person for the loss of the ability to walk or for suffering humiliation or years of post-traumatic stress? The extent to which a remedy can restore a plaintiff to the position they were in prior to the breach of rights will vary from case to case and can depend on many factors, including the individuals' circumstances and characteristics of the plaintiff (like their financial, emotional and economic circumstances and their resilience and support base) and the purpose of the plaintiff's action (that is, what the plaintiff is ultimately hoping and seeking to achieve).

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? If the plaintiff in a defamation case has had their reputation ruined, how can that reputation ever be restored back to before a statement about him or her was published?

In some situations, two or more remedies may be appropriate. For example, a company may seek an injunction restricting someone from trespassing on their land, and seek damages for the trespass that has already occurred. In this example, 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.

Source 9 shows the questions to be asked to determine whether a remedy can achieve its purpose in a particular case.

REMEDY	QUESTIONS TO ASK WHEN DETERMINING TO WHAT EXTENT THE REMEDY ACHIEVES ITS PURPOSE
Damages	• What sort of loss has the plaintiff suffered – economic, physical, emotional, mental, reputational? • What is the appropriate measure for unquantifiable losses such as pain and suffering, humiliation, reputation and loss of life? • Can money return the plaintiff 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 for a personal injury claim under the *Wrongs Act* or for a defamation claim? • 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, 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, that would better compensate the plaintiff?

Source 9 Questions to ask when determining whether remedies achieve their purposes

7.12 CHECK YOUR LEARNING

Define and explain

1 Define the term 'remedy', and outline its main purpose.
2 Distinguish between specific damages and general damages.
3 What is an injunction, and what is its purpose?
4 Describe how the purpose of one type of damages is similar to the purposes of criminal sanctions.
5 How are aggravated damages different to exemplary damages?

Synthesise and apply

6 Read the article 'Reluctant mother sues health system, doctor over the cost of raising boy she didn't want'.
   a Identify the plaintiff and defendants in this case.
   b Explain the central facts of this case.
   c Describe the remedy that is being sought by the plaintiff.
   d Who will decide on the facts in this case?
   e Discuss the role that remedies will play in this case, if they are awarded.
   f Is an injunction an appropriate remedy in this case? Explain your answer.
7 Read the legal case *SAI Global Property Division Pty Ltd v Johnstone*. In this case, why was nominal damages an appropriate remedy?
8 Read the legal case *Medic v Kandetzi*.
   a Identify the plaintiff and the defendant in this case.
   b What are the central facts, and why was the plaintiff seeking aggravated damages?
   c Was the defendant found liable in this case? If so, what remedy was awarded?
   d Explain the purpose of contemptuous damages. Refer to this case in your answer.
9 Read the legal case *Erlich v Leifer*.
   a Identify the exemplary or punitive damages awarded.
   b Do you think it was appropriate to award exemplary damages in this case? Justify your answer.
10 Using information provided in this topic, as well as your own research, identify two cases where interlocutory injunctions were granted. Why was an interlocutory injunction appropriate in both these cases?
11 Read the legal case *Just Group Limited v van Dyk*.
   a Identify the plaintiff and the defendant.
   b What allegations was the plaintiff making, and what remedy did they seek?
   c Was the plaintiff successful? Why or why not?
   d Would damages have achieved a purpose in this case? Give reasons for your answer.

Analyse and evaluate

12 'Remedies can never achieve their purposes because of the cost, stress and time involved in getting a remedy through a court'. Do you agree? Give reasons for your answer.
13 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. Can damages achieve its purposes in this case? Discuss with your class members.

Check your obook assess for these additional resources and more:

- **Student book questions**
  7.12 Check your learning
- **Video tutorial**
  How to distinguish in a response
- **Going further**
  Other types of remedies
- **Weblink**
  In the news article – Decorated cop Gene Hogan

CHAPTER 7

REVIEW

CHAPTER SUMMARY

- Dispute resolution bodies
  - Consumer Affairs Victoria
  - Victorian Civil and Administrative Tribunal
- Purposes of pre-trial procedures
  - Pre-trial steps include pleadings, discovery of documents and the exchange of evidence.
  - Purposes include, depending on the pre-trial procedure, to:
    - ensure procedural fairness
    - avoid taking an opponent by surprise
    - give the court a written record of the case
    - set the limits to the dispute
    - assist in reaching out-of-court settlement
    - allow a party to determine the strength of the other side's case
    - provide opportunity to rebut another side's evidence.
- Reasons for a court hierarchy
  - Administrative convenience
  - Appeals
- Responsibilities of key personnel in a civil trial
  - Judge
  - Jury
  - Parties (plaintiff and defendant)
  - Legal practitioners
- Judicial powers of case management
  - Power to order mediation
  - Power to give directions
- Methods used to resolve disputes
  - Mediation
  - Conciliation
  - Arbitration
- Remedies
  - General purpose of remedies is to restore plaintiff to the position they were in before the wrong occurred
  - Damages
  - Injunction

REVISION QUESTIONS

1 Distinguish between specific damages and general damages. (3 marks)

2 Using an example, describe one purpose of pre-trial procedures. (3 marks)

3 Explain one reason for a court hierarchy in resolving civil disputes. (3 marks)

4 Is arbitration always available to the parties in a civil dispute? Justify your answer. (4 marks)

5 Describe two responsibilities of the jury in a civil trial. (4 marks)

6 Compare CAV and VCAT in the way that they resolve disputes. (5 marks)

7 Identify two Victorian courts, and describe their role in resolving civil claims. (6 marks)

8 Discuss whether you think that CAV is the most superior way to resolve disputes. Make reference to the three principles of justice in your answer. (8 marks)

9 Evaluate the extent to which the civil justice system assists parties in reaching an out-of-court settlement. (10 marks)

Check your obook assess for these additional resources and more:

- **Student book questions** Ch 7 Review
- **Revision notes** Ch 7
- **assess quiz** Ch 7 Test your skills with an auto-correcting multiple-choice quiz

PRACTICE ASSESSMENT TASK

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

Airbnb – how civil disputes have arisen in relation to its use

Consumer Affairs Victoria

Jane Garrett, Victoria's Consumer Affairs Minister, has said that CAV has received complaints about Airbnb, including issues with damaged property, all night music and urinating in stairwells.

VCAT dispute

A dispute arose about an Airbnb rental which ended up in VCAT. Catherine Swan was a landlord of a two-bedroom apartment in St Kilda which she had leased. Her tenants listed the apartment on Airbnb and guests had stayed at the apartment for short-term stays which they booked through the website. Swan took the matter to VCAT and sought an order for possession on the basis that her tenants had sublet the apartment in breach of the lease.

VCAT dismissed the application on the basis that the respondents had granted licences to the Airbnb guests, but not leases, and they had therefore not been in breach of the lease.

Swan appealed to the Supreme Court of Victoria.

Supreme Court of Victoria decision

Justice Croft handed down his decision in *Swan v Uecker* [2016] VSC 313 (10 June 2016). He held that the rental of the apartment on Airbnb and the occupancy of the apartment by Airbnb people constituted a lease, which meant that the respondents were in breach of their lease. Justice Croft ordered that Swan be granted a possession order.

Practice assessment task questions

1 Describe two directions that may have been given by Justice Croft before the appeal.
(4 marks)

2 Referring to the Airbnb case, explain one reason for a court hierarchy.
(3 marks)

3 Describe the method that CAV would have used to attempt to resolve the dispute.
(4 marks)

4 Do you think that the use of a jury would have been available in any of these cases? Give reasons.
(4 marks)

5 Compare the way that CAV and the courts resolve disputes.
(5 marks)

6 Explain how both damages and an injunction may have been useful remedies in this case.
(6 marks)

7 'This case demonstrates that VCAT is useless. It should be abolished.' Do you agree with this statement? Give reasons for your answer.
(6 marks)

8 With reference to at least one of the principles of justice, discuss two responsibilities of a judge in a civil trial.
(8 marks)

9 You are a landlord of an apartment which you have leased. You find out that your tenants are leasing out the apartment for a much higher rate than you are getting as a landlord. You contact the tenants and tell them about a Supreme Court decision you are aware of which says they are doing the wrong thing, and they laugh at you.

Discuss the appropriateness of each of the following methods or bodies to resolve this dispute.

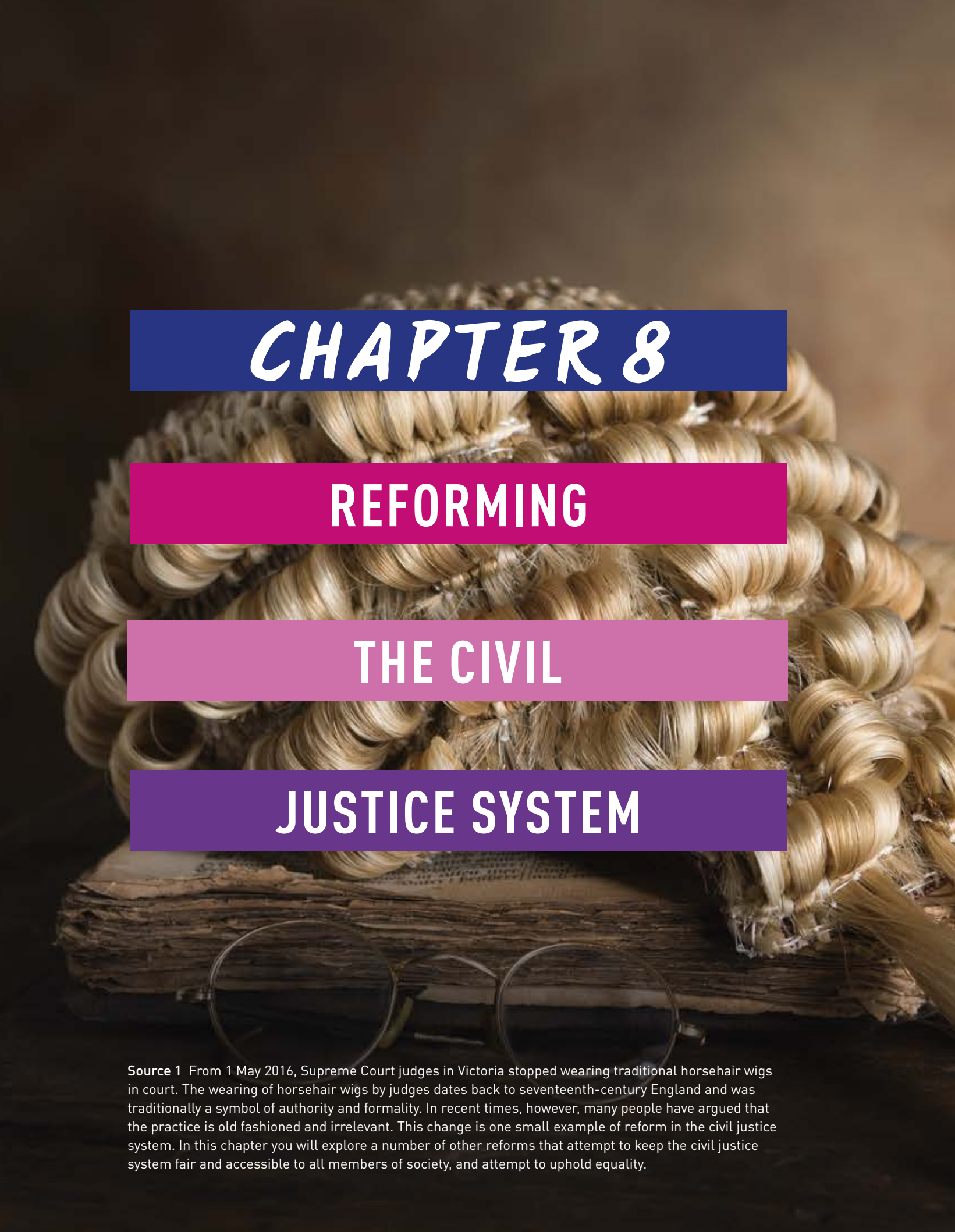
a arbitration
b mediation
c VCAT

(10 marks)

Total: 50 marks

CHAPTER 8

REFORMING THE CIVIL JUSTICE SYSTEM



Source 1 From 1 May 2016, Supreme Court judges in Victoria stopped wearing traditional horsehair wigs in court. The wearing of horsehair wigs by judges dates back to seventeenth-century England and was traditionally a symbol of authority and formality. In recent times, however, many people have argued that the practice is old fashioned and irrelevant. This change is one small example of reform in the civil justice system. In this chapter you will explore a number of other reforms that attempt to keep the civil justice system fair and accessible to all members of society, and attempt to uphold equality.



OUTCOME

By the end of **Unit 3 – Area of Study 2** (i.e. Chapters 6, 7 and 8) you should be able to analyse the factors to consider when initiating a civil claim, discuss the institutions and methods used to resolve civil disputes and evaluate the ability of the civil justice system to achieve the principles of justice.

KEY KNOWLEDGE

In this chapter, you will learn about:

- factors that affect the ability of the civil justice system to achieve the principles of justice, including in relation to costs, time and accessibility
- recent and recommended reforms to enhance the ability of the justice system to achieve the principles of justice.

KEY SKILLS

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- discuss recent reforms and recommended reforms to the civil justice system
- evaluate the ability of the civil justice system to achieve the principles of justice
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

KEY LEGAL TERMS

case management a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (such as an order that the parties attend mediation)

disbursements out of pocket expenses or fees (other than legal fees), incurred as part of a legal case. They include fees paid to expert witnesses, court fees, and other third party costs such as photocopying costs

litigation funder a third party who pays for some or all of the costs and expenses associated with initiating a claim in return for a share of the proceeds. Litigation funders are often involved in representative proceedings

practice note a document issued by a court which guides the operation and management of cases

Productivity Commission the Australian Government's independent research and advisory body, which researches and advises on a range of issues

Productivity Commission Review an inquiry conducted by the Productivity Commission in 2014 in relation to access to justice in civil disputes in Australia

self-represented party a person with a matter before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

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8.1 COSTS FACTORS

Study tip

These factors are specified in the *VCE Legal Studies Study Design*, and are different to the factors that you need to explore as part of Unit 3 – Area of Study 1, which are costs, time and cultural differences. Make sure you recall which factors you need to know for which Area of Study.

This chapter focuses on three factors that can affect the ability of the civil justice system to achieve the principles of justice (fairness, equality and access). The three factors are:

- costs factors
- time factors
- accessibility factors.

Introduction to costs factors

As you have learned, some aspects of the civil justice system – such as alternative dispute resolution methods like mediation and conciliation – have been designed to help reduce legal costs for parties. However, despite some parts of our civil justice system that aim to reduce costs, many people involved in civil disputes may still pay high costs to have their disputes resolved. These high costs can sometimes discourage or prevent people from pursuing civil claims or defences.

In this topic you will explore three costs factors that affect the ability of the civil justice system to achieve the principles of justice. These are:

- legal costs
- Victorian Civil and Administrative Tribunal (VCAT) costs
- increased use of alternative dispute resolution methods.

The first factor can often reduce or restrict the ability of the civil justice system to achieve justice, while the third one enhances the ability of the civil justice system to achieve justice. The second factor can both reduce and enhance the achievement of justice.

civil dispute
a dispute (i.e. disagreement) between two or more individuals (or groups) in which one of the individuals (or groups) makes a legal claim against the other



Source 1
Navigating the civil justice system on your own can feel like having to find your way through a maze.

Legal costs

In Chapter 6 you learnt about some of the costs associated with initiating a claim. One of the costs incurred by the parties in resolving a **civil dispute** is the cost of legal representation. In theory, everyone has the right to legal representation, but in reality not everyone can afford this right. The nature of the court system relies on both parties having good legal representation. This way, the chance of each party winning the case is maximised, the truth will come out, and a fair outcome will be achieved. If one of the parties is poorly represented, or not represented at all, this will have a negative impact on their ability to receive a fair outcome.

EXTRACT

The cost of legal representation

The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians … In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.

Source: Chief Justice Wayne Martin, 'Creative a Just Future by Improving Access to Justice' (Address delivered at the Community Legal Centres Association WA Annual Conference 2012, Perth, 24 October 2012).

The amount of money a party spends on representation often depends on the nature of the dispute and the way the case needs to be resolved. For example, making a complaint through Consumers Affairs Victoria (CAV) is often free, whereas a more complex claim issued in the Supreme Court of Victoria will often result in both parties spending a significant amount of money on legal costs.

In its 2014 review into access to justice (known as the **Productivity Commission Review**), the **Productivity Commission** estimated that the amount spent in legal costs by an average plaintiff on a Supreme Court matter was around $60 000. Significant costs can be spent on pre-trial procedures such as discovery (refer back at Chapter 7 for more details about discovery), which can be high in large commercial and complex cases. Because many people do not have access to that sort of money, they are deterred from initiating or defending a court claim.

Furthermore, most civil parties are not able to access **legal aid**, because the vast majority of legal aid funding is spent on aid for criminal and family law cases rather than civil disputes. As a result, some people pursuing civil disputes are forced to settle or withdraw their claims because of the costs involved in taking a matter to trial, and some are not in a position to initiate a claim at all.

In addition to costs of legal representation, there are also court costs and disbursements ('out of pocket' expenses) associated with:

- engaging expert witnesses and mediators
- filing and hearing fees
- using a jury (if a party requests one).

On top of those costs is the possibility of having to pay some of the other side's costs if the claim or defence is unsuccessful.

These costs are one of the reasons for the increase in **self-represented parties** in the courts. While VCAT encourages self-representation, it is not suitable for everyone. Many people need some assistance to help them navigate the system.

Justice Bell recognised in *Tomasevic v Travaglini* that judges may need to explain matters to self-represented parties to ensure a fair hearing (explored in Chapter 5). This was recognised again in the 2016 *Loftus* case.

Productivity Commission Review
an inquiry conducted by the Productivity Commission in 2014 in relation to access to justice in civil disputes in Australia

Productivity Commission
the Australian Government's independent research and advisory body, which researches and advises on a range of issues

legal aid
legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

self-represented party
a person with a matter before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

Appeal allowed to ensure fair trial for self-represented party

LEGAL CASE

Loftus v Australia and New Zealand Banking Group Ltd [No 2] [2016] VSCA 308 (8 December 2016)

The appellant applied for leave to appeal against a decision which granted the bank possession of his mortgaged property. The parties agreed that the appeal should be allowed, but the Court of Appeal requested the parties to file a joint memorandum so it could be satisfied that a new trial was necessary, given the costs and time involved.

One of the key issues was that the applicant, Loftus, was unrepresented at trial, and the bank was represented. Loftus argued that the trial judge failed to explain certain matters to him, including the consequence of not calling a particular witness to give evidence at trial, not explaining to him his right to object to certain evidence, and restricting his cross-examination of a certain witness. He argued that because he was self-represented, the court had a greater role to play in ensuring the trial was fair, and it failed to do so.

The Court of Appeal stated that the judge has an overriding duty to ensure a fair trial, which includes ensuring that a self-represented litigant understands and is able to vindicate his or

her rights (i.e. show or prove themselves to be right, reasonable, or justified). The Court of Appeal agreed that in this instance the judge did not explain the legal issues sufficiently, and the appeal was therefore allowed.

The assistance given by the courts or tribunals to self-represented parties can help overcome some of the issues faced by a party who does not have the legal means to pay for private legal representation, and is not eligible for legal aid. However, the assistance does not completely overcome the issues faced by a self-represented party. The assistance given to a self-represented party cannot extend to a person advocating (arguing) for that party. The **Victorian Access to Justice Review** report also noted that a self-represented party may still struggle to know what is happening (see the extract below).

Victorian Access to Justice Review an inquiry conducted by the Victorian Government's Department of Justice and Regulation about access to justice. The final report was released in October 2016

EXTRACT

Self-represented litigants

Some self-represented litigants do not understand what is happening when a lawyer or a judge uses technical language or raises a legal point. Some judges will take the time to explain matters, but they will not always be in a position to explain every point. Sometimes the other side's legal representatives will explain matters to a self-represented litigant, but they are not obligated to do so (legal practitioners are also often wary of the potential ethical implications should they assist a self-represented litigant when acting for an opposing party). Self-represented litigants will not be able to participate fully in the proceedings if they have trouble understanding what is being said in court.

Source: Government of Victoria, *Access to Justice Review: Report and recommendations (Volume 2)*, (August 2016) Engage Victoria <https://engage.vic.gov.au/application/files/9414/8601/7548/Access_to_Justice_Review_-_Report_and_recommendations_Volume_2.PDF>



Source 2 The cost of engaging legal practitioners can be significant. These costs are also rising each year.

The principles of justice

Source 3 provides a summary of the ways in which legal costs can affect the ability of the civil justice system to achieve the principles of justice.

PRINCIPLE	LEGAL COSTS
Fairness	• If people do not have access to money to pay for legal costs, they may be forced to settle or withdraw their claim, or self-represent, which can lead to unfair outcomes. • A court's duty to ensure a fair trial and a judge's responsibility to assist a self-represented party can help ensure fairness, but self-represented litigants may still struggle to understand legal issues or procedures. • Self-represented litigants do not have the same objectivity as a party who is represented by an experienced legal practitioner, and may not be able to make the right decisions in the case because they are too emotionally invested.
Equality	• Self-represented parties or parties with less skilled legal representation can often have an unequal footing in court, particularly given the skills necessary to argue the case in front of a judge (and jury if there is one). A lack of legal representation can impact on more vulnerable people.
Access	• Costs can prohibit a person's access to the legal system, particularly courts, as they often are deterred from making or defending a claim, or will have to settle the claim to avoid trial.

Source 3 Legal costs and the principles of justice

VCAT costs

Tribunals are intended to be low-cost, informal and quick in resolving disputes. They are an alternative to courts to resolve civil disputes. VCAT is the Victorian 'super **tribunal**' which offers parties who need to resolve disputes a low-cost alternative. Its fees, particularly for smaller claims, are generally more favourable than court fees. VCAT also ensures lower costs by requiring parties to be self-represented in most cases. Resolving disputes through VCAT can also avoid the costs associated with pre-trial procedures and the formalities of a hearing (though this depends on the case, the parties and the type of dispute).

tribunal
a dispute resolution body that resolves civil disputes and is intended to be less costly, more informal and a faster way to resolve disputes than courts

Although VCAT was established to reduce some of the costs associated with resolving civil disputes, since 2013 there has been an increase in many VCAT fees. These increases take into account the rising costs of operating VCAT, and the need to ensure access to justice.

Source 4 VCAT hears and decides civil and administrative legal cases in the state of Victoria. VCAT is less formal and less expensive than a court because – in most cases – you do not need a lawyer.

Further increases were introduced as part of the *Victorian Civil and Administrative Tribunal (Fees) Regulations 2016* (Vic), which introduced:

- **hearing fees for some hearings** – previously, no hearing fee was payable for most matters for the first day.
- **three tiers of fees** – corporate (such as businesses with a turnover of more than $200 000 per year), health care card holders (i.e. people holding government health care cards), and standard (i.e. all other users)
- a substantial **increase in fees** for corporate users.
- a substantial **reduction in fees** for health care card users.

The new fees also broaden the fee relief provisions (i.e. waiving the fee for certain people) for people in financial hardship, holders of a health care card and victims of family violence, thus increasing accessibility to VCAT. These fees were set by the government after public consultation.

A comparison of the fees payable for a civil claim (i.e. a claim issued in the Civil Claims List) worth $20 000 in 2012 and in 2017 is provided in Source 5. This assumes that the hearing will go for only one day, and the applicant is a standard user (i.e. not a corporate or a health care card user). If the hearing was to go for two days, a hearing fee of $348.40 would need to be paid.

FEE FOR $20 000 CLAIM – BASED ON STANDARD FEE	2012–2013	2017–2018
Application fee	$38.80	$467.80
Hearing fee – Day 1	No fee	No fee
Total fee	**$38.80**	**$467.80**

Source: VCAT Fees Regulations 2013 and 2017

Source 5 An example of fees payable for a $20 000 civil claim, based on the standard fee.

As another example, imagine you are an individual (not a health care card holder) who wishes to challenge the decision to grant a permit for a planning development worth less than $1 million in your local area. An example of the VCAT fees payable in 2012 and 2017 is set out below. This again assumes that the hearing will go for one day, and the applicant is an ordinary user (i.e. not a corporate or a health care card user).

Study tip

For each of the factors you consider in this chapter, make a summary of how they can affect the principles of justice. Think beyond the tables provided for you. What other points can you make about how each of the factors affects each of the principles of justice?

FEE TO CHALLENGE DEVELOPMENT WORTH LESS THAN $1M	2012–13	2017–18
Application fee	$38.80	$935.70
Hearing fee – Day 1	No fee	$348.80
Total fee	**$38.80**	**$1284.10**

Source: VCAT Fees Regulations 2013 and 2017

Source 6 An example of fees payable to challenge a development worth less than $1 million.

Despite these cost increases, VCAT fees are still quite low when compared with the costs required to resolve disputes through the courts. For example, application fees in the Residential Tenancies List (part of the Residential Tenancies Division at VCAT that hears and determines disputes between residential tenants and landlords), standard fees for claims up to $15 000 in 2017–18 was $62.70. No hearing fee is payable for a one-day hearing.

The introduction of a health care card holder fee also assists people accessing VCAT. The fee is capped at $156.40 (up to 30 June 2018) for all types of fees, though a hearing fee and application fee remain payable for some types of disputes.

The fee increases, however, have seen a reduction in the number of claims issued in VCAT for certain claims. In its 2015–16 Annual Report, VCAT noted that fee increases are likely to have influenced the decline in the number of civil claim matters lodged with VCAT.

IN THE NEWS

New VCAT charge will stop objections, help developers, say resident groups

Clay Lucas, the *Age*, 25 April 2016

Residents who want to formally object to a development before the state planning tribunal will have to pay a new levy that opponents say will restrict access to justice and help developers by discouraging community involvement.

But the property industry welcomed the new charge, saying it would discourage the vexatious and frivolous objections that had made the state planning tribunal a 'NIMBY plaything'.

Fees at the Victorian Civil and Administrative Tribunal are under review, with a new $51 charge proposed for residents wanting to be heard individually in a planning matter.

A residents' group whose members often fight large-scale development in Melbourne's suburbs said the proposed charge was just the latest attempt to shut down community participation at VCAT.

'It's not a lot of money, but it's another small bureaucratic thing that makes it more difficult,' said Ian Wood, president of Save Our Suburbs (SOS).

The new VCAT fees would be introduced by the Justice Department from July. The review moves to reduce charges for pensioners and the unemployed, keep them relatively steady for those with a wage, and largely increases the price of applications from corporations and property developers ...

Mary Drost, an anti-development activist from the group Planning Backlash, said the government was simply trying to make it too expensive to speak at VCAT.



Source 7 Residents of Somers who were challenging a planning permit were almost priced out of VCAT, as they were unable to pay the associated fees.

'It was meant to be a way for people to get justice affordably,' she said. 'We see VCAT as the developer's friend. They don't care about what residents think so they are now making it more difficult to be able to speak.'

But Asher Judah, the Property Council's Victorian deputy executive director, said the increase in VCAT fees would reduce vexatious and frivolous objections.

'VCAT has become the plaything of the NIMBY (Not In My Backyard) community,' Mr Judah said. 'This potential reform will limit the number of people gaming the system to frustrate legitimate building activity.'

The principles of justice

Source 8 provides a summary of the effects of VCAT costs on the ability of the civil justice system to achieve justice.

PRINCIPLE	VCAT COSTS
Fairness	• Many people who cannot afford to pay VCAT fees may be at risk of having to abandon their claim which can be an unfair outcome if their rights have been infringed. • VCAT costs remain low for most claims, and health care card holders pay even lower fees. VCAT tries to ensure a fair system where those who have a greater ability to pay are charged more.
Equality	• The three-tier system tries to create equal outcomes by charging higher fees to large businesses and lower fees to health care card holders. • The fees can result in inequality if the lower fees remain unaffordable for parties to a civil dispute.
Access	• The low cost of applying to VCAT and for most hearing fees ensures greater access by people to VCAT than other dispute resolution bodies such as courts. The three-tier system also ensures greater access to those who are more likely to suffer from high costs. • People have criticised VCAT's user-pays system, claiming it restricts access to justice. This applies particularly to claims where VCAT has exclusive jurisdiction (that is, only VCAT can hear and determine the dispute, such as a dispute in relation to the granting of a planning permit), and the person with a claim cannot pay the fees.

Source 8 VCAT costs and the principles of justice

Increased use of dispute resolution methods

The use of **alternative dispute resolution methods** such as mediation and **conciliation** is now well established. These methods can avoid a final hearing or trial in courts or at VCAT.

In addition to courts and VCAT referring parties to dispute resolution methods such as these, providers like the Dispute Settlement Centre of Victoria offer parties an opportunity to work together to resolve disputes outside of the courtroom.

The availability of a range of dispute resolution methods has helped with the costs involved in a civil dispute in two ways:

1 The earlier a dispute is resolved, the more money is saved. Parties avoid the significant costs involved with pre-trial procedures and trial procedures. The settlement of a dispute before trial also saves a party having to pay the winning side's costs, which may be substantial.

alternative dispute resolution methods ways of resolving or settling civil disputes that do not involve a court or tribunal hearing (e.g. mediation, conciliation and arbitration); also known as appropriate dispute resolution

conciliation a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution

2 The costs saved by resolving a matter before trial or hearing means a saving for the court or VCAT, and therefore a saving for the entire civil justice system. The more that is spent on trials and hearings, the more funding is required for our dispute resolution bodies. Resolving matters through dispute resolution methods such as mediation can therefore save time and costs of the courts and tribunals.

However, alternative dispute resolution methods such as mediation are not always appropriate. As discussed in Chapters 6 and 7, its appropriateness depends on the case and the parties. For example, vulnerable parties (such as young employees or persons who have suffered violence) can be disempowered during the process. Dispute resolution methods must also be used at the appropriate time – in some cases parties will not be able to settle a dispute early, particularly if they need additional information about the merits of the claim or the amount of loss or damage suffered by the **plaintiff**. If the parties attempt mediation too early, this can add to the costs rather than reduce them, as the parties will have spent the time and money preparing for mediation that failed.

plaintiff
(in civil disputes) the party who makes a legal claim against another person (i.e. the defendant) in court

The principles of justice

Source 9 provides a summary of how increases in the use of dispute resolution methods other than a final hearing can affect the ability of the civil justice system to achieve the principles of justice.

PRINCIPLE	INCREASED USE OF DISPUTE RESOLUTION METHODS
Fairness	• Dispute resolution methods that use a skilled third party who can monitor processes can ensure equal opportunity for the parties to present their case and have a say. • Informality allows parties unfamiliar with the courtroom to actively engage with the processes and have an opportunity to speak. • The parties take ownership of the processes and the outcome, thus avoiding an unwanted outcome being imposed on them.
Equality	• The third party operates as an impartial and unbiased referee who does not advocate for either side. • Methods such as mediation avoid a third party who may have biases, such as a judge or jury member, making a decision on behalf of the parties. • Whether there is equality in an actual mediation or other alternative dispute resolution method will, however, depend on the skills of the parties and their legal representatives, and any factor that makes them unequal (e.g. a mental illness or disability).
Access	• The cost savings can enable a party to access a wider range of methods to resolve their dispute. • Parties can hire private mediators or conciliators, avoiding the costs of issuing a claim. • However, alternative dispute resolution methods should be used at the appropriate time. Organising a mediation too early or too late can incur significant wasted costs.

Source 9 Increased use of dispute resolution methods and the principles of justice

8.1 CHECK YOUR LEARNING

Define and explain

1 Describe three types of costs that a party may have to pay in a civil dispute.

2 How can the increased use of mediation improve the ability for parties to achieve justice in a civil dispute?

Synthesise and apply

3 Read the legal case *Loftus v Australia and New Zealand Banking Group Ltd [No 2]*.
   - **a** What was the nature of this dispute?
   - **b** Why did the appellant seek leave to appeal?
   - **c** The parties already consented between themselves that the appeal should be allowed. Why did the Court of Appeal feel the need to consider the appeal anyway?
   - **d** Explain some of the matters that were not explained to the applicant at trial. For each, describe why they would have impacted on the ability to achieve a fair trial.
   - **e** Explain how this legal case shows each of the principles of justice were upheld in the Court of Appeal allowing the appeal.

4 Draw a maze (you can do this on paper or using an digital drawing tool). In the maze, show some of the hurdles or issues that a party in a civil case will confront in relation to costs. Try and put them in the order that you think the party is likely to confront them. Think of as many costs as you can.

5 You live in an area in which your local council has just approved a $5 million multi-storey housing development. You and your parents want to object to the building of the dwelling. Go to the VCAT website. A link is provided on your obook assess.
   - **a** Which list would this be heard in?
   - **b** What is the application fee payable?
   - **c** You have been told the hearing will run for 5 days. What will be the total hearing fee?
   - **d** Do you think this scenario demonstrates that VCAT is inaccessible to ordinary Victorians trying to resolve disputes? Discuss with your classmates.

Analyse and evaluate

6 'The parties should be forced to go to mediation as soon as a statement of claim is issued in court. This will save the parties and the court money.' Discuss the extent to which you agree with this statement.

7 Evaluate the ability of the civil justice system to address the issue of the costs involved in resolving disputes.

Check your obook assess for these additional resources and more:

- **Student book questions**
  8.1 Check your learning
- **Video tutorial**
  Introduction to Chapter 8
- **Weblink**
  Productivity Commission
- **Weblink**
  Access to Justice Review – Engage

8.2 TIME FACTORS

Quick and efficient hearings are often the fairest. If a dispute takes a long time to be heard – or the hearing itself is very lengthy, it can become increasingly unfair to one or both parties.

The civil justice system is often seen as being slow. In this topic you will explore four time factors that affect the ability of the civil justice system to achieve the principles of justice. These include:

- court delays
- VCAT waiting times
- appeal processes
- use of **case management** powers.

case management a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (such as an order that the parties attend mediation)

Court delays

The time it takes for courts to resolve disputes can vary greatly depending on the complexity of the case, the number of parties involved, and the court in which the claim was issued.

In 2014 the Productivity Commission Review found that most disputes heard in lower courts were resolved within 6 months, while a third of cases heard in the superior courts took more than 12 months.



Source 1 Quick and efficient hearings are often the fairest.

Court delays have several causes. These include:

- **court backlogs** – While delays in having cases listed for trial (that is, obtaining a court date for trial) have improved in recent years, it largely depends on the court.
- **pre-trial procedures** – Pre-trial steps can be complex and lengthy. Most criticised is the process of discovery, which can take months. Courts that use case management processes often make orders about discovery and other pre-trial steps to streamline the process.
- **evidence gathering and preparation** – The time it takes for the parties to get a case ready for trial (including gathering evidence and preparing for the hearing).

evidence information used to support the facts in a legal case

The principles of justice

Delays have an impact on parties to a civil dispute. The Productivity Commission Review found that some people choose not to pursue a legal claim because it would take too long to resolve. Delays in getting an outcome can cause stress, wasted time and inconvenience. Delays can also add to the costs. They can even force parties to settle on poor terms or withdraw their claims or defences.

Source 2 provides a summary of the way court delays can affect the ability of the civil justice system to achieve the principles of justice.

PRINCIPLE	COURT DELAYS
Fairness	• The delay can impact on the reliability of evidence, jeopardising a fair outcome. • Delays deny the parties fair and due process.
Equality	• Delays can have a serious impact on some parties, (e.g. an injured person). • Delays can also impact on more vulnerable parties, who are generally not familiar with litigation and can be stressed by the inconvenience of court processes (unlike larger businesses).
Access	• Delays may force parties to settle or withdraw their claim, frustrated by the loss of time or unable to continue without settlement. This can reduce genuine access to the civil justice system. • The reality of possible delays may also deter parties from pursuing their claim in the first place.

Source 2 Court delays and the principles of justice

VCAT waiting times

VCAT is intended to be a speedier and more efficient way of resolving disputes. Generally, it is much faster than courts at resolving disputes.

Most VCAT cases are heard in the Residential Tenancies List, and the waiting time is significantly lower than for a court. For tenants and landlords who wish to have a speedy resolution of rent matters, rental arrears, repairs and vacating premises, speed is helpful in ensuring these disputes do not drag on.

However, the waiting times for some lists are significant. A planning dispute takes about six months to resolve. This can be unfair for developers and businesses planning a development. Even a small civil claim can wait 10 weeks to be resolved.

VCAT LIST	WEEKS
Building and Property	14
Civil Claims	10
Human Rights	14
Legal Practice	13
Owners Corporation	6
Planning and Environment	25
Residential Tenancies	2
Review and Regulation	22

Source: VCAT Annual Report 2015–16

Source 3 Median waiting times for a matter to be finalised by VCAT in 2015–16 in some of its lists.

The principles of justice

Source 4 provides a summary of how VCAT waiting times can affect the ability of the civil justice system to achieve the principles of justice.

PRINCIPLE	VCAT WAITING TIMES
Fairness	• The short waiting time for some disputes in VCAT can result in a fairer outcome, with parties being able to recall the facts in dispute and not have to wait a significant amount of time for a resolution. • The long waiting time for some lists, however, can produce unfair results, particularly for large developments and businesses that risk losing costs and time with waiting for a resolution.
Equality	• Short waiting times can reduce any risk that a person needing a quick resolution has to wait – for example, a tenant or a landlord who needs a speedy determination • Long waiting times, however, can impact on more vulnerable people who are stressed or inconvenienced as a result of delays.
Access	• Short waiting times improve access to justice. People are not deterred from issuing claims because of the long time it will take to have the matter heard, and disputes do not fester in the community. • Long waiting times, however, can reduce access to justice, as some people may be deterred from pursuing their case, or may withdraw or settle their claim or defence because of the time taken to get an outcome.

Source 4 VCAT waiting times and the principles of justice

The frustration applicants feel about the waiting times for a case to be heard in the Building and Property List are highlighted in the article below.

IN THE NEWS

Four-storey Moonee Ponds development plans head back to council ahead of VCAT hearing

Natalie Savino, *Moonee Valley Leader*, 10 February 2017

PLANS to build 32 apartments among a row of period homes will likely be considered by Moonee Valley Council on Tuesday.

Moonee Ponds residents last year lodged more than 150 objections to the proposed four-storey building at 2–4 Smith St and 19–21 Park St, which they feared would stick out 'like the Titanic'.

But Margaret St resident Natalie Senjov-Makohon slammed the laborious process, which has already taken more than six months to near an outcome.

'The council hasn't made a decision,' she said.

'We're waiting for a negotiation at VCAT ... then it's supposed to go to a full hearing in April' ...

The applicant lodged an appeal to VCAT after council failed to make a decision within 60 days.

Moonee Valley mayor Andrea Surace said the matter would go before council on February 14, where they would agree on a formal position to be taken to the tribunal hearing.

Clarke Planning director Andrew Clarke, acting on behalf of the applicant, said it was a frustrating delay but they needed to wait their turn.

'It's a six to eight-month delay to get a hearing at VCAT,' he said.

'Clearly everyone wants an outcome. We're waiting and the residents are waiting.'



Source 5 In 2017, Moonee Ponds residents lodged more than 150 objections to a proposed four-storey building at 2–4 Smith St and 19–21 Park St, which they feared would stick out 'like the Titanic'.

Appeal processes

Reforms in the way appeals are handled in both the Court of Appeal and the High Court have aimed to reduce the delays associated with appeals. Two reforms include:

- changes to the way appeals are heard and determined in the Court of Appeal
- changes to the process used by the High Court to hear special leave applications.

Changes to the way appeals are heard and determined in the Court of Appeal

In 2014 the *Supreme Court Act 1986* (Vic) was amended so that leave to appeal is required for almost all civil appeals. Very few matters have a right of appeal. Those exceptions are set out in section 14A(2) of the *Supreme Court Act*. They include an appeal from a refusal to grant *habeas corpus* (an old **common law** remedy challenging the lawfulness of a person's detention) and for an appeal under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (where a person may appeal against a decision in relation to a supervision order).

The Court of Appeal can only grant leave to appeal if it is satisfied that the **appeal** has **a real prospect of success**. That is, the **appellant** must show that there are grounds to substantiate the need for an appeal to be heard.

common law
law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

appeal
an application to have a higher court review a ruling (i.e. decision) made by a lower court

appellant
a person who appeals a ruling or decision (i.e. a person who applies to have the ruling of a lower court reviewed or reversed by a higher court

In addition to requiring leave, amendments were made to the appeal process. For example, there are standard timeframes for certain steps to be taken, and applications may be decided on the papers (that is, without the need for a hearing).

These reforms were implemented to ensure the timeliness of hearing civil appeals to make appeal processes more efficient, faster, and targeted (the Court of Appeal can reject appeals that have no real prospects of success without the need for a full hearing).**Source 6** Applications for leave to appeal to the Court of Appeal were streamlined in 2016 to make the process more efficient.

Changes to the process used by the High Court to hear special leave applications

Civil appeals to the **High Court** of Australia require the leave (consent) of the High Court for the appeal to be heard. Usually, special leave applications are heard and determined in an oral hearing after the parties submit the relevant court documents for the purposes of the hearing.

High Court
the ultimate court of appeal in Australia and the court with the authority to hear and determine disputes arising under the Australian Constitution

In 2016, however, the High Court announced that in represented applications, a Panel of Justices would determine in the first place whether an oral hearing was required, and if the Panel decided that no such hearing was necessary, the application would be determined 'on the papers' and without an oral hearing. The changes were expected to reduce the time between the filing of an application and the oral hearing, and were also intended to reduce costs to parties by avoiding the need to prepare for, and appear at, the hearing.

The principles of justice

Source 6 provides a summary of the way changes to appeal processes can affect the ability of the civil justice system to achieve the principles of justice.

PRINCIPLE	APPEAL PROCESSES
Fairness	• An appeal must have real grounds for it to be granted leave to be heard in the Court of Appeal. This means that parties do not put time and money into weak appeals. • Both parties remain entitled to present their arguments to the courts in written submissions and documents, ensuring they have an opportunity to be considered. • The appeal will be determined on its merits by experienced judges. • The changes are designed to allow appeals to be heard more quickly and with greater cost savings to the parties.
Equality	• A reduction in delays can reduce the impact on the parties, particularly those who are significantly disadvantaged because of delays.
Access	• The parties have greater access to appeal processes without concerning themselves about oral hearings in the Court of Appeal or the High Court, or about long delays before their appeal is heard. Parties may feel more inclined to appeal if they know they have good prospects and know that the appeal will be heard swiftly.

Source 6 Appeal processes and the principles of justice

Use of case management powers

As you explored in Chapter 7, the judge and magistrate have significant powers of case management. These include the powers to order the parties to mediate the dispute, and the power to give directions to the parties. Case management involves the transfer of some of the control and initiative of case preparation from the parties to the court. Tribunals such as VCAT also have powers of case management to ensure disputes are resolved efficiently.

Case management procedures are used widely across the courts and tribunals in Victoria and elsewhere in Australia, and can result in a significant modification of procedure rules, as well as modification of rules relating to **pleadings**, discovery and evidence preparation.

Giving the courts greater control over cases ensures that disputes are resolved in a more timely and cost-effective manner. The courts can, for example:

- order that the parties attend mediation or some other form of dispute resolution method
- limit the scope of discovery to ensure that it does not take too long
- order that no pleadings are required
- restrict the time for final hearings, including limiting the number of witnesses and the time to make submissions or cross-examine witnesses.

It is widely seen that case management procedures reduce delays, and a pro-active judge will help parties narrow the issues in dispute, undertake only those steps that are relevant, and keep to the timelines set by the court. Judges achieve this by making orders along the way, and requiring them to be complied with.

In January 2017, the Supreme Court of Victoria's Commercial Court (which deals with large commercial disputes) released a **practice note** which deals with case management. It emphasised that the overarching purpose is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. It also states that the aim is to resolve disputes efficiently.

An extract from the practice note is provided below.

EXTRACT

Practice note SC CC 1

4 Court Practices and Procedures

4.2 The Commercial Court aims to bring proceedings not otherwise resolved to trial within nine months of issue. Parties are required to act promptly unless there is good reason to the contrary. Shorter time periods than permitted under the Rules will usually be ordered for interlocutory steps. At trial, time limits may be imposed for the examination and cross-examination of witnesses and for oral submissions. Opening and closing submissions may be written or oral, or both.

Source: Supreme Court of Victoria, *Practice Direction SC CC 1— Commercial Court*, January 2017.

The principles of justice

Source 7 provides a summary of the way case management powers can affect the ability of the civil justice system to achieve the principles of justice.

Study tip

Court delays, VCAT waiting times, appeal processes and the use of case management powers are not the only time factors that you can explore. For example, the use of dispute resolution methods such as mediation is also a factor that can substantially assist in reducing the time it takes for a dispute to be resolved. You should look back on Chapters 6 and 7 to consider other time factors, such as the availability of Consumer Affairs Victoria to resolve certain types of civil disputes and the use of technology assisted review in undertaking discovery.

pleadings
a pre-trial procedure during which documents are filed and exchanged between the plaintiff and the defendant and which state the claims and the defences in the dispute

practice note
a document issued by a court which guides the operation and management of cases

PRINCIPLE	USE OF CASE MANAGEMENT POWERS
Fairness	• Courts and tribunals can adapt processes to adapt to the needs of the parties. This can ensure that the parties are focused on resolving the issues in dispute, and the court can focus on what is required to resolve the dispute.
Equality	• Courts and tribunals can ensure there is flexibility without any favour or discrimination. • Orders or directions can apply equally to both parties.
Access	• Case management enables greater access to the courts and tribunals, as there can be flexibility in formalities, in what rules the judge orders in relation to procedure, in the way that documents are filed and the time required to undertake tasks. • The Supreme Court's approach to case management can also help parties access the system without being burdened by the time and costs involved in undertaking pre-trial procedures.

Source 7 Use of case management powers and the principles of justice

8.2 CHECK YOUR LEARNING

Define and explain

1 Provide two reasons why there are sometimes delays in having a case heard by a judge or magistrate.
2 Explain what case management means and describe two ways judges can manage a civil dispute.
3 How can court delays impact on a party pursuing a civil case?

Synthesise and apply

4 Use the current annual report for VCAT (a link is provided on your obook assess) in order to update Source 2 (which shows the timeliness of finalised cases in 2015–16). Has there been an increase or decrease in the waiting times? Provide a summary of your analysis.
5 Read the article 'Four-storey Moonee Ponds development plans head back to council ahead of VCAT hearing'.
   a What is the issue in dispute in this case?
   b What sort of delay was expected for VCAT to hear the matter?
   c How might this delay impact on the objectors, the developers, and possible purchasers of the dwellings?
6 Read the extract from the Supreme Court's Commercial Court Practice Note. Provide two examples given in the Practice Note that may reduce the delays associated with a dispute being resolved.

Analyse and evaluate

7 Do you think that delays impact more on certain groups or individuals in society, or do they affect all parties equally? Give reasons for your answer.
8 Has VCAT become less accessible to parties in dispute because of its increase in costs and delays in planning matters? Discuss.

Check your obook assess for these additional resources and more:

» **Student book questions**
8.2 Check your learning

» **Worksheet**
Appeals 'on the papers'

» **Weblink**
Current VCAT Annual Report

8.3 ACCESSIBILITY FACTORS

Having good access to dispute resolution bodies is an important part of achieving justice. This is particularly important for vulnerable people who may need extra assistance in having their disputes resolved. For many decades access has been a problem, and the civil justice system has been criticised for being out of reach for many people. Lack of access can lead to valid civil claims being abandoned, withdrawn or settled for much less than what a party may be entitled to.

In this topic you will explore three accessibility factors that affect the ability of the civil justice system to achieve the principles of justice. These are:

- barriers to communication
- lack of services in rural and remote areas
- the use of representative proceedings.

The first two factors can often reduce or restrict the ability of the civil justice system to achieve justice, while the third factor often enhances the ability of the civil justice system to achieve justice.

Barriers to communication

Barriers to communication can include anything that prevents a person from receiving and understanding information (e.g. ideas, thoughts and instructions) from other people or organisations. In a legal context, barriers to communication can:

- prevent a person from understanding their legal rights
- reduce a person's understanding of the methods and bodies used to resolve disputes
- reduce a person's understanding of the processes involved in pursuing their rights.

The most common barrier to communication is language based. For example, if a person is unable to speak or understand English, they will have little chance of navigating the legal system. Barriers to communication are not restricted to people born overseas. They also extend to Aboriginal and Torres Strait Islander peoples. While more than 80 per cent of Aboriginal and Torres Strait Islander peoples speak English at home as a first or only language, in some remote communities English is a second, third or fourth language.



Source 1 Victoria Legal Aid provides translation services and legal information sheets in more than 22 different languages. These services assist people from different cultural and language backgrounds to overcome barriers to communication.

The Productivity Commission Review found that Indigenous interpreter services help some Indigenous people understand civil rights and communicate what they need, though it takes a long-term commitment to ensure those services are ongoing. The availability of interpreters for migrants also varies depending on the court. There is general recognition that information about legal rights and legal processes is required in languages other than English, and more attention to this aspect of access to justice is needed.

The principles of justice

Source 2 provides a summary of the way barriers to communication can affect the ability of the civil justice system to achieve the principles of justice.

PRINCIPLE	BARRIERS TO COMMUNICATION
Fairness	• People who are unable to communicate well in English may not understand their legal rights or the dispute resolution methods or bodies that can help them resolve a dispute. This reduces their ability to access procedures and engage in a trial or hearing, therefore reducing their ability to present their case in the best light possible.
Equality	• People who experience communication barriers may struggle to tell their side of their story. This can make them unequal before the law or deny them an equal opportunity to present their case.
Access	• A person with little understanding of their legal rights or the mechanisms used to resolve disputes may abandon their claim or defence, may not know they have a claim or defence in the first place, or may compromise or withdraw their claim or defence just because they feel uncertain about what needs to happen to pursue their case.

Source 2 Communication barriers and the principles of justice

Services in rural and remote areas

People living in rural and remote Victoria often find it more difficult to access legal and dispute resolution services than people living in larger cities and towns, because those services may be insufficient in those areas. For example, there may be fewer people available to provide legal services, and there may not be dispute resolution bodies such as courts in close proximity.

The Victorian Access to Justice Review Report reported on legal services in rural and regional. It stated that there were issues with access to services to Victorians living there.



Source 3 The Bendigo law courts (shown here) are one venue for circuit court sittings.

EXTRACT

Rural and regional Victoria

Stakeholders identified unmet legal needs in rural and regional Victoria. Around 30 per cent of Victoria Legal Aid clients live in a rural or remote area, which is higher than the proportion of Victorians who live outside Melbourne. Rural and regional communities in Victoria, as in the rest of Australia, consistently score higher on measures of disadvantage that correlate with high demand for legal assistance services.

Victoria Legal Aid submits that its 'ability to provide effective and efficient services in regional and outer-metropolitan regions is hampered by the increased barriers to access in these areas'. It also submits that its clients in these areas 'may experience different outcomes through the justice system compared with metropolitan residents'.

cont.

The Productivity Commission observes that the Australian legal profession is predominantly based in State and Territory capital cities, with more than half of practising lawyers based in the central business district of a capital city, and a further quarter based in a suburban location.

The Centre for Rural Regional Law and Justice states that the low number of lawyers in rural and regional areas places additional demands on these lawyers who are required to cover a greater geographical area, are expected to have expertise across a wider range of legal subject areas, are more likely to encounter conflicts of interest, and have greater difficulty accessing professional development. Further, the problem of meeting legal needs in rural and regional Victorian communities is 'exacerbated by a continuing decline in rural and regional practitioners engaging in legally aided work'.

Source: Government of Victoria, *Access to Justice Review: Report and recommendations (Volume 2)*, (August 2016) Engage Victoria

The courts and VCAT have tried to ensure that they sit in locations that are accessible to most Australians. The courts do not usually sit every day in each of those places, but rather use the 'circuit court system', where a calendar is used to determine when the court will sit at a particular location.

The number of locations in Victoria for each of the main courts and VCAT (for 2017) are set out in Source 3 below. By way of example, Ballarat, Bendigo, Geelong, Horsham, Mildura, Morwell, Sale, Shepparton, Wangaratta, Warrnambool and Wodonga all have access to courts at every level as well as VCAT.

COURT OR TRIBUNAL	NUMBER OF LOCATIONS IN VICTORIA
Victorian Civil and Administrative Tribunal	37 (including two Melbourne venues)
Magistrates' Court	51 (including 10 metropolitan courts)
County Court	13 (including Melbourne)
Supreme Court	13 (including Melbourne)

Source 4 Circuit court sittings are held across Victoria to ensure people have local access.

The principles of justice

Source 5 provides a summary of how a lack of services in rural and remote areas can affect the ability of the civil justice system to achieve the principles of justice.

PRINCIPLE	LACK OF SERVICES IN RURAL AND REMOTE AREAS
Fairness	• The decline or lack of legal services in some rural and remote areas of Victoria impacts on people's ability to seek legal advice and assistance, and access resources and information about their case. It can inhibit a person's ability to use legal processes to ensure they put their case forward properly.
Equality	• Rural and remote Victorians may not be equal before the law if they have unequal access to legal services and resources, as well as unequal access to the courts and tribunals.
Access	• An inability to access legal services, courts and tribunals can impact on the ability of a person to pursue their legal rights and seek compensation for any wrong that they have suffered.

Source 5 The lack of services in rural and remote areas and the principles of justice

The use of representative proceedings

Representative proceedings (also known as group proceedings or class actions) are proceedings commenced by a **lead plaintiff** on behalf of seven or more persons who have a claim arising out of the same, similar or related circumstances. Since they were first introduced in Australia in 1992, the number of class actions has substantially increased, and they are now a familiar part of the civil litigation landscape. Representative proceedings increase people's access to dispute resolution. In March 2017, Justice Murphy of the Federal Court said 'It is important to remember that before the class action regime was introduced, it was either impossible, or at least exceedingly rare for consumers, cartel victims, shareholders, investors and the victims of catastrophe to recover compensation ...'. A person who has a legitimate claim against a big business may not otherwise have the desire or ability to pursue that claim, and therefore may abandon that claim. However, the availability of class actions enables that person to seek recovery for loss suffered by joining with several other people who have a similar claim, even if each individual claim is small.

representative proceeding
a legal proceeding in which a group of people who have a claim based on similar or related facts, bring that claim to court in the name of one person (so it can be heard together); also called a class action or a group proceeding

lead plaintiff
the person named as the plaintiff on behalf of the group members in a representative proceeding (i.e. class action)

A person who joins a class action does not have to personally attend trial, pay costs, give instructions to lawyers or give evidence (unless their evidence is critical to the issues in dispute). People in a class action may only need to be personally involved when deciding to join the class and when submitting a proof of claim if a payment is to be made.

Representative proceedings, however, are not without criticism. While the process facilitates access to justice by ensuring people can go to court, some people believe that unmeritorious claims (claims without any basis) are more easily pursued, that the use of a **litigation funder** can erode the ultimate payment that is made to legitimate claimants, and that the risk of class actions can be detrimental to companies and businesses.



Source 6 In July 2017, the Nurofen class action settled for $3.5 million. Reckitt Benckiser (Australia) Pty Ltd (the manufacturer of Nurofen) breached Australian consumer law by marketing four of the range's products as targeting specific pain despite being chemically identical. This class action is an example of a number of people joining a claim to seek recovery for loss even though each individual claim is small.

litigation funder
a third party who pays for some or all of the costs and expenses associated with initiating a claim in return for a share of the proceeds. Litigation funders are often involved in representative proceedingsin representative proceedings

In January 2017, Victorian Attorney-General Martin Pakula asked the **Victorian Law Reform Commission (VLRC)** to undertake a review of the use of litigation funders in representative proceedings to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens. This followed a

Victorian Law Reform Commission (VLRC)
Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

class action over the 2006 collapse of a Bendigo business. The action resulted in a $4.5 million settlement, but the entire sum was taken by the litigation funder and the legal practitioners involved.

Some background to the review of the use of litigation funders in representative proceedings is provided in the article below.

IN THE NEWS

Litigation inquiry could set the standard

Chris Merritt, *The Australian*, 24 March 2017

Victoria's inquiry into the regulation of litigation funders has the potential to set a national benchmark, according to the chairman of the state Law Reform Commission, Phil Cummins. ...



Source 7 Chair of the VLRC, The Hon. Philip Cummins AM

The inquiry was called by the state government after an incident last year in which lawyers and litigation funder LCM received all of a $5 million court win that was supposed to pay the entitlements of 300 sacked workers from Huon Corporation. Mr Cummins said the commission would examine the system in which litigation funders operated and would not examine individual matters unless it could highlight a system-wide issue.

In the Huon Corporation case Piper Alderman received $1.7m and barristers led by Allan Myers QC collected $885,000. But the biggest share – $1.85m – went to LCM Litigation Funding.

Victorian Attorney-General Martin Pakula said at the time it was staggering that any plaintiff could be awarded close to $5m 'and have every last penny soaked up by fees from litigation funders, lawyers and administrators'. 'It suggests a system with some real potential deficiencies,' he said.

The inquiry will consider whether there is scope for the supervisory powers of Victorian courts or Victorian regulatory bodies to be increased in respect of proceedings funded by litigation funders. Mr Cummins will also examine whether clearer disclosure requirements should be imposed on litigation funders and lawyers representing funded plaintiffs concerning advice about the progress of the case, costs and possible outcomes. He will also consider whether any limits should be placed on the success fees that can be charged by a litigation funder.

While litigation funders charge a percentage of the damages won by their clients, the LRC will consider whether this form of billing should also be available to lawyers.

The principles of justice

Source 8 provides a summary of how the use of representative proceedings can affect the ability of the civil justice system to achieve the principles of justice.

PRINCIPLE	THE USE OF REPRESENTATIVE PROCEEDINGS
Fairness	• People with claims are able to join a class and not be subjected to personally having to pay costs (particularly if a litigation funder is involved), or be subjected to adverse costs orders. • The way in which class actions are conducted removes a party from court processes and having to give instructions, which can be difficult for someone without experience in legal processes. • The fairness of the outcome depends on the settlement reached and the payment to be made by any litigation funder or legal practitioners.
Equality	• Class actions are often conducted by experienced legal practitioners and law firms who can present the case in the best light possible and as equally as the defendant's law firm.
Access	• People who cannot afford to initiate their own claim are able to access justice by joining a representative proceeding. • However, the costs of litigation funding and legal fees can restrict the size of the final payment, which reduces the value of having access to justice through a class action.

Source 8 Use of representative proceedings and the principles of justice

8.3 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by 'barriers to communication'. Identify three types of people who may have communication issues when dealing with the civil justice system.

2 Describe two ways in which the civil justice system tries to overcome communication barriers.

3 Provide two issues that may be faced by a potential plaintiff who lives in rural Victoria.

4 Explain what a representative proceeding is. Describe three ways in which it helps improve access to justice.

Synthesise and apply

5 Imagine you are a newly arrived immigrant in Australia, and you have a dispute with your landlord about a significant increase in your rent.

a How would you find out whether you have a claim? Where would you go first to determine whether you do have a claim?

b Find out whether the following dispute resolution bodies or institutions can assist you in your first language:

i Victoria Legal Aid

ii Consumer Affairs Victoria

iii Victorian Civil and Administrative Tribunal

iv Victoria Law Foundation.

c Describe three difficulties that you think you might have in understanding and pursuing your claim, and explain how these difficulties can impact on the ability to achieve justice.

6 Read the article 'Litigation inquiry could set the standard'.

a What is the VLRC examining?

b What happened in the Huon Corporation class action?

c The VLRC was due to report in March 2018. Describe two recommendations made by the VLRC about class actions and litigation funders.

d Conduct some research. Have any of the recommendations been adopted by parliament?

Analyse and evaluate

7 'If people live in remote areas, they can't expect service providers to come to them. They've got to go to the service providers'. Discuss this statement as a class.

Check your obook assess for these additional resources and more:

» **Student book questions**
8.3 Check your learning

» **Going further**
People who experience barriers to communications

» **Weblink**
VLRC litigation funding page

8.4 RECENT REFORMS

Study tip

In the *VCE Legal Studies Study Design*, the term 'recent' is defined as 'within the last four years'. Therefore, if you are studying Legal Studies in 2020, do not use reforms from beyond 2016, and for those introduced in 2016, check exactly when they came into effect.

Reform to our justice system involves the process of changing and updating the way disputes are resolved. Often, disputes or situations arise which highlight problems in our civil justice system, and lawmakers and those tasked with managing that system need to respond.

Some of the reforms to the civil justice system that have occurred in the past four years are discussed in this topic. For each of the recent reforms, you should consider the extent to which they will be able to improve, or have improved so far, the ability of the civil justice system to achieve the principles of justice.

Recent reforms addressing costs factors

Some recent reforms relating to costs factors include:

- **introduction of three-tier fee system in VCAT** – From 1 July 2016, VCAT has three tiers of fees: corporate, standard and health care card holders. The health care card holders. fees are available to people who hold Commonwealth health care cards, and are capped at just over $150 regardless of the type of fee or the nature of the dispute. The fees are intended to ensure that VCAT remains accessible to the most vulnerable in society, and the fees are higher for companies, government agencies and businesses with an annual turnover of $200 000 or more.
- **use of Technology Assisted Review (TAR) in the Supreme Court** – In a first for Victorian courts, the Supreme Court of Victoria, in the December 2016 decision of *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No. 1)*, approved the use of predictive coding or TAR to assist in the discovery process. The technology is expected to be just as accurate as a person managing discovery, and will be more efficient, cost-effective and timely than a **lawyer** doing the same task, thus saving on costs and time. The Supreme Court in 2017 updated its guidelines to approve of TAR in certain cases.



Source 1 Technology Assisted Review (TAR) is considered an accurate method of document review.

Recent reforms addressing time factors

Some recent reforms addressing time factors include:

- **introduction of the Judicial Commission of Victoria (JCV)** – In 2016, the Victorian Parliament passed the *Judicial Commission of Victoria Act 2016* (Vic) which establishes the JCV. A person can make a complaint to the JCV about the conduct or capacity of a judicial officer (which includes judges) or a **member** of VCAT. The types of complaints that can be made include excessive delays in handing down judgments. It is expected that the JCV will establish higher standards when it comes to matters such as these, and may therefore address delay issues, particularly those involving long wait times for court decisions to be handed down.
- **changes to High Court appeal processes** – In 2016, the High Court of Australia changed the way it hears special leave applications for appeals. Rather than allowing every special leave application to have an oral hearing, the High Court first determines, through a Panel of Justices, whether an oral hearing is necessary. If an oral hearing is not necessary, then the application is heard 'on the papers'. Most special leave applications are now heard 'on the papers' without an oral hearing. This reduces the costs and time involved in appearing before the High Court as it determines whether leave should be granted.

member
(in context of VCAT) the person who presides over final hearings and compulsory conferences at VCAT. Members include the President, vice-presidents, deputy presidents and senior and ordinary members

Recent reforms addressing accessibility factors

At the state level, Victorian efficiency measures include:

- **VLA online tool** – In February 2017, Code for Australia and **Victoria Legal Aid** released a prototype online tool which people with legal problems can use to determine whether they are eligible for legal aid, advise people where they can go for help and which can answer simple questions for people. It is expected that the tool will expand to include various types of disputes.
- **use of technology** – In January 2017, the Supreme Court of Victoria issued a practice note titled 'Technology in Civil Litigation'. Its purpose is to promote the use of technology in the conduct of civil litigation to reduce time and costs, as well as to assist parties in accessing documents and information for the purpose of trial. It specifies that emails are the preferred communication with the court, that documents can be filed electronically, and that discovery can be conducted using technology. **Court Services Victoria (CSV)** in its 2015–16 Annual Report also noted the changes to submitting documents electronically in some courts and lists, and VCAT has delivered additional online forms to make it easier for people to make applications.
- **removal of wigs** – In May 2016, the Supreme Court of Victoria announced that judges will stop wearing wigs in all civil matters. Former Chief Justice Warren noted that wigs represented the past and did not assist in the administration of justice. Many believe that the removal of wigs allows the courtroom to feel more accessible to modern-day Australians, who may find the formality of wigs intimidating.

Victoria Legal Aid (VLA)
a government agency that provides free legal advice to the community and low-cost or no-cost legal representation to people who can't afford a lawyer

Court Services Victoria (CSV)
an independent body that provides services and facilities to Victoria's courts and the Victorian Civil and Administrative Tribunal

The ability of recent reforms to achieve the principles of justice

You should be able to discuss recent reforms in light of their ability to achieve the principles of justice, and the extent to which they have overcome the factors that affect the achievement of justice.

Consider the following questions for each recent reform you have chosen:

- What problem, difficulty or issue is it trying to overcome?
- Is it a short-term or long-term solution?

- What principles of justice is the reform achieving?
- Are there any statistics, data or evidence to show that the reform has improved the civil justice system?
- What else needs to be done in addition to the reform, or is it a 'total solution' to the problem, difficulty or issue it is trying to overcome?

Some of the relevant issues for each of the recent reforms explored in this topic are discussed in Source 2.

RECENT REFORM	COMMENTS
Introduction of three-tier fee system in VCAT	• Assists some people, in particular health care card holders, to access VCAT and pay for it without incurring huge costs. • Aims to ensure fairness and equality by charging larger businesses higher fees. • High fees remain for many lists, and certain fees, such as hearing fees, make VCAT unaffordable for many people. • Health care card holders are still subject to an application fee, which can be out of reach for some.
Approval of use of TAR in the Supreme Court	• Provides an accurate way of discovering documents, thus allowing another party easier access to documents relevant to issues in dispute. • Intended to be quicker, cost-effective and more efficient. • Not all parties will have access to the technology to help them with discovery. • Costs and time still need to be spent on building up the technology and 'training' the technology to identify relevant documents. • Still does not address the significant costs associated with reviewing discovered documents.
Introduction of JCV	• Allows greater scrutiny of judicial officers and members of VCAT. • May ensure greater transparency and focus on the time it takes for there to be an outcome. • The JCV will not enquire into general delay issues such as those involving discovery or other pre-trial stages, therefore its ability to speed up justice is limited.
Changes to High Court appeal processes	• Allows a more efficient and cost-effective way of seeking leave. • Avoids the stress and inconvenience of an oral hearing, and parties can be on an equal footing without having to rely on advocacy skills. • Some people may believe that it is fairer to allow oral submissions to the judges. • This is not an 'entire system' solution as few claims will make their way to the High Court.
VLA online tool	• Provides people with access to information about their rights and where to go for help. • Can be a useful 'first port of call' for people who are not aware of legal assistance or rights. • Is currently only a prototype, and offers assistance in a limited range of disputes. • Will not replace the need for legal representation.
Use of technology	• Provides greater access for people, including those in rural and remote areas or those who cannot reach the courts to file documents manually. • Can deal with litigation more efficiently by giving all parties and the courts access. • The uptake of technology is still relatively slow and improvements are still required.
Removal of wigs	• Modernises the courts and makes them more accessible by avoiding formalities. • Currently only applies to the Supreme Court and not the County Court in some matters. • Does not address other formalities and stresses involved with the courtroom.

Source 2 Some of the factors that may be taken into account when discussing recent reforms



Source 3 The removal of wigs from courtrooms makes the courts seem more progressive and accessible to modern-day Australians.

8.4 CHECK YOUR LEARNING

Define and explain

1 Explain how a TAR can overcome cost, time and accessibility issues in the civil justice system.

2 How does technology improve accessibility to the courts?

Synthesise and apply

3 Access the Victoria Legal Aid online tool launched in February 2017. A link is provided on your obook assess. Use the tool to provide as much information as you can for the following scenarios.

- **a** You've been in an accident at work and you want to know where you can get help.
- **b** You are a landlord who wants your tenant out. The tenant is doing no harm, you just don't like him.
- **c** You want to know about how to make your will.

4 In your view, does the online tool overcome some of the accessibility issues faced by some people?

Analyse and evaluate

5 Evaluate the effectiveness of two recent reforms in achieving the principles of justice.

Check your obook assess for these additional resources and more:

- **Student book questions**
  8.4 Check your learning
- **Worksheet**
  Judicial Commission of Victoria
- **Weblink**
  VLA online tool

8.5 RECOMMENDED REFORMS

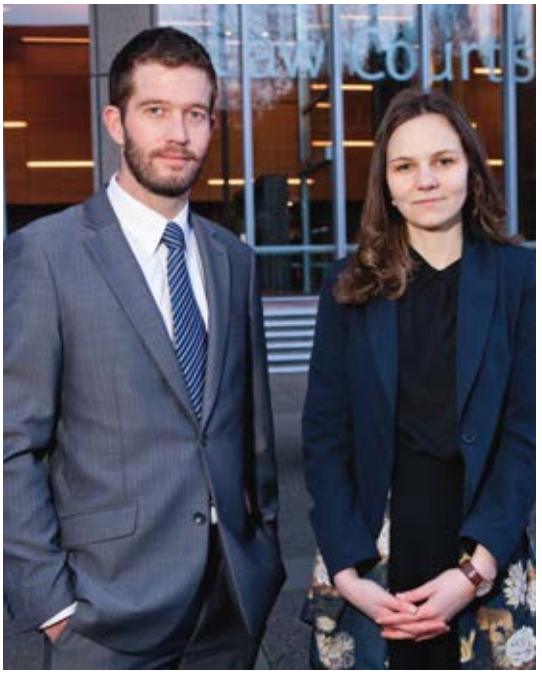
Short Mediation and Hearing (SMAH) a dispute resolution process used for small claims about goods and services in the Civil Claims List at the Victorian Civil and Administrative Tribunal (VCAT). Both the mediation and the hearing will be conducted on the same day (if the dispute is not settled at mediation)

A number of reforms have been recommended by various bodies and institutions, but have not yet been made. Some of the recommended reforms are discussed here. For each of the recommended reforms, you should consider the extent to which they will be able to improve the ability of the civil justice system to achieve the principles of justice.

Recommended reforms addressing costs factors

Suggested improvements that could help to reduce the impact of costs include:

- **increased use of alternative dispute resolution methods** – The Victorian Access to Justice Review recommended expanding and increasing the use of dispute resolution methods such as mediation and other methods to resolve disputes out of the courtroom. In particular, the final report recommended that VCAT expand its **Short Mediation and Hearing (SMAH)** program into regional areas.



Source 1 Greater access to services such as Justice Connect may help self-represented litigants address some of the issues they face.

- **greater legal aid funding** – There is still a need to address longer-term funding issues for legal service providers who provide legal aid, including Victoria Legal Aid and community legal centres. Inquiries have recommended that there be transparent and formal funding models, that funding be increased and that the funding take into account the demands of legal aid.
- **online system for the resolution of small civil claims** – The Victorian Access to Justice Review recommended that the Victorian Government establish a panel to oversee the introduction of an online dispute resolution system for small civil claims in Victoria. The idea would be to pilot its use for small civil claims, then consider its expansion to other claims. This was considered a more accessible and cost-effective way of resolving claims. The Victorian Government has agreed with this recommendation.
- **assistance to self-represented parties** – The Productivity Commission has recommended that all court and tribunal forms be drafted in plain language, and guidelines be prepared for court and tribunal staff about how to assist self-represented litigants. The Victorian Access to Justice Review Report also recommended that there be better use of support people to assist self-represented litigants, that forms and information be reviewed to make them more accessible, and that there be education and training of staff to help them to assist self-represented parties.

Recommended reforms addressing time factors

Suggested improvements that could help to reduce the time taken to deal with disputes include:

- **improvements and increase in case management** – The Productivity Commission has proposed that case management practices be improved and used more. This includes replacing formal pleadings with less-formal alternatives, requiring strict observance of time limits, and limiting traditional discovery. Discovery should be limited to documents that are directly relevant, and the courts should ensure that information technology is used to manage the process more efficiently.

- **making enforcement of VCAT orders easier** – The Victorian Access to Justice Review recommended that the enforcement of VCAT orders be made simpler. VCAT orders require certification in a court before they can be enforced. The report recommends that a monetary order of VCAT should be considered an order of an appropriate court (i.e. be automatically enforceable without having to be certified). It has also recommended that non-monetary orders be enforceable without having to proceed to the Supreme Court of Victoria. The Victorian Government has agreed with this recommendation, therefore it is expected that laws will be introduced to amend the certification requirements.

Recommended reforms addressing accessibility factors

- **expansion of information from Victoria Legal Aid** – The Victorian Access to Justice Review recommended that Victoria Legal Aid expand its website to include a web-chat service and information in a wide range of languages and in accessible formats, and also expand its telephone line services.
- **greater coordination between legal service providers** – The Productivity Commission in 2014 and the Victorian Government in 2016, in their separate reviews into access to justice, have suggested that coordination should occur between legal aid bodies and other service providers such as courts and legal centres. This would include building on their existing telephone hotlines and websites, and referrals should occur where appropriate. Information and training materials should also be shared. The Victorian Government, in its Access to Justice Review, also recommended an integrated delivery model and strengthened relationships between service providers to ensure that users of the system understand the options available to them.
- **publication of plain language guides and information** – The Productivity Commission in 2014 recommended that all government agencies in Australia publish plain language guides that summarise legislation in areas of law regularly encountered, with particular focus on the disadvantaged groups most likely to be affected by those laws. The Victorian Government has also recommended that Victorian courts and tribunals consider making their websites and legal information materials more accessible and ensure that information is provided in languages other than English.
- **improving access to interpreters** – The Productivity Commission has recommended a National Indigenous Interpreter Service to ensure that there is an interpreter service across the country for Aboriginal and Torres Strait Islander peoples. The Victorian Access to Justice Review also recommended adequate availability of interpreters in all courts and VCAT.

The ability of recommended reforms to achieve the principles of justice

You should be able to discuss each of your chosen recommended reforms in light of their ability to achieve the principles of justice, and the extent to which they have overcome the factors that affect the achievement of justice. Consider the following questions for each recommended reform:

- What problem, difficulty or issue is it trying to overcome?
- Is it a short-term or long-term solution?
- Which principles of justice is the reform intended to achieve?
- Are there any criticisms of the recommended reform?
- What else needs to be done in addition to the reform, or is it a 'total solution' to the problem, difficulty or issue it is trying to overcome?

Study tip

The recommendations made by the Productivity Commission and the Victorian Government in their Access to Justice reviews can be viewed only on their websites. Links to these websites are provided on your obook assess. You could access their reports to read more about the recommendations and why they made them.

Study tip

A practice assessment task for Unit 3 – Area of Study 2 can be found on the Unit 3 Assessment Tasks topic on page 296.

Some of the relevant issues for each of the recommended reforms explored in this topic are discussed in Source 2.

RECOMMENDED REFORM	COMMENTS
Increased use of dispute resolution methods	• Dispute resolution methods that do not involve a final hearing can increase access to justice and reduce costs and delays. • Provides parties with equal opportunities to present their case. • Some disputes are not suitable for methods such as mediation, and some disputes may be referred too early, thus wasting costs and time. • Some people may wish to have their 'day in court' and settling early can deny them this right.
More legal aid funding	• More funding may increase parties' access to legal aid and ensure greater equality and fairness. • Would relieve pressure from many parts of the legal system in providing legal advice. • Relies on government to agree on increasing funding. • Not likely to gain traction with governments, as voters tend to see it as increasing funding for 'criminals' without seeing the overall benefits of improving funding.
Online system for the resolution of small claims	• May provide greater access to resolve small claims to people in many areas of Victoria, including those in rural and remote areas. • Depending on its operation, could avoid the need for legal representation. • Since many claims are small, could relieve the pressure on courts, reducing delays. • Likely to require significant expenditure. • May not be fully functional for some time.
Assistance to self-represented parties	• Will provide greater and more simplified information to unrepresented people. • Can assist in understanding basic legal rights and procedures. • Does not replace the need for legal aid for some claims, and may not be helpful for those whose English skills are not sufficient for them to understand the information. • Many courts already have guidelines and information for self-represented parties but that has not alleviated many of the access issues.
Improvements and increase in case management	• Greater use of case management powers can reduce delays and costs. • A modernisation of the way claims are dealt with (e.g. no formal pleadings and limited discovery) can help parties deal with the issues in dispute rather than focusing on procedural steps. • Use of case management powers varies from court to court and from judge to judge, creating inconsistency from case to case. • Greater cooperation from the parties is required to agree on moving away from more formal steps such as pleadings.
Making enforcement of VCAT orders easier	• Allows parties greater ability to enforce VCAT orders that are not complied with. • Will reduce time and costs involved if orders do not require certification. • Is not a 'whole system' solution and is only relevant where a party does not comply with an order.
Expansion of information from VLA	• Will enable access to information about basic legal rights and services. • Will help those from non-English-speaking backgrounds to understand the justice system and services available. • Likely to require significant funding, which governments may be reluctant to give, because they have other spending priorities such as health and education.
Greater coordination between legal service providers	• Can ensure a 'whole system' approach to addressing civil disputes and allow greater access to information. • Allows users to be aware of other services available to them, improving access. • Likely to require significant coordination efforts. • Does not replace the need to address the legal costs involved in resolving disputes.

RECOMMENDED REFORM	COMMENTS
Publication of plain language guides and information	• Will ensure that disadvantaged groups can recognise when their rights that are commonly breached have actually been breached. • Likely to require significant funding and expenditure.
Improving access to interpreters	• Will ensure greater access and understanding of processes, which can address all three principles of justice. • Likely to require significant funding and expenditure.

Source 2 Some of the factors that may be taken into account when discussing recommended reforms

8.5 CHECK YOUR LEARNING

Define and explain

1 Describe one recommended reform which is aimed to assist one or more costs factors, and one or more accessibility factors.

2 Identify the two inquiries that have taken place recently by the Productivity Commission and the Victorian Government in relation to access to justice, and provide at least three recommendations by each body to improve the civil justice system.

Synthesise and apply

3 Choose two of the above recommended reforms that you are most interested in, and conduct some further research on them. Create a visual or multimedia presentation which shows the following:

- **a** Who made the recommendation.
- **b** What issues in the civil justice system it is aiming to overcome.
- **c** Whether further or additional reforms are required to address these issues.
- **d** The status of its implementation.
- **e** Whether you think it is likely to be introduced in the next 12 months.

Analyse and evaluate

4 Discuss the extent to which improved access to interpreters will assist parties in a civil dispute.

5 In your view, are there too many organisations which offer information and resources about civil law, such that it makes it confusing for people seeking access and information? Give reasons for your answer, and consider any recommendations you would make for reform in this area.

Extended task

6 You have now completed your study of the Victorian civil justice system. One of the key skills you are expected to demonstrate is your ability to evaluate the ability of the civil justice system to achieve the principles of justice.

- **a** On an A3 piece of paper, in your notebook or in an online document, write down the headings 'fairness', 'equality' and 'access'.
- **b** Under each heading, write down all of the aspects or features of the civil justice system that help achieve those principles (e.g. 'use of mediation' under access). Some aspects or features may fall under more than one principle.
- **c** Draw a line under these aspects or features. Now write down all of the aspects or features of the civil justice system that may hinder those principles (e.g. 'CAV's powers are limited' under fairness). Again, some aspects or features may fall under more than one principle.
- **d** For at least one of those aspects or features that hinder those principles, identify and write down at least one recent, or recommended reform.
- **e** Share your findings with your class. Add things to your own notes that you find useful from your class discussion. Discuss any differences in opinion.

Check your obook assess for these additional resources and more:

- » **Student book questions** 8.5 Check your learning
- » **Video tutorial** How to discuss reforms
- » **Going further** Other recommended reforms
- » **Weblink** Access to Justice Review

CHAPTER SUMMARY

Factors that affect the ability of the civil justice system to achieve the principles of justice

- Costs factors
  - Legal costs
  - VCAT costs
  - Increased use of dispute resolution methods
- Time factors
  - Court delays
  - VCAT waiting times
  - Appeal processes
  - Use of case management powers
- Accessibility factors
  - Communication barriers
  - Services in rural and remote areas
  - Use of representative proceedings

Recent reforms

- Introduction of three-tier fee system in VCAT
- Approval of use of TAR in the Supreme Court
- Introduction of JCV
- Changes to High Court appeal processes
- VLA online tool
- Use of technology

Recommended reforms

- Increased use of dispute resolution methods
- Greater legal aid funding
- Online system for the resolution of small civil claims
- Assistance to self-represented parties
- Improvements and increase in case management
- Making enforcement of VCAT orders easier
- Expansion of information from Victoria Legal Aid
- Greater coordination between legal service providers
- Publication of plain language guides and information
- Improving access to interpreters

REVISION QUESTIONS

1 Describe how communication barriers can impact on the ability of a person to be equal before the law.
(3 marks)

2 Provide two issues that face service providers in rural and remote areas.
(4 marks)

3 How does the increased use of mediation help to overcome costs, time and accessibility issues?
(6 marks)

4 Explain one feature or aspect of the civil justice system that causes delays, and one feature or aspect that overcomes delays.
(6 marks)

5 Identify and describe one recent and one recommended reform that could assist in reducing delays. In your answer, comment on the extent to which each reform could help improve the civil justice system.
(8 marks)

6 Explain how the use of representative proceedings (a class action) can improve access to the civil justice system. In your answer, discuss one disadvantage to representative proceedings.
(8 marks)

7 Evaluate the ability of the courts to ensure access to everyone to resolve their civil disputes. In your answer, refer to one civil pre-trial procedure, and one judicial power of case management.
(10 marks)

Check your obook assess for these additional resources and more:

- **Student book questions** Ch 8 Review
- **Revision notes** Ch 8
- **assess quiz** Ch 8 Test your skills with an auto-correcting multiple-choice quiz

PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.
Read the following case study and answer the questions that follow.

Marjan and her bakery

In 2015, Marjan started a small bakery in Melbourne selling cakes and biscuits. Her business was going well, and after the first two years, as she became more confident with business operations, she passed more and more responsibility to her on-site manager, Justin. After that time, Justin ran the business on a day-to-day basis, and Marjan moved to the small town of Bonnie Doon with her family. She carried out the financial and administrative duties of her business from Bonnie Doon, and visited the shop about once every two weeks. Every time she visited, all seemed to be running well.

Two months ago, an incident occurred at the shop which caused Marjan to shut down the business.

The incident occurred just after Justin had put the finishing touches to a beautiful display of cakes and biscuits inside a glass cabinet in the shop window. Shortly after he had finished the display, it came crashing down, injuring more than 10 people in the shop. One customer suffered significant injuries to her face from broken glass. Immediately after the accident, the damaged lights in the display cabinet caught on fire. The fire caused significant damage not only to the bakery, but also to the shop next door. A number of employees were injured in the fire. The business was immediately closed, and WorkSafe authorities commenced an inquiry into what happened.



Source 1 Running a business carries risks. Some of them are predictable, others totally unexpected. Business owners need to plan ahead.

While gardening at her home in Bonnie Doon one day, Marjan was served with a statement of claim. She has no idea what the document says. She sees the words 'representative proceeding' and 'loss' and 'damages'. Marjan doesn't know where to get help, and does not know of a nearby lawyer.

Marjan is devastated. She has little money to pay for a lawyer, and does not know what steps to take next.

Practice assessment task questions

1 Define the following terms:
- **a** Representative proceeding
- **b** Damages

(2 marks)

2 Could this matter be heard by VCAT? Why or why not?

(3 marks)

3 Describe one costs factor and one accessibility factor that Marjan is likely to be confronted with in this case.

(4 marks)

4 Identify and describe two ways that Marjan may be able to obtain legal assistance.

(4 marks)

5 Provide one recent reform and one recommended reform to the civil justice system that could assist Marjan and the plaintiffs in achieving justice.

(4 marks)

6 Explain two ways in which the courts could overcome the costs factor and accessibility factor that Marjan may be confronted with. In your view, will these ways completely overcome the issues faced by Marjan? Give reasons.

(8 marks)

Total: 25 marks

PRACTICE ASSESSMENT TASK

For Unit 3 – Area of Study 1

Ronald Rump and his criminal history

Ronald Rump, 45, had a difficult childhood, having suffered from bullying as a child and post-traumatic stress disorder after he lost the love of his life in a car accident at the age of 16. He turned to drugs and alcohol to cope with his difficulties and was regularly caught for drink driving, petty theft and property damage. He has served five stints in prison over his lifetime, the last of which was four years in Barwon Prison for robbery. During his last stint in prison, Ronald actively participated in a drug and alcohol program which saw him recover from his addiction.

Since then, Ronald has been living with his partner, Belinda. However, recently Belinda has been acting erratically. She has missed a number of days at work which has resulted in her getting fired, and is out late at night. Ronald has had good support from his family throughout his life.

One day Ronald got home from work early and saw Belinda doing drugs. Ronald was outraged, particularly given his attempts to recover from his past addictions. He and Belinda got into a fight. Ronald became violent towards Belinda, resulting in her being hospitalised. Ronald has since been charged with various indictable offences, including causing serious injury intentionally. Ronald has been refused bail, and has pleaded not guilty. He wants to negotiate with the prosecutor to drop the charges and for him to be found not guilty. Belinda doesn't like the idea of negotiations.

Practice assessment task questions

1 Identify who has the burden of proof in this case, and the extent to which the case needs to be proven.

(2 marks)

2 Belinda is a witness for the prosecution in this case. Describe one way in which Belinda may be able to give evidence in this case.

(3 marks)

3 Discuss two responsibilities Ronald will have representing himself at trial.

(5 marks)

4 Discuss the appropriateness of plea negotiations in this case.

(5 marks)

5 Explain the relationship between the judge and the jury at trial.

(5 marks)

6 Describe one time factor that may affect the ability of the criminal justice system to achieve fairness in this case, and how one recommended reform may be able to overcome that factor.

(6 marks)

7 Describe one sanction that may be imposed on Ronald, and one of its purposes in this case.

(6 marks)

8 Provide four factors that may be considered in sentencing Ronald, and comment on how they may impact on the sentence imposed if Ronald is found guilty.

(8 marks)

9 Discuss the ability of the criminal justice system to ensure a fair trial in this case. In your answer, describe one recent reform which aims to ensure a fair trial.

(10 marks)

Total: 50 marks

PRACTICE ASSESSMENT TASK

For Unit 3 – Area of Study 2

Report on the civil justice system

Your Legal Studies teacher informs your class that your school is being sued by a former student. The former student believes the school was negligent in failing to ensure that she got good grades. She has sent several letters of demand, arguing that the school knew she had certain needs, but failed to address those needs. As a result, the student claims she failed to get into her choice of university and choice of degree, and has suffered loss and damage as a result, including anxiety, depression, and the cost of having to undertake a different degree to eventually transfer to her degree of choice. The former student is also threatening to sue some of the school's employees, including the counsellor and two of her teachers. The total damages the student is claiming is $1.5 million.

Your Legal Studies teacher thinks this is a good opportunity for each of the class members to demonstrate his or her knowledge about the civil justice system. She tells each of you to imagine that you have to write a paper to the principal, who has no understanding of the civil justice system, so that the principal can understand the basic issues that may be involved in the dispute. She says the paper needs to be prepared in plain English and be easily understood by somebody who has little understanding of legal concepts.

Practice assessment task questions

Your teacher has said that the format is up to you, but that your paper needs to address the following:

1 Who the likely parties are in the case.

(2 marks)

2 Who has to prove the facts, and why.

(2 marks)

3 Whether a jury will be involved, and your reason for your answer.

(3 marks)

4 Two factors that may be relevant as to whether the plaintiff does initiate a claim, and why.

(5 marks)

5 What options, if any, are available to the school now to prevent the plaintiff from issuing a claim, and your reasons.

(5 marks)

6 The likely dispute resolution body used to resolve the dispute, and your reason for your answer.

(4 marks)

7 Three of the responsibilities on the school if the plaintiff does issue the claim, including responsibilities in relation to documents and evidence.

(6 marks)

8 The possible costs that may be incurred by the school.

(4 marks)

9 Whether the matter is likely to go to trial and, if not, what may avoid the need for trial.

(5 marks

10 Whether there are any recent improvements to the civil justice system that the school needs to be aware of that can help it in the claim.

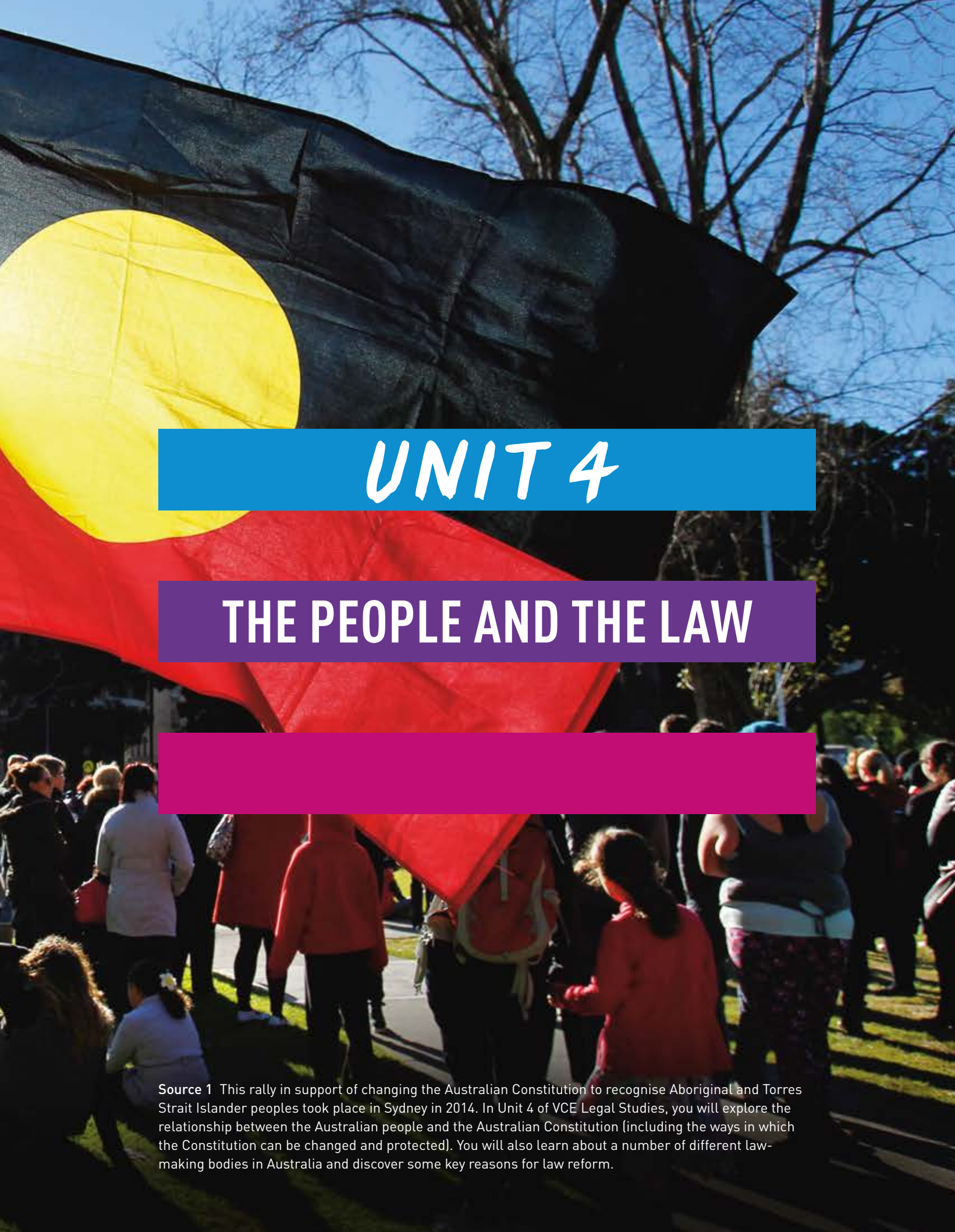
(6 marks)

11 How the school should measure whether justice has been achieved in this particular case, addressing each of the principles of justice.

(8 marks)

Total: 50 marks





UNIT 4

THE PEOPLE AND THE LAW

Source 1 This rally in support of changing the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples took place in Sydney in 2014. In Unit 4 of VCE Legal Studies, you will explore the relationship between the Australian people and the Australian Constitution (including the ways in which the Constitution can be changed and protected). You will also learn about a number of different law-making bodies in Australia and discover some key reasons for law reform.

UNIT 4 – THE PEOPLE AND THE LAW

Area of Study 1 – The people and the Australian Constitution

OUTCOME 1

On completion of this unit the student should be able to discuss the significance of High Court cases involving the interpretation of the Australian Constitution and evaluate the ways in which the Australian Constitution acts as a check on parliament in law-making.

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 4 – AREA OF STUDY 1 THE PEOPLE AND THE AUSTRALIAN CONSTITUTION	Chapter 10	The people and the Constitution	• the roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making • the division of constitutional law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers • the significance of section 109 of the Australian Constitution • the means by which the Australian Constitution acts as a check on parliament in law-making, including: – the bicameral structure of the Commonwealth Parliament – the separation of the legislative, executive and judicial powers – the express protection of rights – the role of the High Court in interpreting the Australian Constitution – the requirement for a double majority in a referendum.
	Chapter 11	Changing and protecting the Constitution	• the significance of one High Court case interpreting sections 7 and 24 of the Australian Constitution • the significance of one referendum in which the Australian people have protected or changed the Australian Constitution • the significance of one High Court case which has had an impact on the division of constitutional law-making powers • the impact of international declarations and treaties on the interpretation of the external affairs power.

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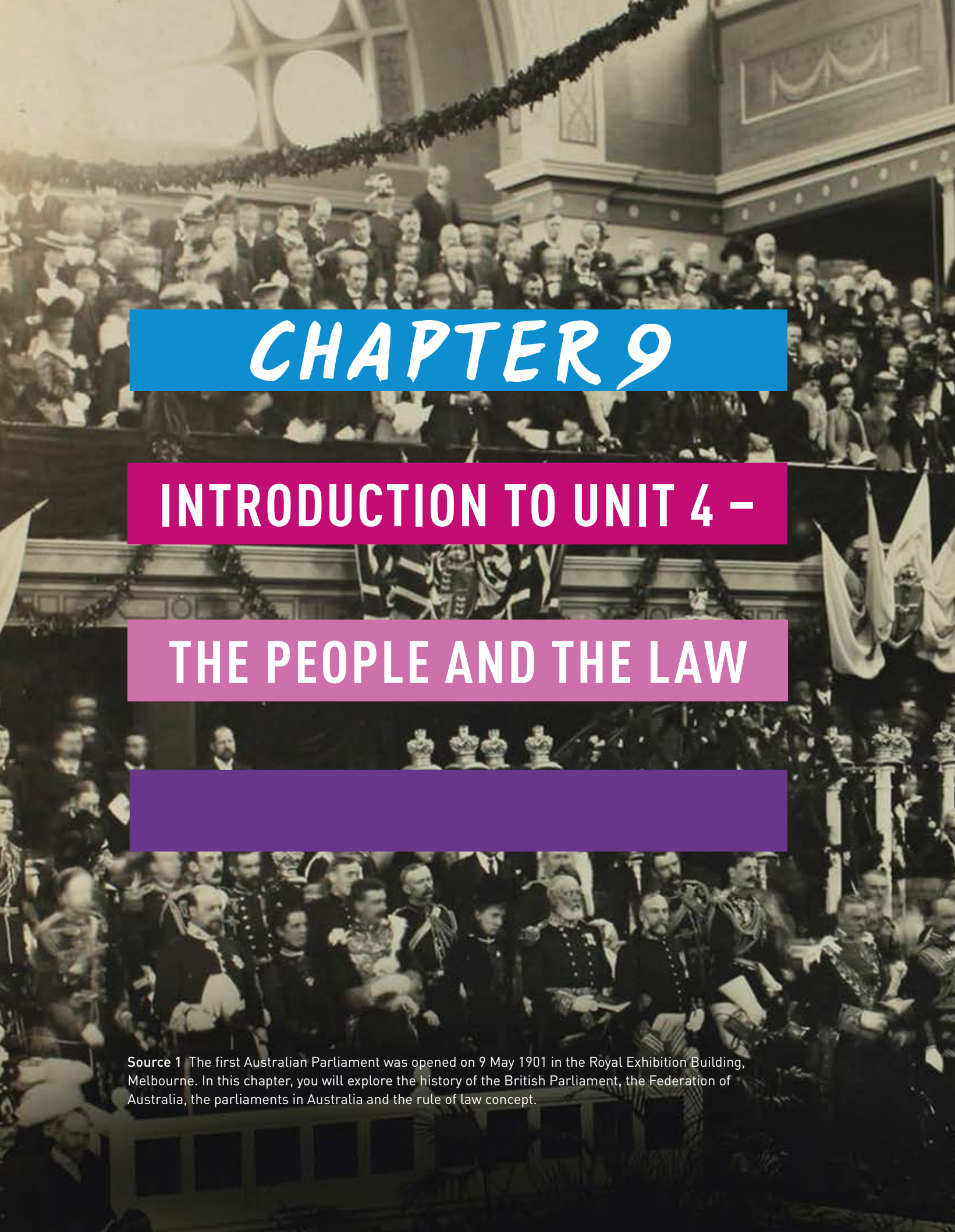
Area of Study 2 – The people, the parliament and the courts

OUTCOME 2

On completion of this unit the student should be able to discuss the factors that affect the ability of parliament and courts to make law, evaluate the ability of these law-makers to respond to the need for law reform, and analyse how individuals, the media and law reform bodies can influence a change in the law.

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 4 – AREA OF STUDY 2 THE PEOPLE, THE PARLIAMENT AND THE COURTS	Chapter 12	The parliament	• factors that affect the ability of parliament to make law, including: – the roles of the houses of parliament – the representative nature of parliament – political pressures – restrictions on the law-making powers of parliament.
	Chapter 13	The courts	• the roles of the Victorian courts and the High Court in law-making • the reasons for, and effects of, statutory interpretation • factors that affect the ability of courts to make law, including: – the doctrine of precedent – judicial conservatism – judicial activism – costs and time in bringing a case to court – the requirement for standing • features of the relationship between courts and parliament in law-making, including: – the supremacy of parliament – the ability of courts to influence parliament – the interpretation of statutes by courts – the codification of common law – the abrogation of common law.
	Chapter 14	Law reform	• reasons for law reform • the ability and means by which individuals can influence law reform including through petitions, demonstrations and the use of the courts • the role of the media, including social media, in law reform • the role of the Victorian Law Reform Commission and its ability to influence law reform • one recent example of the Victorian Law Reform Commission recommending law reform • the role of one parliamentary committee or one Royal Commission, and its ability to influence law reform • one recent example of a recommendation for law reform by one parliamentary committee or one Royal Commission • the ability of parliament and the courts to respond to the need for law reform.

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CHAPTER 9

INTRODUCTION TO UNIT 4 – THE PEOPLE AND THE LAW

Source 1 The first Australian Parliament was opened on 9 May 1901 in the Royal Exhibition Building, Melbourne. In this chapter, you will explore the history of the British Parliament, the Federation of Australia, the parliaments in Australia and the rule of law concept.



AIM

The aim of this chapter is to provide background information on some of the topics that will be explored in Unit 4. In addition to this, it provides a refresher on some of the topics which are foundational to your studies, such as the rule of law.

TOPICS COVERED

This chapter provides an overview of the following topics:

- the historical development of the British Parliament
- the Federation of Australia
- parliaments in Australia
- the meaning of the rule of law.

KEY LEGAL TERMS

bicameral parliament a parliament with two houses (also called chambers). In the Australian Parliament, the two houses are the Senate (upper house) and the House of Representatives (lower house). In the Victorian Parliament the two houses are the Legislative Council (upper house) and the Legislative Assembly (lower house)

Australian Constitution, the a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

constitutional monarchy a system of government in which a monarch (i.e. a king or queen) is the head of state and a parliament makes the laws under the terms of a constitution

Federation of Australia the union of sovereign states that gave up some of their powers to a central authority to form Australia

parliament a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

representative democracy a system of government in which all eligible citizens vote to elect people who will represent them in parliament, make laws and govern on their behalf

rule of law the principle that everyone in society is bound by law and must obey the law. The rule of law also states that laws should be fair and clear, so people are willing and able to obey them

self-represented party a person with a matter before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

Westminster system, the a parliamentary system of government that developed in Britain and upon which Australia's parliamentary system is modelled.

KEY LEGAL CASES

A list of key legal cases in this chapter is provided on pages vii–viii.

Please note

Aboriginal and Torres Strait Islander readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of people who have died.

9.1 THE HISTORICAL DEVELOPMENT OF THE BRITISH PARLIAMENT

In 1215, King John was king of England. He was an unpopular monarch because he raised taxes and led the country to defeat in a number of overseas wars. The English nobles (i.e. powerful landowners such as lords and barons) took action and forced the king to sign a charter (i.e. legal document) known as the **Magna Carta**. The signing of the Magna Carta marked a very significant point in the development of English law because for the first time the English monarch was subject to the will of others, not just God. The nobles became part of the King's Great Council and advised him on a range of matters. In around 1236, the word parliament was first used to describe the Great Council.

From 1295 onwards, parliament began to meet regularly, and from around 1350 onwards two separate groups formed and began meeting separately. These groups included:

- nobles (i.e. lords and barons) and the clergy (i.e. members of the church such as bishops) – this group met in one house which became known as the **House of Lords** (or upper house)
- the knights and townspeople (selected to represent each county or town) – this group met in another house which became known as the **House of Commons** (or lower house).



Source 1 The Palace of Westminster in London

During the seventeenth century, the Stuart kings tried to override the authority of parliament. Conflict between the monarchs and the parliament grew during the rule of James I (1603–25) and his son Charles I (1625–49). These kings claimed that they ruled by divine right (i.e. God's will). However, the power of the people overcame the divine right of kings when Charles I was brought to trial for **treason** against the people. He was beheaded, and Oliver Cromwell led the country without a monarch for a short period. The Crown was restored in 1660, when Charles II came to the throne. Both Charles II and his brother, James II, who followed him, were unpopular with the people. James converted to Catholicism, and when he had a son in 1688, a group of Protestant nobles asked William III of Orange and his wife Mary to bring an army to take the throne and re-establish Protestant rule, on the condition that they would govern with respect for the rights of their subjects.

After this time the law-making power stayed with the parliament, and the monarch had very few powers. The British parliamentary system is called the **Westminster system**, after the British Parliament situated at Westminster in London. Under the Westminster system there are two houses of parliament (a **bicameral parliament**) and the monarch is the head of state.

treason
the crime of betraying one's country, especially by attempting to overthrow the government

Westminster system
a parliamentary system of government that developed in Britain and upon which Australia's parliamentary system is modelled.

bicameral parliament
a parliament with two houses (also called chambers). In the Australian Parliament, the two houses are the Senate (upper house) and the House of Representatives (lower house). In the Victorian Parliament the two houses are the Legislative Council (upper house) and the Legislative Assembly (lower house)

9.1 CHECK YOUR LEARNING

Define and explain

1 What does 'bicameral' mean?
2 What are the two houses of the British Parliament?

Synthesise and apply

3 Conduct some research on the internet, and identify four other bicameral parliaments (other than Australia and the United Kingdom).

Check your obook assess for these additional resources and more:

» **Student book questions**
9.1 Check your learning

» **Weblink**
The Westminster System

9.2 THE FEDERATION OF AUSTRALIA

Australian Constitution, the a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

Federation of Australia the union of sovereign states that gave up some of their powers to a central authority to form Australia

Throughout Unit 4, you will learn about the **Australian Constitution** and its role in protecting the Australian people. To understand the Australian Constitution and why it was created, you need to understand how Australia became a unified country. This unification process is known as the **Federation of Australia**.

In the nineteenth century, Australia was made up of different British colonies. Each of our present states was a separate colony, with the power to make its own laws for the people of that colony.

During the 1870s and 1880s there was a real fear of invasion. People were concerned about the arrival of non-British immigrants and the lack of a common immigration policy. This made them realise that there was a need for a central government that could make laws on matters such as these, which could apply to the whole of Australia and benefit the entire country. The colonies saw the advantage of having consistent laws in the national interest – for example, to strengthen Australia's defence and to simplify immigration, rail transport, tariffs and trade issues.

By the 1880s each of the six colonies had begun formal discussions to consider federating. They needed to agree on which laws they would allow a central parliament to make and which areas of law-making power they would keep as individual colonies.

In the 1890s each of the colonies sent a group of representatives to special meetings (called constitutional conventions). At the conventions it was decided that a new central Commonwealth Parliament would be created. A draft federal constitution bill was prepared and submitted to the Australian people for voting in 1898 and 1899. In each colony a majority of voters approved the bill.

The result of the constitutional conventions and the voting on the bill was the Federation of Australia. With the approval of Britain, the separate colonies became states with their own parliaments and a central body, the Commonwealth Parliament, was formed. The *Commonwealth of Australia Constitution Act 1900* (UK) is the formal document by which the process of federation was achieved. It is an Act of the British Parliament and it came into force on 1 January 1901, the date celebrated as the anniversary of the Federation of Australia.

9.2 CHECK YOUR LEARNING

Define and explain

1 Why did the British colonies in different parts of Australia want to unite to form a federation?
2 What is the formal title of the Australian Constitution and which parliament passed it?
3 What date is the anniversary of the Federation of Australia?

Synthesise and apply

4 Research the constitutional conventions.
   - **a** Who were some of the key people involved?
   - **b** What was the subject of the major arguments between the colonies, and why?
   - **c** Who is credited with writing the first draft of a constitution?
5 Conduct some research on how the colonies voted on the Federal Constitution Bill.
   - **a** When was the Victorian vote held?
   - **b** What was the outcome of the vote?
   - **c** Which state was least in favour of federation? Why?

Check your obook assess for these additional resources and more:

- **Student book questions** 9.2 Check your learning
- **Video tutorial** Introduction to Unit 4
- **Worksheet** Federation of Australia
- **Weblink** Australian Parliament – history of federation

9.3 PARLIAMENTS IN AUSTRALIA

Did you know?

In Queensland, the unicameral parliament consists of the Queen and the Legislative Assembly. Victoria's bicameral parliament consists of the Queen, the Legislative Council and the Legislative Assembly.

constitutional monarchy
a system of government in which a monarch (i.e. a king or queen) is the head of state and a parliament makes the laws under the terms of a constitution

constitution
a set of rules that establishes the nature, functions and limits of government

representative democracy
a system of government in which all eligible citizens vote to elect people who will represent them in parliament, make laws and govern on their behalf

The British established Australia's current system of government after they began settling in Australia from 1788 onwards. However, before the arrival of the British, the first inhabitants of Australia, the Aboriginal and Torres Strait Islander peoples, had their own system of law and well-established rights, responsibilities and codes of behaviour. They have the oldest living cultural history in the world, dating back at least 75 000 years.



Source 1 Aboriginal and Torres Strait Islander peoples had their own system of laws and rights before the arrival of the British in 1788.

As Westminster-style parliaments, the Commonwealth Parliament and all Australian state parliaments (except Queensland) have two houses. The monarch or Crown (Queen of the United Kingdom and Australia) is the head of state and part of the parliament. Australia is a **constitutional monarchy**, meaning it has a monarch as the head of state and a **constitution** that establishes the parliamentary system and provides a legal framework for making laws.

Australia is also a **representative democracy**. A representative democracy is a system in which the people vote to elect representatives to the parliaments and to make the law and govern on their behalf.

In Australia, there are six state parliaments and one Commonwealth Parliament, located in our nation's capital, Canberra. Two mainland territories have also been given the power by the Commonwealth Parliament to have their own elected parliament to make laws that apply within territory.

Therefore, in total there are nine parliaments in Australia: the Commonwealth Parliament (the central or federal parliament); six state parliaments (Victoria, New South Wales, Queensland, South Australia, Tasmania, and Western Australia); and two territory parliaments (Australian Capital Territory and the Northern Territory).

9.3 CHECK YOUR LEARNING

Define and explain

1. Give two different terms that describe the way in which Australia is governed.
2. How many states and territories are there in Australia?
3. How many parliaments are there in Australia? Why does this number differ from the number of states and territories?

Synthesise and apply

4. Conduct some research to find out why the Queensland Parliament is a unicameral parliament.
5. 'The people of Australia are the ones who uphold the system of a representative democracy'. Explain what this means.

Check your obook assess for these additional resources and more:

- **Student book questions**
  9.3 Check your learning
- **Worksheet**
  Museum of Australian Democracy
- **Weblink**
  AIATSIS

9.4 THE MEANING OF THE RULE OF LAW

rule of law
the principle that everyone in society is bound by law and must obey the law. The rule of law also states that laws should be fair and clear, so people are willing and able to obey them

law reform
the process of constantly updating and changing the law so it remains relevant and effective

The **rule of law** underpins many of the topics in Units 3 & 4. The rule of law is not only upheld in our criminal and civil justice systems, but is also upheld through the Australian Constitution, the parliament, the courts and **law reform**.

The rule of law means that **everyone** – individuals, groups and the government – is bound by and must adhere to laws, and the laws should be such that people are willing and able to abide by them.

In Unit 4, you will explore some of the principles of the rule of law below:

- the Australian Constitution acts as a check (restraint) on parliament in law-making so that parliament does not have unlimited power
- judges interpret the law free from the pressure of government and are independent of government and parliament
- the laws made by parliament are subject to open and free criticism, and people can seek to influence a change in the law
- people are free to associate and assemble without fear, which includes demonstrating against unfair laws
- people can use the courts to challenge laws made by parliament
- judges are able to interpret laws made by parliament when a case comes before them that requires the meaning of the law to be clarified.



Source 1 In 2017, Prime Minister Malcolm Turnbull criticised an Australian union leader who had claimed it was acceptable to break an unfair law.

The rule of law is often mentioned in the media. For example, in June 2017 three members of the Commonwealth Parliament had to apologise for comments they made about sentencing in Victoria. The comments suggested that judges were being soft when sentencing terrorist offenders. Justice Beech-Jones, the President of the Judicial Conference of Australia, said 'The statements attributed to the ministers are deeply troubling. They represent a threat to the rule of law.' Others noted that judges should be free from political pressures (a principle that is part of the rule of law).

9.4 CHECK YOUR LEARNING

Define and explain

1. Explain what is meant by the rule of law.
2. Identify two principles of the rule of law.
3. What happened in June 2017 in relation to sentencing in Victoria and three members of parliament, and how is this relevant to the rule of law?
4. Is the Prime Minister subject to the rule of law? Why?

Synthesise and apply

5. Conduct some research to find out if there are any governments around the world that do not consider the rule of law to be important. Discuss your findings with your class.
6. Why do you think that it is important that judges are kept separate and independent of the people who make the law?

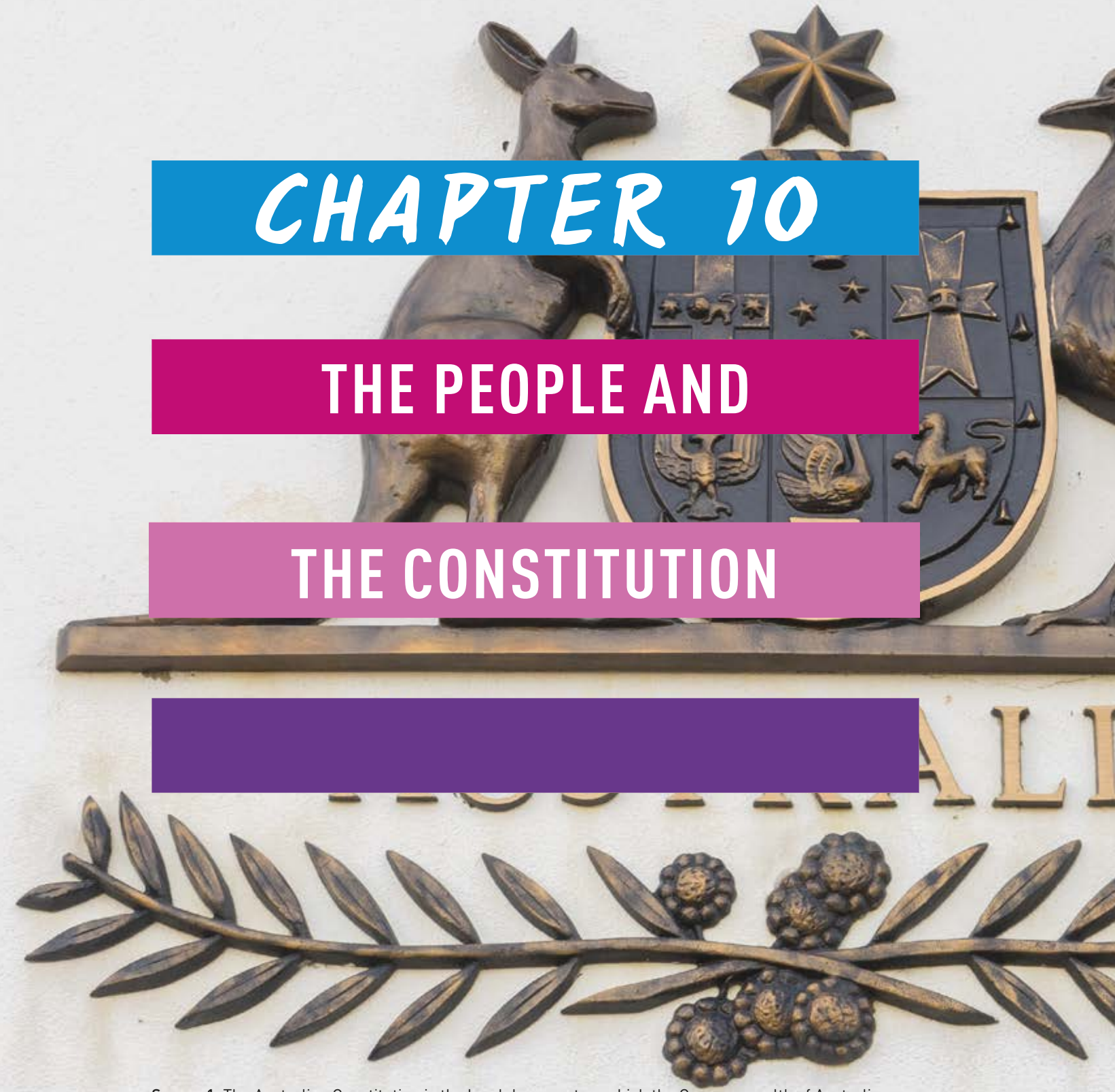
Check your obook assess for these additional resources and more:

» **Student book questions**
9.4 Check your learning

» **Weblink**
Rule of Law Institute of Australia

CHAPTER 10

THE PEOPLE AND THE CONSTITUTION



Source 1 The Australian Constitution is the legal document on which the Commonwealth of Australia was founded at federation in 1901. The Australian Constitution transferred specific powers from the six independent British colonies to the newly-formed Commonwealth Parliament – represented here by a national coat of arms. In this chapter, you will learn about how the Australian Constitution acts as a check on parliament in law-making.



OUTCOME

By the end of **Unit 4 – Area of Study 1** (i.e. Chapters 10 and 11), you should be able to discuss the significance of High Court cases involving the interpretation of the Australian Constitution and evaluate the ways in which the Australian Constitution acts as a check on parliament in law-making.

KEY KNOWLEDGE

In the chapter, you will learn about:

- the roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making
- the division of constitutional law-making powers of the state and Commonwealth Parliaments, including exclusive, concurrent and residual powers
- the significance of Section 109 of the Australian Constitution
- the ways in which the Australian Constitution acts as a check on parliament in law-making, including:
  - the bicameral structure of the Commonwealth parliament
  - the separation of the legislative, executive and judicial powers
  - the express protection of rights
  - the role of the High Court in interpreting the Australian Constitution
  - the requirement for a double majority in a referendum.

KEY SKILLS

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- compare the constitutional law-making powers of the state and Commonwealth Parliaments, using examples
- discuss the significance of Section 109 of the Australian Constitution
- evaluate the ways in which the Australian Constitution acts as a check on parliament in law-making
- synthesise and apply legal principles to actual scenarios.

KEY LEGAL TERMS

Australian Constitution, the a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

concurrent powers powers in the Australian Constitution that may be exercised by both the Commonwealth and one or more state parliaments (as opposed to residual powers and exclusive powers)

Executive Council a group consisting of the prime minister and senior ministers (at the Commonwealth level) or premier and senior ministers (at the state level) that is responsible for administering and implementing the law by giving advice about the government and government departments

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

judicial power the power given to courts and tribunals to enforce the law and settle disputes

Legislative Assembly the lower house of the Victorian Parliament

Legislative Council the upper house of the Victorian Parliament

legislative power the power to make laws, which resides with the parliament

referendum the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australia people in a public vote by a double majority

residual powers powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain with the states (as opposed to concurrent powers and exclusive powers)

royal assent the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or the governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on page vi–vii

Extracts from the VCE Legal Studies Study Design (2018–2022) reproduced by permission, © VCAA.

Aboriginal and Torres Strait Islander readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of people who have died.

10.1 INTRODUCTION TO THE AUSTRALIAN CONSTITUTION

constitution
a set of rules that establishes the nature, functions and limits of government

Australian Constitution, the
a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

House of Representatives
the lower house of the Commonwealth Parliament

Senate
the upper house of the Commonwealth Parliament

High Court
the ultimate court of appeal in Australia and the court with the authority to hear and determine disputes arising under the Australian Constitution

referendum
the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australia people in a public vote by a double majority

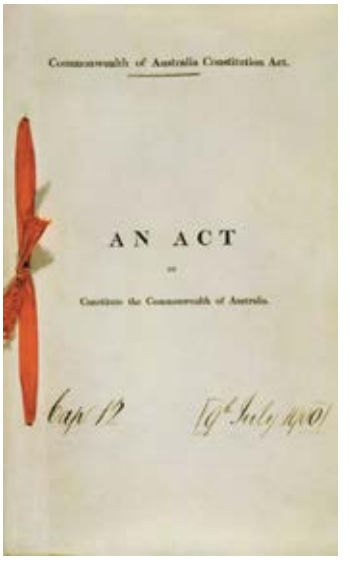
bill of rights
a document that sets out the basic rights and/or freedoms of the citizens in a particular state or country

A **constitution** is a set of rules that establishes the nature, functions and limits of government. The role of a constitution is to determine the powers and duties of the government. Many countries around the world (such as Canada, India, New Zealand, the United States and the United Kingdom) have constitutions. Some of these constitutions guarantee certain rights to the people of those countries.

Many countries such as the United States and India have formal written constitutions; others such as New Zealand and the United Kingdom do not. Instead, those countries have a set of documents which collectively establish the rules by which they are governed.

Australia has a **formal written constitution**. It is commonly known as the **Australian Constitution** or the Commonwealth Constitution, but its long title is the *Commonwealth of Australia Constitution Act 1900* (UK). It came into force on 1 January 1901 after the citizens in each of the separate colonies voted in favour of federating as one united body (details about federation are contained in Chapter 9).

In comparison with other legal documents, the Australian Constitution is very short – especially considering it is the most important legal and political documents affecting the lives of all Australians.



Source 1 The Australian Constitution

Features of the Australian Constitution

Some of the main features of the Australian Constitution are as follows:

- it establishes the Commonwealth **Parliament** and outlines its structure, including how its two houses, the **House of Representatives** and the **Senate**, are to be composed.
- it establishes the **High Court of Australia** and gives it powers to interpret the Constitution
- it sets out matters relating to the states. The Constitution expressly provides that state laws will continue in force in the state which made them unless they are altered or repealed
- it facilitates the **division of law-making powers** by setting out what law-making powers are held by the Commonwealth Parliament
- it provides a mechanism by which the Australian Constitution **can be changed** – i.e. by means of a **referendum.**

Unlike the American Constitution, the Australian Constitution does not contain a **bill of rights**. A bill of rights is a document that lists the most important rights given to the citizens of a country (such as the right to free speech).

Although our Constitution does not contain a bill of rights, it does provide protection for a limited number of rights, such as the right to freedom of religion.



Source 2 Megan Davis, Pat Anderson and Noel Pearson in May 2017, holding the 'Uluru Statement from the Heart'. Some of Australia's Indigenous leaders, including those pictured here, called for the establishment of a First Nations Voice to be enshrined in the Constitution.

It is only because of the Australian Constitution that the central systems and foundations of our political and legal systems, such as the Commonwealth Parliament, the High Court of Australia, the referendum process and the division of law-making powers, exist in Australia. You will explore these features of the Australian Constitution in Chapters 10 and 11.

Did you know?

The generally held view in the 1890s was that Australia did not need a bill of rights because basic freedoms in our country were already adequately protected.

Study tip

A link to the Australian Constitution is provided on your obook assess. You should print out a copy and tag the sections that are discussed in Chapters 10 and 11. This will help you understand key constitutional concepts in greater depth.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)

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

10.1 CHECK YOUR LEARNING

Define and explain

1 Define the word 'constitution'.

2 Which parliament created the legislation that became Australia's Constitution? Why was this so?

3 Identify three systems or features of our legal and political systems that only exist because of the Australian Constitution.

Synthesise and apply

4 Using information provided in this topic, as well as your own research, provide two reasons why the colonies of Australia wanted to federate.

5 Imagine that the year is 1897 and you live in one of the smaller colonies such as Tasmania or South Australia. Describe two concerns you may have held about the introduction of the new parliamentary system in Australia.

Analyse and evaluate

6 Constitution survey

a Conduct a survey of five people. These people should not come from your Legal Studies class. Ask them the following questions:
- What is the Australian Constitution?
- What role does the Constitution play in Australian society?

b Prepare a short summary of each person's responses.

c Using your summary as a reference, take part in a class discussion about the following statement:

'The Australian Constitution has no relevance to the lives of everyday Australians.'

Check your obook assess for these additional resources and more:

- **Student book questions** 10.1 Check your learning
- **Video tutorial** Introduction to Chapter 10
- **Video** The Constitution
- **Video worksheet** The Constitution

10.2 THE ROLE OF THE PARLIAMENT IN LAW-MAKING

In this topic, you will learn about the roles of the Houses of Parliament in law-making in Australia – both at a federal level (i.e. the Parliament of Australia) and at a state level (i.e. the Parliament of Victoria).

The Commonwealth Parliament

The Parliament of Australia (also commonly known as the Commonwealth Parliament or Federal Parliament) consists of the following:

- the **Queen** (represented by the **Governor-General of Australia**)
- the **Senate** (the upper house)
- the **House of Representatives** (the lower house).

Governor-General
the Queen's representative at the Commonwealth level

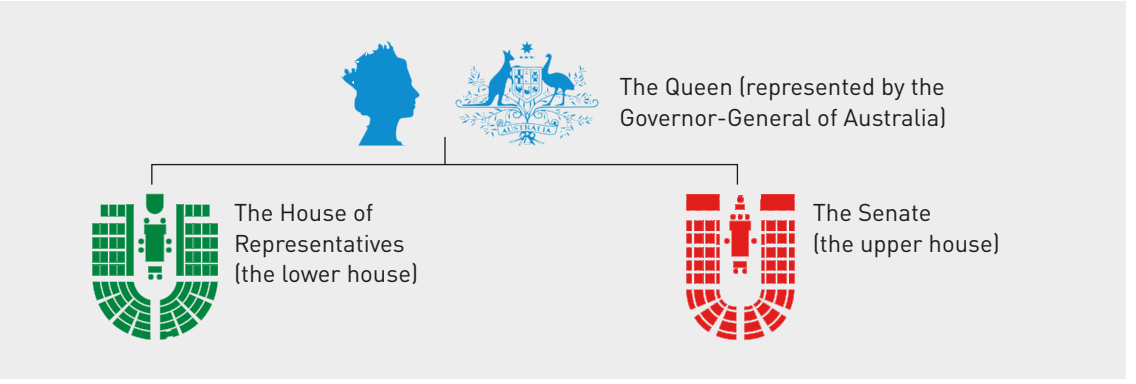
government
the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

political party
an organisation that represents a group of people with shared values and ideas, and which aim to have its members elected to parliament

coalition
an alliance of two or more political parties that join to form government

minister
a member of parliament who is a member of the party in government and is in charge of a government department

opposition
the political party that holds the second largest number of seats (after the government) in the lower house. The opposition questions the government about policy matters and is responsible for holding them to account



Source 1 The Parliament of Australia 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**'.

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. To be eligible to vote, a person must be 18 years old and registered to vote.

The **political party** (or **coalition** of parties) that achieves the majority 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 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. For example, while there is a Minister for Defence in the Commonwealth Government, there is also a member of the opposition, known as the Shadow Minister for Defence, who has the role of scrutinising the decisions made by the minister and ensuring he or she is accountable to the parliament.

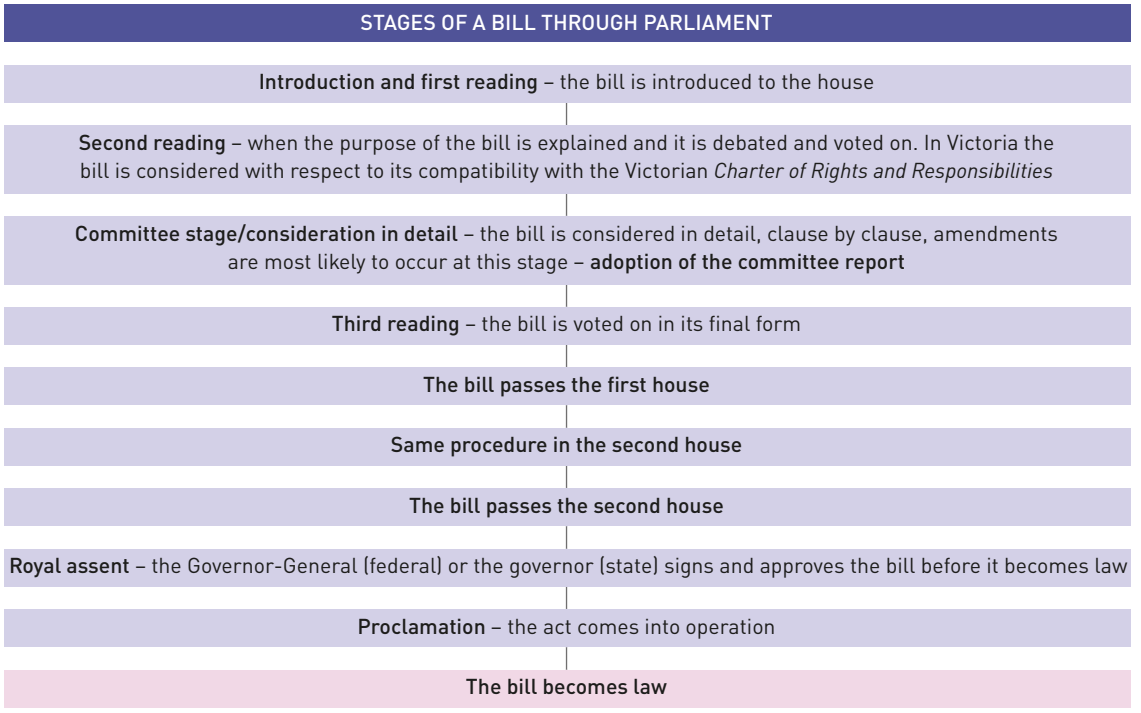
The role of the House of Representatives in law-making

The main role of parliament is to make laws. A **bill** is a proposed law, which must go through specific stages to become a statute (also known as an **Act of Parliament** or legislation). The bill must pass through the first house before it goes on to the other house, where it goes through the same processes before it receives **royal assent** (the signing and approval of the proposed law by the Crown's representative) and becomes law. A majority vote of the members of the House of Representatives will therefore always be required for a bill to pass.

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

Act of Parliament
a law made by parliament; a bill which has passed through parliament and has received royal assent (also known as a statute)

royal assent
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or the governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)



Source 2 Stages of a bill through parliament

The House of Representatives has several roles in law-making:

- **initiate and make laws** – The main function of the House of Representatives is to initiate new laws. These are usually introduced by the government, although any member may introduce a proposed law (bill). A bill that is introduced without the authority of the **Cabinet** is known as a **private member's bill**. Such bills do not reflect the policy of the government of the day. 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 pass important legislation. In terms of law-making, as the government has the majority in the lower house, it has the opportunity to generate the vast majority of law reform that enters the parliament.
- **provide responsible government** – Ministers are responsible to parliament and therefore to the people. They are examined by opposition members about their ideas for law reform during question time, where deficiencies in legislation can be exposed.
- **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 proposed laws should reflect the views and values of the majority of the community.

Cabinet
the policy-making body made up of the Prime Minister (or premier at a state level) and a range of senior government ministers in charge of a range of government departments. Cabinet decides which laws should be introduced into parliament

private member's bill
a bill introduced into parliament by a member of parliament who is not a government minister

hung parliament
a situation in which neither major political party wins a majority of seats in the lower house of parliament after an election

- **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 and 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** can also investigate proposed laws.
- **act as a house of review** – The House of Representatives will act as a house of review in the law-making process when a bill has been initiated and agreed upon in the Senate. If the House of Representatives passes the bill, it will then be sent to the Governor-General and be made into law on a nominated date.
- **control government expenditure** – A bill must be passed through both houses of parliament before a government is able to collect taxes or spend money, but only the lower house can introduce **money bills**. Expenditure is also examined by parliamentary committees. This is a key aspect of law-making by the parliament, especially as governments need to navigate the country through the changing global economy, while meeting the expectations of the public.

money bill
a bill that imposes taxes and collect revenue; also known as an appropriation bill

committee system
a system used by federal and state parliaments in Australia that involves the use of separate working parties (i.e. committees) to investigate a wide range of legal, social and political issues and report back to the parliament about the need for law reform

The Senate

The Senate consists of 76 elected members. Each state elects 12 representatives, regardless of the population of that state. There are two representatives elected from each mainland territory. The Senate is elected by proportional representation, where 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 six years. Half of them are elected every three years, and the changeover takes place on 1 July of the relevant year.



Source 3 The House of Representatives in the Commonwealth Parliament. During Question Time in the House of Representatives, the Prime Minister and ministers are called upon to answer questions and explain government decisions and actions.



Source 4 Senator Fiona Nash was elected to the Senate in 2016. Here, Senator Nash is seen making a statement in the Senate.

The role of the Senate in law-making

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). The Senate, however, cannot initiate money bills. It is also 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 will be introduced in the House of Representatives.

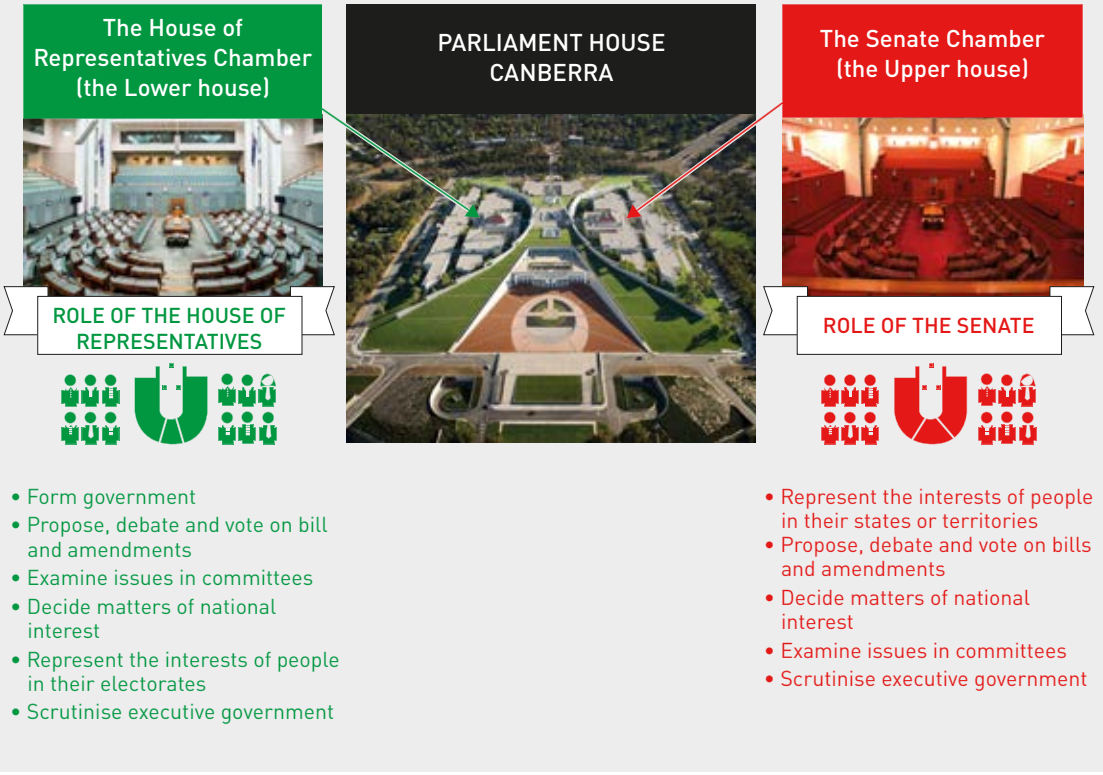
The Senate debates the proposed laws and has a large and active **committee system** that enables senators to inquire into policy issues in depth and to scrutinise bills before they become law.

The main roles of the Senate in law-making are summarised below:

- **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 or inappropriate are not passed through the parliament.
- **act as a states' house** – At the time of the creation of the Commonwealth Parliament, the states (which were separate colonies before the Federation of Australia) were afraid of giving

up too much 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, Section 7 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 in law-making.

- **scrutinise bills through the committee process** – The Senate has a number of committees, including the Senate Standing Committee for the Scrutiny of Bills. The Committee is made up of various senators whose role it is to assess legislative proposals to determine what effect the proposals would have on individual rights, freedoms and obligations, as well as the rule of law. Since 2017, the Committee has published its scrutiny comments on recently introduced bills.
- **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. 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.



Source 5 The role of the two houses in the Federal Parliament.

The Victorian Parliament

Like the Parliament of Australia, the Parliament of Victoria (also commonly known as the Victorian Parliament) is a **bicameral parliament**. The Parliament of Victoria consists of:

- the Queen (represented by the **Governor of Victoria**)
- the **Legislative Council** (upper house)
- the **Legislative Assembly** (lower house).

Did you know?

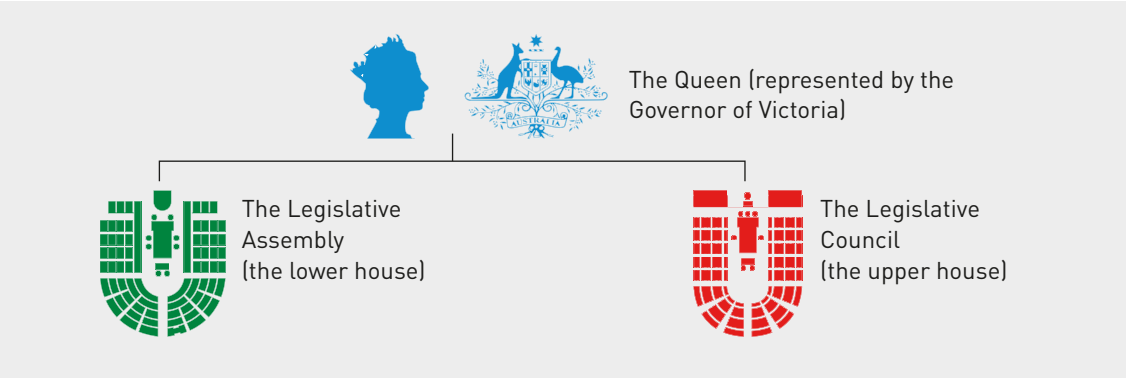
Although senators are generally elected as members of a political party, they can be independent, and they can also resign and form a new party. This occurred in 2017 when Senator Cory Bernardi resigned from the Liberal Party to form a new political party, the Australian Conservatives.

bicameral parliament
a parliament with two houses (also called chambers). In the Australian Parliament, the two houses are the Senate (upper house) and the House of Representatives (lower house). In the Victorian Parliament the two houses are the Legislative Council (upper house) and the Legislative Assembly (lower house)

Governor
the Queen's representative at the state level

Legislative Council
the upper house of the Victorian Parliament

Legislative Assembly
the lower house of the Victorian Parliament



Source 6 The Parliament of Victoria consists of the Queen's representative (the Governor of Victoria), the Legislative Assembly and the Legislative Council.

The Legislative Assembly

There are 88 members of the Legislative Assembly. For the purposes of state elections, Victoria is divided into 88 districts. One member of the Legislative Assembly is elected to represent each of these districts, and will remain in office for four years. Elections are held on the last Saturday in November every four years.

The political party (or coalition of parties) that wins the majority of seats in the Legislative Assembly forms government. The leader of the government is known as the premier.

As in the Commonwealth Parliament, the party with the next highest number of elected members becomes the opposition. The leader of the opposition will appoint shadow ministers, whose role is to keep a check on the activities and responsibilities of the corresponding government minister.

Study tip

It's easy to remember the names of the houses because they go in alphabetical order from lower (Legislative Assembly) to upper (Legislative Council).



Source 7 The Legislative Assembly is the lower house of the Victorian Parliament. This is the house in which government is formed.

The role of the Legislative Assembly in law-making

Like the Commonwealth Parliament, the main role of the Victorian Parliament is to make laws. The process of a bill through the Victorian Parliament is similar to that of the Commonwealth Parliament, in that it must go through specific stages in both houses of parliament. The bill must then receive royal assent from the Governor of Victoria before it becomes a statute.

The role of the Legislative Assembly in law-making is to:

- **initiate and pass bills** – The main function of the Legislative Assembly is to initiate new laws. These are usually introduced to the Legislative Assembly by the government, although any member may introduce a bill.
- **form government** – The political party that has the most members in the Legislative Assembly forms government. Most bills are initiated in the Legislative Assembly in the form of government bills, reflecting the policies laid down by the premier and senior ministers.
- **provide representative government** – Members of the Legislative Assembly are elected to represent the interests of the people. Their actions in law-making should reflect the views and values of the people. If not, they are at risk of being voted out of government at the next election.
- **act as a house of review** – the Legislative Assembly will act as a house of review in the law-making process when a bill has been initiated in and passed by the Legislative Council.
- **control government expenditure** – For taxes to be collected or money to be spent, the government must introduce a bill in the Legislative Assembly. Therefore, the Legislative Assembly in law-making will control government expenditure as only it can initiate money bills.

The Legislative Council

The Legislative Council comprises 40 members of parliament. For the purposes of electing members to the Council, Victoria is divided into eight regions, each consisting of 11 districts. Five members of the Legislative Council are elected for each region, making a total of 40 members of parliament 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 primary role of the Legislative Council is to act as a house of review. That is, it will review bills that have already been passed by the Legislative Assembly, and can scrutinise, debate and reject proposed legislation.



Source 8 In the Victorian Parliament, members may ask ministers questions on notice, by lodging a written question that is published in the Council's Notice Paper.

The role of the Legislative Council in law-making

The role of the Legislative Council in law-making includes:

- **act as a house of review** – 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 in the law-making process, the upper house can apply many of the important checks and balances that ensure that the parliament is reflective of the will of the people.
- **examine bills through its committees** – The Legislative Council has a number of committees that debate the proposed laws at length and recommend to the House whether bills should be supported as part of the legislative process.
- **initiate and pass bills** – Bills can be initiated in the Legislative Council but it is less common than 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 legislation. However, this could lead to less scrutiny of government programs and less debate in parliament.

Did you know?

Women could be elected as members of the Legislative Council from 1923. However, it wasn't until 1979, with the election of Gracia Baylor and Joan Coxsedge, that a female member was elected to the House.

A comparison of the structure of the Parliament of Australia and the Parliament of Victoria

Source 9 summarises some of the key similarities and differences between the Houses of Parliament at a state and federal level.

	THE PARLIAMENT OF AUSTRALIA (FEDERAL)	THE PARLIAMENT OF VICTORIA (STATE)
Lower house	**The House of Representatives (the lower house)**	**The Legislative Assembly (the lower house)**
	150 seats	88 seats
	One member for each of the 150 electorates across Australia	One member for each of the 88 districts across Victoria
	Term of office is usually three years	Term of office is fixed at four years

cont.

	THE PARLIAMENT OF AUSTRALIA (FEDERAL)	THE PARLIAMENT OF VICTORIA (STATE)
Upper house	**The Senate (the upper house)**	**The Legislative Council (the upper house)**
	Each state is an electorate	State is divided into eight regions
	12 senators elected from each state two senators elected from each of the Australian Capital Territory and the Northern Territory	Five members elected from each region
	76 senators	40 members
	Term of office is usually six years (half elected every three years)	Term of office is fixed at four years

Source 9 The structure of the Parliament of Australia (federal) compared with the structure of the Parliament of Victoria (state).

10.2 CHECK YOUR LEARNING

Define and explain

1. Outline two roles of the Legislative Assembly in law-making.
2. Explain the term 'states' house' in relation to the role of the Senate in law-making.
3. For each of the Commonwealth Parliament and the Victorian Parliament, which is the house of government? Explain how this impacts on the law-making process of the parliaments.
4. If you were elected to a seat in the House of Representatives, how many years would you serve before the next election?
5. Provide two similarities and two differences between the roles of the House of Representatives and the Senate in law-making.

Synthesise and apply

6. Access the Parliament of Victoria website and go to the Legislation page. A link is provided on your obook assess. Provide a chronology of the passage of the legislation.
7. Your friend keeps on confusing the names of the houses of parliament, the structure of both parliaments and who each house represents. Devise a creative way for your friend to remember all of this. It can be a poem, song, rap or visual diagram.

Analyse and evaluate

8. Undertake research to discover the present make-up of the Senate in terms of the number of seats held by political parties and independent members.
   - **a** Does the government have a majority of members in the Senate?
   - **b** To what extent does it serve the interests of democracy if opposition parties and independent members have a majority in the Senate? Give reasons for your answer.
9. In a 200-word response, explain why it is important that laws made in Australia represent the views, values and expectations of the people. What might occur if the Commonwealth Parliament ignored the will of the people?

Check your obook assess for these additional resources and more:

- **Student book questions**
  10.2 Check your learning
- **Worksheet**
  Parliament
- **Weblink**
  Parliament of Australia
- **Weblink**
  Parliament of Victoria

10.3 THE ROLE OF THE CROWN IN LAW-MAKING

In this topic, you will learn about the role of the Crown in law-making in Australia.

The **Crown** (i.e. the British monarch) is part of the system of government in Australia through its representatives:

- one Governor-General (at a federal level)
- six Governors (at a state level).

The Governor-General is appointed by the Queen on the advice of the Prime Minister of Australia.

The governors of each state are appointed by the Queen on the advice of the premier of each of the six states.

The main responsibility of the Crown's representatives in Australia 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**.

There are three main roles of the Crown in law-making:

- granting royal assent
- withholding royal assent
- appointing **Executive Council**.



Source 1 The Governor-General, Sir Peter Cosgrove, signing a bill into law. This is known as giving or granting royal assent.

Granting royal assent

The Crown's representative in both the Commonwealth Parliament (i.e. the Governor-General) and the Victorian Parliament (i.e. the Governor of Victoria) is required to approve bills before they can become law. This is known as **royal assent**. Royal assent is normally given as a matter of course on the advice of the prime minister or ministers at the Commonwealth level, and on the advice of the Premier of Victoria or ministers at the Victorian level.

Withholding royal assent

The Crown's representative has the power to withhold royal assent (that is, refuse to approve a bill and therefore make it an Act of Parliament). However, this rarely occurs, and the ordinary course is that the Queen's representative will approve bills.

At a federal level, the Australian Constitution specifies the circumstances in which the Governor-General can withhold royal assent.

Appointing Executive Council

The Governor-General (or governor of each state) has the responsibility of appointing the Executive Council. This comprises the leader of the government (the prime minister at the federal level and the premiers at the state level) as well as senior ministers.

The role of the Executive Council is to give advice on government matters as well as approve **secondary legislation** (also known as delegated or subordinate legislation). Secondary legislation is rules

democracy
a system of government in which members of parliament are voted into office by the people, and represent the wishes of the people

Executive Council
a group consisting of the prime minister and senior ministers (at the Commonwealth level) or premier and senior ministers (at the state level) that is responsible for administering and implementing the law by giving advice about the government and government departments

royal assent
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or the governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)

secondary legislation
rules and regulations made by secondary authorities (e.g. local councils, government departments and statutory authorities) which are given the power to do so by the parliament. Also referred to as delegated legislation

and regulations made by government bodies such as government departments or statutory authorities. For example, the *Parliamentary Entitlements Amendment (Presiding Officer and Parliamentary Delegation Travel) Regulations 2017* (Cth) was created to provide greater scrutiny of members of parliament when they made claims for expenses incurred in the course of their work (called 'entitlements').

In reality, the Queen's representative in approving secondary legislation acts on the advice of the prime minister or premier.

Did you know?

The Queen's representative also has what are known as 'reserve powers', being powers exercisable without the approval of government. This includes appointing the leader of government and even dismissing a government.

EXTRACT

Parliamentary Entitlements Amendment (Presiding Officer and Parliamentary Delegation Travel) Regulations 2017

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 09 February 2017

Peter Cosgrove

Governor General

By His Excellency's Command

10.3 CHECK YOUR LEARNING

Define and explain

1 What is royal assent? How important is it in the process of law-making?

2 Does the Queen's representative have the power to stop a bill from being passed? Justify your answer.

Synthesise and apply

3 Access this year's Commonwealth Regulations online on either the Australasian Legal Information Institute (AustLII) website or the Commonwealth Parliament website. A link to these websites is provided on your obook assess. Find a regulation that has been made by the Governor-General of Australia and answer the following questions.

- **a** What is the name of the regulation?
- **b** When did the Governor-General make the regulation?
- **c** Under what Act of Parliament was this regulation made?

4 Conduct some research.

- **a** Who is the current Governor-General?
- **b** How long is the Governor-General's term in office, and when will a new Governor-General be appointed?
- **c** Who is Victoria's current Governor?
- **d** How long is the Governor's term in office, and when will a new Governor be appointed?

Analyse and evaluate

5 Outline the role of the Executive Council. Explain how the existence of the Executive Council might make the process of law-making more efficient.

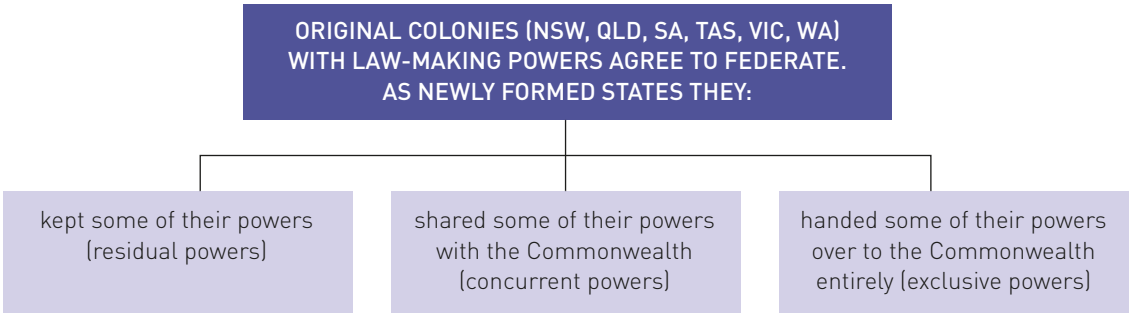
6 'Given that royal assent is almost always granted, the role of the Crown in law-making is redundant'. Do you agree? Give reasons.

Check your obook assess for these additional resources and more:

- » **Student book questions** 10.3 Check your learning
- » **Going further** Witholding royal assent
- » **Worksheet** Granting royal assent
- » **Weblink** Governor-General

10.4 THE DIVISION OF CONSTITUTIONAL LAW-MAKING POWERS

You may recall from Chapter 9 that before federation, Australia was a collection of six colonies which created their own laws for their own people. To allow for federation, the colonies had to give up some of their powers to the new Federal Parliament. When they became states they kept some powers, shared some powers with the new Commonwealth Parliament, and gave up some powers completely, as shown in Source 1.



Source 1 Prior to federation, the colonies (now known as the states) agreed to allow some of their powers to be handed to the newly formed Commonwealth Parliament. The states retained power over some significant areas that they had traditionally controlled.

Study tip

The *VCE Legal Studies Study Design* requires you to compare law-making powers, using examples. Whenever you see the word 'compare', remember that you will need to provide similarities as well as differences.

Law-making powers are powers or authority given to parliament to make laws in certain areas. Those powers are exercisable by parliament, which is the **supreme law-making body** in Australia (meaning it has the ultimate authority to make laws and can change laws whenever it wants to, so long as it is acting within its powers). There are a significant number of areas in which laws need to be made in Australia and include roads, education, tax, currency, marriage, trade and crime.

The creation of the Commonwealth Parliament required the Australian Constitution to specify the way law-making powers were to be shared. The colonies agreed on the areas where the Commonwealth Parliament was to make laws, and the areas where the state parliaments would retain their power to make laws. The Constitution agreed by the states establishes the rules which divided those law-making powers between the Commonwealth and the state parliaments.

The Australian Constitution divides the law-making powers into:

- **residual powers** – those law-making powers left with the states at the time of federation. The Commonwealth Parliament has no authority over to make laws in these areas
- **exclusive powers** – law-making powers that are held only by the Commonwealth Parliament, and only that parliament can create laws in these areas (the states cannot create law in those areas)
- **concurrent powers** – those law-making powers that are shared by the Commonwealth and the state parliaments.

A description of each of the powers is provided below.

residual powers powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain with the states (as opposed to concurrent powers and exclusive powers)

exclusive powers powers in the Australian Constitution that only the Commonwealth Parliament can exercise (as opposed to residual powers and concurrent powers)

concurrent powers powers in the Australian Constitution that may be exercised by both the Commonwealth and one or more state parliaments (as opposed to residual powers and exclusive powers)

Residual powers

Residual powers are law-making powers left with the states at the time of federation and not listed in the Australian Constitution. Before the Federation of Australia 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.

Specific sections of the Constitution protect the continuing power of the states to create law in areas that were not given to the Commonwealth. These include Sections 106, 107 and 108 of the Australian Constitution, set out below.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
The States

106 Saving of Constitutions

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107 Saving of Power of State Parliaments

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108 Saving of State laws

Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

criminal law
an area of law that defines a range of behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

Areas of law-making such as **criminal law**, medical procedures such as in-vitro fertilisation, road laws, education and public transport are not mentioned in the Constitution. They therefore remain as areas of residual power that belong only to the states. This means that in these particular areas of law, the state's laws may differ. As you may recall from Unit 3 – Area of Study 1, crime is an area of law-making that is held by the states, therefore each state has its own courts, its own laws which establish crimes and sanctions, and its own police force.



Source 2 States have powers to make laws about schools and education. States also have powers to make laws about roads, healthcare and public transport so laws in different states vary in these areas too.

Exclusive powers

Most of the law-making powers of the Commonwealth Parliament are set out in Section 51 of the Australian Constitution, and are referred to as 'heads of power'. These key powers of the Commonwealth are either **exclusive powers** or **concurrent powers**.

An exclusive power is a power which can **only be exercised** (that is, exclusively or solely) by the Commonwealth Parliament. This means that only the Commonwealth Parliament can make laws in these areas. Examples of exclusive powers include:

- **defence** (i.e. the Australian Defence Force including army, navy and air force)
- **currency** (i.e. printing and coining money)
- **customs and border protection** (i.e. immigration, controls on imports and exports, and border security).



Source 3 The Commonwealth has power to make laws on currency, customs, migration, naturalisation, defence, and railways for defence purposes.

Some powers that are held by the Commonwealth are made exclusive by **other sections** of the Constitution. For example, Section 51(xii) gives power to the Commonwealth Parliament to make laws relating to coining money and Section 115 provides that a state shall not coin money, thereby making this an exclusive power of the Commonwealth.

LAW-MAKING POWER GIVEN TO THE COMMONWEALTH	SECTION OF THE CONSTITUTION THAT MAKES THE POWER EXCLUSIVE
Section 51(iii) gives power to the Commonwealth Parliament to make laws regarding customs and excise.	**Section 90** states that this power is exclusive to the Commonwealth Parliament.
Section 51(vi) gives power to the Commonwealth Parliament to make laws relating to naval and military forces.	**Section 114** provides that the states shall not raise naval or military forces, making this exclusive to the Commonwealth Parliament.
Section 51(xii) gives power to the Commonwealth Parliament over currency, coinage and legal tender.	**Section 115** provides that the states shall not coin money. Coining money is therefore an exclusive power of the Commonwealth Parliament.

Source 4 An example of powers in Section 51 that are made exclusive by other sections of the Australian Constitution.

Other powers held by the Commonwealth are **exclusive by their nature**. For example, Section 51(xix) gives power to the Commonwealth to make laws relating to naturalisation (becoming an Australian citizen). Powers that are exclusive by nature are set out in Source 6 below.

SECTION	POWER
51(iv)	Borrowing money on the public credit of the Commonwealth
51(xix)	Naturalisation (becoming an Australian citizen)
51(xxv)	Recognition throughout the Commonwealth of state laws and records
51(xxxii)	Control of railways for defence purposes
51(xxxiii)	Acquisition of state railways with the consent of the state concerned

Source 5 Powers given to the Commonwealth Parliament that are, by their nature, exclusive.

Did you know?

State parliaments can refer law-making powers to the Commonwealth Parliament. That is, they can ask the Commonwealth Parliament to make laws in an area of residual power. This has occurred a number of times, including when the Victorian Parliament referred powers to the Commonwealth Parliament in 2009 to allow the Commonwealth to pass national business name legislation.

In addition, as shown in the extract below, Section 52 of the Australian Constitution contains a small list of powers that are exclusive powers of the Commonwealth Parliament.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
52 Exclusive powers of the Parliament

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.

Commonwealth territories

Sections 111 and 122 give exclusive power to the Commonwealth with respect to Commonwealth territories (for example, the Northern Territory and the Australian Capital Territory).

Concurrent powers

Concurrent powers are law-making powers that both the Commonwealth and the state parliaments share. Many of the powers given to the Commonwealth Parliament in the Australian Constitution are concurrent powers. In fact, all those powers that are not exclusive to the Commonwealth Parliament are concurrent powers. Examples of concurrent powers include:

- **trade** – Both the Commonwealth and the states can make law with regard to trade. Under the Constitution, no unreasonable limitations can be made by any parliament, Commonwealth or state, on freedom of trade between states.
- **taxation** – The power to make laws about taxation is given to the Commonwealth Parliament but state parliaments can also make laws about taxes. Commonwealth taxes include income tax and GST (goods and services tax). State taxes include stamp duty and payroll tax.
- **marriage and divorce** – Both the Commonwealth Parliament and state parliaments have the power to make laws on marriage and divorce.
- **postal, telegraphic, telephonic and similar services** – communication services may be legislated upon by both the Commonwealth and the state parliaments.



Source 6 Trade, taxation and marriage are concurrent powers, shared between the Comonwealth and state parliaments.

Comparison of law-making powers

There are some similarities and differences between the three law-making powers. Source 8 below sets out some of the main features of each of the law-making powers.

	RESIDUAL POWERS	EXCLUSIVE POWERS	CONCURRENT POWERS
Held by	State parliaments	Commonwealth Parliament	Commonwealth Parliament and state parliaments
Expressed in Constitution?	No	Yes	Yes
Protected by the Constitution?	Yes – Sections 106, 107 and 108	Yes – Sections 51, 52 and other sections	Yes – Section 51
Does the Constitution allow them to be referred to another parliament?	Yes	No	No
Can affect states?	Yes	Yes	Yes

Source 7 Features of each of the law-making powers

10.4 CHECK YOUR LEARNING

Define and explain

1. Identify the three different types of law-making powers.
2. Using two examples, define the term 'concurrent powers'.
3. Explain why the Commonwealth can create laws for the territories.

Synthesise and apply

4. Identify two examples of exclusive powers and provide reasons why the original writers of the Constitution may have decided to deny the states law-making powers over these areas.
5. Provide one similarity and one difference between residual powers and concurrent powers.
6. For each area of the following, identify the parliament that has the power to make the law. You may need to access the Constitution to answer some of these:
   - **a** building submarines for defence purposes
   - **b** creating a new school
   - **c** building a new road
   - **d** raising taxes
   - **e** establishing an army
   - **f** denying citizenship to a person
   - **g** imposing a levy on imported goods.

Analyse and evaluate

7. Given that many areas of law-making power are residual, there are now differing laws across Australian states in areas such as altruistic surrogacy (where a woman agrees, for no financial gain, to become pregnant and bear a child with the intention of handing over the child at birth to another person or couple).
   - **a** What human rights issues may occur in an area such as altruistic surrogacy where laws vary from state to state?
   - **b** In your opinion, would Australia be better served by just having the Commonwealth Parliament create law on all areas for the entire nation? In your answer, address the issue of how residual powers can address the particular needs of states.

Check your obook assess for these additional resources and more:

- **Student book questions** 10.4 Check your learning
- **Video tutorial** How and when to use examples
- **Worksheet** Law-making powers
- **Weblink** Section 51 of the Australian Constitution

10.5 SECTION 109 OF THE AUSTRALIAN CONSTITUTION

Study tip

Sections that are specifically identified in the *VCE Legal Studies Study Design*, such as Section 109, are examinable. You should become familiar with those sections. A good way to do this is to read the sections out aloud and record them. That way, you can listen to them while you are out walking or jogging.

Section 109 of the Australian Constitution is designed to help resolve conflicts and inconsistencies between state and Commonwealth laws. These inconsistencies sometimes arise when concurrent powers are exercised by the Commonwealth Parliament and one or more state parliaments. For example, if the Commonwealth Parliament and a state parliament make a law in the same area – and the state law is inconsistent with the federal law – there will be a conflict between the state and Commonwealth legislation that needs to be resolved.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Under Section 109 of the Australian Constitution, if there is a conflict between state and Commonwealth laws, the Commonwealth law will prevail, to the extent of the inconsistency between the two pieces of legislation. State law provisions that are inconsistent with the Commonwealth law will be invalid.

For example, if the Commonwealth law prohibits a specific form of conduct which the state law allows, then the state law will be inoperable where those laws are inconsistent. Or, 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 if challenged. You can't obey both laws at the same time, so the inconsistent part of the state law is invalid.

Inconsistency in the marital status law

An area of concurrent law-making where there has been inconsistency between laws is marital status. The case of *McBain v Victoria* discussed below found that the requirements of the *Infertility Treatment Act 1995* (Vic) were invalid because they were inconsistent with the Commonwealth provision.

LEGAL CASE

Discrimination in infertility treatment services

McBain v Victoria (2000) 99 FCR 116

The *Infertility Treatment Act* was passed by the Victorian Parliament to establish the Victorian Infertility Treatment Authority and the in-vitro fertilisation (IVF) program. The program assisted infertile couples to have children using their own or donor sperm or ova. Section 8 of the *Infertility Treatment Act* stated that, 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.

Access to the program could be denied if the marital status requirement was not met.

Separately, Section 22 of the *Sex Discrimination Act 1984* (Cth), passed by the Commonwealth Parliament, 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*, was 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.

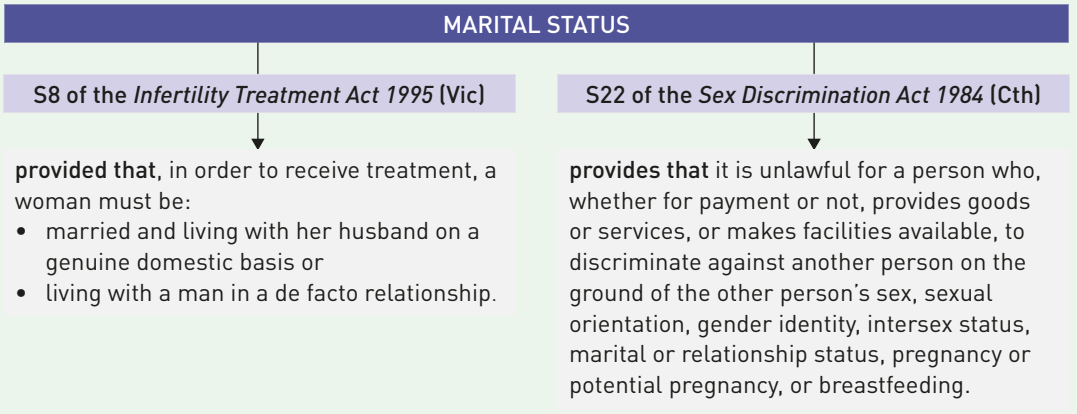
The provision of IVF services is a service under the *Sex Discrimination Act*. Therefore, under this Act it is unlawful to refuse to provide the IVF service on the grounds that the person is not married or living in a de facto relationship.

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*, however, it was an offence for a doctor to treat a woman who was 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.

To establish the inconsistency, McBain was required to show that a specific patient was being denied the service; in this case, that person was 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 Section 109 of the Australian Constitution, the Commonwealth law 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.

The law is now clear in this area under Section 10 of the *Assisted Reproductive Treatment Act 2008* (Vic). A woman can undergo reproductive technology where a doctor is satisfied, on reasonable grounds, that in the woman's circumstances, she is unlikely to become pregnant other than by a treatment procedure.



Source 1 The *McBain* case highlights the significance of Section 109 of the Australian Constitution.

The significance of section 109

Why is Section 109 significant? First, Section 109 can act as a restriction on state parliaments. It does so because it provides that, if a state parliament passes a law in an area where there is a Commonwealth law, the federal law will prevail over the state law to the extent of the inconsistency. That means that the state parliament will, in passing laws in areas of concurrent powers, recognise that its powers are constrained where a Commonwealth law already exists.

For example, marriage is an area of concurrent power. The Commonwealth Parliament has already passed legislation dealing with marriage, namely the *Marriage Act 1961* (Cth). That Act states that the marriageable age is 18 years. People aged 16 and 17 can only marry in exceptional circumstances and with the approval of a court. The state parliaments will recognise that any law passed by them which contradicts this law will, if challenged, be invalid.

However, Section 109 does not automatically operate such that the state parliament lacks the power to pass a law which is inconsistent with a Commonwealth law. First, the law needs to be challenged before it is declared to be invalid (that is, the court will need to determine whether the two laws are inconsistent). Second, if at some time in the future the Commonwealth law is abrogated or changed, and the state law continues to be in existence, then the state law will be in force and have effect. That is, the state law will have no practical effect only for so long as the Commonwealth law remains in force.

Section 109 is also significant because it imposes a consistent approach to the way inconsistencies between state and Commonwealth laws will be dealt with. That is, there is no doubt that the Commonwealth law will prevail.

10.5 CHECK YOUR LEARNING

Define and explain

1 Is Section 109 of the Australian Constitution relevant to:
   - **a** inconsistencies between Commonwealth laws and territory laws
   - **b** inconsistencies between different state laws?

   Give reasons for your answer.

2 Explain the significance of Section 109 in relation to the division of law-making power between the Commonwealth and state parliaments.

3 To what extent does Section 109 of the Australian Constitution restrict the state parliaments in law-making? Give reasons for your answer.

Synthesise and apply

4 Provide two reasons why the original writers of the Constitution may have included this provision.

5 Read the legal case *McBain v Victoria*.
   - **a** What were the two statutes that were said to be in conflict?
   - **b** How were they in conflict?
   - **c** Why was Dr McBain affected by this potential inconsistency?
   - **d** Why was Leesa Meldrum part of the case?
   - **e** What was the decision of the Federal Court?

Analyse and evaluate

6 If Victoria passed a law which allowed for a 15-year-old to marry, would this law be operable? Discuss.

Check your obook assess for these additional resources and more:

» **Student book questions**
10.5 Check your learning

» **Going further**
High Court interpretation of s109

10.6 THE BICAMERAL STRUCTURE OF THE COMMONWEALTH PARLIAMENT

Study tip

Each of these five means is listed separately in the *VCE Legal Studies Study Design*, which makes each of them specifically examinable. You should be able to evaluate each of the means.

Although parliament is the supreme law-making body in Australia, it does not have **absolute power**. The Australian Constitution prevents this by acting as a check (a restraint or safeguard) on parliament when it comes to law-making.

There are five key means by which the Australian Constitution acts as a check on parliament in law-making:

- the bicameral structure of the Commonwealth Parliament
- the separation of the legislative, executive and judicial powers
- the express protection of rights
- the role of the High Court in interpreting the Australian Constitution
- the requirement for a **double majority** in a referendum.

Each of these means is discussed in more detail in Topics 10.6 to 10.10 of this chapter.

double majority
a voting system that requires a national majority of all voters in Australia and a majority of electors in a majority of states (i.e. four states); a double majority is required for a change to be made to the Australian Constitution at a referendum

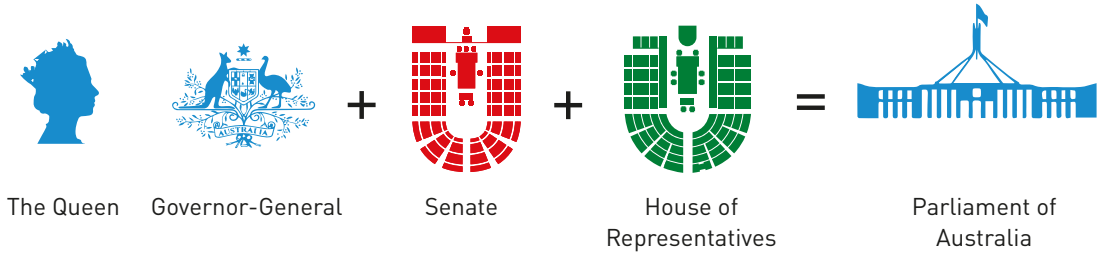
The bicameral Commonwealth Parliament

The Commonwealth Parliament is a bicameral parliament, which means it has a lower house and an upper house. Under the Australian Constitution, Section 1 states that there must be two houses.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
1 Legislative Power

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called **The Parliament**, or **The Parliament of the Commonwealth**.



Source 1 The Commonwealth Parliament is a bicameral parliament, meaning it has a lower house and an upper house. This structure is designed to act as a check on parliament in law-making.

Other provisions of the Australian Constitution establish how the House of Representatives and the Senate are to be composed:

- Section 7 requires the Senate to be composed of senators for each state, which are to be directly chosen by the people for a term of six years
- Section 24 requires the House of Representatives to be composed of members directly chosen by the people
- Section 28 states that every House of Representatives shall continue for three years (but it may be dissolved sooner by the Governor-General).

Did you know?

A foreign citizen cannot be a member of the Commonwealth Parliament because of Section 44 of the Australian Constitution. A number of senators and members of parliament were caught by this section in 2017 when it was discovered many of them were dual citizens.

The Australian Constitution does leave certain matters about the composition of the Houses to be legislated by the Commonwealth Parliament. For example, Section 7 states that 'until the Parliament otherwise provides there shall be six senators for each Original State'. In 1983, the Commonwealth Parliament passed the *Representation Act 1983* (Cth), which states that the number of senators for each state shall be 12.

The Australian Constitution does not require state parliaments to be bicameral parliaments. This is why the Queensland Parliament was not constitutionally prevented from abolishing its upper house in 1922, converting it from a bicameral parliament to a unicameral one.

Checking process

The bicameral structure of the Commonwealth Parliament is designed to act as a check on parliament in its law-making role. The Senate in particular is designed to operate as a house of review.

As explored earlier, most bills are introduced into the lower house, which means that the Senate will, among its duties, act as a house of review and as a state's house. This means that the Senate's role is to review bills already passed by the lower house. It also means that when reviewing bills, senators should in theory vote according to not only the wishes of their political party but also the interests of their state. In this way, a broad range of views is considered before the bill can pass the Senate. It also means that any legislation that appears to support one state over the others would quickly be rejected.

rubber stamp
a term used to describe a situation in which the upper house of parliament automatically approves decisions made in the lower house of parliament because the government holds a majority of seats in both houses and its members vote along party lines

In reality, however, some senators vote on bills according to the wishes of their political party rather than according to the interests of their state. If the government holds a majority in both the upper house and the lower house, the Senate tends to be a '**rubber stamp**', merely confirming the decisions made in the lower house. This may affect the checks and balances that are designed to protect against misuse of power if the upper house is simply 'ticking the box' when voting on legislation.

In recent years, the government has not held majority in the upper house, which has meant that rather than the Senate acting as a 'rubber stamp', there has been considerable debate about and often substantial amendments to legislation before it is passed.

CASE STUDY

Amendment to Section 18C rejected

Human Rights Legislation Amendment Bill 2017 (Cth)

On 22 March 2017 Senator Brandis, the Attorney-General for the Commonwealth Liberal-National Government, introduced the Human Rights Legislation Amendment Bill 2017 (Cth) into the Senate. One of the purposes of the Bill was to amend Section 18C of the *Racial Discrimination Act 1975* (Cth). Section 18C makes it unlawful for a person to do an act that is reasonably likely to offend, insult, humiliate or intimidate a person or group because of race, colour or national ethnic origin.



Source 2 Tasmanian Senator Jacqui Lambie voted against the amendments

The Commonwealth Government tried to replace the words 'offend, insult, humiliate' with the word 'harass', which was seen by some to 'water down' Section 18C (which aimed to prevent

hate speech). In his second reading speech, Senator Brandis said that Section 18C has a 'chilling effect on freedom of speech'. On the other hand, those who do not support the change believe that the right to freedom of speech should not go unchecked, and people should not be able to say racist comments without facing consequences.

In March 2017 the amendments were struck down by the Senate as a result of opposition from the Australian Labor Party (ALP), the Greens, the Nick Xenophon Team and Senator Jacqui Lambie.

This is an example of a situation where the government controls the lower house, but the upper house still has significant power to reject or amend legislation. This power of the upper house operates as a check on the power of parliament to pass laws, so that laws cannot be introduced that might be considered inappropriate.

When the government does have a majority in the upper house, it can pass legislation that might not be popular with sections of the general public, which can then lead to voter backlash. This is because the opposition parties are not in a position to amend the bill and it may be too narrow in focus. After the 2004 federal election, the Howard Government controlled both houses. In that time, it passed contentious workplace relations laws that some commentators argue was a reason for its defeat at the 2007 election.

The politics of WorkChoices legislation

CASE STUDY

Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

The *Workplace Relations Amendment (Work Choices) Act* came into effect on 27 March 2006. Known as WorkChoices, the purpose of the law was to create greater flexibility for small and medium-sized businesses to hire and dismiss staff. It provided that no claim for unfair dismissal could be made if the employer, at the time of termination, employed fewer than 100 staff. The law also made it more difficult for trade unions to enter workplaces or to undertake industrial action.

The laws were opposed by the ALP and the trade union movement, which conducted an intensive media campaign under the banner of 'Your Rights at Work'. There were also public demonstrations attacking what the trade unions regarded as the unfair consequences of the law to low income earners. The issue dominated the 2007 election campaign and was considered to be a factor in the loss of government for the Coalition parties.



Source 3 The WorkChoices legislation passed by the Commonwealth Parliament was unpopular in some sections of the community and seen as a factor in the Coalition government losing the 2007 election.

Strengths and weaknesses

How effective is the Australian Constitution in acting as a check on parliament by requiring the Commonwealth Parliament to be bicameral? Set out below are some strengths and weaknesses of this check on parliament in law-making.

Study tip

A summary table of the strengths and weaknesses of the bicameral nature of parliament acting as a check in law-making can be found on your obook assess.

Strengths

Some of the strengths of this structure are as follows:

- The existence of two houses **allows for review of legislation** by the second house. This scrutiny provides for checks and balances against abuse of power. The review process also identifies errors and omissions in bills.
- If the government holds a **slim majority** or there is a hung parliament, then **considerable debate can occur in the lower house** than there might otherwise be. The outcome of the 2010 federal election was a hung parliament, which led to the Labor Government constantly having to engage in negotiations with the Australian Greens and the independent members to achieve the passage of many bills through both houses.
- If there is a **hostile Senate** (one being an upper house that is not controlled by the government of the day) or there are a significant number of minor parties and **independents** in the Senate, then the **upper house is likely to review bills passed through the lower house more carefully**. This can often result in robust discussion and amendments to bills to satisfy those parties or independents, thus increasing the checks on parliament in law-making.
- The requirement for a bicameral parliament is **specifically stated** in the Australian Constitution. This means that the Commonwealth Parliament is not able to pass legislation which abolishes either house. The only way in which the bicameral nature of parliament could be changed is through a referendum process (discussed later in this chapter).

hostile Senate
a situation in which the government does not hold a majority of seats in the upper house and relies on the support of the opposition or crossbench to have their bills passed

independents
individuals who stand as candidates in an election but do not belong to a political party

Weaknesses

Some of the weaknesses of this structure are as follows:

- If the government holds a majority in the lower house, then debate and negotiations in the lower house are **unlikely to occur**.



Source 4 The existence of two houses of parliament allows for review of legislation by the second house.

- Where the government controls the upper house, it tends to be a '**rubber stamp**' confirming the decisions made in the lower house. This can dilute the checks that the upper house has in law-making.
- The recent increase in the number of minor parties and independents in the Senate, while ensuring robust debate and views, can often mean that **law-making is stalled or laws are not as effective as they could be** (particularly if substantial amendments are made to 'water down' laws to satisfy independent senators and senators who are members of minor parties).
- The Australian Constitution does not require state parliaments to be bicameral, which means that there is no **constitutional requirement** for the Victorian Parliament to have two houses.

- Because the lower house is controlled by the government, and usually members of parliament are required to vote according to the views of their political party (and not their conscience) **laws will generally only be passed if they are laws that the Federal Government support**. This can dilute the checks on law-making, as it means that laws that are supported by the majority of people, but are not in line with the Federal Government's own policies or views, are unlikely to get through parliament.

10.6 CHECK YOUR LEARNING

Define and explain

1 What is a bicameral parliament?
2 What section of the Australian Constitution requires the Commonwealth Parliament to be bicameral?
3 Briefly describe two other sections of the Australian Constitution that set out some of the requirements in relation to the composition of the two Houses.
4 Explain how the bicameral structure of parliament acts as a check in law-making.

Synthesise and apply

5 Research the present make-up of the Senate in terms of which parties they represent (if any). Identify:
   a two senators who are likely to vote on bills according to the wishes of their party
   b two senators who are more likely to vote on bills according to the interests of their state.
   Give reasons for your answer.
6 Conduct some research on how the Queensland Parliament operates as a unicameral parliament.
   a What is their law-making process?
   b Is there any check on law-making by another house or committee?
   c How effective do you think a unicameral parliament is in acting as a check on law-making? Discuss.

Analyse and evaluate

7 Read the case study 'Amendment to Section 18C rejected'.
   a What was the purpose of this Bill?
   b In which House was the Bill introduced?
   c Explain why there was opposition to the amendment to Section 18C.
   d Discuss whether you believe this case study serves as an example of the Senate acting effectively as a house of review.
8 Read the case study 'The politics of WorkChoices legislation'.
   a Outline the purpose of the law.
   b Explain why there was opposition to the law in the community.
   c Discuss the extent to which this case study highlights weaknesses in the bicameral nature of parliament acting as a check on parliament in law-making.
9 Do you think that the existence of minority parties and independent senators is increasing or decreasing checks and balances on law-making in the Commonwealth Parliament? Discuss.

Check your obook assess for these additional resources and more:

- » **Student book questions**
  10.6 Check your learning
- » **Summary table**
  Strengths & weaknesses of bicameral parliament acting as a check on parliament in law-making
- » **Weblink**
  Senate – Parliament of Australia
- » **Weblink**
  Queensland Parliament

10.7 THE SEPARATION OF EXECUTIVE, LEGISLATIVE AND JUDICIAL POWERS

The Australian Constitution establishes **three separate types of powers** in our parliamentary system. At a federal level, it requires all three powers to operate independently of each other. This is referred to as the **separation of powers**. The purpose of this is to ensure that no one body has absolute power or control over the functions of the political and legal systems. It is one of the core principles of the **rule of law**.

These powers include:

- **executive power**
- **legislative power**
- **judicial power**.

separation of powers a doctrine established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate. This principle provides a set of checks and balances to ensure that no single body has the power to make, implement, apply and interpret the law

rule of law the principle that everyone in society is bound by law and must obey the law. The rule of law also states that laws should be fair and clear, so people are willing and able to obey them

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

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

Executive power

Executive power is the power to **administer the laws and manage the business of government**. This power is vested in the Governor-General under Chapter II of the Australian Constitution. Specifically, Section 61 of the Australian Constitution states that the executive powers of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General.

In practice, the executive power is carried out by the prime minister, senior ministers and government departments.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
61 Executive power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Legislative power

Legislative power is the power to **make laws**. This power resides with the parliament under Chapter I of the Australian Constitution. Specifically, Section 1 of the Australian Constitution states that the legislative power of the Commonwealth shall be vested in the Federal Parliament.

In Australia, the legislative power and the executive power are **combined at a federal level**. 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 Cabinet consists of the prime minister and senior ministers, whose main role is to decide on general government policy and formulate proposed laws to be introduced to parliament. The head of the executive, in practice, is the prime minister, not the monarch or the monarch's representative.

The executive power and the legislative power are also closely linked by the fact that laws passed by parliament must receive royal assent from the Governor-General 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.

Judicial power

Judicial power is the power **given to courts and tribunals to enforce the law and settle disputes**. It is provided for under Chapter III of the Australian Constitution, and is vested in the High Court and other federal courts (as well as courts that are invested with federal jurisdiction). Section 71 in particular states that the judicial power of the Commonwealth shall be vested in the courts.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Did you know?

In the US, federal judges are appointed, then confirmed in a Senate hearing. State judges are elected. This has been criticised in Australia because it makes the role of the judge political, bringing them under pressure to please voters rather than focusing on the law.

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 (explored further in Chapter 13). At a state level these lines of separation are less clearly defined.

tribunal
a dispute resolution body that resolves civil disputes and is intended to be less costly, more informal and a faster way to resolve disputes than courts

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 bad conduct and parliament approves their removal.

Reasons for the separation of powers

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.

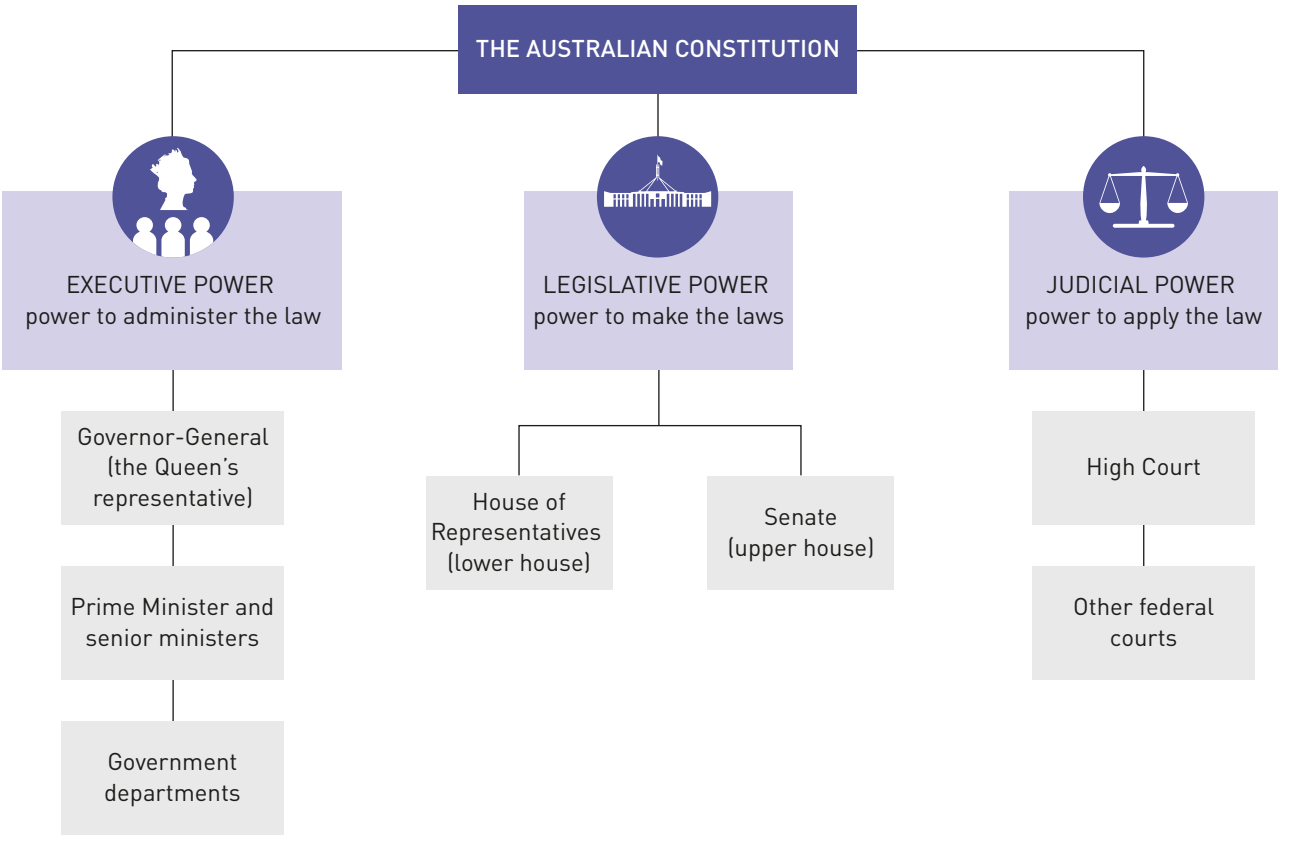
judiciary
a legal term used to describe the courts and tribunals (which have the power to apply and interpret the law)

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, to maintain the independence of the judiciary, judges cannot take a seat in parliament where laws are made.



Source 1 Judicial power is the power given to courts to enforce the law and settle disputes.





The Prime Minister and the Governor-General



Parliament in action



Judges in action

Source 2 The Australian Constitution requires the legislative, executive and judicial powers to be separate, though in reality the legislative and executive powers are combined.

The importance of the separation of powers between the government and the judiciary is explored in the legal case below.

LEGAL CASE

Ministers apologise for comments made

DPP (Cth) v Besim [2017] VSCA 158 (23 June 2017) and *DPP (Cth) v M H K (a Pseudonym)* [2017] VSCA 157 (23 June 2017)

In June 2017, three federal ministers were forced to apologise for comments they made about sentencing in the Supreme Court of Victoria in the cases of *Besim* and '*M H K*'. The comments were seen by some people as threatening the separation of powers.

At trial, each offender pleaded guilty to certain terrorist offences and was sentenced to a term of imprisonment. However, the Commonwealth Director of Public Prosecutions appealed both sentences, arguing they were too lenient.

On 9 June, the Victorian Court of Appeal heard the appeals. They were conducted in the standard way, which included the judges, in the ordinary course of the hearing, asking the lawyers questions. Once the hearings were concluded, the Court reserved its judgment (that is, the decision on the appeal was to be handed down on a later date).

On 13 June, the *Australian* newspaper published an article about one of the cases, titled 'Victorian judiciary "light on terrorism"'. The article stated that senior ministers had claimed the Victorian judiciary was 'advocating lighter sentences for terrorists'. Health Minister Greg Hunt had 'blasted' the Victorian court system for 'becoming a forum for "ideological experiments"'. Human Services Minister Alan Tudge and Assistant Treasurer Michael Sukkar, both federal ministers, were also said to have made statements, including that the judiciary should focus more on safety and victims, and that judges seemed more concerned about the welfare of the terrorists. The article was published after the appeal hearings, but before judgment was handed down.



Source 3 Health Minister Greg Hunt was one of the three federal ministers forced to apologise about the comments he made in the *Australian* newspaper article.

The Court of Appeal released a statement on 16 June 2017 about the cases and the article. As part of the statement, it said:

> Given that the court's decisions in both cases were pending, the court is concerned that the attributed statements were impermissible at law and improperly made in an attempt to influence the court in its decision or decisions. Further, the court is concerned that some of the statements purported to scandalise the court. That is by being calculated to improperly undermine public confidence in the administration of justice in this state in respect of the disposition of the appeals that the court has presently under consideration.

It also said the statements on their face had failed to respect the separation of powers, and reflected a lack of proper understanding of the importance of the independence of the judiciary from government.

The Court's Judicial Register wrote to the three ministers and the publisher, editor and journalist about the article, asking them to appear before the Court to explain why they should not be referred to prosecution for contempt of court.

The three ministers ultimately made an unconditional apology to the Supreme Court, stating that they were wrong to have made the statements. They apologised after they had watched the hearing and reviewed the transcripts of the hearing. Fiona McLeod SC, president of the Law Council of Australia, said that the apology showed 'respect for the separation of powers and the rule of law'.

On 23 June 2017, the Court of Appeal handed down its decisions in the two cases. The appeal was allowed in both cases, and the prison sentences for both offenders were increased.

Strengths and weaknesses

There are a number of strengths and weaknesses in the separation of powers acting as a check on parliament in law-making.



Source 4 Question time can allow for members of the opposition to challenge the government. This allows for ministers to be subject to scrutiny on the floor of parliament, often being challenged by the shadow minister who sits on the opposite side of the House. The public can also attend question time, which maintains confidence in the law-making process.

Strengths

Some of the strengths are as follows:

- the separation of powers allows for the **executive to be scrutinised by the legislature**. This provides checks and balances in that the legislature as the law-maker can refuse to pass legislation that is inappropriate
- the judiciary is **independent** of the parliament and government. This independence is vital, especially when the Commonwealth is a party in a case heard before the court
- despite the overlap between the executive power and the legislative power, there are still checks between the two. Ministers are **subject to scrutiny in parliament during question time**, and it is the role of the opposition to examine the policies and bills and expose flaws
- at times the upper house **is controlled by the opposition**, or is composed of minority parties and independent senators, which provides for greater scrutiny of the government and its legislation
- the principle of separation of powers is **entrenched in the Australian Constitution**. To abolish the principle would require a referendum – a difficult outcome to achieve (you will explore referendums more later in this chapter).

legislature
a legal term used to describe the parliament (which has the power to make the law)

Weaknesses

Some of the weaknesses are as follows:

- in reality, **the legislative power and the executive power are combined**. This can decrease the ability of the separation of powers principle to act as a check on each of the powers, as in practice the power to administer the law is carried out by the cabinet
- where the government controls the Senate, there is **far less scrutiny** that is applied to the laws and therefore the exercise of legislative power, particularly given the legislative power and the executive power are in reality combined
- judges are **appointed by the executive**. This may result in the perception that the executive is influencing the composition of the benches of superior courts (that is, the government of the day can 'choose' which judges they want to hear cases)
- the Australian Constitution only provides for separation of powers at a **federal level**, not at a state level (though the principle of separation of powers exists at a state level as well)
- if the opposition controls the Senate, it can obstruct bills for political gain rather than providing authentic scrutiny.

Did you know?

In 2017, the Judicial Commission of Victoria was established as an independent body to hear complaints about the conduct of judicial officers and VCAT members. The Commission has the ability to hear complaints from the public or members of the legal profession regarding delays in judgments and courtroom demeanor. The most serious complaints may be referred to a special panel with coercive 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. The 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 dispute (the judicial role) and also make regulations (the legislative role).

Study tip

A summary of the strengths and weaknesses of the separation of powers acting as a check on parliament in law-making can be found on your obook assess.

10.7 CHECK YOUR LEARNING

Define and explain

1. Identify the three types of powers set out in the Australian Constitution, and briefly describe each of them.
2. Explain the reasons for the separation of powers in the Australian parliamentary system.
3. Does the Australian Constitution separate powers at a state level? Why not?
4. Explain how the legislative and the executive powers overlap in reality.

Synthesise and apply

5. Read the legal case *Besim* and *'M H K'*.
   - **a** Outline the key facts of this case.
   - **b** Why did the Court of Appeal ask the relevant ministers to appear at Court?
   - **c** Why did the ministers apologise?
   - **d** Do you think the ministers should have made the comments in relation to these cases? Give reasons.

Analyse and evaluate

6. Discuss the extent to which the overlap between the executive and the legislative powers of government decreases the ability of the separation of powers to act as a check on parliament in law-making.
7. Should there be a ban on politicians criticising judges for decisions made in cases? Discuss.

Check your obook assess for these additional resources and more:

- » **Student book questions**
  10.7 Check your learning
- » **Summary table**
  Strengths & weaknesses of separation of powers acting as a check on parliament in law-making
- » **Worksheet**
  The separation of powers
- » **Weblink**
  Separation of powers – PEO

10.8 THE EXPRESS PROTECTION OF RIGHTS

express rights
rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed at a referendum

common law
law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. verdict)

An **express right** (also known as an **explicit right**) is a right that is specifically listed in a document or constitution.

The Australian Constitution contains five express rights. These express rights are entrenched in the Constitution, meaning that they can only be removed from the Constitution by amending it using the referendum procedure established by Section 128. By comparison, rights that exist at **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 in the Australian Constitution are:

- the right to freedom of religion by preventing the Commonwealth from making laws establishing a religion, imposing any form of religious ceremony or worship and prohibiting the exercise of any religion (Section 116)
- the right to free interstate trade and commerce (Section 92)
- the right to receive 'just terms' when property is acquired by the Commonwealth (Section 51(xxxi))
- the right to trial by **jury** for indictable Commonwealth offences (Section 80)
- the right not to be discriminated against on the basis of the state where you reside (Section 117).

These rights tend to be expressed as **limitations** on the Commonwealth Parliament in law-making, rather than as positive rights for individuals. These five rights are protected because parliament cannot pass legislation that infringes against the protected rights.

Study tip

The focus on this key knowledge is how the express protection of rights acts as a check on parliament in law-making. Your notes and answers should therefore be about checks and balances on parliament, rather than about the effectiveness of rights protection in Australia.

Religion

Section 116 of the Australian Constitution states that the Commonwealth Parliament cannot make 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 *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116
- requires a religious test as a requirement for holding any Commonwealth office.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
116 Commonwealth not to legislate in respect of religion
The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Section 116 restricts the powers of the Commonwealth Parliament 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 Commonwealth* that Section 116 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 Section 116 narrowly. As shown in the legal case below, the Commonwealth Government was able to provide funding to religious schools.

Challenging chaplaincy funding

LEGAL CASE

Williams v Commonwealth (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'.

Williams argued that the funding agreement was invalid because it was beyond the executive power of the Commonwealth under Section 61 of the Constitution and/or prohibited by Section 116 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'. 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 Section 116 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, Section 61 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.

Immediately following the High Court's decision, the parliament passed legislation (the *Financial Framework Legislation Amendment Act (No. 3) 2012 (Cth)*) to allow the chaplaincy program and other similar programs to be funded by the Commonwealth. Williams challenged the constitutional validity of this legislative change and its funding arrangements. The High Court found in favour of 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.



Source 1 Ronald Williams, who challenged the Federal Government's power to spend taxpayers' money on the national school chaplaincy program.

Trade within the Commonwealth

Under Section 92 of the Constitution, interstate trade and commerce must be free (whether it be by means of road or sea). 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 taxes on goods moving from one state to another from being imposed.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
92 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.

injunction
a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

This right mainly refers to trade and commerce but it can also refer to movement of people between states. However, 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 Section 92.

The case of *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 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 claimed 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 Section 92 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 Section 92 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 did not contravene Section 92.

LEGAL CASE

Challenging anti-gambling, anti-competitive laws

Betfair Pty Limited v Western Australia (2008) 234 CLR 418

In this case, a challenge was made to legislation passed by the Western Australian Parliament to prohibit certain types of betting.

The company involved in this case, Betfair, is incorporated in Tasmania and operates a national agency.

Amendments to the *Betting Control Act 1954* (WA) prevented Betfair from participating in a segment of the wagering market that was largely controlled by Western Australian bookmakers and gambling agencies. The Western Australian government argued that the type of gambling offered by Betfair, where a punter could place bets on a horse to lose a race, was not appropriate. Betfair challenged the validity of the legislation in the High Court, arguing that it was inconsistent with Section 92 of the Australian Constitution, which provides that trade and commerce between the states must be free.

In a unanimous decision, the High Court found that the Western Australian legislation was discriminatory against a company that was incorporated outside of that state, so was therefore invalid.



Source 2 In a case involving the gambling agency, Betfair, there was a High Court challenge to state legislation that attempted to ban certain types of betting. Betfair won the case.

The scope of Section 92 was limited by *Cole v Whitfield* (1988) 165 CLR 360. This case related to the importation of undersized crayfish from South Australia to Tasmania. In this case the High Court 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.

Acquisition of property on just terms

Under Section 51(xxxi) of the Australian Constitution, 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 (immovable property such as land) and personal (movable property such as goods) 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.

Did you know?

The famous Australian movie 'The Castle' focused on whether the acquisition of the Kerrigan's treasured family home was on 'just terms'.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
51 (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 Section 51(xxxi) can apply to state legislation that is passed under a Commonwealth funding agreement.

The constitutional validity of the *Tobacco Plain Packaging Act 2011* (Cth) was challenged in relation to Section 51 (xxxi) in the legal case of *JT International SA v Commonwealth* (2012) 250 CLR 1.

LEGAL CASE

Plain packaging for tobacco products

JT International SA v Commonwealth (2012) 250 CLR 1



Source 3 Plain packaging of tobacco boxes was the subject of a High Court case relating to the acquisition of property on just terms.

This case involved a challenge to the constitutional validity of the *Tobacco Plain Packaging Act*, which imposed a requirement for 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 give a proprietary benefit or interest on the Commonwealth or any other person. The High Court distinguished between **taking rights** and **acquiring rights**. The Court stated that to engage Section 51(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 Section 80 of the Australian Constitution, there must be a jury trial for indictable Commonwealth offences under the criminal law. The High Court has found that a decision of a jury in such a trial must be unanimous. However, Section 80 provides only a limited right to trial by jury for two reasons.

- Most **indictable offences** are crimes under state law, and this section only applies to Commonwealth offences.
- The High Court has ruled that indictable means 'crimes tried on indictment'. Therefore, the government can avoid Section 80, 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).

indictable offence a serious offence generally heard before a judge and a jury in the County Court or Supreme Court of Victoria

summary offence a minor offence generally heard in the Magistrates' Court

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)

80 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.

Section 80 of the Constitution was upheld in the case of *Brown v The Queen* (1986) 160 CLR 171.

LEGAL CASE

Jury trials for indictable offences

Brown v The Queen (1986) 160 CLR 171

In *Brown v The Queen*, the appellant, Michael Rodney Jonathon Brown, was presented for trial before Justice White in the Supreme Court of South Australia. The Commonwealth Director of Public Prosecutions charged him with offences against the *Customs Act 1901* (Cth). He pleaded not guilty to the charges.

Before a jury was empanelled, the appellant chose to be tried by a judge alone under Section 7 of the *Juries Act 1927* (Cth). The trial judge held that section was not valid because Section 80 of the Constitution required a trial by jury for indictable offences. The Constitution prevailed and Brown was not able to be tried by judge alone.

Brown appealed to the High Court. In this case, Justice Dawson found that, under Section 80 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'.

Discrimination on the basis of state residence

Under Section 117 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 living in Victoria cannot be subject to a Victorian law that would place them in a worse position than if they were born in 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 Section 117 of the Constitution and treated people differently because they resided in another state.

Study tip

Try and make links where you can in your coursework. Did you pick up the link between the right to trial by jury as a right available to an accused in a criminal trial, discussed as part of Unit 3 – Area of Study 1, and the right to trial by jury acting as a check on parliament in law-making?

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
117 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.



Source 4 A resident of Victoria living in New South Wales cannot be subject to New South Wales law that would place them in a worse position than if they had been born in New South Wales.

Strengths and weaknesses

The existence of express rights in the Australian Constitution acting as a check on parliament in law-making has a number of strengths and weaknesses. Some of these are discussed below.

Strengths

- Express rights impose **limits** on what parliament can make laws on and what it can't. For example, Section 116 prohibits the Commonwealth Parliament from making a law which restricts the free exercise of any religion. In this way, the public is protected against the Parliament being able to make any laws it wants to.
- Any person who believes that a law infringes on these rights **can take a case to the High Court**. The High Court can then declare the law invalid. This allows for a judicial check on parliament.
- Express rights **cannot be removed by the Commonwealth Parliament**. Only through a referendum process can the rights be changed or removed. Referendums are difficult to pass (see next topic), so this check on parliament in law-making is unlikely to be removed any time soon.
- The High Court **can act swiftly** in declaring a law ***ultra vires*** if a person brings a court action, ensuring that there is an ability to challenge a Commonwealth law that has been made beyond the power of the parliament.
- Express rights are clearly stated in the Australian Constitution and have remained unchanged since federation. The stability of express rights provides the **opportunity for the public to become aware that such rights exist** and to undertake legal action if their rights are breached.

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

Weaknesses

- Because express rights can **only be changed by a referendum**, which is a difficult process to undertake, there is limited ability for further rights to be added into the Constitution, therefore reducing the ability of more express rights to act as a check on parliament in law-making.
- Where a person's rights have been affected adversely, the **cost of initiating a court case is high**. Some people may not be able to afford such action, which could result in parliament making laws that infringe those rights, and those laws not being challenged.
- 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. Therefore, parliament can make laws in relation to those rights where those laws do not infringe (e.g. laws can be passed which do not require a trial by jury for state offences).
- The protection of rights **does not prevent** the Commonwealth Parliament from passing the law; that is, it will require the law to be challenged in court for the law to be declared invalid. So this protection does not significantly restrict parliaments in their law-making.
- **Express rights are relatively few in number compared to other countries.** They are generally an ineffective means of acting as a check on parliament in law-making because there are so few of them, and they are so limited in scope.

Study tip

A summary of the strengths and weaknesses of express rights acting as a check on parliament in law-making can be found on your obook assess.

10.8 CHECK YOUR LEARNING

Define and explain

1 Define the term 'express rights'.

2 Outline three express rights that exist under the Australian Constitution.

Synthesise and apply

3 For each of the following cases, state:
- how the case highlights the role of express rights in providing a check and balance on the exercise of authority by the legislature
- the outcome of the case, if available
- the significance of the case.

a *Cole v Whitfield*

b *R v Loubie*

c *Brown v The Queen*

d *Betfair Pty Limited v Western Australia*.

4 Look back at the legal case *JT International SA v Commonwealth*.

a Which section of the Australian 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.

e In what way did this case involve a check on the authority of the Commonwealth?

Analyse and evaluate

5 'Express rights contained in the Constitution are so few, and limited in scope. They do not act as an effective check on parliament in ensuring our freedoms are protected.' Discuss.

Check your obook assess for these additional resources and more:

» **Student book questions**
10.8 Check your learning

» **Summary table**
Strengths & weaknesses of express rights acting as a check on parliament in law-making

» **Going further**
Other legal cases

10.9 THE ROLE OF THE HIGH COURT IN INTERPRETING THE AUSTRALIAN CONSTITUTION

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

As you may have seen in cases you have studied so far, the role of the High Court in relation to the Constitution is to hear cases brought before it and interpret its words.

The High Court was established under Section 71 of the Australian Constitution. Section 76 gives the Commonwealth Parliament the power to provide the High Court with **jurisdiction** to hear disputes arising under the Constitution or involving its interpretation.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;
(ii) arising under any laws made by the Parliament;
(iii) of Admiralty and maritime jurisdiction;
(iv) relating to the same subject-matter claimed under the laws of different States.

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.

Role of the High Court

The role of the High Court in interpreting the Australian Constitution includes as follows.

It acts as guardian of the Australian Constitution

The High Court does this by explaining what the Constitution means, and deciding how it should be interpreted. As the High Court is the only court that can do this, it is often considered to be a 'protector' or 'guardian' of the Constitution.

By interpreting the words of the Constitution, the High Court can have an influence on the day-to-day application of the Constitution, ensuring that it remains relevant to the Australian people.

It acts as a check on any abuse of power

Individuals, groups, state, territory and Commonwealth bodies may argue that a territory, state or Commonwealth parliament has made a law that is beyond its power. These people can bring a matter to the High Court for a ruling to be made on whether a 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 take a case to the High Court.

If a parliament has passed law outside its own power, then the High Court can declare the law *ultra vires*. 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 amend the Constitution in accordance with Section 128, which would require a referendum.

When the High Court hears cases where there is a challenge to the legislative authority of the Commonwealth or Victorian Parliament, the judges can also affirm that the particular legislation is valid. This creates certainty both for the parliament and for those directly affected by that area of law, as it makes clear the legislative authority of the Commonwealth.

It gives meaning to the words

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 consider the facts of the case and decide whether a statute 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.

In the past, the High Court has:

- interpreted the Constitution to determine whether a law has been made within the parliament's law-making power. In doing so, the High Court's interpretation has at times **shifted the division of law-making powers**
- interpreted the Constitution and has **implied rights** within the Australian Constitution. The High Court has, in particular, found that there is a freedom of political communication, and a right that the Houses of the Commonwealth Parliament be directly voted for by the people.

implied rights
rights not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

The following case highlights the ways in which courts have been able to affect the operation of law and legal processes. The independence of the High Court is vital here, especially where the Commonwealth is a party to the case.

Implied freedom of political communication

LEGAL CASE

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

In a series of cases heard by the High Court from 1992, the High Court interpreted the Constitution and held there was an implied freedom of political communication, which exists through the interpretation of the Australian Constitution. One of those cases was *Australian Capital Television Pty Ltd v Commonwealth*.

The *Australian Capital Television v Commonwealth* case dealt with Commonwealth legislation that banned all political advertising on radio and television during election periods, being 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 freedom of political communication.



Source 1 The implied freedom of political communication has been developed by the High Court over more than two decades. It allows peaceful protest and commentary on key issues that affect Australia as a nation.

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.

The legal case below is an example of the High Court determining whether the tied grants right is within the Commonwealth Parliament's law-making power.

LEGAL CASE

Roads Case

Victoria v Commonwealth (1926) 38 CLR 399

The right to make tied grants (that is, the provision of funding by the Commonwealth to states with conditions attached as to how that funding is used) was questioned in this case, which 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 Victorian Government wanted an unconditional grant. The High Court decided that the Act was valid and therefore 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 about how that money can be used.

Strengths and weaknesses

The role of the High Court in interpreting the Australian Constitution and acting as a check on parliament in law-making has a number of strengths and weaknesses.

Strengths

- Judges are **independent of the executive** and the legislature and therefore decisions made on cases are based on legal principles rather than political pressure.
- The existence of the High Court allows individuals who have an interest in the case to bring the matter to court and **have a law overturned**. This reinforces to the public that members of parliament are not above the law and judges are able to scrutinise laws made.
- The judges of the High Court are experienced in making decisions, they have available to them a wide range of legal resources to ensure that **decisions are properly made**. They can read broadly in terms of international development of legal principles and can ensure, where possible, that Australian law keeps pace with these developments.
- Where a parliament has made law outside its power, the High Court can act as an **independent check** to confirm whether there has been an abuse of power.

Weaknesses

- Judges can only rule on the facts of the case that is brought before them. They cannot create general principles of law outside the immediate case.
- High Court judges cannot intervene in a dispute over parliamentary authority unless a case is brought before them. Such cases are often complex and expensive for the ordinary person.
- The role of the High Court in interpreting the Constitution is limited by the fact that litigation is expensive, which potentially reduces the volume of cases that can be heard by the Court.
- The decision of the High Court may depend on the composition of the High Court justices. Some justices are more conservative in their approach to interpreting the Constitution.
- The High Court's role is limited to interpreting the Constitution rather than changing the words of the Constitution or ruling on whether it believes the parliament should have made the laws in question.

Study tip

A summary of the strengths and weaknesses of High Court interpretation acting as a check on parliament can be found on your obook assess.

10.9 CHECK YOUR LEARNING

Define and explain

1 Outline the jurisdiction of the High Court in relation to the Australian Constitution.

2 Define the following terms:

- **a** *ultra vires*
- **b** implied rights.

Synthesise and apply

3 'Given the nature of cases on the Australian Constitution that are heard by the High Court, it is important that the judges are independent of the political process and cannot be influenced by populism.' Explain this statement.

4 a Explain the High Court's decision in the case of *Victoria v Commonwealth*.

b To what extent has this case been significant in allowing the Commonwealth to influence the states' exercise of residual powers? Explain your answer.

Analyse and evaluate

5 Read the legal case *Australian Capital Television Pty Ltd v Commonwealth*.

- **a** Outline the key facts of the case.
- **b** Explain why freedom of political communication is important in a modern society such as ours.
- **c** Do you believe that political advertising during an election campaign enhances the ability of electors to be informed about the major issues at stake in an election? Explain.
- **d** Collect a range of media sources (for example, newspapers, online opinion pieces and blogs), which contain criticism of political figures. How are such comments important as a means of allowing electors to scrutinise the actions of politicians? Give reasons for your answer.

6 With reference to at least one legal case you have studied, evaluate the role played by the High Court in acting as a check on parliament in law-making.

Check your obook assess for these additional resources and more:

- » **Student book questions**
  10.9 Check your learning
- » **Summary table**
  Strengths & weaknesses of High Court interpretation acting as a check on parliament in law-making
- » **Going further**
  Other High Court cases
- » **Weblink**
  High Court

10.10 THE REQUIREMENT FOR A DOUBLE MAJORITY IN A REFERENDUM

When the Australian Constitution was drafted, it was recognised that times would change and the Constitution would need to alter to keep up with changing attitudes.

The only way the words of the Australian Constitution can be changed is through a referendum process. This process is set out in Section 128 of the Australian Constitution.

The referendum process acts as a restriction on the powers of parliament, because the Commonwealth Parliament cannot change the Constitution outside of this process. For example, the wording of the Constitution would have to be changed before Australia could become a republic. The Commonwealth Parliament cannot make this change without referring it to the people. In this way, Section 128 operates as a check on the power of parliament to pass laws that change the Constitution.

The procedure for changing the Australian Constitution, as set out in Section 128, has three stages: the parliament, the people and the Governor-General. Any proposed change to the Australian Constitution must first be passed by the Commonwealth Parliament. The process has proven to be difficult to achieve – only 8 out of 44 referendums have been successful so far in the history of Australia.

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 Australian 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.

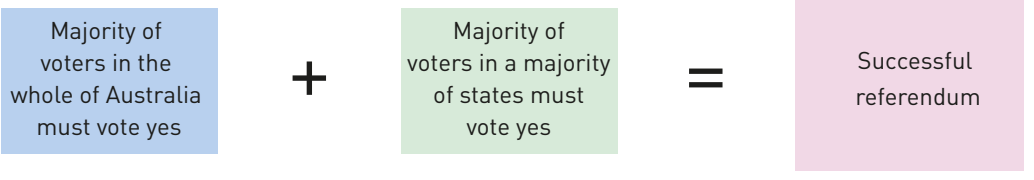
Before the referendum is put to the people, the Australian Electoral Commission sends information to every household that explains the proposed change, and provides arguments for and against it.

Double majority provision

In the referendum, voters are required to answer 'yes' or 'no' to the question asked; for example, 'Do you agree to alter the Constitution to insert a **preamble**?' For the referendum to be successful, each referendum question must satisfy the double majority provision:

preamble
the introductory part of a statute that outlines its purpose and aims

- 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. The provision protects the smaller states from being dominated by the larger, more populated states.



Source 1 The double majority requirement is key to ensuring a change to the Australian Constitution.

The double majority requirement in Section 128 operates to restrict the power of the Commonwealth Parliament in that the wording of the Constitution can be changed only with agreement of voters according to the requirement. The impact of Section 128 was seen in a 1977 referendum, the purpose of which focused on the term of service of senators. While the proposal attracted 62.2 per cent of the national vote, it was only supported by the majority vote in three states, so the referendum failed. Under the Section 128 processes, each of the states has an equal voice regardless of their size or population.

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 in Australia, it is then presented to the Governor-General for royal assent.

In the below legal case Section 128 of the Constitution acted as a check on the power of the parliament as a law-maker.

Study tip

The number of states is important to determining whether a referendum is passed. Make sure you remember your states! Perhaps have a map of Australia in your notes and identify through borders each of the six states.

Banning communism

LEGAL CASE

Australian Communist Party v Commonwealth (1951) 83 CLR 1

In 1950, the Commonwealth Parliament passed the *Communist Party Dissolution Act 1950* (Cth), which had the effect of banning the Communist Party of Australia.

In this case, the Communist Party challenged the Act in the High Court, which ruled that it was constitutionally invalid. The High Court found that the Parliament had declared the Communist Party guilty of 'sedition' and had authorised the executive to 'declare' individuals or groups of individuals banned.

The majority of the High Court found that the law gave the executive the right to outlaw an organisation without the need to establish a factual connection between that organisation and any act of subversion. In other words, the High Court ruled that the Commonwealth could not assume that a person has engaged in illegal activity merely because they are members of an organisation such as a political party.

Following this decision, the Menzies Government proposed a referendum that would grant the Commonwealth power to ban the Communist Party.

When the issue was debated, the referendum question was opposed by the Communist Party and the Labor Party on the grounds that it would restrict the freedoms of speech and association. When the referendum occurred, the proposal failed, gaining support in only three states and winning 49 per cent of the national vote.

In this way, Section 128 operated as a check on the power of the parliament as a law-maker, in that the public refused to allow the change to the Constitution. Further, the referendum only occurred because the High Court rejected the original legislation on the grounds that it was unconstitutional.



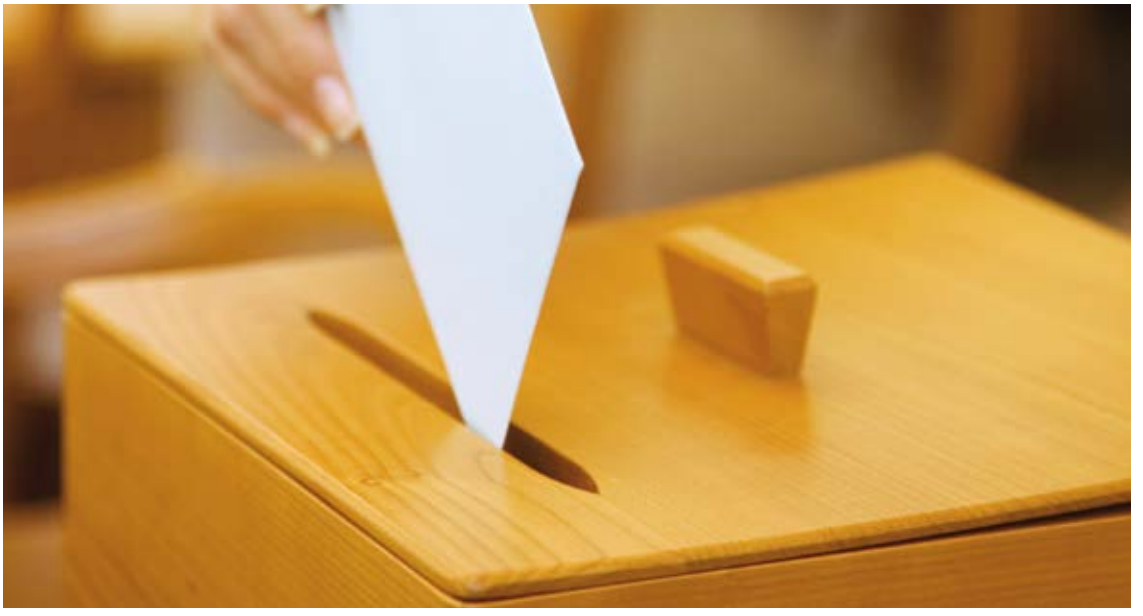
Source 2 The 1951 referendum is an example of how the double majority requirement acts as a safeguard against the potential misuse of power by the Commonwealth. In this case, voters narrowly rejected a proposal that would have outlawed a political party.

Strengths and weaknesses

The double majority requirement acting as a check on parliament in law-making has a number of strengths and weaknesses.

Strengths

- Section 128 **allows the public** to refuse to support a proposed change to the Constitution if the proposal is deemed inappropriate. In this way, the Commonwealth is not able to exert power in an arbitrary manner
- The double majority requirement is **strict**, and has proven to be difficult to achieve. The requirement that more than half the voters in more than half the states, in particular, provides the power to the people in determining whether a change to the Constitution is to be made
- The double majority requirement **protects smaller states** such as Tasmania and South Australia, meaning that the larger states that may support the change do not determine the success of the referendum
- The **vote is compulsory**, which means all eligible voters will be required to vote 'yes' or 'no' to the proposal. This removes the power from the Commonwealth Parliament to decide whether the Constitution should be changed and gives it to all eligible voters in Australia.
- The process is a **lengthy one and requires information** to go to voters about the proposed change, including whether it will provide the Commonwealth Parliament with more power. The information can be an important way of informing the public about what the change will mean.



Source 3 The vote to meet the double majority requirement for a referendum is compulsory.

Weaknesses

- The public may not understand the **complex details** of the proposal, or may be reluctant to change or wary of change, and may vote 'no' through fear of change or mistrust of politicians. This reluctance for change might see a lack of needed reform in the Constitution
- The double majority provision is **difficult to achieve**, which means that changes to the Constitution – even valid ones – have been limited to those where there is overwhelming public support, or which are non-controversial in nature

- It is a **timely and costly** check on Commonwealth Parliament. It takes significant time for a referendum process to be effected, and it can be costly. For example, the 1999 referendum cost more than $66 million
- If the referendum proposes an increase in the Commonwealth Parliament's 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'
- The double majority requirement can result in an outcome that appears undemocratic. This was seen in the 1977 referendum on simultaneous elections, which attracted support from 62.2 per cent of electors nationally, but won support in only three out of six states, so was unsuccessful. This would appear to be an unjust result given such a large majority of voters nationally had supported the proposal.

Study tip

A summary of the strengths and weaknesses of the double majority requirement acting as a check on parliament in law-making can be found on your obook assess.

10.10 CHECK YOUR LEARNING

Define and explain

1 Outline the three stages required for a change to the wording of the Australian Constitution.
2 Explain the double majority requirement of a referendum.
3 Does every single person in Australia vote on a referendum? Give reasons.
4 Explain one reason why the Constitution contains the requirement that there must be a majority of voters in a majority of states for the proposal to succeed.

Synthesise and apply

5 Suggest two reasons why the writers of the Australian Constitution required that the people be directly involved in deciding whether the wording of the Constitution should be changed.
6 Prime Minister Malcolm Turnbull suggested in 2017 that the term of the Federal Parliament should be four years, not three years. Conduct some research to determine what role the people will have in relation to this change, and explain that role.
7 There has been some talk for years about recognising Aboriginal and Torres Strait Islander peoples in the Constitution. Comment on the likely outcome of the people on such a referendum.

Analyse and evaluate

8 To what extent could it be argued that this model for change gives too much power to the smaller states? Explain in your answer, refer to the 1977 referendum on simultaneous elections.
9 Discuss the extent to which the 1951 referendum regarding the Communist Party highlights the importance of the High Court in hearing challenges regarding the validity of legislation.
10 With reference to the 1951 referendum, evaluate the extent to which the double majority requirement acts as a check on parliament in law-making.

Check your obook assess for these additional resources and more:

» **Student book questions**
10.10 Check your learning

» **Summary table**
Strengths & weaknesses of the double majority requirement acting as a check on parliament in law-making

» **Going further**
Other possible referendums

CHAPTER 10

REVIEW

CHAPTER SUMMARY

The role of the Houses of Parliament in law-making

- House of Representatives
  - Initiates and makes laws
  - Provides responsible government
  - Represents the people
  - Scrutinises government administration
  - Controls government expenditure
- Senate
  - Acts as a states' house
  - Scrutinises bills through committees
  - Initiates and passes bills
- Legislative Assembly
  - Initiates and passes bills
  - Forms government
  - Provides representative government
  - Controls government expenditure
- Legislative Council
  - Examines bills through its committees
  - Initiates and passes bills

The role of the Crown in law-making

- Gives royal assent to bills
- Appoints Executive Council

Law-making powers between parliaments in Australia

- Residual powers left with the states
- Exclusive powers, which can only be exercised by the Commonwealth
- Concurrent powers, which can be exercised by Commonwealth and the state parliaments

Section 109 of the Constitution

- Governs conflicts between Commonwealth and state laws

The way in which the Constitution acts as a check on parliament

- Bicameral structure of parliament
- The separation of the executive, legislative and judicial powers
- The express protection of rights
- The role of the High Court in interpreting the Australian Constitution
- The requirement for a double majority

REVISION QUESTIONS

1 With reference to the three powers, explain the purpose of the separation of powers.
(4 marks)

2 Outline two roles played by the Crown in the Commonwealth Parliament in law-making.
(4 marks)

3 Explain the role that the High Court plays in relation to the Australian Constitution.
(4 marks)

4 With reference to one case you have studied this year, explain the significance of Section 109 of the Constitution.
(5 marks)

5 Outline the double majority requirement for a referendum. With reference to one referendum you have studied this year, explain how the double majority requirement operates as a check on parliament in law-making.
(6 marks)

6 'The power of the High Court to create implied rights in the Australian Constitution operates as an important check on the authority of the executive and the legislature.'
Discuss this statement with reference to one case that you have studied this year.
(6 marks)

7 Evaluate the ability of express rights to restrict the Commonwealth Parliament from legislating to restrict those rights.
(10 marks)

Check your obook assess for these additional resources and more:

» **Student book questions**
Ch 10 Review
» **Revision notes**
Ch 10
» **assess quiz**
Ch 10
Test your skills with an auto-correcting multiple-choice quiz

PRACTICE ASSESSMENT TASK

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

Jacqui Lambie proposes full face coverings ban if terror threat raised

News.com.au, 8 February 2017

SENATOR Jacqui Lambie has called for all full face coverings, including the burqa, to be banned in public if Australia's terror threat level is raised to 'probable'.

Under the … proposal, it would be a criminal offence to wear a full face covering in public.

Any person who compelled another person to wear a full face covering in public when the terror threat was probable would face six months' jail, or 12 months if they compelled a child to wear face coverings.

Senator Lambie said the measures would increase security and 'feelings of safety' in a speech tabled to Parliament today.

'There is a clear national security need to bring in a nationwide ban on all identity concealing garments, unless the wearer has a reasonable and lawful excuse to wear those garments,' Senator Lambie's speech said.

'And while some small groups of people may make an argument that their right to express their religious feelings or views by wearing identity concealing garments is being limited, the security and the safety of the community must always come first...'

'Therefore, the security and safety will be enhanced with the introduction of this Bill...'

Senator Lambie's proposal will need to be supported by the Senate to be introduced to the House of Representatives.

Practice assessment task questions

1 Define the term 'royal assent'.

(1 mark)

2 Describe the law-making powers of the Commonwealth Parliament, using examples.

(4 marks)

3 Outline the structure of the Commonwealth Parliament.

(3 marks)

4 With reference to the above article, outline one role played by the Senate in law-making.

(3 marks)

5 Senator Lambie proposed to introduce a private members' bill. Outline the nature of this type of bill and explain whether such bills are typically passed by the Commonwealth Parliament.

(4 marks)

6 A legal commentator said, 'If this proposed law was passed, it would most likely face constitutional challenge on the grounds that it interferes with express rights.'

a Identify which court would most likely hear such a constitutional challenge.

(1 mark)

b On what grounds would such a challenge be heard? In your answer, refer to any express right that may be relevant in this case.

(3 marks)

c To what extent does any possible challenge highlight the checks that are provided for by the Australian Constitution? Give reasons.

(5 marks)

Total: 25 marks



CHAPTER 11

CHANGING AND PROTECTING THE AUSTRALIAN CONSTITUTION

Source 1 The Australian Constitution is a set of rules and principles that guide the way in which Australia is governed. The Constitution can only be changed by referendum. In the 1960s, international concern about human rights issues increased the general population's interest in Aboriginal and Torres Strait Islander peoples' affairs. The 1967 referendum was unique because both major parties campaigned strongly for the 'Yes' vote. The referendum was passed with a record vote of support of over 90 per cent. In this chapter, you will explore the interpretation of Sections 7 and 24 of the Constitution, some Australian referendums and the significance of the external affairs power.



OUTCOME

By the end of **Unit 4 – Area of Study 1** (i.e. Chapters 10 and 11), you should be able to discuss the significance of High Court cases involving the interpretation of the Australian Constitution and evaluate the ways in which the Australian Constitution acts as a check on parliament in law-making.

KEY KNOWLEDGE

In this chapter, you will learn about:

- the significance of one High Court case interpreting Sections 7 and 24 of the Australian Constitution
- the significance of one referendum in which the Australian people have protected or changed the Australian Constitution
- the significance of one High Court case which has had an impact on the division of constitutional law-making powers
- the impact of international declarations and treaties on the interpretation of the external affairs power.

KEY SKILLS

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- analyse the ability of the Australian people to protect or change the Australian Constitution
- discuss the significance of High Court cases involving the interpretation of the Australian Constitution
- discuss the impact of international declarations and treaties on the interpretation of the external affairs power
- synthesise and apply legal principles to actual scenarios.

KEY LEGAL TERMS

ex post facto a Latin term meaning 'out of the aftermath'; a legal term used to describe a law that is established in relation to an event that has already taken place

international declaration a non-binding agreement between countries which sets out the aspirations (hopes) of the parties to the agreement

preamble the introductory part of a statute that outlines its purpose and aims

ratify (ratification) confirmation by a nation's parliament of its approval of an international treaty signed by its government. The parliament expressly passes legislation that requires them by law to adopt the various rights and responsibilities set out in the treaty

representative government a political system in which the people elect members of parliament to represent them in government

retrospective legislation Acts of Parliament that are made to apply to conduct that existed before the passage of the law (backdating the operation of law)

treaty a legally binding agreement between countries or intergovernmental organisations which is in written form and is governed by international law

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

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Please note

Aboriginal and Torres Strait Islander readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of people who have died.

11.1 HIGH COURT CASES AND SECTIONS 7 AND 24 OF THE CONSTITUTION

High Court
the ultimate court of appeal in Australia and the court with the authority to hear and determine disputes arising under the Australian Constitution

Australian Constitution, the
a set of rules and principles that guide the way in which Australia is governed. The Australian Constitution was passed by the British Parliament as part of the *Commonwealth of Australia Constitution Act 1900 (UK)*

The **High Court** of Australia, through its interpretation of the **Australian Constitution**, serves as the guardian of the Constitution. At times, the High Court is called upon to consider the text of the Constitution and interpret its wording to decide the case that is before the court.

Some cases in which the High Court has interpreted the Australian Constitution have involved the meaning of Sections 7 and 24.



Source 1 The High Court of Australia has had a significant influence in our nation's system of law-making as a result of cases that have arisen since the Court first sat in 1903.

Sections 7 and 24 of the Constitution

Section 7 of the Australian Constitution sets out matters related to the Senate and Section 24 sets out matters related to the House of Representatives. Both sections require the Commonwealth Houses of Parliament to be directly chosen by the people. This enshrines in the Australian Constitution a system of **representative government**; that is, a government which reflects the majority of people who voted for it. In the High Court case of *Rowe v Electoral Commissioner* (2010) 243 CLR 1, the requirement that members of the Commonwealth Parliament be 'directly chosen by the people' was said to be a 'constitutional bedrock'.

representative government
a political system in which the people elect members of parliament to represent them in government

The High Court of Australia has often been called on to determine the meaning of Sections 7 and 24 of the Australian Constitution. In a series of cases, the High Court has interpreted these words from the Constitution to form the basis of an implied freedom of political communication. In another series of cases, the High Court has considered Sections 7 and 24 in relation to voting in general elections.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
7 The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate...

...Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

Study tip

The *VCE Legal Studies Study Design* requires you to discuss the significance of one High Court case involving the interpretation of Sections 7 and 24. Make sure you are familiar with Sections 7 and 24, the central facts of the case and, more importantly, its significance.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
24 Constitution of House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

Did you know?

Although the High Court of Australia was established in 1901, the first sitting didn't take place until 1903 (when the Court sat in the Banco Court in the Supreme Court building in Melbourne). In 1980, the Queen opened the High Court building on Lake Burley Griffin in Canberra.

Implied freedom of political communication

In two cases in 1992 the High Court found there was an **implied freedom of political communication** in the Australian Constitution. These cases were *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

The *Australian Capital Television* case dealt with Commonwealth legislation that banned all political advertising on radio and television during election periods (the *Political Broadcasts and Political Disclosures Act 1991* (Cth)). This legislation allowed some free advertising to political parties that already had members of parliament. However, it did not allow free or paid time on television or radio for making political comments in the media. The High Court held that the legislation was invalid because the Constitution guaranteed a freedom to discuss matters about politics (see Chapter 10 for further details on this case).

The reasons the High Court justices gave for the decision varied, but in general terms the implied right was linked to the idea 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 they were voting in an election.

Cases that confirmed the freedom of political communication

Did you know?

The High Court conducts hearings in all the capital cities of Australia (though most are held in Canberra), and can conduct some applications by video link to save the costs of parties travelling to Canberra.

Theophanous v Herald and Weekly Times Limited (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, both High Court cases, have confirmed the existence of the freedom of political communication. The *Theophanous* case extended the implied freedom to allow comments about members of parliament and their suitability for office. The *Lange* case below went further, saying there was a permanent freedom of political communication. That is, the freedom did not just apply immediately before an election. However, the freedom is not a general right to free speech, but a right to free communication on matters relating to political issues.

Developing the implied freedom of political speech

LEGAL CASE

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

The former Prime Minister of New Zealand, David Lange was featured in a report on the ABC program, *Four Corners*. The program suggested that his government was under the influence of large corporations through political donations that had been made to the party. Lange sued the ABC, arguing that the program had suggested that he was corrupt in his dealings as prime minister. This was a claim of defamation (where the plaintiff claims that someone has made a statement which is harmful to their reputation).

In its judgment, the High Court discussed previous decisions about the implied freedom of political communication and examined its impact on defamation laws. The *Lange* case confirmed

and extended the freedom of political communication, which exist by reason of Sections 7 and 24 of the Constitution. The High Court said that state, territory and Commonwealth legislation and common law must allow for the freedom of political communication implied in the Constitution.

In Lange's case, the High Court developed a two-stage test to determine whether a law infringes the implied freedom of political communication:



Source 2 David Lange, former Prime Minister of New Zealand, sued the ABC in a case that would confirm the right to freedom of political communication.

1 Does the law restrict 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 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.

Importantly, the freedom of political communication is not considered to be a general freedom to communicate. Instead, it operates as a negative right, in that it prevents us from being exposed to laws that stop communication on matters relating to politics and government. The High Court emphasised that the implied freedom is central to our system of representative government in the Constitution. The justices noted that Sections 7 and 24 of the Constitution says members of parliament are 'directly chosen by the people', and that is the basis for this freedom.

The significance of the *Lange* case

The *Lange* case reinforced the implied freedom of communication that had previously been established by the High Court from 1992. However, the High Court also established that the freedom is not limited to the period during which an election is held. Instead, it held that it was an ongoing freedom as shown in the below extract.

EXTRACT

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

The High Court justices in their judgment stated as follows:

If the freedom is to effectively serve the purpose of ss 7 and 24 and related sections, it cannot be confined to the election period. Most of the matters necessary to enable 'the people' to make an informed choice will occur during the period between the holding of one, and the calling of the next, election. If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an effective choice at the election.

judgment
a statement by the judge at the end of case that outlines the decision and the legal reasoning behind the decision

representative government
a political system in which the people elect members of parliament to represent them in government

The *Lange* case is also significant because it recognised that while the implied freedom of political communication exists, there are limits that can be placed by the parliament on that freedom. In its **judgment**, the High Court developed the two-stage test, which affirmed the right but also found that it could be appropriate in some circumstances for parliament to limit the freedom. This limitation can occur provided that the law is compatible with the principles of **representative government** and responsible government.

The parliament has since used the legal principles created in the *Lange* case to place restrictions on the movement in some circumstances of individuals who are involved in political protest, and to prohibit political comment when it is communicated in a way that interferes with the privacy of individuals.

Although the constitutional implied freedom of political communication has been firmly recognised, the freedom is limited in scope. Other than the parliament being able to restrict the freedom as indicated above, it is not an absolute right to freedom of speech. Instead, it is a freedom limited to political communication and only to ensure that the freedom upholds the principles of representative and responsible government.

The 2012 decision in *Wotton v Queensland* highlights the way in which the High Court has since applied the test established in the *Lange* case. The case involved **parole** conditions that were imposed on an offender after he was released from custody.

parole
the supervised and conditional release of a prisoner after the minimum period of imprisonment has been served

Applying the legal principles from the *Lange* case

LEGAL CASE

Wotton v Queensland (2012) 246 CLR 1

The plaintiff, Lex Wotton, 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, the Parole Board imposed 22 conditions on Wotton under Section 200(2) of the *Corrective Services Act 2006* (Qld), 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.



Source 3 Palm Island resident Lex Wotton led angry locals on a riot through the town after the death of one of the residents, Cameron Doomadgee. Mr Wotton was later convicted of inciting a riot and served 19 months in jail before being released on parole.

Wotton was also subject to Section 132(1)(a) of the *Corrective Services Act*, which made it an offence for a person to interview or obtain a statement from a prisoner (including parolees).

Wotton 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 test set down in the *Lange* case and held that the sections in question did 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). Therefore, the High Court held that the sections of the *Corrective Services Act* were **not** invalid.

In *Monis v The Queen* (2013) 249 CLR 92, a man had sent offensive letters by Australia Post and later claimed that the contents of the letters were of a political nature. The High Court was asked to examine and apply the second stage of the test from the *Lange* case.

LEGAL CASE

Sending offensive material by post

Monis v The Queen (2013) 249 CLR 92

Between 2007 and 2009, Man Haron Monis wrote a series of letters to the families of Australian soldiers killed while on active service in Afghanistan. In the letters, Monis criticised Australia's involvement in the conflict. As a result, he was charged under Section 471.12 of the Commonwealth Criminal Code for the crime of using a postal service in a way that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'. Monis challenged the constitutional validity of that section on the grounds that it infringed upon the implied freedom of political communication.



Source 4 In 2013, Man Haron Monis appealed to the High Court against his conviction for the offence of sending 'offensive' material by post. The appeal considered the implied freedom of political communication.

The key issue in the *Monis* case was the circumstances in which it is considered reasonable for the law to place limits on the freedom of political communication. The case focused on the second stage of the test established by the High Court in the *Lange* case.

The final decision in the *Monis* case was split 3:3. While all six judges of the High Court held that Section 471.12 restricted political communication, they were divided on whether that section was compatible with the system of representative and responsible government. Three of the judges ruled that the intention of parliament to protect the privacy of an individual in their own home when receiving personally addressed mail was reasonable and proportionate. The High Court justices focused on the main intention of Section 471.12, which is to protect individuals from 'intrusion into their personal domain of unsolicited material which is seriously offensive'. The focus of the legislation was whether 'reasonable persons' would find the sending of this material by post to be offensive. They noted that privacy is an important concern in modern society and needed to be respected when communicating with others.

Where the High Court is equally divided (which in this case it was, with three judges ruling in favour of the appeal and three judges ruling to dismiss the appeal), the *Judiciary Act 1903* (Cth) states that the decision of the court below will stand. Therefore, the High Court dismissed the appeal.

The right to vote

The High Court has recognised that Sections 7 and 24 of the Australian Constitution require the Houses of the Commonwealth Parliament to be 'directly chosen by the people', and as such enshrine the principle of representative government.

Some of these cases have considered Commonwealth legislation that restricts the ability to vote. The High Court has made it clear that when passing law, the Commonwealth Parliament cannot unnecessarily interfere with people's capacity to engage in the political process. In a series of judgments, including *Rowe v Electoral Commissioner*, the High Court has found that a law that interferes unreasonably with access to voting at elections is likely to be declared invalid.

The main case about the requirement that the houses of parliament be directly chosen by the people was *Roach v Electoral Commissioner* (2007) 233 CLR 162.

Exploring whether prisoners could be prevented from voting

LEGAL CASE

Roach v Electoral Commissioner (2007) 233 CLR 162

In 2006, the Commonwealth Parliament passed the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), which banned 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. Under the previous Act made in 2004, prisoners who were serving sentences longer than three years were banned from voting; the 2006 Act extended this ban so that no sentenced prisoners could vote. At the time, there were around 20 000 prisoners in Australia who would be affected by the Act.

Roach challenged the constitutional validity of both Acts in the High Court.



Source 5 While in jail, Vickie Lee Roach completed a master's degree in professional writing and commenced studies for a PhD.

The High Court held that the 2006 Act was inconsistent with the system of representative democracy established by the Constitution. It found that the Act was unconstitutional because Sections 7 and 24 of the Australian Constitution, which require that parliament be chosen 'directly by the people', legally protect the right of the people to choose the members of parliament.

The principle of representative government, which protects the right of the people to directly choose the parliament, gives people a right to vote for those who govern the country, so the parliament should only be able to restrict a person's right to vote if it is necessary to preserve representative government. Good enough reasons might include unsoundness of mind, conviction of treason, or committing serious criminal misconduct. In the High Court ruling Chief Justice Gleeson stated that the right to vote could be removed for serious criminal misconduct (e.g. for prisoners serving a sentence of more than three years) but could not be removed for prisoners who had been sentenced for less serious criminal offences.

The High Court ruled that while the 2004 legislation (banning prisoners serving three years or more from voting) was valid, 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; therefore this section of the Act was declared invalid by the High Court.

Interestingly, as Roach was sentenced to a six-year term of imprisonment, she still did not have the right to vote after the High Court decision.

The significance of the *Roach* case

This case upheld the fundamental requirement that members of the Commonwealth Parliament must be directly chosen by the people. It found that the Commonwealth Parliament had acted beyond its power (unconstitutionally) by denying certain prisoners the right to vote. Some legal commentators have interpreted this decision as implying a 'right to vote' in the Constitution, and that this right can only be limited for a 'substantial reason'. Others see the High Court as being cautious about directly stating that there is an implied right to vote. Regardless it is clear that the High Court has held that Sections 7 and 24 do not allow for unreasonable restrictions on the ability of the people to choose the members of parliament.

As with the implied freedom of political communication, the requirement that the houses be directly chosen by the people can be limited by the Commonwealth Parliament. However, any limitation must be for appropriate reasons.

The significance of the *Roach* case was confirmed by the High Court in the 2010 case of *Rowe v Electoral Commissioner*. This case involved a challenge to the validity of provisions of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act*. The Act had reduced the time between announcing a general election and closing off the electoral roll (i.e. the list of registered voters). Before the 2006 amendment, new electors could enrol with the Australian Electoral Commission (AEC), and existing electors could change their details, at any time up to seven days after 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 8:00 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 Sections 7 and 24 of the Constitution. Justice Crennan held that the democratic right to vote is supported and protected by the Constitution.

writ
the legal document that establishes the official timetable and process for the election to begin

The High Court has recently looked again at the principles of law created in both the *Roach* case and the *Rowe* case. The case of *Murphy v Electoral Commissioner* (2016) 334 ALR 369 is an example of the way courts balance different interests to achieve a just outcome. The High Court balanced the broad need for orderly elections against the narrower rights of individual voters to enrol, or change their details on the electoral roll.

LEGAL CASE

Advancing an orderly and efficient electoral system

Murphy v Electoral Commissioner (2016) 334 ALR 369

In this case, the High Court was asked to consider a constitutional challenge to the Commonwealth's power to legislate to suspend processing of claims for enrolments to vote from seven days after the issue of writs for an election. The plaintiffs, led by activist Anthony Murphy, argued that the electoral rolls should be open right up to polling day. They argued that the current law, which closes the electoral rolls earlier, contravenes the principles of representative government contained in Sections 7 and 24 of the Australian Constitution. They claimed that the process, which is operated by the AEC, results in some voters being denied the opportunity to vote if they try to enrol once the electoral rolls have closed.



Source 6 In the *Murphy* case, the plaintiffs challenged the validity of provisions contained within the *Commonwealth Electoral Act 1918* (Cth), arguing that they were contrary to Sections 7 and 24 of the Constitution.

The plaintiffs argued that technological improvements over the past decade mean there is no valid reason to suspend the electoral rolls from seven days after the issue of the writs for an election. They cited the *Roach* case, claiming that the closure of the electoral rolls well before polling day placed a substantial and unnecessary burden on the constitutional principle of choice of candidates by the people.

In response, the Commonwealth argued that among other things it had the power to design an electoral system that gives Australians the right to vote, and as long as people acted within the timeframe set by the AEC, nobody was excluded from exercising that right.

The High Court found that the restrictions were appropriate and adapted to the achievement of an orderly process in managing the electoral roll. The provisions of the *Commonwealth Electoral Act 1918* (Cth) were found to be consistent with the principle of representative government. The Court also referred to the principles from the *Roach* case. It ruled that the Commonwealth law was valid because it did not exclude or restrict particular individuals from enrolling to vote and there was a 'substantial reason' for having a process that was designed to ensure the accuracy of the electoral roll.

11.1 CHECK YOUR LEARNING

Define and explain

1 Explain the purpose of Sections 7 and 24 of the Australian Constitution. In particular, explain in your own words what the term 'directly chosen by the people' means.
2 In which legal case was the requirement that members of the Commonwealth Parliament be 'directly chosen by the people' said to be a 'constitutional bedrock'?
3 Outline the two-stage test that is used to determine whether a law infringes the implied freedom of political communication.
4 Provide two circumstances where it may be considered reasonable for the law to restrict freedom of political communication.

Synthesise and apply

5 Read the legal case *Wotton v Queensland*.
  a Explain the central facts of the case.
  b Do you agree with the decision that the legislation was a reasonable interference with the plaintiff's freedom to express his views on political matters? Give reasons.
6 Read the legal case *Roach v Electoral Commissioner*.
  a Outline the key facts of the case.
  b Explain the significance of the decision that was reached by the High Court in this case. In your answer, refer to Sections 7 and 24 of the Australian Constitution.
  c 'In referring to the principles from the *Roach* case, the Court held that the Commonwealth law in the *Murphy* case was valid because it did not exclude or restrict particular individuals from enrolling to vote and there was a 'substantial reason' for having a process that was designed to ensure the accuracy of the electoral roll.'
  Explain this statement. In your answer, refer to the differences between the *Roach* case and the *Murphy* case.

Analyse and evaluate

7 Read the legal case *Monis v The Queen*.
  a Describe the purpose of Section 471.12 of the Australian Criminal Code.
  b Explain how this section was breached by Monis.
  c Explain the significance of the *Lange* case in the legal reasoning used by the High Court in the *Monis* case.
  d Discuss whether the ruling in the *Monis* case was a reasonable outcome.
8 Conduct some research on the case of *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013). You may wish to look at the High Court's summary of the case, or articles about the case.
  a Outline the main facts of the case.
  b Discuss the significance of the *Lange* case in light of this case.

Check your obook assess for these additional resources and more:

- **Student book questions** 11.1 Check your learning
- **Video tutorial** Introduction to Chapter 11
- **Video tutorial** High Court cases
- **Going further** The *Corneloup* case

11.2 REFERENDUMS

referendum
the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australia people in a public vote by a double majority

double majority
a voting system that requires a national majority of all voters in Australia and a majority of electors in a majority of states (i.e. four states); a double majority is required for a change to be made to the Australian Constitution at a referendum

When the Australian Constitution was written, safeguards were put in place to ensure that the Commonwealth Parliament could not change the wording of the document without first seeking the permission of the Australian people (i.e. voters). This was based on democratic principles that respected the right of voters to be involved in any process that would change the way the nation is governed.

In Chapter 10, you looked at the **referendum** process, which is used to change the words of the Australian Constitution. In particular, you learnt about the double majority requirement that is necessary for a change to the Constitution to occur.

As a result of the strict nature of the **double majority** requirement, actual changes to the wording of the Australian Constitution have been rare. Since federation, a total of 44 referendum proposals have been put to the people. Of those 44, the Australian people have only voted eight times in favour of changing the words of the Constitution.

The referendum process not only enables the Australian people to change the Australian Constitution (by voting 'yes' to a change), but also enables them to protect the Constitution (by voting 'no').

Protecting the Australian Constitution

One of the main functions of Section 128 is to prevent the Commonwealth from increasing its powers without first referring the proposal to the people in a referendum. This ensures voters have a direct say in whether the wording of the Constitution will be changed. As noted in Chapter 10, the referendum process gives the states equal voting rights on referendums, in that any proposal must be supported by a majority of voters in a majority of states. This offers a significant protection to the residents of the smaller states, in that their voices have equal weight in the referendum process as their neighbours in other larger states such as New South Wales and Victoria.

The most recent referendum which was rejected by the Australian people was in 1999, which required the people to decide whether Australia would become a republic. Rejecting a referendum can be a way of protecting the Constitution, as it means the Australian people have said no to a change. They are preserving the Constitution in its existing form.

Study tip

A list of the referendum proposals that have been put to the Australian people can be found on your obook assess.

Study tip

You are required to know one referendum that the Australian people rejected (and therefore resulted in the Australian people upholding the Constitution), or one referendum that the Australian people supported (and therefore resulted in a change to the Constitution).

The 1999 referendum on the republic

In the early 1990s, then prime minister Paul Keating expressed a desire for a republic in time for the Centenary of Federation (1 January 2001). The **Coalition** parties, led by John Howard, won the 1996 election and established a Constitutional Convention. The 1998 Constitutional Convention's role was to debate the proposed change to the Constitution which would remove the monarchy as Australia's head of state. A majority of those attending the Convention agreed on a proposal that was put to the people on 6 November 1999.

coalition
an alliance of two or more political parties that join to form government

preamble
the introductory part of a statute that outlines its purpose and aims

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

Proposals put to the people

The proposal included two changes to the wording of the Constitution. The first proposal was for Australia to become a **republic**, and the second was to change the **preamble** to the Constitution. Two **bills** had been passed by both houses of the Commonwealth Parliament to allow the proposals to be put to the people.

The first bill, the Constitution Alteration (Establishment of Republic) Bill 1999 (Cth), proposed the following changes to Australia's political system:

- making a president as head of state instead of the Queen's representative
- setting out the mechanism for selecting a president, including a committee to receive and consider nominations
- establishing the powers of the president
- establishing the term of office and power for removal of the president
- removing monarchical references from the Constitution.

The second bill, being the Constitution Alteration (Preamble) Bill 1999 (Cth), was aimed at inserting a new preamble into the Australian Constitution. This change was required to be put to the people as the preamble forms part of the Australian Constitution and can therefore only be changed by referendum. The proposed preamble was as follows:



Source 1 The 1998 Constitutional Convention was attended by many prominent Australians, who addressed the gathering at Old Parliament House, Canberra. Here republican Eddie McGuire is shown about to address the Convention.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)

With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.

We the Australian people commit ourselves to this Constitution:

proud that our national unity has been forged by Australians from many ancestries;

never forgetting the sacrifices of all who defended our country and our liberty in time of war;

upholding freedom, tolerance, individual dignity and the rule of law;

honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;

recognising the nation-building contribution of generations of immigrants;

mindful of our responsibility to protect our unique natural environment;

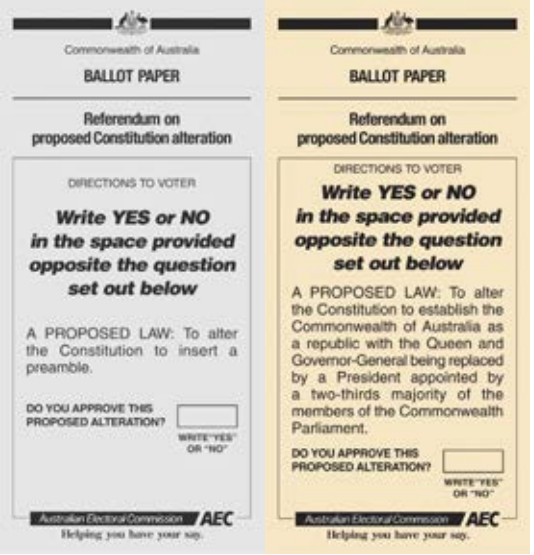
supportive of achievement as well as equality of opportunity for all;

and valuing independence as dearly as the national spirit which binds us together in both adversity and success.

Before the referendum, 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 parliamentary system and the proposed republican model.

Referendum results

The first question, which proposed the establishment of a republic, was rejected by 54.87 per cent of voters nationally and supported by only 45.13 per cent. That is, the majority of voters in Australia rejected the change.



Source 2 Ballot papers from the 1999 referendum to see if the people wanted to change the words in the preamble of the Constitution and whether Australia should become a republic.

The first question also did not receive majority support in any state. The 'yes' vote of 49.84 per cent in Victoria for the republic was the largest vote in any individual state. The strongest 'yes' vote for the republic came from inner metropolitan areas; the lowest vote came from rural and remote areas, as well as many outer suburban areas.

The second question, about inserting a preamble into the Australian Constitution, was only supported by 39.34 per cent of voters nationally, and was rejected by 60.66 per cent of voters. This proposal also failed to gain a majority of support in any Australian state, with Victorian voters once again being those most willing to support the referendum, with it gaining 42.46 per cent support by those voters for the insertion of a preamble.

The reasons for failure

Some of the reasons why the referendum failed included:

- Australians are traditionally cautious of constitutional change and the proposal put forward in this case, to have a president elected by the parliament, was unfamiliar and caused concern among voters.
- Public opinion on the introduction of a president varied. Traditional monarchists argued that a constitutional monarchy provides stable government. This encouraged those in doubt to maintain the status quo of a **constitutional monarchy**.
- Many people who would usually support a republic voted 'no' because they believed that the president should be elected by the people rather than being chosen by a two-thirds majority of the Commonwealth Parliament. Some voters regarded the model put forward to be undemocratic and wanted a choice in the selection of the president.
- In the weeks before the referendum, then prime minister John Howard of the Liberal Party urged a 'no' vote on the grounds of maintaining ties to Britain, which had stood the test of time. This argument swayed some undecided voters to vote 'no', especially those who would normally support the Liberal Party. Given that a referendum proposal can be confusing for many voters, people are more likely to look to their political leaders for guidance when making their decision, especially if that advice is from the prime minister.

constitutional monarchy
a system of government in which a monarch (i.e. a king or queen) is the head of state and a parliament makes the laws under the terms of a constitution

Did you know?

When it became clear that the proposal to make Australia a republic would fail, a disappointed Malcolm Turnbull conceded defeat on behalf of the Australian Republican Movement. He reflected on the challenges of what had been a nine-year campaign. Seventeen years later, as Prime Minister, he reaffirmed his commitment to a republic but said he would only support a referendum after the reign of Queen Elizabeth II had ended.

EXTRACT

John Howard's Statement in Support of the 'NO' Case

25 October 1999

Why I will vote 'No' to a Republic

I will vote 'no' to Australia becoming a republic because I do not believe in changing a constitutional system which works so well and has helped bring such stability to our nation.

The changes being proposed would not make Australia's constitution or system of government any better or more effective. They are not as simple or as minuscule as their proponents would like people to believe.

There are no demonstrated benefits from the proposed changes. They would add nothing to the already democratic character of Australia.

They will not enhance our independence.

There is nothing to be gained from tampering with a system of government which has contributed to our country being one of only a handful of nations which has remained fully democratic throughout the 20th century.

Some of the checks and balances in our present system would be weakened under the republic being proposed.

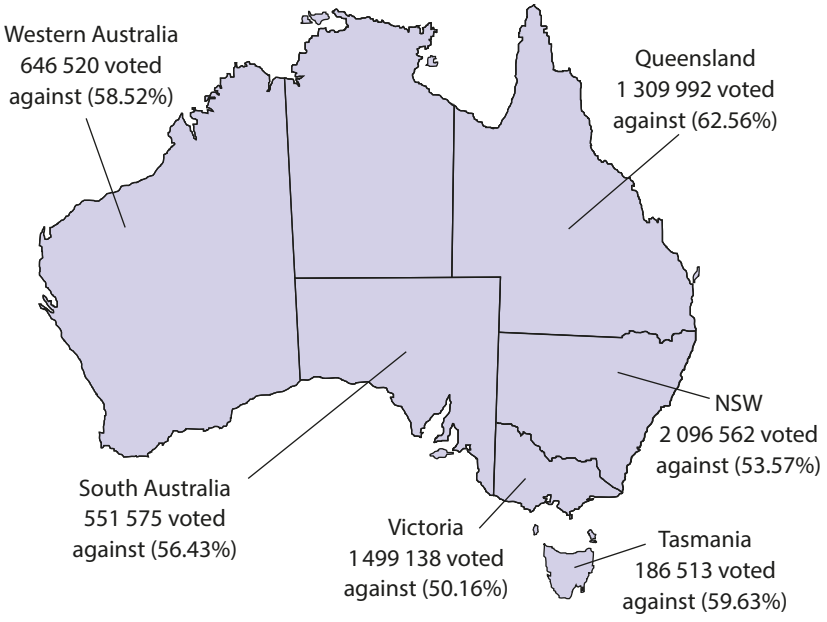
The president could be less secure in his or her position, than is the Governor-General. This in turn could, among other things, affect the appropriate exercise of the reserve powers by a president in a future republic.

Source: John Howard, 'Why I will vote "No" to a Republic' (Statement, 27 October 1999) < http://australianpolitics.com/1999/10/25/john-howard-statement-against-a-republic.html>.

The ability of the people to protect the Constitution

In this referendum, the Australian people protected the Australian Constitution from being changed in a way that would have shifted our traditional ties to the United Kingdom and allowed for a model of electing the president that many argued would have denied ordinary Australians a choice.

It was clear from the overwhelming response by the people that the majority of voters in every state, as well as nationally, wanted to maintain the current model. It had stood the test of time.



Source 3 The results for the 1999 referendum on the republic. Which states voted yes, and which no?

The 1999 referendum highlights the importance of Section 128 of the Australian Constitution in requiring that the people support such a change, which would have amended fundamental elements of our legal system. It serves as an example of how democratic processes, including the requirement under Section 128 for a double majority, allow the people to have the final say on constitutional reform. This enhances confidence in the legal system, especially in a referendum such as this, which would have substantially changed the way that Australia is governed.

On the other hand, perhaps the referendum failed because of factors such as reluctance among voters for change, a lack of bipartisan support (support from both major parties), and a lack of understanding about the proposals. In 2017, both Malcolm Turnbull and Bill Shorten stated that voters' views on constitutional change for a republic had shifted.

Changing the Australian Constitution

The Australian people have voted eight times in favour of changing the Australian Constitution. One popular change occurred in 1946, but by far the most popular and accepted change made by the Australian people was about the rights of Indigenous Australians in 1967. Both of these referendums are explored on the next page.



Source 4 Mr Dedman's victory suit for the war effort, with no cuffs: 'Save vital resources and help'.

The 1946 Social Services referendum

Section 51(xxiii) of the Australian Constitution grants the Commonwealth Parliament the power to legislate in relation to invalid and old-age pensions. When the Constitution was being negotiated, people were not thinking about broader social needs, and these pensions were the only two items mentioned.

As Australia moved through the Second World War, society was changing. It became clear that the Commonwealth Parliament needed to address emerging needs across a range of areas. These included broader welfare benefits, including unemployment and sickness benefits.

The Commonwealth relied on its general spending power (Section 81) to make laws to grant Australians these types of welfare benefits, and there was bipartisan support (both sides of politics agreed). However, the Commonwealth's power to do so was unclear. So, to clarify the situation, the Commonwealth took it to the people in a referendum.

In 1946, a referendum was put to the people of Australia to provide the Commonwealth Parliament with a new 'head of power' to pass laws in relation to these benefits. The new power would allow the Commonwealth Parliament to make laws about various types of welfare benefits, including unemployment, sickness, medical and dental services, students and family allowances. The referendum won 54.39 per cent of the national vote and the majority support of voters in every Australian state. The main reason for the success of this referendum was that it involved greater financial support to Australians from the Commonwealth, which was appealing to the average voter, particularly after the Second World War. The new power was added to the Constitution in a new paragraph immediately under Section 51(xxiii):

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
51 Legislative Powers of the Parliament

(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;

Did you know?

During the Second World War many cast iron fences around parks, gardens, cemeteries and grand houses were compulsorily taken for the war effort. Clothing was rationed (government coupons were needed to buy material; people were told to 'make do and mend'). John Dedman, the Minister of War Organisation of Industry, designed a suit that would 'help win the war', and wore it during a newsreel interview. People found it ridiculous and he became a laughing-stock.

The 1967 Aboriginal and Torres Strait Islander peoples referendum

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.

Until then, the Australian Constitution had stated as follows:

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)
51 Legislative Powers of the Parliament

S51 (xxvi) '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 ... the people

of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.'

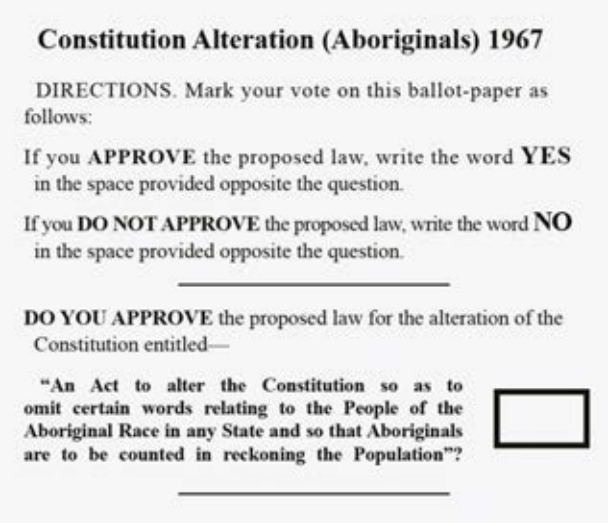
127 Aborigines not to be counted in reckoning population

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.

Many people thought these provisions were unfair for Aboriginal and Torres Strait Islander peoples and a barrier to effective policy making for the Commonwealth Parliament.

In 1967 it was proposed to remove the barriers facing Aboriginal people from the Constitution. The Coalition government of the time, led by prime minister Harold Holt, held a referendum on whether the Commonwealth Parliament should have powers in respect to Aboriginal and Torres Strait Islander peoples.



Constitution Alteration (Aboriginals) 1967

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"?

Source 5 The ballot paper for the 1967 referendum

Proposals put to the people

Two proposals were put to the electors for a proposed change in 1967:

- A proposal under the Constitution Alteration (Parliament) Bill 1967 (Cth) 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.
- A proposal under the Constitution Alteration (Aboriginals) Bill 1967 (Cth) 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.

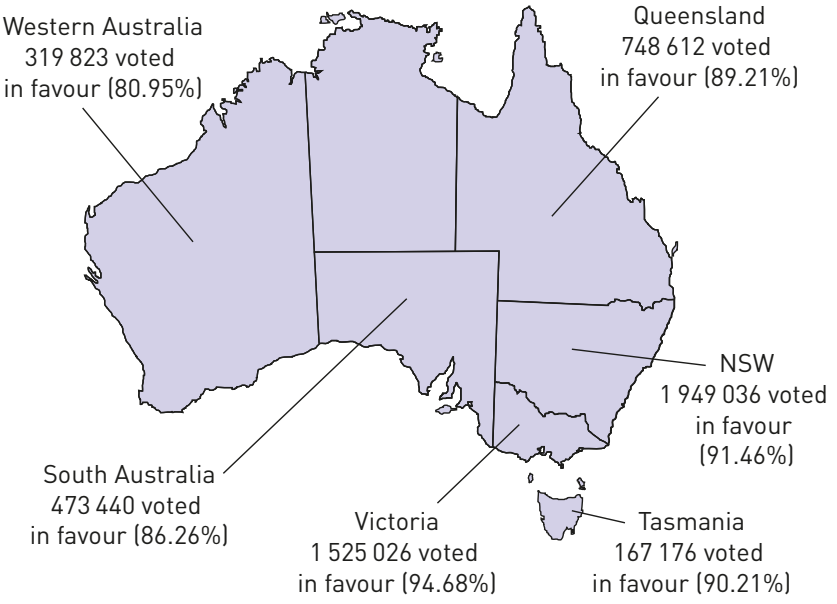
House of Representatives the lower house of the Commonwealth Parliament

The two questions put to the people on the second proposal involved whether Indigenous people should be included in the national census and whether the Commonwealth Parliament should be allowed to create law regarding 'People of the Aboriginal Race'. This referendum, if passed, made the authority to legislate with regard to Australia's indigenous people a concurrent power, where previously it had been a residual power.

Referendum results

The majority of voters in Australia voted in favour of the referendum. Across the whole of Australia, 90.77 per cent of voters were in favour and only 9.23 per cent against.

Despite the fact that this referendum was held at the same time as an unsuccessful referendum (being the referendum about the increase of numbers in the House of Representatives), it was accepted with the highest 'yes' vote to date. This vote was said to have reflected a general community view that it was time to make amends to Aboriginal and Torres Strait Islander peoples, 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).



Source 6 The referendum results for the 1967 referendum. Which states voted yes, and which no?



Source 7 The 1967 referendum gave the Commonwealth the power to create laws on matters relating to Indigenous people, as well as Indigenous Australian people being included in the national census. Important legislation such as the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth) would not have been possible without the 1967 referendum.

This referendum gave the Commonwealth Parliament the power to legislate for Indigenous people in the states and territories and to include them in national censuses. This amendment altered Section 51(xxvi) of the Constitution and deleted Section 127.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) After the 1967 change to include Indigenous people

S51(xxvi) 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 … 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.~~

Did you know?

Given that the majority of parliamentarians supported the proposed amendment relating to Indigenous people, a NO case was never presented as part of the referendum campaign.

The ability of the people to change the Constitution

The amendment allowed the Commonwealth Parliament to move into an area that it was previously denied under the Constitution. An area of residual power became a concurrent power.

The outcome of the 1967 referendum highlights the power of the people to decide whether key changes in the wording of the Constitution are to be made, especially those that relate to social and human rights issues. Much of the debate in 1967 focused on the need to recognise Indigenous Australians in the national census, and the benefits of having the Commonwealth legislate for the changing needs of Indigenous people. The overwhelming support across all states for these proposals, as well as at the national vote, highlighted the importance of the referendum process in being able to allow the views and values of the public to be reflected in constitutional change.

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 Aboriginal and Torres Strait Islander peoples 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), which allowed Indigenous people to claim land rights. This referendum also led the way for changes in the way Indigenous people were treated, and the financial assistance they could receive from the Commonwealth.

11.2 CHECK YOUR LEARNING

Define and explain

1 Outline the requirements of the double majority set out in Section 128 of the Australian Constitution.

2 In what ways does the double majority requirement enable the Australian people to protect the Australian Constitution?

3 Explain how the double majority requirement allows for the people in the smaller states to protect the Constitution in spite of the support for change in the larger states.

Synthesise and apply

4 Explain two concerns that may arise if the Commonwealth Parliament were able to change the wording of the Constitution without first presenting the proposals for change to the people.

5 In 1946, the referendum on social services was successful. It is one of only eight referenda to succeed since federation.

- **a** Explain how the social services referendum in 1946 gave more power to the Commonwealth.
- **b** Suggest why this referendum proposal was so successful. In your answer, refer to the nature of this proposal compared to one or two others that were rejected by the people.

6 The 1967 referendum represented a major shift in the capacity of the Commonwealth to recognise Indigenous Australians in the Constitution.

- **a** Relating to Indigenous people what propositions for reform were put to the Australian people in the 1967 referendum?
- **b** What percentage of people accepted the 1967 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** Conduct research to find out when Indigenous people became Australian citizens. In your explanation refer to the 1967 referendum.
- **e** Explain the significance of this referendum with reference to major legislation that has been passed by the Commonwealth Parliament since 1967.

Analyse and evaluate

7 'The 1999 republic referendum serves as a clear example of the ways in which the referendum process protects the Australian Constitution from arbitrary interference by government.'

- **a** Comment on the statement above. In your answer, identify the proposals that were presented to voters in the 1999 republic referendum.
- **b** Explain two reasons why this referendum failed. In your answer, refer specifically to the statements made by then prime minister John Howard regarding the forthcoming referendum.
- **c** To what extent does the outcome of the 1999 referendum demonstrate the ability of the Australian public to protect the Constitution? Give reasons.

8 In your view, is it necessarily a good thing that the people have the power to protect the Constitution by voting no in a referendum? Discuss.

Check your obook assess for these additional resources and more:

- » **Student book questions** 11.2 Check your learning
- » **Video tutorial** Things to know about referendums
- » **Going further** Increasing the division of law-making power of the Commonwealth
- » **Going further** Australian constitutional referendums

11.3 THE HIGH COURT AND THE DIVISION OF LAW-MAKING POWERS

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

The High Court has **jurisdiction** under Section 75 of the Australian Constitution to hear and determine cases involving disputes:

- in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party
- between states, or between residents of different states, or between a state and a resident of another state.

The High Court has heard significant cases involving disputes over law-making powers between the Commonwealth and state parliaments. The decisions in some of these cases have affected the division of powers between the parliaments in Australia, with High Court judgments since 1920 being more inclined to grant additional powers to the Commonwealth, with reduced law-making powers for the states. The cases below explore some of the ways in which the law-making powers of the Commonwealth have increased as a result of High Court interpretation of the Constitution.

Study tip

You need to know one High Court case which has had an impact on the division of law-making powers. Make sure you focus on the **significance of the case** – therefore, you only need to know the key facts of the case that are relevant to demonstrating its significance. Try to avoid going into too much of an explanation of the facts which might miss its significance.

The *Brislan* case

A 1935 case involving a wireless set (i.e an early type of radio common in homes before the invention of television) provides a useful example of how the High Court can change the division of law-making powers.

LEGAL CASE

Exploring Commonwealth control over electronic communications

R v Brislan; Ex parte Williams (1935) 54 CLR 262

Section 51(v) of the Australian Constitution provides 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. 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.

The defendant challenged the validity of the *Wireless Telegraphy Act* 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 Section 51(v). A 'wireless set' was not mentioned in the Constitution and did not fit within Section 51(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, it would be up to the states to legislate in this area because the 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 Section 51(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 Section 51(v) to include broadcasting to wireless sets. This case changed the division of law-making powers by extending the Commonwealth Parliament's power to legislate regarding postal, telegraphic, telephonic and other like services to include broadcasting to wireless sets.



Source 1 Wireless sets like this were common in homes during the 1930s in Australia.

The significance of the *Brislan* case

The High Court's interpretation of the relevant heads of power caused a shift in the division of law-making powers from the states to the Commonwealth. After this decision, the Commonwealth Parliament had 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 in accordance with Section 109 of the Australian Constitution.

Since the decision in the *Brislan* case, electronic technology has boomed. The Commonwealth has assumed control of electronic means of communication, with the term 'other like services' being read broadly. For example, the *Interactive Gambling Act 2001* (Cth) regulates the advertising and promotion of live sports wagering available over the internet. The authority of the Commonwealth to create law in this area is based on its powers under Section 51(v).

Since the 1920s, the changing balance between state and federal law-making power has generally been in favour of the Commonwealth. This has weakened the states' rights to make laws in some areas that were once considered **residual powers**. Under the Australian Constitution, where the Commonwealth can show it has power over a certain area, its laws will prevail over conflicting state laws.

Each time the High Court finds in favour of Commonwealth law-making power in cases involving the Constitution, this balance tips further towards the Commonwealth. For those who like centralised government and the consistency found in uniform laws, that is a good thing. Others like to see differences between the states and argue that law-making power should be distributed more broadly. The difficulty with this approach, however, is that laws tend to differ between the states.



Source 2 Television was invented in the 1930s, long after federation in Australia. As a result, the High Court has been called upon to decide whether the Constitution gives the Commonwealth Parliament the power to make law in this area.

Did you know?

The Commonwealth Parliament has moved to impose limits on television advertising by gambling companies, although the television industry was upset by this shift in policy. The major networks rely on revenue from the gambling industry, which spent almost $150 million on wagering and lottery advertisements in 2016. This power of the Commonwealth can be traced back to the High Court decision in the *Brislan* case.

residual powers powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain with the states (as opposed to concurrent powers and exclusive powers)

The *Ha* case

A 1997 case involving excise duties required the High Court to consider Section 90 of the Australian Constitution.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK)

90 Exclusive power over customs, excise, and bounties

On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

LEGAL CASE

Licence fees on tobacco sellers

Ha v New South Wales (1997) 189 CLR 465

The New South Wales Parliament had passed the *Business Franchise Licences (Tobacco) Act 1987* (NSW), which required sellers of tobacco products to hold a licence and pay licensing fees.

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 because the Commonwealth had exclusive power in this area of law-making.

The High Court in *Ha v New South Wales* had to interpret the meaning of excise duties in Section 90 of the Constitution. By a 4:3 majority, the High Court ruled that the fees charged by the NSW Government were excise duties, and so were unconstitutional, as the power to levy these fees was exclusive to the Commonwealth Parliament.

The significance of the *Ha* case

Study tip

Another High Court case which changed the division of law-making powers is the *Tasmanian Dam* case. You will study this in the next topic. You can use the *Tasmanian Dam* case in your answers to questions about the division of law-making powers.

The High Court's decision in the *Ha* case 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.

In deciding that a number of state laws imposing licence fees on retailers and wholesalers of tobacco was inconsistent with the Australian Constitution, the High Court effectively deprived the states of approximately 16 per cent of the taxes that they collect. An important effect of the High Court ruling was to further entrench the Commonwealth's control over the national economy.

The impact of the decision in the *Ha* case can be seen more clearly when you consider the effects on a state being unable to pass laws that raise money, or having to spend its money in the way the Commonwealth prefers (that is, through tied grants). This further reduces the capacity of the states to undertake planning for the future.

The *WorkChoices* case

One area where the state and Commonwealth Governments have disagreed about laws is workplace relations (being laws about employment, wages and work conditions, and workers' rights).

The *WorkChoices* case

LEGAL CASE

New South Wales v Commonwealth (2006) 229 CLR 1

Since federation, all Australian states have had their own workplace relations laws, which established the terms and conditions of employment in all matters outside of interstate disputes, which were regulated by the Commonwealth.

In the case of *New South Wales v Commonwealth*, 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 (WorkChoices) Act 2005* (Cth), an Act that brought about major changes in the area of industrial relations.

The key issues in the case were as follows:

- Section 51(xx) of the Australian Constitution allows the Commonwealth to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.
- The Commonwealth argued that this power under the Constitution allows it to make laws regarding the rights and responsibilities of workers who are employed by corporations. This is known as the corporations power.
- The states and trade unions argued in response that this was a grab for power by the Commonwealth, which was interpreting the corporations power too broadly.

The Commonwealth had relied on the corporations power in section 51(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. This was a landmark case because it gave the Commonwealth much greater control over workplaces across the nation. It was estimated at the time that 85 per cent of all employees in Australia would now be covered by Commonwealth laws in this area.



Source 3 Legal counsel assembled for the start of the *WorkChoices* case in 2006. This case involved the greatest number of lawyers to ever appear before the High Court at one time.

The significance of the *WorkChoices* case

The Australian Constitution allows the Commonwealth to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. The High Court's ruling in the *WorkChoices* case was that this power allows the Commonwealth to make law with regard to industrial matters between employers and employees. This has greatly reduced the ability of the states to regulate workplace relations at the local level.

According to the Explanatory Memorandum of the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth), this use of the corporations power would 'mean that up to 85 per cent of Australian employees would be covered by the federal system'. Therefore, the High Court decision meant that only 15 per cent of employees would be left to be covered by state law. In practice, the High Court ruling handed the Commonwealth very broad control over industrial relations, which greatly shifted the balance of power away from the states.

The Commonwealth could now control all aspects of industrial law for the vast majority of workers, which affected a diverse range of people such as teenagers working casually in the retail sector, to tradespeople employed in the construction and mining industry. Some commentators claimed that this was one of the most significant rulings of the High Court in the area of Commonwealth/state relations since the 1920s.

11.3 CHECK YOUR LEARNING

Define and explain

1 Explain the purpose of Section 75 of the Australian Constitution.

2 Outline one reason why the laws of the Commonwealth might come into conflict with laws made by the states.

Synthesise and apply

3 Read the legal case *Ha v New South Wales*.
- **a** Explain the key facts of the case.
- **b** Outline the impact that the High Court judgment in this case had on the revenue stream earned by state governments through the charging of licence fees on the sale of tobacco products.
- **c** Outline one impact that this decision is likely to have on the states' capacity to manage their economies.

Analyse and evaluate

4 In the case *New South Wales v Commonwealth*, the High Court made some important decisions regarding the corporations power of the Commonwealth.
- **a** Explain the significance of this case in terms of the control of industrial relations law in Australia.
- **b** Describe the ways in which Section 109 could be used to impact on the laws previously made by the states in the area of industrial relations.
- **c** Do you think it is appropriate that the Commonwealth controls workplace law for the vast majority of all Australians? In your answer, address the issue of the potential problems that may exist had the states retained control over industrial relations.

5 A significant power of the Commonwealth involves its ability to regulate communication services, including advertising.
- **a** Outline the key facts of the case *R v Brislan; Ex parte Williams* (the *Brislan* case).
- **b** In relation to this case, discuss the impact that the High Court can have on the law-making powers of the states.
- **c** To what extent is the decision in the *Brislan* case made even more significant given that it relates to electronic communications? In your answer, anticipate some developments in communications technologies over the next decade that may be covered by laws made by the Commonwealth Parliament.

Check your obook assess for these additional resources and more:

- **Student book questions**
  11.3 Check your learning
- **Video tutorial**
  Identifying the significant facts of a case
- **Going further**
  Other High Court cases

11.4 INTERPRETATION OF THE EXTERNAL AFFAIRS POWER

One of the areas of Commonwealth law-making power that has been the focus of High Court cases is its external affairs power.

The external affairs power

international treaty a legally binding agreement between countries or intergovernmental organisations which is in written form and is governed by international law

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

ratification confirmation by a nation's parliament of its approval of an international treaty signed by its government. The parliament expressly passes legislation that requires them by law to adopt the various rights and responsibilities set out in the treaty

Under Section 51(xxix) of the Australian Constitution, the Commonwealth Parliament has the power to create laws in relation to 'external affairs'. Over the past three decades, the external affairs power has been relied on by the Commonwealth Parliament to pass legislation that reflects international agreements that Australia has entered into.

In various cases, the High Court has decided that the external affairs power includes authority to legislate to give effect to an international agreement such as a treaty. This gives the Commonwealth Parliament the ability to make laws on treaty topics that are not listed as powers in the Constitution. It can potentially legislate on a residual power if the treaty topic covers that area. Before considering a series of High Court cases, it is useful to understand the basics of international treaties and declarations.

International treaties and declarations

Australia is an active member of the international community. Our government enters into agreements with other nations in key areas such as trade, environmental protection and human rights. In a global community, these agreements are an important focus of government policy. Two types of agreements are treaties and declarations.

International treaties

An **international treaty** (i.e. an international convention) is a binding agreement between countries and is governed by international law. A treaty can be bilateral (between two countries only) or multilateral (between three or more countries). It can also include organisations as parties.

A multilateral treaty is generally developed through international organisations such as the United Nations. An example of a treaty is the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted by the General Conference of UNESCO in 1972. The terms of this convention have been influential in shaping policy on the environment since the 1980s.

In our globalised world, there needs to be international cooperation in areas such as trade, human rights and the environment. One country acting alone can achieve little without the assistance of others.

Source 1 Australia is an active member of the international community.



The power to enter into treaties is considered an **executive power** under Section 61 of the Australian Constitution. Therefore, it is the responsibility of the executive (the government) rather than the parliament (the legislature) to negotiate treaties, although the Commonwealth Parliament plays a role before a treaty is ratified (brought into legal force).

All treaties must be tabled in both houses of the Commonwealth Parliament at least 15 sitting days prior to the Commonwealth Government agreeing to ratify the treaty. **Ratification** makes it binding under international law. The executive has the right to remove itself from obligations under a treaty if it considers that the treaty no longer serves Australia's interests.

An international treaty is not Australian law. It can only apply in Australia if the parliament passes a statute that includes the provisions set out in the treaty. The statute is then interpreted by the courts in Australia.

International declarations

international declaration a non-binding agreement between countries which set out certain aspirations of the parties to the agreement

In contrast to a treaty, an **international declaration** is a non-binding agreement between countries which sets out certain 'aspirations' or 'intentions' of the parties to the agreement. Declarations can be influential in the development of government policy. They can ultimately lead to a treaty being made, such as in the case of the *United Nations Convention on the Rights of the Child*. An example of a declaration is the *Declaration on the Rights of Disabled Persons*, some of the key features of which are reflected in the *Disability Discrimination Act 1992* (Cth).



Source 2 The UN Convention on the Rights of the Child applies to all children regardless of race, religion, abilities, political views or family circumstances. It emphasises the right of children to live free of harm and exploitation.

Did you know?

One of the most important United Nations conventions ever agreed to on the international stage was the Paris Agreement, which deals with issues such as greenhouse gas emissions. The agreement was negotiated by representatives of 195 countries. Only Syria and Nicaragua did not sign. In June 2017 President Trump announced that the United States would withdraw from the agreement. This reflected the different approaches to climate change policy of the Obama and Trump administrations.

International declarations and treaties and the interpretation of the external affairs power

The Commonwealth has signed a number of treaties and declarations, which gives it a range of topics that can be the subject of Commonwealth legislation. Since the 1980s, the High Court has considered a number of international agreements signed by Australia. In a series of cases, the High Court has interpreted the term 'external affairs' as giving power to the Commonwealth Parliament to pass legislation to give effect to obligations or rights under international law.

The *Tasmanian Dam* case

In the case of the *Commonwealth v Tasmania* (1983) 158 CLR 1 (below), the High Court was required to interpret the words 'external affairs' in Section 51(xxix) of the Constitution.

LEGAL CASE

The *Tasmanian Dam* case

Commonwealth v Tasmania (1983) 158 CLR 1

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 that was within its law-making power (that is, a 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 intervene in an area of state power. The state of Tasmania maintained that it had the right to make laws concerning the dam, which was a state issue.

Intervention by the Commonwealth Parliament

The Commonwealth Parliament maintained that it had a duty to stop 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 List in 1982. According to UNESCO, the *Convention Concerning the Protection of the World Cultural and Natural Heritage* 'links together in a single document the concepts of nature conservation and the preservation of cultural properties. The Convention recognises the way in which people interact with nature, and the fundamental need to preserve the balance between the two.'

The *World Heritage Properties Conservation Act 1983* (Cth) was passed to prohibit construction of the proposed dam. This legislation was based on the core principles of the above convention in seeking to protect fragile wilderness regions. In response, the Tasmanian Government argued that the Commonwealth Parliament had passed law in an area of state responsibility and the Commonwealth law was unconstitutional. The Commonwealth responded that it had the power to intervene because its 'external affairs' power gave it authority to make laws relating to an issue covered by World Heritage listing (an international treaty).


The Examiner

Doorknock appeal tomorrow

NO DAM!

Landmark ruling expands Federal powers

'No vendetta' — PM

$99 OFF SCOOP

$159

Source 3 The front page of *The Examiner*, a daily newspaper in Tasmania, 2 July 1983.

Decision of the High Court

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 too 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* and the *Gordon River Hydro-Electric Power Development Act*. Under Section 109, 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 the Act was in conflict with the Commonwealth Act.

Significance of the *Tasmanian Dam* case

Through the High Court's interpretation of Section 51(xxix) of the Constitution, the Commonwealth Parliament was able to move into a law-making area previously left with the states. This increased the law-making power of the Commonwealth Parliament. 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*.

The decision in the *Tasmanian Dam* case was considered by the High Court five years later in the case of *Richardson v Forestry Commission of Tasmania* (1988) 164 CLR 261. This case considered the same convention as that in the *Tasmanian Dam* case. In this case, the High Court again interpreted the external affairs power as allowing the Commonwealth Parliament to pass laws which fulfilled an international obligation.



Source 4 A protest against the damming of the Franklin River

LEGAL CASE

The *Lemonthyme Forest* case

Richardson v Forestry Commission of Tasmania (1988) 164 CLR 261

Facts of the case

This case involved a consideration of the Commonwealth Parliament's external affairs power in light of its implementation of the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (Convention). One of the objectives of the Convention was to identify and protect areas of World Heritage.

The High Court in this case looked at the validity of the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth), which established a Commission of Inquiry into an area of the Lemonthyme and Southern Forests in western Tasmania. The role of the Commission was to determine whether a particular part of the forests (known as the 'protected area') was or contributed to a World Heritage area. The objective of the *Lemonthyme Act* was to provide measures that would give effect to Australia's obligations under the Convention.



Source 5 The role of the Commission was to determine whether a particular part of the forest was (or contributed to) a World Heritage area.

In this action the plaintiff, who was the federal Minister for the Environment and the Arts, and was responsible for the administration of the *Lemonthyme Act*, tried to enforce Sections 16(1) and (2) of that Act which prohibited, except with the written consent of the Minister, certain acts (including timber harvesting) in the protected area during an interim protection period. The interim protection period was a specified time period during which no works could occur in the protected area until a final decision was made regarding World Heritage protection.

The defendants wanted works in the protected area to continue. Lawyers for the defendants argued that this was not a legitimate use of the Convention and therefore the Commonwealth law was invalid.

The central issue was whether the *Lemonthyme Act* was invalid, and therefore whether the plaintiff could prevent harvesting while the Commission of Inquiry took place.

The decision of the High Court

The High Court held that the *Lemonthyme Act* was supported by the external affairs power. It stated that the Convention was aimed to ensure that measures were taken to protect and conserve the cultural and natural heritage of certain areas. The High Court found that as the Convention required parties to identify areas for protection, it allowed the Commonwealth to establish an interim protection period to operate until a decision was made regarding World Heritage protection.

The High Court found that Article 5 of the Convention places a duty on signatories to 'endeavour, in so far as possible, and as appropriate for each country ... to take appropriate legal,

scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage'.

As it did in the *Tasmanian Dam* case, the High Court spoke of the need for the Commonwealth Parliament to be able to legislate to honour its international obligations under the Convention: 'If part of an area might possess world heritage characteristics and if that part might be damaged unless the area is protected by legislative measures appropriate to preserve that part, a failure to take those measures involves a risk that the Convention obligation will not be discharged. It is only by taking those measures that the risk of failing to discharge the Convention obligation can be avoided.'

The justices made clear, consistent with the majority views in the *Tasmanian Dam* case, that if the Commonwealth Parliament enacts legislation to discharge an international obligation, then the Parliament can choose how that international obligation is discharged, **so long as the legislation is appropriate and adapted to carry out that purpose**. The High Court therefore upheld the right of the Commonwealth Parliament to legislate to protect the area in question.

Significance of the *Lemonthyme Forests* case

Consistent with the decision in the *Tasmanian Dam* case, the High Court held that the legislation passed by the Commonwealth Parliament was supported by Section 51(xxix) of the Australian Constitution, being the power to legislate with respect to external affairs. As the relevant international convention required parties to identify and protect areas which were considered appropriate to have World Heritage protection, the High Court considered that establishing a commission to identify those areas was within the power of the Commonwealth Parliament.

In particular, the High Court found that the *Tasmanian Dam* case established that if the Commonwealth Parliament passes legislation with the objective of discharging an international obligation (contained in an international convention), then it has the choice as to how the law achieves that objective, **so long as the law is appropriate and adapted to attain that objective.**

Other High Court cases involving the interpretation of the external affairs power are set out below.

Study tip

When you are using a case in your answers, make sure you name it properly. You don't need the full citation, but you must name it in a way that makes it clearly identifiable.

Seas and Submerged Lands case

LEGAL CASE

New South Wales v Commonwealth (1975) 135 CLR 337

In the case of *New South Wales v Commonwealth*, an issue arose about whether the Commonwealth Parliament's external affairs power gave it power to pass legislation with respect to territorial seas.

The law in question was the *Seas and Submerged Lands Act 1973* (Cth), a Commonwealth statute which provided the Commonwealth with sovereign rights over the continental shelf (the seabed and subsoil of certain submarine areas) for the purpose of exploring it and exploiting its natural resources. This also included sovereignty over a belt of sea adjacent to the coast of Australia, and the airspace over that sea, the seabed and subsoil of the sea. The Act gave effect to two international conventions: the 1958 *Convention on the Territorial Sea and the Contiguous Zone*, and the 1958 *Convention on the Continental Shelf*, both ratified by Australia. Both conventions made available to Australia sovereignty and sovereign rights to these areas.

All of the states challenged the legislation in the High Court, claiming it was invalid.

A majority of the High Court justices ruled that the Commonwealth did have the power to pass the legislation, because the sovereignty rights were available to Australia through an international agreement; in this case through the conventions.

Justice Murphy noted that the Commonwealth Parliament had power under Section 51(xxix) to make laws to implement treaties or conventions to which Australia is a party. He stated that:

> The Constitution, particularly s. 51 (xxix.), is intended to enable Australia to carry out its functions as an international person, fulfilling its international obligations and acting effectively as a member of the community of nations. If not, Australia would be an international cripple unable to participate fully in the emerging world order.

The High Court has also interpreted the external affairs power to hold that the power can be used by the Commonwealth to pass legislation about matters external to Australia. That is, the external affairs power is not limited to making laws in relation to international treaties. This is explored in the case below.

LEGAL CASE

The *War Crimes* case

Polyukhovich v Commonwealth (1991) 172 CLR 501

Ivan Polyukhovich was born in Ukraine in about 1916. After the German invasion of the Soviet Union in 1941, Ukraine was occupied by Nazi troops. In the process, some Ukrainian citizens collaborated with the German Army (i.e. they cooperated with the enemy). The collaborators included Polyukhovich, who allegedly participated in the execution of approximately 850 people from a Jewish ghetto in Serniki, Poland. Further allegations were made about the executions of civilians in August and September 1942. When the Germans left Ukraine, Polyukhovich was employed in Germany.



Source 6 Polyukhovich allegedly participated in the execution of approximately 850 people from a Jewish ghetto in Serniki, Poland.

In December 1949, Polyukhovich and his family arrived in Melbourne and received Australian citizenship in 1958. In 1990, Polyukhovich was arrested and charged with 24 counts of murder and complicity in 850 counts of murder committed during the Second World War.

Constitutional validity

Before his prosecution commenced, Polyukhovichcommenced legal action in the High Court against the Commonwealth on the grounds that the *War Crimes Amendment Act 1988* (Cth) and/or the *War Crimes Act 1945* (Cth) were invalid. Those statutes allowed the Commonwealth to prosecute people for 'war crimes' committed during the Second World War (i.e. crimes that occurred outside of Australia).

One of the issues the High Court had to decide was whether the Commonwealth

Parliament had power under Section 51(xxix) of the Australian Constitution to enact the legislation. If the High Court found that the Commonwealth did not have the right to create these laws, then the prosecution of Polyukhovich could not proceed.

The High Court had to consider whether the Commonwealth Parliament had the power to create law on matters that occurred decades ago, in a different country.



Source 7 Ivan Polyukhovich leaving his home in Adelaide

Decision of the High Court

The majority of the High Court found in favour of the Commonwealth. It held that 'mere geographic externality' was sufficient to allow the Commonwealth Parliament to exercise its external affairs power. In other words, the fact that the deaths occurred outside Australia made the investigation and prosecution of the alleged offences an 'external affair' that fell within the powers of the Commonwealth Parliament.

The High Court also found that the *War Crimes Amendment Act* was consistent with Article 15 of the *International Covenant on Civil and Political Rights* (ICCPR), which states that 'Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'. The ICCPR is an international treaty that came into effect in 1976, and which Australia signed in 1980.

Polyukhovich was eventually sent for trial before a jury, and was acquitted in May 1993. He died in 1997, aged 81.

The impact of international declarations and treaties

International agreements have significantly influenced the way in which the external affairs power has been interpreted by the High Court. The court has adopted a broad interpretation of the external affairs power and held that it enables the Commonwealth Parliament to enact legislation, the objective of which is to give effect to obligations found in international law.

High Court interpretations of the external affairs power in relation to international obligations have therefore expanded and broadened what 'external affairs' means. The impact of the High Court's interpretation of the power includes as follows:

- The cases highlight the way the external affairs power can be applied to any matter that is contained in an international document such as a treaty or declaration. This allows the Commonwealth to create law to address global concerns.
- The *Tasmanian Dam* case and the *Lemonthyme Forest* case, among others, uphold the idea that the Commonwealth Parliament is able to legislate in areas in which it has no express constitutional power if it were to give effect to its international obligations. For example, environment is an area of residual power, but in both these cases, the Commonwealth Parliament was able to legislate in this area where it was giving effect to obligations set out in an international treaty.
- The legal principles in the *Tasmanian Dam* case were affirmed by the High Court in the *Lemonthyme Forests* case. In particular, in that case, the majority held that it was a matter for the Commonwealth Parliament to decide how to give effect to a treaty, so long as the means used was appropriate.
- The *Seas and Submerged Lands* case highlights the view of the High Court that the Commonwealth could legislate in relation to areas within its territorial waters. Australia was signatory to United Nations conventions in relation to sovereignty and sovereign rights over certain areas.

Did you know?

At the time of the Second World War, there was no Australian legislation that criminalised war crimes in Europe. Following the passing of the *War Crimes Act*, there was a 5-year period of military courts sitting in Darwin, Singapore, Hong Kong and locations in the south-west Pacific. These courts conducted 296 war crimes trials involving 924 individual Japanese defendants.

- In a separate High Court case, *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, the High Court considered that the external affairs power is not limited to implementing an international agreement, but that it could also be relied on to implement obligations found in other forms of international law.
- The High Court in the *Polyukhovich* case is an example of the Court interpreting the external affairs power as allowing the Commonwealth Parliament to make laws in relation to matters external to Australia. Therefore, there are other ways that the Commonwealth Parliament can use the external affairs power to make laws, other than in relation to international treaties and declarations.

legislative power the power to make laws, which resides with the parliament

express rights rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed at a referendum

Limitations imposed on the Commonwealth Parliament

Despite the broad interpretation of the external affairs power in light of international agreements, the High Court has found that it is not an unlimited power. Some of the limitations that the High Court has considered are as follows.



Source 8 The High Court found that having become a party to an international treaty, the Commonwealth Parliament is able to rely on the external affairs to enact legislation which gives effect to an international obligation.

Extending beyond the treaty

The High Court has found that having become a party to an international treaty, the Commonwealth Parliament is able to rely upon the external affairs power to give it power to enact legislation which gives effect to an international obligation. However, this is not an unlimited **legislative power**. It does not enable the Commonwealth to expand far beyond what is in the treaty. On this point, in the *Tasmanian Dam* case Justice Mason stated:

> I reject the notion that once Australia enters into a treaty parliament may legislate with respect to the subject-matter of the treaty as if that subject-matter were a new and independent head of Commonwealth legislative power. The law must conform to the treaty and carry its provisions into effect.

Bona fide agreement

Further, the High Court has held that the treaty or other international agreement must be *bona fide*; that is, genuine (though noting that it would be difficult to argue that Australia's agreement to sign a treaty and give effect to that treaty is unlikely to be disingenuous).

Constitutional rights

The Commonwealth Parliament does not have free reign to give effect to obligations contained in international agreements. In particular, the parliament is limited by **express rights** contained in the Australian Constitution such as the right to freedom of religion under Section 116. If legislation passed by the Commonwealth Parliament giving effect to a treaty obligation interferes with an express right, that legislation is likely to be invalid.

Declarations v treaties

The High Court's interpretations have to date focused on the interpretation of the external affairs power in relation to treaties. Given the High Court's broad interpretation of 'external affairs' to date, it is likely that domestic laws which give effect to international obligations or aspirations set out in a declaration are also likely to fall under that power, though it will depend on the case before the

court. Justice Mason's comments in the *Koowarta* case suggest that international 'obligations' do not necessarily need to be specified in a treaty. Further, given that matters contained in declarations often then become obligations under treaties (as stated above), then it is often the case that terms set out in declarations become part of domestic law which the Commonwealth Parliament has the power to pass.

Study tip

A practice assessment task for Unit 4 – Area of Study 1 can be found on the Unit 4 Assessment tasks topic on page 532.

11.4 CHECK YOUR LEARNING

Define and explain

1 Using an example, define the following terms:
   - **a** treaty
   - **b** declaration.

2 Provide two reasons why it is important for Australia to enter into international treaties.

3 Explain two limitations that are imposed on the Commonwealth Parliament when legislating to give effect to an international treaty.

Synthesise and apply

4 Read the legal case *Commonwealth v Tasmania*.
   - **a** Explain the arguments made by the Tasmanian Government as to why it should be permitted to build the dam on the Franklin River.
   - **b** Why did the Commonwealth oppose the building of the dam?
   - **c** What was the international treaty that formed the basis of this case?
   - **d** Explain the relationship between the external affairs power of the Commonwealth and the right of the Commonwealth to legislate to prevent the construction of the dam.
   - **e** Outline the decision of the High Court in this case.
   - **f** Describe the impact of this case on the law-making powers of the state and Commonwealth Parliaments.
   - **g** Explain how the decision in the case of *Richardson v Forestry Commission of Tasmania* reflected the principles set out in the *Tasmanian Dam* case with respect to the external affairs power.

5 Read the legal case *New South Wales v Commonwealth*.
   - **a** Outline the material facts of this case.
   - **b** With reference to the judgment in this case, explain the link between United Nations agreements and the ability of the Commonwealth to legislate in regard to its external affairs power.

6 Read the legal case *Polyukhovich v Commonwealth*.
   - **a** Outline the key facts of this case.
   - **b** What did the High Court have to decide?
   - **c** Outline the decision of the High Court, and explain its relevance to the interpretation of the external affairs power.

Analyse and evaluate

7 To what extent could it be argued that the decision in the *Tasmanian Dam* case resulted in a significant increase in the law-making powers of the Commonwealth Parliament, to the detriment of the states? Give reasons.

8 'If Australia ratifies an international agreement such as the 1951 Convention Relating to the Status of Refugees, then any law that the Commonwealth Parliament passes which gives effect to that convention will be valid.' Discuss whether you agree with this statement.

Check your obook assess for these additional resources and more:

- **Student book questions**: 11.4 Check your learning
- **Going further**: Other influences on the external affairs power
- **Worksheet**: Treaties, declarations and the High Court
- **Weblink**: Rights and protections

CHAPTER SUMMARY

High Court cases and Sections 7 and 24 of the Constitution

- Section 7 – Senate to be composed of senators for each state, directly chosen by the people of the state
- Section 24 – House of Representatives to be composed of members directly chosen by the people of the Commonwealth
- High Court has established an implied freedom of political communication
  - *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106
  - *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
- High Court has established that Sections 7 and 24 enshrine the principle of representative government
  - *Roach v Electoral Commissioner* (2007) 233 CLR 162
  - *Rowe v Electoral Commissioner* (2010) 243 CLR
  - *Murphy v Electoral Commissioner* (2016) 334 ALR 369

Referendums

- Referendum outcomes that protected the Australian Constitution (people voted no):
  - 1999: Republic
- Referendum outcomes that changed the Australian Constitution (people voted yes):
  - 1946: Social security
  - 1967: People of the Aboriginal race: Commonwealth powers

The High Court and the division of law-making powers

- *R v Brislan; Ex parte Williams* (1935) 54 CLR 262
- *Ha v New South Wales* (1997) 189 CLR 465
- *New South Wales v Commonwealth* (2006) 229 CLR 1

International treaties and declarations

- Treaty – binding agreement between countries and is governed by international law
- Declaration – non-binding agreement between countries which sets out certain 'aspirations' or 'intentions' of the parties to the agreement
- High Court has interpreted external affairs power in relation to international declarations and treaties
  - *Commonwealth v Tasmania* (1983) 158 CLR 1
  - *Richardson v Forestry Commission of Tasmania* (1988) 164 CLR 261
  - *New South Wales v Commonwealth* (1975) 135 CLR 337

REVISION QUESTIONS

1 Describe the role of the High Court when hearing cases involving the Australian Constitution.
(3 marks)

2 Provide one similarity and one difference between an international treaty and an international declaration.
(4 marks)

3 In your own words, explain what you believe were the intentions of the original writers of the Australian Constitution when drafting Sections 7 and 24.
(4 marks)

4 With reference to one case that you have studied this year, discuss the impact of international instruments on the interpretation of the external affairs power.
(8 marks)

Check your obook assess for these additional resources and more:

» **Student book questions** Ch 11 Review
» **Revision notes** Ch 11
» **assess quiz** Ch 11 Test your skills with an auto-correcting multiple-choice quiz



5 'Decisions of the High Court have played a significant role in shifting the balance of power between parliaments in Australia.'

With reference to one case that you have studied this year, explain the above statement.

(5 marks)

6 To what extent could it be argued that the existence of an independent High Court allows for protection of our constitutional rights? In your answer, refer to one case that you have studied in this chapter.

(5 marks)

7 'While the implied freedom of political communication remains an important means of allowing Australians to engage freely in debate, the limits imposed on the freedom in both the *Lange* and *Monis* cases cause concern. While the Commonwealth Parliament can limit the implied freedom in circumstances that the High Court deems appropriate, we are at risk of losing our freedom in this important area altogether.'

Discuss this comment. In your answer, refer to two cases that you have studied in this chapter.

(8 marks)

PRACTICE ASSESSMENT TASK

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

The power of the High Court and the people

Sir Prancealot, a professor of law at the University of Hard Knox, said in his speech at a graduation ceremony:

> The High Court's interpretation of the Australian Constitution has sometimes changed the division of law-making powers. Sometimes its interpretation has also resulted in a broadening of the rights afforded to Australians. Three High Court cases stand out as having the greatest impact on the powers of the parliament. The *Tasmanian Dams* case confirmed the power of international declarations and treaties to weave their way into the Australian Constitution to impact on the external affairs power. The *Roach* case and the *Lange* case gave us significant re-interpretations of sections 7 and 24 of the Australian Constitution.
>
> But the High Court is no more powerful than the people of Australia. The people protect the Australian Constitution. It's like their own baby, and they often resist attempts to change it. They can reject proposed changes which would see a new type of government in Australia, and you can see that from the referendum in 1999. They can also broaden the powers of the Commonwealth, as we see from the referendum in 1967.

Practice assessment task questions

1 **a** Define the words 'treaty' and declaration'.

(2 marks)

b Describe one reason why the Commonwealth Government may enter into a treaty.

(3 marks)

2 Explain the role of the High Court in relation to the division of constitutional law-making powers in Australia.

(3 marks)

3 Discuss the significance of one High Court case that has interpreted Sections 7 and 24 of the Constitution.

(5 marks)

4 Using one referendum that you have studied this year, explain how the Australian people can change or protect the Australian Constitution.

(6 marks)

5 'The external affairs power of the Commonwealth has been used as a powerful means of creating legislation by the parliament.'

Referring to one case you have studied this year, discuss the impact of international treaties on the external affairs power.

(6 marks)

Total: 25 marks



CHAPTER 12

THE PARLIAMENT

Source 1 The main role of parliament is to make laws and change existing laws. Because Australia is a federation, each state and territory has its own parliament responsible for making laws for the people who live there. Opposition Leader Bill Shorten is pictured here during question time at Parliament House in Canberra. In this chapter, you will explore how parliaments make laws.



OUTCOME

By the end of **Unit 4 – Area of Study 2** (i.e. Chapters 12, 13 and 14), you should be able to discuss the factors that affect the ability of parliament and courts to make law, evaluate the ability of these law-makers to respond to the need for law reform, and analyse how individuals, the media and law reform bodies can influence a change in the law.

KEY KNOWLEDGE

In the chapter, you will learn about:

- factors that affect the ability of parliament to make law, including:
  - the roles of the houses of parliament
  - the representative nature of parliament
  - political pressures
  - restrictions on the law-making powers of parliament.

KEY SKILLS

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- discuss the factors that affect the ability of parliament to make laws
- synthesise and apply legal principles to actual scenarios.

KEY LEGAL TERMS

balance of power (between political parties) if no single party has a majority of seats in the lower house of parliament, the crossbenchers (independent members) may be able to vote in a bloc (together) to reject government bills so they do not pass

crossbenchers independent members of parliament or members of minor parties (i.e. not members of the government or opposition). They are named after the seating area provided for them, called the 'crossbenches'

hostile upper house a situation in which the government does not hold a majority of seats in the upper house and relies on the support of the opposition or crossbench to have their bills passed

micro party a very small political party (e.g. one that is formed around a single-issue)

minor political parties political parties that do not have elected representatives to win government but are able to place pressure on the government to address specific issues and introduce law reform

minority government a government that does not hold a majority of seats in the lower house and relies on the support of minor parties and independents (i.e. the crossbench) to form government

rubber stamp a term used to describe a situation in which the Senate (i.e. upper house of parliament) automatically approves decisions made in the House of Representatives (i.e. lower house) because the government holds a majority of seats in both houses and votes along party lines

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

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12.1 INTRODUCTION TO THE PARLIAMENT

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

legislature
a legal term used to describe the parliament (which has the power to make the law)

laws
legal rules made by a legal authority that are enforceable by the police and other agencies

The main role of **parliament** (also referred to as the **legislature**), is to make the law and change the law. Parliament is the supreme law-making body, meaning it can make and change any law within its power.

Parliament has many different features, structures and processes to make sure it is an effective law-making body. For example, it consists of members who are elected by the people to make **laws** on their behalf. If these members fail to make laws that reflect the views and values of the people, they risk not being re-elected. However, while parliament is an effective law-making body, it does have limitations.

In this chapter you will explore four factors that affect the ability of parliament to make law:

- the roles of the houses of parliament
- the representative nature of parliament
- political pressures
- restrictions on the law-making powers of parliament.

Before you consider these factors, you might like to review the roles of the houses of parliament (Victorian and Commonwealth) in law-making, examined in Chapter 10 (Topics 10.2 and 10.3).

Australia's parliamentary system

bicameral parliament
a parliament with two houses (also called chambers). In the Australian Parliament, the two houses are the Senate (upper house) and the House of Representatives (lower house). In the Victorian Parliament the two houses are the Legislative Council (upper house) and the Legislative Assembly (lower house)

Australia has a federal system of government. This means the country is divided into states, each of which has its own parliament that is responsible for making laws for the residents of that state. In addition, there is one central or federal parliament with power to make laws that apply to the entire country.

The Commonwealth and Victorian Parliaments consist of two houses. Because these parliaments are made up of two houses, they are referred to as **bicameral parliaments** (i.e. an upper house and lower house). The Queen (or Crown) is the head of state in Australia. Her representatives are part of both the federal and state parliaments.



Source 1 The main role of parliament is to make the law and change the law.

The role of parliament in law–making

All laws made by parliaments must be passed or approved by a majority of members in both houses of parliament, and by the Crown. The role of the houses of parliament, at both Commonwealth and the Victorian level, is summarised in Source 3 below.

ROLE OF THE LOWER HOUSE	EXPLANATION
Initiate and make laws	While all bills except money bills (which approve government expenditure) can be introduced into either house by any member of the parliament, most are introduced to the lower house by members of the government.
Determine the government	After an election, the political party (or coalition of parties) that has the majority of members in the lower house forms government.
Provide responsible government	The government must be accountable to the parliament and the people and if the government loses the support of the lower house it must resign.
Represent the people	Members of the lower house are elected to represent the people, and therefore proposed laws introduced into the lower house should reflect the views and values of the majority of the community.

ROLE OF THE LOWER HOUSE	EXPLANATION
Publicise and scrutinise government administration	The lower house must publicise government policies, question the activities of the government and discuss and debate matters of public importance.
Act as a house of review	The lower house will act as a house of review when a bill has been initiated and agreed upon in the upper house.
Control government expenditure	All appropriation bills commence in the lower house. The house also has parliamentary committees to examine government spending.
ROLE OF THE UPPER HOUSE	**EXPLANATION**
Act as a house of review	Given the majority of bills are initiated in the lower house, the upper house has the task of reviewing and scrutinising the bills already passed through the lower house.
Examine bills through its committees	The extensive committees debate proposed laws at length and recommend to the upper house whether bills should be supported.
Initiate and pass laws that represent the interests of the states	The law-making powers of the upper house are seen as being equal to the lower house in that it can initiate all bills except appropriation bills.

Source 2 A summary of the roles of the houses in law-making. More information can be found in Topic 10.2 of Chapter 10.

The role of the Crown in law-making

Other than withholding royal assent, the two main roles of the Crown in law-making are set out in Source 3 below.

GRANT ROYAL ASSENT	EXECUTIVE COUNCIL
• Queen's representative is required to approve bills before they can become law. • Royal assent is normally given as a matter of course.	• The Queen's representative has the responsibility of appointing the Executive Council. • The role is to give advice on government matters and approve secondary legislation.

Source 3 A summary of the role of the Crown in law-making. More information can be found in Topic 10.3 of Chapter 10.

12.1 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by a bicameral parliament and federal system of government.

Synthesise and apply

2 Prepare a PowerPoint, poster, brochure or quiz that summarises the role of the houses of Commonwealth and Victorian Parliaments in law-making.

Analyse and evaluate

3 Visit the website of the Governor-General or Victorian Governor. Discuss whether or not you think they have an important role to play within our parliamentary system and the community in law-making.

Check your obook assess for these additional resources and more:

- **Student book questions**
  12.1 Check your learning
- **Video tutorial**
  Introduction to Chapter 12
- **Going further**
  Double dissolution
- **Weblink**
  Forming and governing a nation

12.2 THE ROLES OF THE HOUSES OF PARLIAMENT

The roles of the houses of parliament is one factor that can affect the ability of parliament to make law. In this topic you will explore the following in relation to the roles of the houses of parliament:

- the effectiveness of the lower house
- the effectiveness of the upper house
- the law-making process
- the **committee system**.

committee system
a system used by federal and state parliaments in Australia that involves the use of separate working parties (i.e. committees) to investigate a wide range of legal, social and political issues and report back to the parliament about the need for law reform

House of Representatives
the lower house of the Commonwealth Parliament

Legislative Assembly
the lower house of the Victorian Parliament

political party
an organisation that represents a group of people with shared values and ideas, and which aim to have its members elected to parliament

coalition
an alliance of two or more political parties that join to form government

law reform
the process of constantly updating and changing the law so it remains relevant and effective

private member
a member of parliament who is not a government minister

private member's bill
a bill introduced into parliament by a member of parliament who is not a government minister

The effectiveness of the lower house



Source 1 The effectiveness of the lower house can depend on whether the government holds a majority or a minority in the house.

Majority government

The lower house (i.e. the **House of Representatives** in the Commonwealth Parliament and the **Legislative Assembly** in the Victorian Parliament) is often referred to as the house of government because the **political party** or **coalition** that holds the majority of seats in the lower house forms government.

If the government holds a majority of seats in the lower house, as is usually the case, its legislative program or policies will generally be accepted and passed by the lower house. It can then progress to the upper house and, if passed, become law. This allows the government to fulfil its election promises and program of **law reform**.

If the government has a majority in both houses, it has the power to introduce whatever bills it likes and implement all of its legislative program. Only public pressure and the risk of not being re-elected can prevent it from doing so. However, having a majority in both houses can mean bills and issues are not adequately debated in the upper house. It also gives the government the ability to reject bills without debate when they have been introduced by a **private member**.

Private member's bills are introduced by non-government members of parliament. They are not a part of the government's legislative program and therefore do not generally have the support of the government. Most private member's bills are introduced into the upper house, where the government often does not hold a majority of seats. In this way the bill may at least be discussed and debated by the upper house before being rejected by the lower house.

While private member's bills often fail, introducing a bill into either house will at least raise some publicity for the cause by gaining media attention and raising the awareness of members of parliament.

Private member's bill on greenhouse gases

CASE STUDY

In 2016, the then Deputy Leader of the Australian Greens, Adam Bandt, introduced the Renew Australia Bill 2016 (Cth) into the House of Representatives. The purpose of the bill was to establish Renew Australia (a proposed statutory authority to oversee the transformation of Australia's electricity system). This was part of the Australian Greens' strategic plan to create a new clean economy with at least 90 per cent renewables by 2030.

As Mr Bandt was not a member of government of the day but a **crossbencher**, the Bill was introduced as a private member's bill. This means it was not part of the government's legislative program and did not have the support of the government. At the time of the introduction of the Bill on 2 May 2016, the government's policy was to encourage mining development including coal mining, so its progress through the parliament to become law was not likely. It did, however, raise awareness of the need to create more renewable energy.

In 2017 Senator Richard Di Natale, the Leader of the Greens, introduced the same bill into the Senate.



Source 2 Adam Bandt MP introduced a private member's bill in 2016 to establish Renew Australia, but the bill did not have the support of government.

crossbenchers independent members of parliament or members of minor parties (i.e. not members of the government or opposition). They are named after the seating area provided for them, called the 'crossbenches'

Minority government

A **hung parliament** can also influence the effectiveness of parliament. A **hung parliament** is where neither major political party wins a majority of seats in the lower house at an election. In situations such as this, the major political parties must seek the support of members of **minor political parties** and **independents** (known as the **crossbench**) to enable them to form a **minority government**.

One main problem associated with a minority government is that it must constantly negotiate with minor parties and independents to ensure its legislative program is supported and passed by the lower house. This can result in the government being forced to alter or 'water down' its original policies often to the annoyance of voters.

By contrast, however, a minority government does ensure that government bills are thoroughly discussed and debated in the lower house. Even without a majority of seats in the lower house, minority governments can be successful in passing important law reforms. For example, between 2010 and 2012, the minority Gillard Government managed to get 432 bills passed by the Commonwealth Parliament.

hung parliament a situation in which neither major political party wins a majority of seats in the lower house of parliament after an election

independents individuals who stand as candidates in an election but do not belong to a political party

minority government a government that does not hold a majority of seats in the lower house and relies on the support of minor parties and independents (i.e. the crossbench) to form government

The effectiveness of the upper house



Source 3 The effectiveness of the upper house can depend on whether the upper house is a rubber stamp or is hostile.

Rubber stamp

Since all bills must be passed by both houses of parliament before they can become law, the composition (make-up) of the houses is an important factor affecting the ability of the parliament to make law.

Senate
the upper house of the Commonwealth Parliament

Legislative Council
the upper house of the Victorian Parliament

The composition of the upper house (i.e. the **Senate** in the Commonwealth Parliament and the **Legislative Council** in Victorian Parliament) is a significant factor that can either assist or limit the ability of a government to implement its legislative program. As we have seen, if members of the government vote, as they usually do, according to the directives of their party (i.e. along party lines) and the government holds a majority of seats in both houses, government bills will inevitably be passed.

While this allows the government to introduce the law reforms and promises it made during their election campaign, it may prevent the upper house from adequately fulfilling its role as a 'house of review' or representing the interests of the states or regions (in the Commonwealth and Victorian Parliaments respectively). When the government holds a majority of seats in both houses, the upper house can become a '**rubber stamp**' that merely confirms the decisions made by the government in the lower house.

rubber stamp
a term used to describe a situation in which the upper house of parliament automatically approves decisions made in the lower house because the government holds a majority of seats in both houses and votes along party lines

Hostile upper house

If the government does not hold a majority of seats in the upper house, referred to as a **hostile upper house**, it will face difficulties implementing its policy agenda. This is because the upper house will be able to reject the government's bills, or negotiate significant amendments to them.

hostile upper house
a situation in which the government does not hold a majority of seats in the upper house and relies on the support of the opposition or crossbench to have their bills passed

At the Commonwealth level, the Senate is often hostile. While this may mean more thorough debate and scrutiny of laws, it can also prevent or obstruct the ability of the government to implement law reform. In April 2016, the Senate twice failed to pass legislation on the reintroduction of the Australian Building and Construction Commission (ABCC). This led to Prime Minister Malcolm Turnbull visiting the **Governor-General** to ask him to dissolve both houses of parliament to force an early general federal election. The ABCC had been abolished by the federal Labor Government in 2012, and the government wanted to reintroduce it as a way to monitor the building and construction industry and improve workplace relations.

Governor-General
the Queen's representative at the Commonwealth level

In Victoria, the Legislative Council was considered conservative and obstructive for much of its history. In the past it frequently delayed or rejected legislation.

In 2003, however, the Legislative Council agreed to reforms to the Victorian state constitution which included giving up its power to block supply bills (government expenditure bills) and providing a method of solving deadlocks.



Source 4 Prime Minister Malcolm Turnbull returning to Parliament House in Canberra after visiting the Governor-General to request a double dissolution of the Commonwealth Parliament in 2016.

The balance of power

Another problem associated with having a hostile upper house is that it can allow a small group of independents or members of a **minor party** or **micro party** to hold a disproportionately high level of power compared to their voter base – especially if they are placed in a position where they can vote with the **opposition** to block government bills. A situation where a small group of independents or minor political parties are able to vote with the opposition to reject a bill is referred to as the crossbench holding the **balance of power**. In these circumstances, the government will need to win the support of the minority parties and independents to have bills passed through the upper house.

Another potential problem associated with minor parties and independents holding the balance of power in the upper house is that they often do not represent the views and values of the majority of the community because they often focus on a relatively narrow range of policy issues without having a detailed plan or stance on a broad range of key issues. For example, after the 2016 federal election, Senators Jacqui Lambie and Pauline Hanson attracted particular criticism from some political commentators for having a narrow policy agenda that did not address the complexities associated with major areas of law-making. This included areas such as reforming the taxation and social welfare systems and increasing economic stability and growth.



Source 5 Senators Jacqui Lambie and Derryn Hinch (the respective leaders of the Jacqui Lambie Network and Derryn Hinch's Justice Party) were members of the Senate crossbench that held the balance of power after the 2016 federal election.

Study tip

Make sure you have an understanding of the current composition of the houses of parliament at both Victorian and Commonwealth levels. Go to the parliamentary websites and determine who holds the power in each house. This will help you develop an understanding of the contemporary issues facing the parliaments, rather than discussing the issues in theory.

minor party
political parties that do not have elected representatives to win government but are able to place pressure on the government to address specific issues and introduce law reform

micro party
a very small political party (e.g. one that is formed around a single-issue)

opposition
the next-largest political party after the government. The opposition questions the government about policy matters and is responsible for holding them to account

balance of power
(between political parties) if no single party has a majority of seats in the lower house of parliament, the crossbenchers (independent members) may be able to vote in a bloc (together) to reject government bills so they do not pass

On the other hand, a diverse upper house can equally be seen as an opportunity for a more effective parliament. The government may be forced to take account of a wider range of views, and reflect community interests better. Over the last two decades, support for minor and micro parties and independents has increased. At the 2016 federal election, minor parties and independents won a record high 23 per cent of the vote. While still relatively low compared with support for the major parties, this suggests voters may be turning away from the major parties and are attracted to minor parties with a narrower focus.

The impact minor parties, micro parties and independents can have on the government's ability to pass bills through the Senate is demonstrated in the case study below.

CASE STUDY

A hostile Senate blocks the plebiscite

In 2017, Senator Cory Bernardi resigned from the Liberal Party to form his own minor party called the Australian Conservatives. The Liberal–National Coalition government faced a hostile Senate and had to rely on the support of the crossbench to pass bills through the Senate. While many bills were still ultimately passed, the government was forced to make amendments to some of its original policies while others were outright rejected.

For example, in November 2016, some of the independent senators and senators from minor parties joined with the opposition and the Greens (who together, at the time, held 35 of the total 76 seats in the Senate) to block the government's proposal to hold a national plebiscite (a public vote) on whether Australian law should be changed to allow for marriage equality (namely, same-sex marriage). The government introduced the bill seeking approval to hold the plebiscite, at an estimated cost approximately $170 million, believing it would be the quickest way to determine support for same-sex marriage. The opposition, however, did not support the plebiscite, claiming it was an unnecessary waste of public money that would lead to a damaging public debate on an issue that polls clearly indicated had the support of the majority of Australians.

The law-making process

royal assent
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or the governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)

At both the Commonwealth and Victorian levels, a bill must be passed by both houses before it can become law. All bills must progress through several stages in each house before they can receive **royal assent**. These stages include debating the bill in broad or general terms (during the second reading debate) and examining it in great depth, clause by clause (during consideration in detail).

There are both strengths and weaknesses of the roles of the houses in this process.

Strengths

- The requirement that a bill must be passed by both houses gives the second house (usually the upper house, because in reality most bills are introduced by the government in the lower house) an opportunity to check the bill and suggest amendments.
- An important part of the law-making process is the debate that takes place in each of the houses. Members can point out any flaws or any positives of the bill. In this way a wide range of views on the bill can be considered during the debates that take place.
- Parliament is able to change the law quickly if necessary, particularly if the government has a majority in both houses of parliament, even though the legislative process is generally slow (see below). For example, in 2017 the Bail Amendment (Stage One) Bill 2017 (Vic), introduced in the Legislative Assembly on 24 May 2017, was passed by both houses and granted royal assent by 27 June 2017. The

Bill sought to strengthen **bail** laws for certain **accused** persons after an accused person, who had been released on bail, allegedly killed six pedestrians and injured many others when he recklessly drove his car down Bourke Street in Melbourne in January 2017.

- At the Victorian level, a compatibility statement is tabled to ensure that the bill that is being presented is compatible with human rights as protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

bail
the release of an accused person from custody on condition that they will attend a court hearing to answer the charges

accused
a person charged with a criminal offence



Source 6 The Bail Amendment (Stage One) Bill 2017 (Vic) sought to strengthen bail laws for certain accused persons

Weaknesses

- The need to pass legislation through two houses before it can become law can slow the progress of legislative reform.
- Parliament only sits for a limited number of days each year, and laws must be made during parliament sitting time. This can slow the legislative process. For example, in 2016, the Senate and the House of Representatives only sat for 42 and 51 days respectively, compared with 60 and 75 days in 2015. The government can, however, extend the sitting period or even recall parliament for a special session.
- The parliament as a whole is restricted in its law-making ability by the fact that it can only pass the laws that are presented to it, usually by the government of the day. The government therefore has a responsibility to ensure that the laws presented to parliament, as far as possible, respond to the needs of the people.

The committee system

Another strength of the houses of parliament in the law-making process is that both the lower and upper house (at Commonwealth and Victorian level) have an extensive committee system. This allows members of the houses to examine and evaluate the need for law reform, and provides a way for members of the community to have input on the issues being investigated. Their views will then be considered in the parliamentary decision-making process. For example, in addition to a range of other committees, the Victorian Legislative Council has three ongoing or permanent committees (called standing committees) that examine the need for law reform and propose legislative reform in the areas of economy and infrastructure, environment and planning, and legal and social issues. The committee system is examined later in this chapter and discussed in greater detail in Chapter 14.

Summary of the roles of the houses of parliament in law-making

A summary of how the roles of the houses of parliament in law-making affect the ability of parliament to make laws is set out in Source 7.

FACTOR	SUMMARY
Effectiveness of the lower house	• Having a majority in both houses makes it easy for the government to implement its legislative program. • Having a majority in both houses allows the government to pass bills with less debate. • Government can reject private member's bills without debate. • A minority government can be forced to alter its legislative program to gain the support of minor parties and independents needed to allow them to govern. • Minority government ensures thorough discussion and debate of bills.
Effectiveness of the upper house	• A government with a majority in the upper house may result in bills being passed with less scrutiny (i.e. the rubber stamping of bills) and debate. • A hostile upper house can ensure government bills are carefully scrutinised. • A hostile upper house can block bills or force amendments and obstruct or slow the government's ability to implement its legislative program. • Having the crossbench hold the balance of power can increase the range of interests considered and consulted in law-making, but they may not represent the majority.
Law-making process	• Provides opportunity to check bills and suggest amendments. • Thorough debating can take place • Enables law reform, with the support of both houses, to take place quickly if necessary. • At the Victorian level, compatibility statement ensures human rights are protected. • Law reform can be a slow process, especially given parliament sits for a limited number of days. • Government can restrict law-making ability.
Committee system	• Extensive committee system which allows members of community input on issues.

Source 7 The way the roles of the houses of parliament may affect the parliament's ability to make laws

Did you know?

The Mackerras Pendulum was invented by Malcolm Mackerras a psephologist (i.e. an election analyst). The pendulum works out the swing needed for a seat to change hands. Seats are classified as 'marginal', 'fairly safe' or 'safe' depending on how far the pendulum has to swing.

→ GOING FURTHER

Question time in parliament is an opportunity for members of government to be questioned. Question time is open to the public and is publicised on television and on radio. It is a way that government can be held accountable for their actions.

Question time is often criticised for being an ineffective means of making our government accountable. For example, 'Dorothy Dixers' are used. Dorothy Dixers are questions that members of the governing party ask the government ministers - they are 'rehearsed' and give an opportunity to government to boast about their policies or work. This process is named after an American journalist who used to frame her own questions to write answers to.



Source 8 The law-making process provides opportunity to check bills and suggest amendments

12.2 CHECK YOUR LEARNING

Define and explain

1 Identify the four main factors that affect the ability of parliament to make laws.
2 Name the lower and upper houses of the Commonwealth Parliament and Victorian Parliament.
3 Using an example, define the following terms:
   a hostile upper house
   b minority government
   c minor party.

Synthesise and apply

4 Explain how a minority government may negatively influence the effectiveness of the lower house. Suggest how these problems might be overcome.
5 Do the terms 'hostile upper house' or 'rubber stamp' currently apply to the composition of the Senate and the Legislative Council? Give reasons for your answer.
6 Visit the Victorian Parliament website and access legislation passed this year. A link is provided on your obook assess. Find one Act of Parliament that was passed within one to two months of being introduced into the first house. Explain why you think the law was passed so quickly.

Analyse and evaluate

7 Discuss one strength associated with having a bicameral system of parliament to make laws.
8 In your view, is it appropriate for a politician who has been elected to parliament as a member of one political party to resign from that party mid-term and start their own political party? Give reasons.
9 To what extent does the law-making process restrict parliament as a law-maker? Give reasons.

Check your obook assess for these additional resources and more:

» **Student book questions**
12.2 Check your learning

» **Weblink**
Members (Federal)

» **Weblink**
Members (Victoria)

12.3 THE REPRESENTATIVE NATURE OF PARLIAMENT

In addition to the roles of the houses of parliament, political pressures, and restrictions on the law-making powers of parliament, the **representative nature of parliament** is another factor that can affect parliament's effectiveness as a law-making body.

In this topic you will explore the following in relation to this factor:

- the meaning of **representative government**
- the views of the majority
- regular elections.

representative government
a political system in which the people elect members of parliament to represent them in government

The meaning of representative government

Australia's parliamentary system is based on the principle of representative government. This means that at both Commonwealth and state levels, parliament and government consists of members who are elected by the people to make laws on their behalf. If these members fail to make laws that reflect the views and values of the people, or fail to address the needs of the community, they will jeopardise their chance of being re-elected.

This essential parliamentary principle is the basis of our democratic system. It helps to ensure that members of parliament engage with and listen to the views and concerns of the electorate. It also ensures that the government, and the opposition, remain accountable and answerable to the people, and explain their legislative programs during their term in office and election campaigns so the public make an informed decision about which party or members they support.

The views of the majority

The representative nature of parliament encourages members of parliament to listen to the views of the community and make laws in accordance with these views. When people see the need for a change in the law, they may undertake a range of activities, such as forming a **petition**, organising a **demonstration**, using **social media** or contacting their local member of parliament, to express their view and indicate to government that there is a need for law reform. The fact that our parliament and government is representative of the people means that these activities can often be influential in promoting law reform.

petition
a formal, written request to the government to take some action or implement law reform

demonstration
a group of people who gather to protest (i.e. express their common concern or dissatisfaction with) an existing law as a means of influencing law reform

social media
a range of digital tools, applications and websites used to share information in real time between large groups of people (e.g. Facebook, Twitter, Instagram and Snapchat)

While the representative nature of the parliament helps ensure elected members make laws that reflect the views and values of the majority of society, it does have limitations. In an attempt to be re-elected, members of parliament may introduce and support laws that are popular with voters rather than passing more controversial laws that may be necessary, but are unpopular with voters.

For example, as part of the 2013 election, the Liberal–National Coalition campaigned on a policy that they would abolish the existing carbon tax and introduce strict border security laws where boats carrying asylum seekers would be sent back to their place of origin, in an attempt to 'stop the boats'. While the policies initially attracted the support of a large number of voters, the policies were divisive. For example, many people believed the 'stop the boats' policy was inhumane and created an environment of fear to attract voters. Likewise, some people believed the carbon tax should not have been abolished because it benefited the environment by encouraging a reduction in greenhouse gas emissions.

Other instances where governments have introduced popular laws to win votes rather than introducing more necessary or practical laws have occurred in the area of taxation and law and order measures. For example, they may legislate tax cuts at a time when they are short of funds and it might be wiser to pay off debt. Similarly, governments can introduce harsher penalties for crimes because it appears popular

with voters. The media often presents a harsh view that stresses the effect on victims. While victims are important, they are not the only consideration in well-balanced criminal laws. For example, academic studies show that harsher sentences generally do little to reduce crime and do not address the underlying reasons for crime. Taking a longer term view, some of the money spent on keeping more people in prison might be better spent on education.

The case study below explores whether introducing penalties that the majority of society supports actually reduces crime rates.

Increased penalties for street violence

CASE STUDY

In March 2017, following an increase in street violence at public events such as Moomba, the Victorian Government announced it would implement harsher penalties for members of gangs and individuals who participated in street violence. The government announced it would create the new crime of violent disorder for those people who participated in violent street riots, which would carry a maximum penalty of 10 years imprisonment, or 15 years imprisonment if the offender was wearing a mask or face covering.

The introduction of more severe penalties for specific crimes has been popular with voters (e.g. Victorian mandatory sentencing laws that impose a minimum ten-year term of imprisonment on those found guilty of a fatal one-punch attack). However some critics argue that these penalties do little to reduce crime rates and do not address its underlying causes.



Source 1 Members of Victoria Police using OC spray (Oleoresin Capsicum spray) at the 2017 Moomba Festival.

Another limitation associated with the representative nature of parliament is that members of parliament and governments may be reluctant to initiate law reform in areas where there is a highly vocal group of people who do not support the change in the law. For example, while opinion polls suggest that the majority of Australian voters support changing the law to allow voluntary euthanasia, some vocal and outspoken minority groups do not support law reform in this area. Parliaments have been reluctant to change the law without a clear majority view.

It can also be difficult for members of parliament and governments to assess the view of the majority of people in areas where there are conflicting societal views on controversial issues. For example, community opinion appears divided in many areas of law reform. These include decriminalising drug use and allowing the opening of safe drug injecting rooms, allowing the mining and export of uranium, and introducing lock-out laws that ban people from entering pubs and clubs after a certain hour (e.g. 2:00 am) in an attempt to reduce alcohol-fuelled violence.

Reform is also expensive, and governments may avoid it for that reason. Even though parliament can investigate areas of proposed laws change using parliamentary committees and inquiries or referring matters of law reform to bodies such as the **Victorian Law Reform Commission (VLRC)**, these investigations and consultations can be time-consuming and expensive to set up, which may delay reform. Even if changes are recommended, they are not necessarily adopted by the parliament, and that wastes the time and money spent on them.

Victorian Law Reform Commission (VLRC) Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

Similarly, while parliament also has the power to make laws to cover future circumstances, it can be difficult for governments to accurately predict the future views and needs of the community and make laws to provide for them. For example, successive Australian Governments have found it difficult to anticipate the effects of medical advancements in areas such as assisted reproductive treatment and genome testing (to identify genetic disorders). This means the law in these areas can lag behind technological advancements.

Where predictions seem to be easier to make, an effective government will be proactive, rather than responding only after problems arise. For example, it can be expected that more individuals will undertake genome testing in the coming years. Our governments should therefore consider laws such as ways to protect people from being discriminated against by potential employers.

Regular elections

To achieve representative government, regular elections must be held 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 during its term in office, it is likely to be voted out of office at the forthcoming election.

It is compulsory to vote. Some critics claim compulsory voting undermines the principle of representative government because it forces those who are not interested to cast an ill-informed vote. Other members of the community consider compulsory voting to be a breach of individual rights.

By contrast, those who support compulsory voting suggest that it helps ensure our parliaments and governments have the support of the majority of people and not just those who bother to vote. It also forces candidates and political parties to consider the needs of the entire society when formulating their policies.

In Australia, elections for the Commonwealth Parliament are held every three years, while the Victorian Parliament is elected every four years, on the last Saturday in November.

A criticism of the federal electoral system made by some political analysts and members of the community is that federal elections are not held on a fixed date. The government can call an early election when the political climate might best suit them. For example, a government might call an early election if they fear an imminent or looming slow-down in the economy, which may cause them to lose popularity. Likewise, governments may introduce a 'soft budget' that has very few unpopular tax increases and spending cuts prior to an election to help win the support of voters.

On the other hand, there may be good reasons why the government, the opposition parties or the people might want an election earlier than planned. For example, in the United Kingdom, the seriousness of Brexit (Britain's exit from the European Union) led the prime minister to call an early election so preparations would not be interrupted half-way through by an election and a possible change of government.

referendum
the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australia people in a public vote by a double majority

At the federal level, a change of election timing to extend the election term would require a **referendum**, since Section 28 of the Constitution provides that a term must last no longer than three years (but can be shortened). At the state level it requires only an ordinary Act to be passed.



Source 2 Australian workers in Antarctica casting their vote in a federal election

However, four-year terms might encourage governments to be more willing to introduce law reforms that have a longer term benefit because they will be less concerned about any short-term negative impacts associated with the reform. Increasing the term of government would also give voters more certainty and allow businesses to be more confident about investment. Businesses often delay making important decisions prior to an election in anticipation that the government might change. Having elections every four years is also consistent with many other nations that have federal elections every four years on fixed dates, including the United States of America. Interestingly, in 2017 Prime Minister Malcolm Turnbull and Opposition Leader Bill Shorten indicated that they both agree that the federal elections should be every four years.

Summary of the representative nature of parliament

A summary of the way the representative nature of parliament affects its ability to make laws is set out in Source 3 below.

FACTOR	SUMMARY
The views of the majority	• Parliament is elected by the people and can make laws that reflect the views and values of the community. • Individuals, pressure groups, the media and public opinion can force government to carefully consider law reform. • Government may support 'popular' law reform to win voter support rather than showing leadership by introducing progressive reforms. • Government may be reluctant to initiate law reform in areas where there is opposition from vocal minority groups. • Assessing the view of the majority on controversial issues can be difficult for the government.
Regular elections	• Government that does not represent the needs of the majority can be voted out of office. • Fixed terms give government a specified period to implement their programs but can make it reluctant to implement longer term reforms. • Compulsory voting helps ensure Government has the support of the majority, not just those who bother to vote. • Compulsory voting forces those who are not interested to cast an ill-informed vote.

Source 3 A summary of the representative nature of parliament and how it may affect its ability to make laws

12.3 CHECK YOUR LEARNING

Define and explain

1 Explain the term 'representative government'.
2 Explain two features of our parliamentary system that help to ensure representative government.

Synthesise and apply

3 Suggest one law that you think should be introduced (or changed). Why do you think this law (or change) has not been introduced before now? Do you think the majority of the community would support your view to introduce (or change) this law? Why/why not?
4 Conduct some research and answer the following questions.
   a Identify one controversial law at a federal level or state level that has not yet been introduced, but which you believe the majority of people support.
   b Justify why you say that the law has majority support.
   c Why do you think the law has not been introduced?
   d Do you think that there will be any consequences for the government as a result of not passing this law?

Analyse and evaluate

5 Explain two weaknesses associated with members of parliament being elected by the people to make laws on their behalf. Use one example to support your response.
6 Hold a class debate on the following topic: 'Voting in federal and state elections in Australia should not be compulsory'.

Check your obook assess for these additional resources and more:

- **Student book questions**: 12.3 Check your learning
- **Worksheet**: The representative nature of parliament
- **Weblink**: Australian Electoral Commission

12.4 POLITICAL PRESSURES

One of the strengths of our parliamentary system is that it is **representative of the people**. Parliament consists of members elected by the people to make laws on their behalf. If they fail to do so, they may jeopardise their re-election. This helps ensure that members of parliament and governments listen to the views of the community and make laws in accordance with these views.

It also means, however, that individual members of parliament, governments and political parties feel that they need to remain popular with voters. This can cause them to make decisions and support law reform based on whether or not it will increase their popularity and public approval rating rather than the merits of the law reform. Similarly, it can allow influential individuals, organisations, businesses and pressure groups, particularly those which have significant financial power or the ability to influence community perceptions, to place pressure on politicians and political parties to implement policies and support law reform that is in their best interest rather than the nation's.

Individual members of parliament may also feel pressure from within their own political party to vote in accordance with party policy even when they do not support their party's stance on a particular issue or law reform. Politicians and governments can also be subject to political pressure from other countries, international organisations (like the United Nations and Amnesty International) and multinational corporations.

In this topic you will explore the following types of political pressures facing parliament:

- domestic political pressures
- internal political pressures
- international political pressures.



DOMESTIC POLITICAL PRESSURES



INTERNAL POLITICAL PRESSURES



INTERNATIONAL POLITICAL PRESSURES

Source 1 Parliament is subject to domestic, internal and international political pressures

Domestic political pressures

One strength of having a parliamentary system based on the principle of representative government, where members of parliament are elected by the people to make laws on their behalf, is that there is a link between the people, the parliament and the government. Members of parliament and the government must be responsive to the needs of the people and make laws that reflect the views and values of the community.

This is important because it enables individual members of the community, business groups, organisations and pressure groups, particularly those that might represent a minority group that feels ignored, to have a sense that they can influence individual members of parliament and the government. For example, individuals and pressure groups can organise petitions and demonstrations in an attempt to pressure members of parliament and governments to introduce law reform that support their cause.

If these methods gain strong community support and media attention (which can generate further public support), members of parliament and governments will be more likely to respond through fear of losing popularity with voters.

However, sometimes small but vocal minority pressure groups and powerful businesses and organisations may place excessive pressure on politicians and impede important law reform. For example, state governments have generally been slow to introduce law reform in areas like the decriminalisation of abortion and the right of individuals to make end-of-life choices (euthanasia) in part through fear of losing the support of vocal pressure groups and organisations that oppose such change (such as the Australian Christian Lobby, Right to Life Australia and the Australian Family Association). Methods used by individuals and pressure groups to influence a change in the law are examined in more detail in Chapter 14.

The case study below is an example of the Victorian Government passing a law that has been impeded for many years by pro-life pressure groups.

CASE STUDY

Anti-abortion protesters moved on

In 2016, a law came into effect in Victoria that prevented members of anti-abortion pressure groups from being within a 150-metre boundary of an East Melbourne Fertility Clinic that provides lawful terminations of pregnancy. The law was passed by the Victorian Parliament after the clinic had expressed concerns for decades that many of its clients were being approached, and sometimes felt intimidated and harassed, by anti-abortion protesters who regularly waited outside the clinic to urge women not to proceed with their termination.

Over the years, anti-abortion pressure groups such as Right to Life Australia have been vocal in their support for laws that control and prohibit abortion and end-of-life choices. After the Victorian Parliament passed the exclusion (or 'buffer zone') law, the president of Right to Life Australia, Margaret Tighe, released a statement expressing her dissatisfaction with the law, claiming it was a denial of freedom of speech and would not deter the group from their cause. She stated, 'People will not remain silent in the face of so much killing of human life.'

Business groups and organisations

Influential business groups and organisations can also place significant political pressure on members of parliament and governments to make laws in their best interests. For example, trade unions (like the Australian Council of Trade Unions, the Victorian Trade Hall Council and the Australian Nurses Federation) often lobby the government and support political parties that promise to provide better wages and conditions for workers, while business organisations (e.g. the Business Council of Australia and the Victorian Chamber of Commerce and Industry) lobby and support political parties that will best represent employer groups and the business sector.

Similarly, large environmental groups (like Wilderness Society (Australia) and the Australian Conservation Foundation) have been able to place political pressure on governments to consider the way their policies and decisions will impact upon the environment. Such groups have sought to influence legislation relating to areas such as land care and clearing, nuclear power, renewable energy, forest logging and the timber industry, the mining industry, conservation of Australia's nature and wilderness and climate change.

Did you know?

The Australian Labor Party (ALP) was created in the 1890s by trade unions to represent the views of the workers and give them a voice in parliament. Even today some trade unions still have an important influence at state and federal Labor Party conferences, where policy is determined.

Financial donations

Influential individuals, business groups and organisations may also seek to place indirect pressure on political parties, including the governing party, to make policies and support law reform and initiatives that are in their interests by contributing financial donations. While donations may not necessarily influence



Source 2 Before the July 2016 federal election, the Liberal Party received a $1.3 million donation from Paul Marks, the executive chairman of mining company Nimrod Resources.

the decisions made by political parties, many business organisations donate large sums of money in an attempt to ensure the political party that best reflects their values and interests is re-elected. Financial donations may be used by political parties in a variety of ways, including on promotions and marketing during election campaigns.

In the financial year 2015–16, just before the July 2016 federal election, the Liberal Party received approximately $15 million in donations including a $1.3 million donation from Paul Marks, the executive chairman of mining company Nimrod Resources. The Liberal Party also received a $1.75 million donation from its own party leader, Prime Minister Malcolm Turnbull, and $500 000 from Chinese property investment company Hong Kong Kingson Investment Co. Ltd.

By contrast, the ALP received its largest donation of $657 395 from the Shop, Distributive & Allied Employees' Association, a union for those who work in the retail, fast food, warehouse, hair and beauty and modelling industries. The ALP also received $520 000 from United Voice, one of Australia's largest, and oldest, trade unions.

Independents

Influential individuals, prominent business people and members of community groups and organisations sometimes run as independent candidates, or form their own political parties, in an attempt to win a seat in parliament so they may directly influence law reform.

For example, a well-known media personality, Derryn Hinch, formed his own political party, Derryn Hinch's Justice Party, in 2015. Mr Hinch was keen to influence law reform within the **criminal justice system** to ensure that violent offenders received harsher sentences and the rights of victims of crime were upheld. Mr Hinch, who was elected to the Senate in 2016, also supports the controversial proposal to introduce a national public register for sex offenders, by way of a website and online application which shows the offender's name, aliases, crime he or she has committed and address.

criminal justice system a set of processes and institutions used to investigate and determine criminal cases

Internal political pressures from within a political party

As explored in Topic 12.2, members of parliament who belong to a political party are generally expected to vote as one bloc and support the views of their party. This is referred to as **voting on party lines**, because the members of parliament vote according to the wishes of their party. For example, members of parliament who belong to the governing party are expected to support all government bills. This means these bills will pass through the lower house 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).

However, individual members of parliament sometimes disagree with their party's view or policy stance on a particular issue or law reform, yet still feel compelled to vote in accordance with their party. The political pressure to vote along party lines can lead to individual members of parliament not voting in accordance with their own moral conscience or in accordance with their specific electorate or local community. Alternatively, if an individual member strongly disagrees with their party's policy, and the party does not allow its members a rare **conscience vote**, the member may 'cross the floor' to temporarily support the opposing party's view, and vote against their own party.

voting on party lines when members of parliament vote in accordance with their party's policy or agenda

conscience vote a vote in parliament by its members in accordance with their moral views and values (or those held by the majority of their electorate) rather than in accordance with party policy

The case study below provides some examples of members crossing the floor.

Crossing the floor

CASE STUDY

Back in 2015, when Malcolm Turnbull took over the leadership of the federal government from Tony Abbott, three National Party Senators crossed the floor. The three senators (who were part of the Coalition in government) voted against the government's policy by supporting a motion introduced by the Australian Greens. The motion was to change laws on competition regulation as a way to reduce the power of large businesses to act in ways that disadvantaged farmers and small businesses. Two other government senior ministers also abstained from voting.

Similarly, in 2017 another government member, George Christensen, crossed the floor to vote with the opposition in an attempt to prevent cuts to weekend penalty rates (increased wages for certain employees who work on weekends).

Where a minority government does not hold an absolute majority in the lower house, the government will be subject to even more political pressure. This is because they will need to negotiate with the minor parties and independent members of parliament and at times may have to compromise their policies to ensure their bills pass the lower house. This ensures the actions of the government are carefully scrutinised. Similarly, if the government faces a hostile upper house, it will face political pressure from the opposition and crossbench members, and may be required to make further compromises.

Even if 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.

In the case study below, Julia Gillard succumbed to political pressure and went against an agreement she had previously made with an independent member of parliament.

Political pressure on a minority government

CASE STUDY

In 2012, when prime minister Julia Gillard led a minority government, she succumbed to political pressure and abandoned an agreement she had made with an independent member of parliament, Andrew Wilkie MP, to introduce law reform aimed at reducing the use of poker machines.

Mr Wilkie was furious that the prime minister dishonoured a promise that she made to him to gain his support to form a government, but Ms Gillard defended her withdrawal of support. She claimed that the proposal would not have passed the lower house.

Critics of the prime minister claimed she never intended to introduce the controversial anti-gambling reforms but rather told Mr Wilkie that she would to secure his support.

In July 2016, in the new parliament formed after a double dissolution (which returned even more senators from alternative parties), Andrew Wilkie MP and Senator Nick Xenophon joined with other backbenchers to return to this issue, pressuring the government to tackle problem gambling. They were backed by the Reverend Tim Costello and his Alliance for Gambling Reform.



Source 3 Poker machines have been a constant irritation to governments. They raise a lot of money, but social reformers strongly oppose them.

International political pressures

Politicians and governments can be influenced by political pressure from international forces including other countries, international organisations (such as the United Nations, Human Rights Watch, Amnesty International and Greenpeace International) and multinational corporations.

international treaty a legally binding agreement between countries or intergovernmental organisations which is in written form and is governed by international law

ratification confirmation by a nation's parliament of its approval of an international treaty signed by its government. The parliament expressly passes legislation that requires them by law to adopt the various rights and responsibilities set out in the treaty

Australia is part of a global community. It is not only a signatory to a range of **international treaties** but has also passed legislation to formally recognise its commitments under those treaties. For example, Australia has formally agreed to adopt the principles set out in international treaties including the *Convention on the Rights of the Child* (1989) and the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (1984).

Being a signatory to, or having **ratified**, international treaties can subject the Australian Government to international political pressure if it fails to uphold the basic principles they contain. For example, in 2015 the Federal Government received domestic and international pressure from bodies including the United Nations, the Australian Human Rights Commission and the National Inquiry into Children in Immigration Detention over its policies relating to the treatment of children of asylum seekers held in detention, which many claimed breached the *Convention on the Rights of the Child*. In particular, the National Inquiry found that 34 per cent of children detained in Australia and on Christmas Island had a mental health disorder of such severity that they required psychiatric support. This compared with fewer than 2 per cent of children in the general community with mental health disorders of this severity. There was also a very high incidence of self-harming of children in detention centres, with 128 incidents reported over a 15-month period between 2013 and 2014.

The case study below highlights the increasing pressure Australia is facing from the United Nations over breaches of Australia's international responsibilities.

CASE STUDY

United Nations condemns Australia's asylum seeker policy

In March 2015, the United Nations 'Special Rapporteur on Torture' released findings that Australia's policies on the treatment of asylum seekers breached the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, to which Australia was a signatory.



Source 4 By the end of 2016, some 65 million people worldwide had been displaced and more than 7000 migrants and asylum seekers had died or were missing after seeking refuge from global conflict, climate change and economic hardship. It was the highest annual number ever recorded by the United Nations.

Among other breaches, the special investigating taskforce found that the Australian policies violated and dishonoured Australia's international responsibilities under the Convention.

In response to the criticism, Australia's prime minister at the time, Mr Tony Abbott, claimed that Australians were 'sick of being lectured to by the United Nations particularly given that we (the government) had stopped the boats and (in doing so) had ended the deaths at sea.'

Similarly, in 2017, a plan to place a ban on homeless people sleeping in Melbourne city streets was criticised in a United Nations report on the grounds that it violated human rights. In September 2017, it was reported that the plan was abandoned after advice had been recieved that the ban could infringe on human rights.

The government can also be subject to political pressure from major international trading partners and defence allies, and must consider our economic partnership and trade and defence agreements when developing foreign policy and domestic laws. For example, Australia has numerous economic and trade agreements with a range of countries including China, the United States of America, Japan, Great Britain, Indonesia and New Zealand, which must be kept in mind when developing domestic law.

Changing international circumstances and specific global events can also place pressure on local governments to make and change law. For example, over the past decade, as the threat of global terrorist attacks has increased, successive Australian Governments have come under pressure to introduce strict anti-terrorism laws. International conflicts also place pressure on local governments to develop responses and foreign policy to address a range of significant issues including the provision of troops, peacekeeping forces and technical support to our allies and foreign aid. Recent conflicts in Syria and Iraq, Turkey, Afghanistan and various African nations have also seen a rise in the level of global refugees, which has placed pressure on our federal government to examine Australia's migration laws and respond accordingly.

Australia's migration laws have been a source of great controversy in recent years. Many citizens and organisations, including Amnesty International and the United Nations, have been critical of Australia's response. For example, in late 2016 the Federal Government introduced the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (Cth) to change the *Migration Act 1958* (Cth) to permanently ban asylum seekers and refugees who try to arrive in Australia by boat from entering the country. Many international organisations found this excessively harsh.

Did you know?

In 2016 the Federal Government received pressure from the European Centre for Medium Range Weather Forecasts (ECMWF) to stop reducing funding to the Commonwealth Scientific and Industrial Research Organisation's (CSIRO) climate science division. The ECMWF claimed the work was vital to their organisation's work and that cutting their funding would negatively affect global climate monitoring.

Summary of the political pressures

A summary of the way political pressures can affect the ability of parliament to make laws is set out in Source 5 below.

FACTOR	SUMMARY
Domestic political pressures	• Individuals and groups can use demonstrations, petitions and court action to force law reform. • Populist governments can be reluctant to pass controversial but necessary laws. • Vocal minorities and powerful organisations may unduly influence government legislative agendas. • Independent candidates can directly influence law reform.
Internal political pressures	• Voting along party lines ensures certainty and stability. • Denial of a conscience vote can detract from representative government. • Internal party friction (disagreement) can encourage thorough debate of law reform. • Internal party friction can be disruptive and distract government from its legislative priorities.
International political pressures	• International treaties can improve the quality of domestic laws and encourage stronger relationships with other countries. • Ratifying international treaties can restrict the parliament's ability to pass different local laws. • International treaties can pressure governments to act more in the interest of other countries or global corporations rather than Australia. • Major international trading parties and defence agreements, and global events, can influence legislative change.

Source 5 A summary of the way political pressures may affect the ability of parliament to make laws.



Source 6 Australia must consider our economic partnership and trade and defence agreements when developing foreign policy and domestic laws.

12.4 CHECK YOUR LEARNING

Define and explain

1 Describe two ways in which individuals and pressure groups can place pressure on members of parliament and government to introduce desired law reforms.

2 Explain how influential individuals and businesses can place pressure on members of parliament and governments to make laws in their best interest.

Synthesise and apply

3 Conduct some research to provide two examples of pressure groups that are placing pressure on either the Victorian Parliament or Commonwealth Parliament to introduce new laws or change existing laws.
   - **a** What law is each group hoping to see implemented or changed?
   - **b** What activities are each group undertaking to place pressure on members of parliament and the government to implement or change the law?

4 Research one independent member of state or federal parliament (or one minor party) to discover why they decided to run for parliament (or why the minor party was created).
   - **a** What are the single most important issues the member (or minor party) is hoping to influence?
   - **b** How successful do you think the member will be in achieving their aims or influencing the implementation or changing of the law? Give reasons for your answer.

5 Using an example, explain how other nations or international organisations can place political pressure on the Australian Government to make or change the law.

Analyse and evaluate

6 Discuss the extent to which financial donations can influence political parties.

7 In Canada, companies and trade unions are banned from making political donations. Do you think the same ban should exist in Australia or should there at least be a limit on the amount of donations a single individual, business or organisation can make to a political party each year? Give reasons for your view.

8 Discuss how members of parliament voting along party lines can affect the ability of parliament to make law.

9 For many years the Liberal Party did not allow its members a conscience vote on marriage equality (same-sex marriage). Discuss the extent to which denying a conscience vote enables parliament to make laws.

obook assess

Check your obook assess for these additional resources and more:

- **Student book questions**
  12.4 Check your learning
- **Going further**
  Clive Palmer
- **Weblink**
  Pressures on the Australian Government (report)

12.5 RESTRICTIONS ON LAW-MAKING POWERS

subordinate bodies delegated bodies or secondary authorities (e.g. local councils, government departments and statutory authorities such as Australia Post and the Australian Broadcasting Corporation Board) which are given power by parliament to make rules and regulations on its behalf

specific prohibitions areas in which the state and Commonwealth parliaments are constitutionally banned from making law

residual powers powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain with the states (as opposed to concurrent powers and exclusive powers)

tied grant funding (i.e. money) given to a state government by the Commonwealth on the condition that it spends the money in the manner specified by the Commonwealth

exclusive powers powers in the Australian Constitution that only the Commonwealth Parliament can exercise (as opposed to residual powers and concurrent powers)

While parliament is the supreme law-making body, and it can override laws made by other types of law-making bodies such as courts and **subordinate bodies**, its law-making powers are not unlimited. The restrictions to law-making powers result from:

- jurisdictional limitations
- **specific prohibitions**
- the law-making process.

Jurisdictional limitations

One main restriction on the law-making power of parliament is that it can only make law within its constitutional power or jurisdiction (area of power).

As discussed in Chapter 10, the Australian Constitution not only established the Commonwealth Parliament, but it also specifies its law-making powers, such as in the areas of taxation, marriage and divorce, currency and defence.

Law-making powers

Any areas of law-making power not listed in the Constitution are referred to as **residual powers**. They belong solely to the states, and include power to make laws on public transport, education, law enforcement and health. The Commonwealth Parliament has no right to make laws in areas of residual power unless they are given the power to do so through:

- a High Court interpretation of the Constitution
- the states handing over or referring their powers to the Commonwealth, or
- through an actual change to the Constitution by way of a referendum.

The Commonwealth does, however, have the power to make a **tied grant** to the states, and that can indirectly allow them to influence law–making in the states' residual areas of power. It may also make laws in areas of residual power if it is making laws with respect to its international obligations (as discussed in Chapter 11).

A tied grant is funding given by the Commonwealth to the states 'with strings attached'. The Commonwealth specifies what the states must do with the money – for example, it might specify that the funds be spent on new roads or a hospital.

Similarly, the state parliaments are not able to make laws in areas of **exclusive powers**, as they are powers held solely by the Commonwealth Parliament. This acts as a restriction on the state parliaments as they cannot pass laws in areas such as defence and border patrol.

Challenging the validity of law

If an individual, group, organisation or government believes the Victorian or Commonwealth Parliament has made a law outside of or beyond its law-making powers they are able to challenge the validity of the law in the courts.

One advantage of challenging a law through the court is that it can clarify the extent of the law-making powers of parliament and whether a law is valid. This can clarify an unclear area that may apply to many people, or challenge a politically controversial government policy (e.g. offshore detention centres such as Manus Island). Test cases are often run with the assistance of not-for-profit bodies such as community

pro bono
a Latin term meaning 'for the public good'; a term used to describe legal services that are provided for free (or at a reduced rate)

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

rule of law
the principle that everyone in society is bound by law and must obey the law. The rule of law also states that laws should be fair and clear, so people are willing and able to obey them

abrogate
to cancel or abolish a court-made law by passing an Act of Parliament

legal centres (discussed in Chapter 4) or a ***pro bono*** institution. A weakness is that running a court case is expensive and time-consuming even if the lawyers are not paid.



Source 1 The High Court of Australia has the power to resolve constitutional disputes and declare laws made by the Commonwealth Parliament invalid if they are made beyond the parliament's law-making power.

One of the main roles of the High Court of Australia is to resolve constitutional disputes. If the High Court rules that the Commonwealth parliament has passed legislation beyond its law-making powers (that is, ***ultra vires***), it has the power to declare the legislation invalid and this decision cannot be overridden by the parliament. This is one way in which the High Court defends the **rule of law** and protects the Constitution; by preventing legislation made beyond power from taking effect.

While parliament is the supreme law-making body and has the ability to override common law, or **abrogate** common law, it cannot override a decision of the High Court when the Court declares that legislation has been made *ultra vires*.

Specific prohibitions

The Australian Constitution also restricts the law-making powers of the state and Commonwealth Parliaments by expressly banning or prohibiting parliaments from making laws in particular areas. For example, the Australian Constitution restricts the states' law-making powers by, among other things, banning them from forming their own military or naval forces (Section 114) and creating their own currency (Section 115). The Constitution also restricts the law-making powers of the Commonwealth Parliament by banning the Commonwealth Parliament, among other things, from establishing a religion or imposing any religious service (Section 116) and making laws that discriminate against the residents of a state (Section 117).

concurrent powers
powers in the Australian Constitution that may be exercised by both the Commonwealth and one or more state parliaments (as opposed to residual powers and exclusive powers)

The Constitution also prohibits the Commonwealth Parliament from making laws in **residual areas** of power – that is, areas of power that solely belong to the states. The Constitution also prevents the state and Commonwealth Parliaments from changing its wording by providing, through Section 128, that it can only be changed by way of a referendum.

Section 109 of the Commonwealth Constitution states that to the extent of any inconsistency Commonwealth law overrules state law. Not only does this limit the states' law-making power if they pass legislation that is inconsistent with the Commonwealth in a **concurrent** area of **power**, but it also might discourage the states from making a law in a concurrent area of power.

SECTION 114	SECTION 115	SECTION 116	SECTION 117	RESIDUAL POWERS	SECTION 128
• Restriction on state parliaments • Military or naval forces	• Restriction on state parliaments • Creating own currency	• Restriction on Commonwealth Parliament • Freedom of religion	• Restriction on Commonwealth Parliament • Discrimination against residents of a state	• Restriction on Commonwealth Parliament • Making laws in areas of residual power	• Restriction on all parliaments • Changing the wording of the Constitution

Source 2 Some of the ways in which the Australian Constitution restricts the law-making powers of the state and Commonwealth parliaments.

Summary of the restrictions on parliament can affect its ability to make laws

A summary of the way the restrictions on parliament can affect its ability to make laws is set out in Source 3 below.

RESTRICTION	SUMMARY
Jurisdictional limitations	• Ensure parliaments can only legislate within their power. • Allow individuals and groups to challenge legislation potentially made *ultra vires*. • The High Court can declare law made to be *ultra vires*. • The High Court must wait for a dispute to be brought before the court before making a ruling. • Challenging legislation is expensive, time consuming and has no guarantee of success.
Specific prohibitions	• Restrict the law-making powers of parliament and indirectly protect individual rights. • Section 109 limits the state parliaments when legislating in concurrent areas of power. • The Commonwealth can influence the state legislative agenda through tied grants. • The wording of the Constitution can only be altered to change the Commonwealth's law-making powers by a referendum (public vote).

Source 3 A summary of the way restrictions on parliament may affect its ability to make laws

12.5 CHECK YOUR LEARNING

Define and explain

1 Why is parliament referred to as the supreme law-making body?

2 Explain two ways in which the Australian Constitution limits the law-making powers of the Commonwealth parliament.

3 What is a specific prohibition? Describe two examples of a specific prohibition that applies to the state parliaments and two examples that apply to the Commonwealth Parliament.

Synthesise and apply

4 Using your knowledge from Chapter 10 to assist you, explain two ways that the Commonwealth Parliament may be able to make laws in residual areas of power that belong to the states.

Analyse and evaluate

5 'As the supreme law-making body, parliament has the power to make and change any law.' Discuss the extent to which you agree with this statement.

Check your obook assess for these additional resources and more:

» **Student book questions**
12.5 Check your learning

» **Weblink**
The Australian Constitution and the High Court

CHAPTER 12

REVIEW

CHAPTER SUMMARY

Factors that affect the ability of parliament to make law

- The roles of the houses of parliament
  - The effectiveness of the lower house
    - Government and private member's bill
    - Conscience votes
    - Minority governments
  - The effectiveness of the upper house
    - House of review
    - Voting along party lines
    - Hostile upper house
- Law-making process
  - The committee system
- The representative nature of parliament
  - Strengths of representative government
  - Regular elections
  - Compulsory voting
  - Ability to investigate law reform
  - Ability to make laws in future
  - Limitations of representative government
    - The influence of vocal minority groups
    - The difficulty in assessing community views
    - Limited time and resources
- Political pressures
  - Domestic political pressures
  - Business groups and organisations
  - Financial donations
  - Independents
  - Internal political pressures from within a political party
  - International political pressures
- Restrictions on law-making powers
  - Jurisdictional limitations
  - Specific prohibitions

REVISION QUESTIONS

1 Describe one way that an individual can place pressure on a government to make or change the law.

(3 marks)

2 Define the term 'hung parliament' and outline one difficulty facing a minority parliament.

(3 marks)

3 Identify three restrictions on the law-making powers of the Commonwealth Parliament.

(3 marks)

4 Other than passing bills, describe one role of the Legislative Assembly in law-making.

(3 marks)

5 Explain how international circumstances can place pressure on the Commonwealth Parliament to make law.

(4 marks)

6 'The Crown's role in law-making is limited to approving bills'. Do you agree? Give reasons.

(4 marks)

7 Evaluate the role of the Senate in the law-making process.

(5 marks)

8 Discuss two benefits of our parliamentary system being representative of the people.

(6 marks)

9 Discuss the extent to which constitutional restrictions impact on the ability of the Commonwealth Parliament and the Victorian Parliament to make laws.

(10 marks)

Check your obook assess for these additional resources and more:

- **Student book questions** Ch 12 Review
- **Revision notes** Ch 12
- **assess quiz** Ch 12 Test your skills with an auto-correcting multiple-choice quiz

PRACTICE ASSESSMENT TASK

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

The turbulent nature of the Federal Government

After the July 2016 election, Prime Minister Malcolm Turnbull found himself under growing political pressure from an electorate that was becoming increasingly dissatisfied with the conservative right within the Liberal Party. After Donald Trump won the US Presidency in November 2016, former Liberal prime minister Tony Abbott claimed the Liberal Party's best chance of success was to follow a conservative political approach.

The Liberal–National Coalition faced a hostile upper house and a crossbench with some new players, including three senators from Pauline Hanson's One Nation party, Jacqui Lambie and Derryn Hinch. The defection of Cory Bernardi from the Liberal Party in February 2017 made it harder for the Federal Government to have their bills passed. The government was required to win the support of at least 10 of the 12-member crossbench if the opposition (the Labor Party) and the Greens voted against their policies.

Winning the support of the minor parties and the independents could prove challenging given some of their policies. An example is Pauline Hanson's One Nation Party which supports a range of controversial policies. Many of these relate to the rights of Muslims in Australia, such as banning Muslim immigration until the safety of Australians can be assured, banning the wearing of the burqa and niquab in public places and banning halal certification.

On top of this, Prime Minister Malcolm Turnbull may also face pressure from members of his own party. Mr Turnbull's approval rating dropped within months of the election, possibly due to voters becoming impatient with some of the government's policies.

Practice assessment task questions

1 Explain how the government is decided after a federal election.

(3 marks)

2 Explain how the current composition of the Senate could impact on law-making.

(4 marks)

3 Research one minor political party that holds at least one seat in the Senate.

a State the name of the party, the name of its leader, when the party was created and approximately how much electoral support it won in the 2016 federal election.

(2 marks)

b Discuss the extent to which the Senate, with the minor political party holding seats, can uphold the representative nature of parliament.

(6 marks)

4 Explain how international factors, including the election of Donald Trump as the President of the United States, could place pressure on the Federal Government to make and change the law.

(4 marks)

5 Describe two reasons why Malcolm Turnbull appeared to be under political pressure from within his own political party and the electorate after the 2016 federal election.

(4 marks)

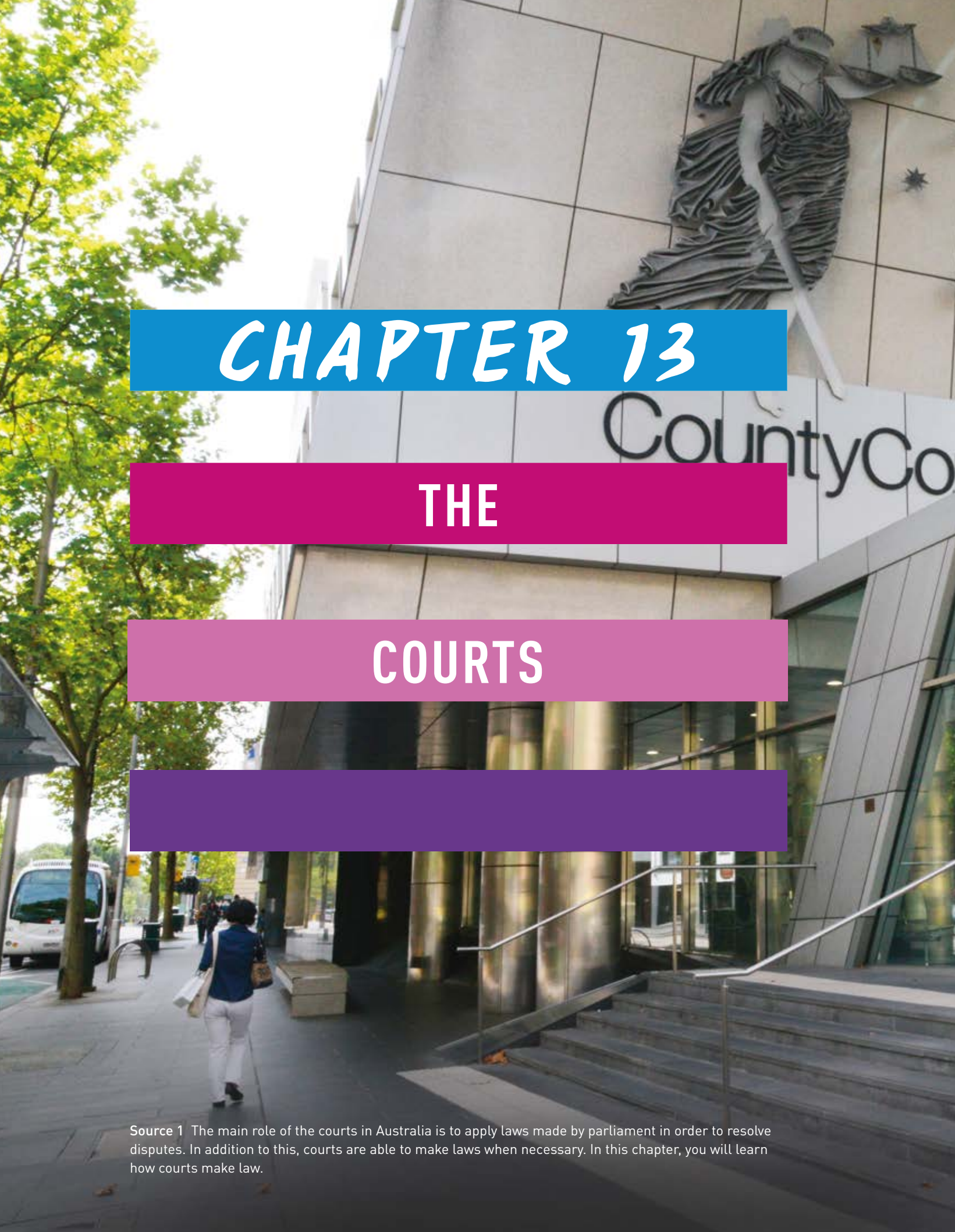
6 Describe one way in which a parliament's law-making powers might be restricted.

(2 marks)

Total: 25 marks

CHAPTER 13

THE COURTS



Source 1 The main role of the courts in Australia is to apply laws made by parliament in order to resolve disputes. In addition to this, courts are able to make laws when necessary. In this chapter, you will learn how courts make law.

OUTCOME

By the end of **Unit 4 – Area of Study 2** (i.e. Chapters 12, 13 and 14) you should be able to discuss the factors that affect the ability of parliament and courts to make law, evaluate the ability of these law–makers to respond to the need for law reform, and analyse how individuals, the media and law reform bodies can influence a change in the law.

KEY KNOWLEDGE

In this chapter, you will learn about:

- the roles of the Victorian courts and the High Court in law-making
- the reasons for, and effects of, statutory interpretation
- factors that affect the ability of courts to make law, including:
  - the doctrine of precedent
  - judicial conservatism
  - judicial activism
  - costs and time in bringing a case to court
  - the requirement for standing
- features of the relationship between courts and parliament in law-making, including:
  - the supremacy of parliament
  - the ability of courts to influence parliament
  - the interpretation of statutes by courts
  - the codification of common law
  - the abrogation of common law.

KEY SKILLS

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- discuss the factors that affect the ability of courts to make laws
- analyse the features of the relationship between parliament and courts
- synthesise and apply legal principles to actual scenarios.

KEY LEGAL TERMS

abrogate to cancel or abolish a court-made law by passing an Act of Parliament

binding precedent the legal reasoning for a decision of a higher court that must be followed by a lower court in the same jurisdiction (i.e. court hierarchy) in cases where the material facts are similar

codify (codification) to collect all law on one topic together into a single code or statute

common law law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

doctrine of precedent the common law principle by which the reasons for the decisions of higher courts are binding on courts ranked lower in the same hierarchy in cases where the material facts are similar

ex post facto a Latin term meaning 'out of the aftermath'; a legal term used to describe a law that is established in relation to an event that has already taken place

judicial activism an expression used when judges consider a range of social and political factors when interpreting Acts of Parliament and deciding cases (i.e. consider the changing political beliefs and the views of the community)

judicial conservatism an expression used when judges adopt a narrow interpretation of the law when interpreting Acts of Parliament and deciding cases (i.e. avoid major or controversial changes in the law and not be influenced by their own political beliefs or the views of the community)

locus standi a Latin term meaning 'standing in a case'; that is, the litigant must be directly affected by the issues or matters involved in the case for the court to be able to hear and determine the case

obiter dictum a Latin term meaning 'by the way'; comments made by the judge in a particular case that may be persuasive in future cases (even though they do not form a part of the reason for the decision and are not binding)

persuasive precedent the legal reasoning behind a decision of a lower (or equal) court within the same jurisdiction, or a court in a different jurisdiction, that may be considered relevant (and therefore used as a source of influence) even though it is not binding (see binding precedent)

precedent a legal case (or ruling) that establishes a principle or rule (i.e. a court decision that is followed by lower courts in the same hierarchy in cases where the material facts are similar)

ratio decidendi a Latin term meaning 'the reason'; the legal reasoning behind a judge's decision. *Ratio decidendi* forms the binding part of a precedent

stare decisis a Latin term meaning 'let the decision stand'; the basic principle underlying the doctrine of precedent

statutory interpretation the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. statute) so it can be applied to resolve the case before them

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

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13.1 INTRODUCTION TO THE COURTS

statute law
law made by parliament; also known as legislation or Acts of Parliament (as opposed to common law)

common law
law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

legislature
a legal term used to describe the parliament (which has the power to make the law)

judiciary
a legal term used to describe the courts and tribunals (which have the power to apply and interpret the law)

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

High Court
the ultimate court of appeal in Australia and the court with the authority to hear and determine disputes arising under the Australian Constitution

Australian Constitution, the
a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

The Australian legal system consists of a whole body of law that regulates society. This body of law includes **laws** made by the parliaments, called **statute law**, and laws made by judges or the courts, called **common law** (or case law).

The main role of an elected parliament (also referred to as the **legislature**), is to make law and change the law on behalf of the people. This is why parliament is referred to as the supreme law-making body. It can make and change any law within its constitutional power.

The main role of the courts, (also referred to as the **judiciary**), is to apply existing laws made by parliament to resolve disputes. The courts are also able to make law when necessary, and are vital in the process of law-making. However, as we will see throughout this chapter, like **parliament**, their ability to make law is limited.

The Australian courts

The Australian legal system includes a range of different courts; some are federal courts and some are state courts. Generally, the state courts deal with issues that arise under state law, and the federal courts deal with disputes that relate to federal (or Commonwealth) law.

The federal courts are:

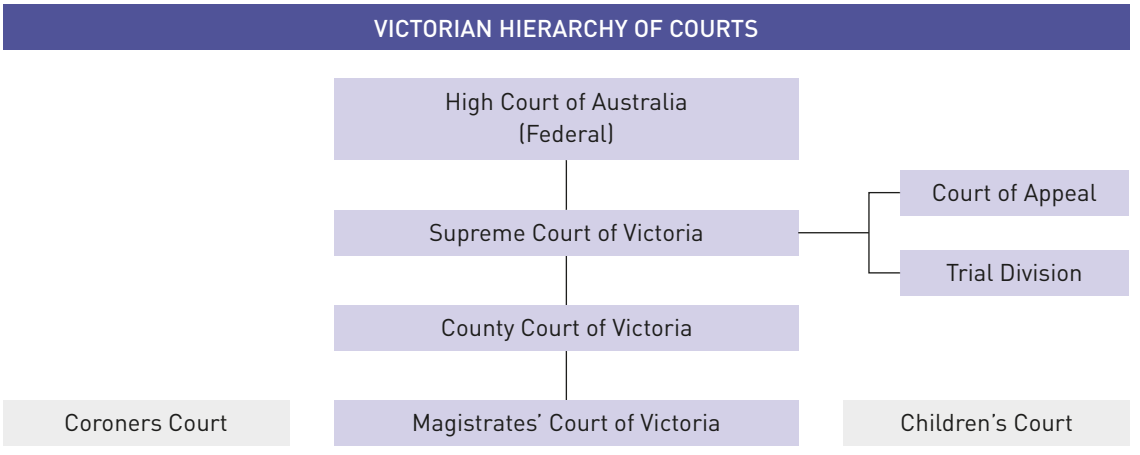
- the **High Court** of Australia
- the Federal Court
- the Federal Circuit Court
- the Family Court.

The Victorian courts are:

- the Supreme Court (separated into the Trial Division and the Court of Appeal)
- the County Court
- the Magistrates' Court
- the Children's Court
- the Coroners Court.

The courts in the Australian court system are ranked in a hierarchy from lowest to highest, with the higher courts hearing more serious and complicated cases, and the lower courts dealing with more minor issues.

While the High Court is a federal court, matters from each of the state Courts of Appeal can be heard by the High Court on appeal where leave (permission) has been granted. The High Court is the highest judicial law-making authority in Australia. The Victorian court hierarchy is shown in Source 1 below.



Source 1 The Victorian court hierarchy, including the High Court (which is a federal court).

As we saw in Chapter 10, the High Court of Australia is the only court in Australia with the authority to hear and determine disputes arising under the **Australian Constitution**. For example, if an individual, organisation or state government believes the Commonwealth Parliament has made a law beyond or outside its power, it can challenge the legislative authority of the Commonwealth Parliament by taking the case to the High Court. If the High Court declares the Commonwealth has made a law ***ultra vires*** (or beyond its constitutional power) it can declare the law invalid or void.



Source 2 Inside one of the courtrooms of the High Court of Australia – Australia's highest court and the only court with the power to resolve constitutional matters.

In accordance with the principles of the **separation of powers** and the rule of law, all courts throughout Australia are independent from the parliament and the government. This means judges can determine cases and establish legal principles without pressure or influence from the parliament or government of the day. Because they are appointed by government and not elected by the people, they are also able to make independent and impartial decisions without being subject to political pressure from voters, pressure groups, influential individuals and organisations, and the media.

Throughout this chapter, you will learn how courts can make laws by establishing legal principles and interpreting statutes when resolving disputes. You will also examine the factors that affect the ability of courts to make law and analyse the relationship between parliament and the courts in law-making.

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

separation of powers
a doctrine established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate. This principle provides a set of checks and balances to ensure that no single body has the power to make, implement, apply and interpret the law

13.1 CHECK YOUR LEARNING

Define and explain

1 Describe the difference between statute law and common law.
2 Define the terms 'legislature' and 'judiciary'.
3 Identify the highest court in Victoria and in Australia.

Synthesise and apply

4 Suggest two benefits associated with judges making law, compared with parliaments making laws.
5 Using your knowledge from Chapter 10, describe one case in which the High Court of Australia declared a federal law to be invalid because it was made beyond the Commonwealth Parliament's law-making power.

Analyse and evaluate

6 Which body is the highest law-maker: the Commonwealth Parliament or the High Court of Australia? Discuss.

Check your obook assess for these additional resources and more:

- **Student book questions**
  13.1 Check your learning
- **Video tutorial**
  Introduction to Chapter 13
- **Going further**
  Federal courts
- **Weblink**
  Court Services Victoria

13.2 THE ROLE OF COURTS IN LAW-MAKING – PRECEDENT

The main role of the courts is to resolve disputes and hear cases.

Judges in superior courts (the Supreme Court and the High Court) are sometimes able to make law when deciding cases that have been brought before the court. This is known as **common law** (or judge-made law, or case law).

More specifically, these superior courts can make law in the following situations:

- When the court resolves a dispute in which there is no existing law – that is, no existing statute or principle of law that can be applied to resolve the case. For example, a judge might be required to make a decision on a totally **new issue** that has not previously been brought before the court, or be required to expand an existing principle of law so it can be applied to a new situation.
- When the court resolves a dispute in which there is an existing statute but the statute requires interpretation so it can be applied to the case before the court. By interpreting the meaning of the words and phrases in an existing Act of Parliament, judges can broaden or narrow its meaning. In doing so, judges make law by establishing a new principle of law to be followed in future similar cases. This process, where courts are required to interpret the meaning of an Act of Parliament, is referred to as **statutory interpretation** and is examined in more detail later in this chapter.

When judges in superior courts make a decision in one of these circumstances, the reason for the decision (referred to as the ***ratio decidendi***) establishes a new legal principle to be followed (referred to as a **precedent**).

statutory interpretation
the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. statute) so it can be applied to resolve the case before them

ratio decidendi
a Latin term meaning 'the reason'; the legal reasoning behind a judge's decision. *Ratio decidendi* forms the binding part of a precedent

precedent
a legal case (or ruling) that establishes a principle or rule (i.e. a court decision that is followed by lower courts in the same hierarchy in cases where the material facts are similar)

The doctrine of precedent

As in other courts throughout Australia, judges within the Victorian court hierarchy rely on previous court decisions to guide them. In other words, they look at the reasoning 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's decision. It establishes a legal principle or legal rule that must be followed by other courts ranked lower in the same court hierarchy when they are deciding future cases that are similar. This process of judges following the legal reasoning behind the decisions of higher courts is referred to as the **doctrine of precedent**. The doctrine of precedent creates consistency and predictability. By looking at past cases, a party that takes a case to court can anticipate how the law may apply to their situation and have some idea of the outcome because similar cases are decided in a similar manner.

Law-making through the courts generally occurs when a court is hearing an appeal (so there is no jury) or a case where there is no a jury. A verdict given by a jury cannot create a precedent because juries determine only the facts of the case. They do not decide on points of law – that is left to judges. Juries also do not give reasons for their decisions. The judges make their decision and state the legal reasoning behind their decision. It is this legal reasoning behind the decision that forms the precedent and becomes binding on lower courts in the same hierarchy when they are deciding future cases with similar material facts.

doctrine of precedent
the common law principle by which the reasons for the decisions of higher courts are binding on courts ranked lower in the same hierarchy in cases where the material facts are similar

Study tip

Understanding the doctrine of precedent and how it operates is one of the more complex topics of the Legal Studies course. Consider trying to teach a family member or a friend (who does not also study Legal Studies) about how precedents work – this will help you to work out where there are gaps in your understanding.

The Victorian court hierarchy and the doctrine of precedent

The doctrine of precedent requires lower courts to follow precedents set in superior courts. Precedent, therefore, depends on the courts being organised in a hierarchy based on the seriousness and complexity of the cases they have authority to resolve. Only superior courts, usually those that have the power to decide cases on appeal, are able to set precedents and make law. In the Victorian court hierarchy (from lowest to highest) these are the High Court, the Court of Appeal of the Supreme Court and the Trial Division of 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.

Key features of the doctrine of precedent

There are a number of key features of the doctrine of precedent:

- the principle of ***stare decisis***
- *ratio decidendi*
- binding precedents
- **persuasive precedents**
- ***obiter dicta***.

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* is a Latin phrase meaning 'to stand by what has been decided'. Where appropriate and required, judges should stand by previous decisions to ensure common law is consistent and predictable.

Ratio decidendi

Ratio decidendi is a Latin phrase meaning 'the reason for the decision'. It is the binding part of a judgment. A **judgment** is a statement by the judge at the end of a case that outlines the decision and the legal reasoning behind the decision. The *ratio decidendi* is not the decision itself, or the sanction or remedy given. It is regarded as a statement of law to be followed in the future.

An example of a court's reason for its decision is provided in the legal case below.

stare decisis
a Latin term meaning 'let the decision stand'; the basic principle underlying the doctrine of precedent

persuasive precedent
the legal reasoning behind a decision of a lower (or equal) court within the same jurisdiction, or a court in a different jurisdiction, that may be considered relevant (and therefore used as a source of influence) even though it is not binding (see binding precedent)

obiter dictum
a Latin term meaning 'by the way'; comments made by the judge in a particular case that may be persuasive in future cases (even though they do not form a part of the reason for the decision and are not binding)

judgment
a statement by the judge at the end of case that outlines the decision and the legal reasoning behind the decision

LEGAL CASE

Negligent advice about land

L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1) (1981) 150 CLR 225

In this case, Shaddock was given incorrect advice by Parramatta City 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. There was a proposal for road-widening, which made the land useless for the purpose for which it was purchased.

Shaddock sued Parramatta City Council for giving negligent advice, also referred to as negligent misstatement.

The High Court decided that the council had given negligent advice because it did owe a duty of care to Shaddock (to provide accurate advice); it had breached that duty of care and was therefore liable to pay damages.

The reason for the decision (*ratio decidendi*) 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 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*.

The task of determining the *ratio decidendi* of a case can be complex. 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 heard in the High Court, several judges are involved in reaching a decision. If they cannot reach a unanimous decision, 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. The **material facts** are important facts that could affect the outcome of the case and are vital to the reason for the decision. 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.

material facts
the key facts or details in a legal case that were critical to the court's decision

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 precedent
the legal reasoning for a decision of a higher court that must be followed by a lower court in the same jurisdiction (i.e. court hierarchy) in cases where the material facts are similar

Binding precedents

Binding precedents are precedents that have been established by superior courts and **must be followed** by lower courts in the same hierarchy when resolving disputes with similar material facts. If a judge is bound by an existing precedent, they are obliged to follow it, regardless of whether they agree with the legal reasoning behind the decision of the superior court.

For a precedent to be binding on a particular case, it must be set by a superior court from within the same court hierarchy. For example:

- in cases where the material facts are similar, the Magistrates' Court of Victoria and the County Court of Victoria are bound to follow precedents set by the Supreme Court of Victoria (Trial Division or Court of Appeal) or the High Court of Australia
- for the Supreme Court of Victoria to be bound by a precedent, the precedent would need to be set in the Victorian Court of Appeal or the High Court of Australia
- being the highest court in Australia, the High Court is not bound by precedents set by any Australian state or territory court.

Study tip

The *VCE Legal Studies Study Design* requires you to know the role of the Victorian courts as well as the High Court in law-making. You might be asked specifically about the High Court, so make sure you understand its unique role in the process of law-making.

Persuasive precedents

Persuasive precedents are precedents that are **not** binding on a court but may still be considered by a judge and used to influence their decision. It may be an important legal principle which is relevant to the case before the court, highly regarded by the judge and used to guide or sway their decision. Persuasive precedents may be:

- set by courts in another court hierarchy, such as a court in another state, territory or country
- set by lower courts in the same court hierarchy (e.g. the Victorian Court of Appeal or High Court of Australia may consider a precedent set by the Trial Division of the Supreme Court of Victoria to be persuasive)
- set by courts of the same standing (that is on the same level) within the same court hierarchy. These precedents are not binding, although in reality, in the interests of consistency, judges will almost inevitably follow them. One exception is the High Court. While the High Court will also usually follow its previous decisions in an attempt to maintain consistency, it will not do so if it no longer considers the precedent to be good law (e.g. the justices consider the law to be outdated due to changes in community attitudes, technologies or other circumstances that occur over time)
- statements made as *obiter dicta* contained in a judgment of a court in the same hierarchy or in another court hierarchy. *Obiter dicta* are comments made by a judge that are not an actual part of the reason for the decision (and are therefore not binding), but are still important and may be considered as persuasive in future cases.

A famous example of a persuasive precedent is the British case of *Donoghue v Stevenson* [1932] All ER 1, which expanded the law of negligence. This case was not binding on Australian courts, but was used as persuasive precedent in *Grant v Australian Knitting Mills Ltd* [1932] All ER 209, which was the first case to establish the law of negligence in Australia.

The snail in the bottle case

LEGAL CASE

Donoghue v Stevenson [1932] All ER 1

In this British case, Mrs May Donoghue poured half the contents of a bottle of ginger beer into a glass and drank it. The bottle was a dark opaque glass, so it was not possible to see the contents.

When she poured the ginger beer into her glass she discovered the remains of a decomposed snail, which had been inside the bottle. She became very ill.

Realising that the fault lay with the manufacturer, Mr David Stevenson 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 the goods were faulty, she sued the manufacturer for negligence.

Because a friend had bought the ginger beer for Donoghue, she was not party to a contract with either the seller or the manufacturer.

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.

The Court also stated:

> 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, Donoghue was successful and the law of negligence was established in Great Britain.



Source 1 A decomposed snail was found in the bottom of a ginger beer bottle (similar to this one) manufactured by Stevenson.

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, 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.
- Donoghue suffered gastroenteritis and shock as a result of the manufacturer's action.

The legal case below established the law of negligence in Australia.

LEGAL CASE

Dr Grant's underpants

Grant v Australian Knitting Mills Ltd [1935] All ER 209

In this Australian case, Grant was affected by dermatitis from wearing a pair of long woollen underpants he had purchased from a retail store. The manufacturer of the underpants had left a chemical, metal sulphite, in the material.

Grant had a contract with the seller (the retail store), but did not have a contract with the manufacturer. He sued the manufacturer for negligence.

The Court referred to the case of *Donoghue v Stevenson*. Although this was only a persuasive precedent, as it was set 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 established in Australia.



Source 2 Grant was affected by dermatitis from wearing a pair of long woollen underpants.

Obiter dictum

Obiter dictum (also called just '*obiter*') is a Latin term meaning 'a thing said by the way'. When handing down a judgment, the judge (or judges) sometimes makes a statement that is not part of the reason for the decision (*ratio decidendi*) – that is, the statement was not a matter that was necessary to the decision in that case but was still a matter of considered opinion. This is something the judge reflected upon and contemplated when making his or her decision. While not forming a part of the binding precedent, comments made in *obiter* may still be relevant and influential on decisions in future cases and as such can act as persuasive precedent.

A famous legal example of *obiter dicta* being used as persuasive precedent occurred in the *Hedley Byrne v Heller* case and the subsequent *Shaddock* case outlined earlier in this chapter.

It is important to note that the *Hedley Byrne v Heller* case was heard in England in 1964, well before the Australian case of *Shaddock,* heard in 1981. As the facts in the *Shaddock* case were similar to the situation envisaged by the House of Lords in the *obiter* in *Hedley Byrne v Heller*, the *obiter* in that case was used as persuasive precedent in the *Shaddock* case.

Negligent advice about creditworthiness

LEGAL CASE

Hedley Byrne & Co v Heller and Partners Ltd [1963] 2 All ER 575

This case was decided by the Appellate Committee of the English House of 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.

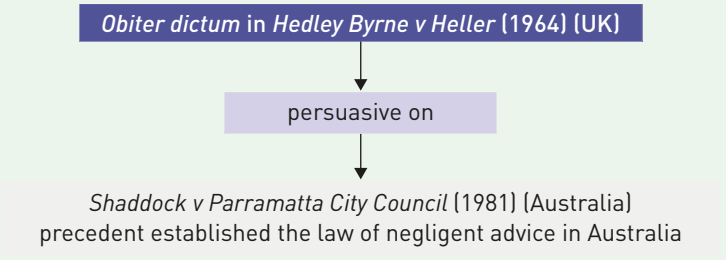


Source 3 On advice from the bank an advertising agency did business with a client of the bank which resulted in the loss of £17 000.

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 that 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.



Source 4 The English case of *Hedley Byrne v Heller* contained *obiter dictum* that was persuasive in the Australian case of *Shaddock v Parramatta City Council*.

The key features of binding and persuasive precedents are set out in Source 5 below.

BINDING PRECEDENT	PERSUASIVE PRECEDENT
A precedent made by a superior court, which must be followed by: • a lower court, in the same hierarchy, in cases where the material facts are similar.	A precedent that is not binding, but may be considered by a court as influential. It may be: • from a court in another hierarchy • from a court of same standing in the same court hierarchy • from a lower court in the same hierarchy • *obiter dicta* from a court in the same or another hierarchy.

Source 5 Binding and persuasive precedent

13.2 CHECK YOUR LEARNING

Define and explain

1 Explain why courts usually only make law when determining cases on appeal.

2 Explain how the doctrine of precedent provides for consistency in the common law.

3 Describe two reasons why it may be difficult to establish the legal reasoning behind a previous decision.

Synthesise and apply

4 Explain why some precedents are binding and some precedents are persuasive. 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.

5 Read the legal case *Shaddock v Parramatta City Council*.
- **a** Explain the material facts of this case.
- **b** What is the *ratio decidendi* in this case?
- **c** How did the *Shaddock* case follow the *obiter dictum* in *Hedley Byrne v Heller*?

6 Gemma was considering buying an empty factory with the intention of starting a panel beating business. She made enquiries of the local council about the zoning of the factory and was told that the business would be 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.
- **a** Explain how the material facts are essentially the same as in the *Shaddock* case.
- **b** What do you think the outcome of this case would be? Give your reasons.

7 Look back at the legal case *Donoghue v Stevenson*.
- **a** Explain the facts of this case.
- **b** What was the reason for the decision in this case.
- **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.

8 Look back at the legal case *Hedley Byrne & Co Ltd v Heller and Partners Ltd*.
- **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.

Analyse and evaluate

9 'Given that parliament is elected to make law, courts should play no role in the law-making process.' Discuss the extent to which you agree with this statement.

Check your obook assess for these additional resources and more:

- » **Student book questions**
  13.2 Check your learning
- » **Going further**
  Extending the influence of *obiter dicta*
- » **Going further**
  The *AON* case

13.3 THE ROLE OF THE COURTS IN LAW-MAKING – DEVELOPING AND AVOIDING PRECEDENT

When deciding cases, judges will consider precedents developed in earlier cases. If they are not bound to follow the earlier precedent, they may decide to:

- **adopt** the precedent (follow or apply the precedent)
- **affirm** the precedent (agree with the precedent)
- **avoid** following the existing precedent.

In cases where judges are not bound to follow an existing precedent they may also be able to create new precedents, which allows some **flexibility** in the common law; that is it allows precedents and the common law to change and develop over time.

Apart from following a binding precedent, there are four other ways that judges can treat previous precedents: **distinguishing, reversing, overruling** and **disapproving**.

distinguishing a precedent
the process by which a lower court decides that the material facts of a case are sufficiently different to that of a case in which a precedent was established by a superior court so that they are not bound to follow it

Distinguishing a precedent

A judge may be able to avoid following an existing binding precedent if he or she can find a difference in the material facts of the case they are deciding and the material facts in the case in which the existing precedent was set. This is known as **distinguishing a precedent**. A judge can avoid following an existing precedent by distinguishing it. This is because a precedent set by a superior court in the same hierarchy is only binding on a lower court in cases where the material facts are similar.

The case below is an example of a judge distinguishing a previous precedent because there was a difference in the material facts of the case.

LEGAL CASE

Drunk in charge of a motor vehicle

Davies v Waldron [1989] VR 449

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.

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.

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.

reversing a precedent when a superior court changes a previous precedent set by a lower court in the same case on appeal, thereby creating a new precedent which overrides the earlier precedent

Reversing a precedent (in the same case on appeal)

When a case is taken on appeal to a higher court, the superior court may change the decision of the lower court. This is called **reversing a precedent**. When a court reverses an earlier decision, **in the same case on appeal**, a new precedent is created by the superior court's decision. The new precedent becomes the one to follow in future cases.

R v Klamo [2008] 18 VR 644 is an example of a case where the Court of Appeal reversed the decision of the Supreme Court.

LEGAL CASE

Shaking a baby

R v Klamo (2008) 18 VR 644

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 that he shook 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, there was no evidence to show that the accused was of unsound mind at the time of the death of the child.

One of the grounds of appeal was that '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 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 (in a different and later case)

When a superior court decides not to follow a previously established precedent, set by a lower court in a different and earlier case, it can choose to overrule the existing precedent. By **overruling a**

precedent, in a different and later case, the superior court creates a new precedent that makes the earlier precedent inapplicable.

This is similar to reversing a precedent, except that reversing applies when a judge changes an existing precedent set in a lower court in the **same case** on appeal, whereas overruling applies to changing a precedent in a different and later case. So, for example, a precedent set by the Trial Division of the Supreme Court in 'Case A' can be overruled by the Victorian Court of Appeal in 'Case B'. In the same way, the High Court can overrule a precedent set by a decision of the Victorian Court of Appeal in a different case.

Superior courts can overrule an existing precedent set by a lower court in an earlier and different case because they are not bound to follow precedents created in lower courts.

overruling a precedent when a superior court changes a previous precedent, established by a lower court, in a different and later case thereby creating a new precedent which overrules the earlier precedent

disapproving a precedent when a court expresses dissatisfaction of an existing precedent but is still bound to follow it

Disapproving a precedent

When a lower court disagrees with an existing binding precedent set by a superior court in the same hierarchy, it may wish to express its dissatisfaction with the previous precedent. This is referred to as **disapproving a precedent**. While this statement of discontent **does not** allow the lower court to avoid following the precedent, it may encourage parliament to change the law or encourage a party to consider lodging an appeal against the decision in a higher court. A statement of disapproval, made as *obiter dicta*, may also be used to indicate to a higher court that a judge in a previous case believed the precedent needed to be reconsidered.

In cases where judges are not strictly bound by precedents previously set by their own court they may still choose to follow it, while expressing their disapproval. This statement of disapproval may then encourage a party to the case to appeal against the verdict in the hope that a superior court will reverse the decision. Similarly, it may also encourage the parliament to override or change the existing law.

Sometimes even the High Court of Australia will express their disapproval of an existing precedent rather than overruling it, in an effort to convince the parliament to change the law. An example is provided below.

Study tip

Previous VCAA Legal Studies Examination Reports have indicated that in the past some students have incorrectly explained what disapproving an existing precedent means. Remember that disapproving does not mean that a court does not have to follow a precedent – instead it only demonstrates a negative view of the precedent.

The *Trigwell* case

LEGAL CASE

State Government Insurance Commission v Trigwell (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 principle inherited from Britain that the landowner did not owe a duty of care for their stock straying from their land onto the highway.

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 to highways.



Source 1 The Victorian Parliament overruled the High Court's decision that landowners were not responsible for damage caused by their straying animals



Source 2 When a superior court decides not to follow a previously established precedent it can choose to overrule the existing precedent

Applying earlier precedents

Most often, when resolving a case brought before them, the courts will be required to consider and apply precedents set in previous cases. Even if they do not distinguish, overrule, reverse or disapprove of past decisions, they may still need to refine the law and make it clearer as they apply a precedent to a new case. This allows the law to expand and develop over time.

When applying previous precedents courts will sometimes be required to interpret the meaning of the words and phrases used in the past precedents. This may result in their meaning being broadened or narrowed by future courts. This is one reason why it is often said that a precedent set by a court is **never a final statement of the law**, because circumstances always change.

Over time, through reversing, overruling, distinguishing and disapproving, precedents have been changed and developed to allow a gradual expansion of common law. In fact, some whole areas of the law have developed through the courts in this way, piece by piece. The law of negligence is one of them as highlighted in the cases below.

KEY FEATURES OF THE DOCTRINE OF PRECEDENT

stare decisis

- like cases decided in like manner

ratio decidendi

- the reason for the decision; the part of the judgment that is binding on lower courts

binding precedents

- superior court decisions are binding on inferior courts
- similar material facts
- a decision of a superior court remains law until it is overruled by a higher court or the law is altered by an Act of Parliament

persuasive precedents

- precedents from another hierarchy are not binding but are a valuable source of legal reasoning and can be influential on decisions of other courts
- *obiter dictum* (plural is *obiter dicta*) – statement made by the judge that is not directly relevant to the point of law in question, but can have a persuasive influence on future cases

precedents can be developed or avoided through

- distinguishing
- overruling
- reversing
- disapproving

Source 3 Key features of the doctrine of precedent

LEGAL CASE

The *Bonnie Doon Motor Inn* case

Norris v Sibberas [1990] VR 161

In this case, the trial judge followed the precedent on 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 Norris for negligent advice. The trial court found that 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, Norris, were relied on in the course of business, and the estate agent was setting herself up as a centre for giving advice**.

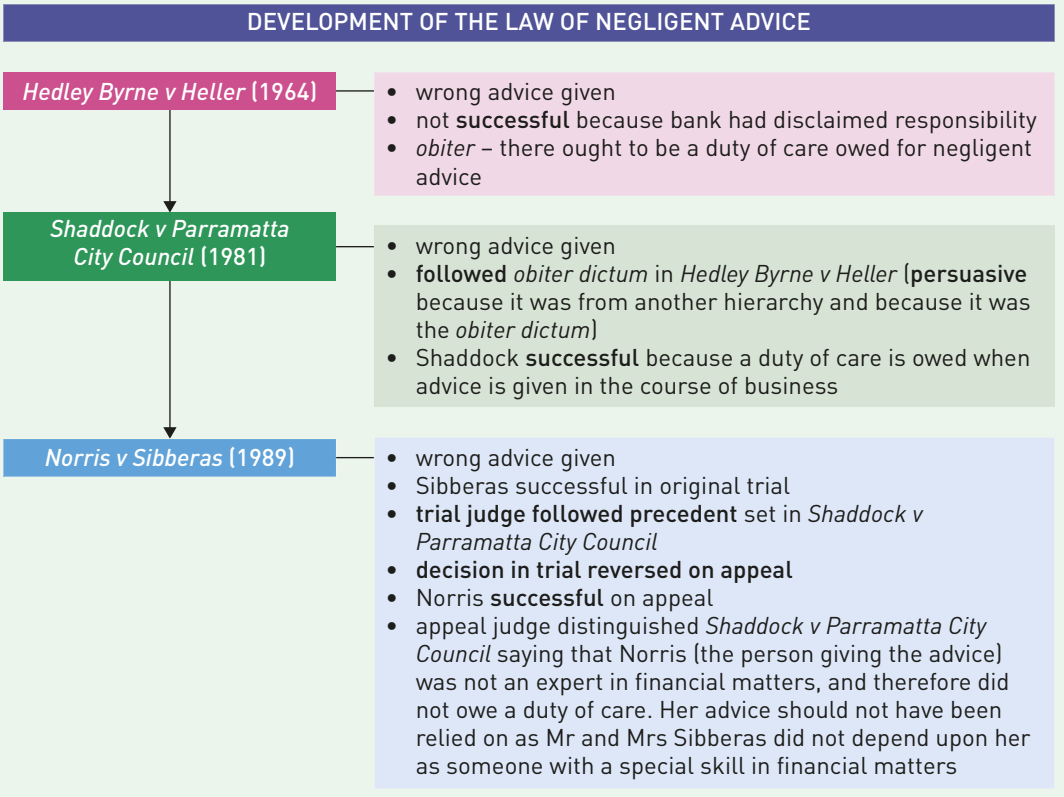
The Full Court of the Supreme Court (now called the Court of Appeal) *reversed* this decision on appeal. The Full Court of the Supreme Court decided that Norris was not liable, and that Mr and Mrs Sibberas should have relied on advice from their accountant.

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.

Norris did not have special financial skills or expertise.

In handing down its 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.



Source 4 The doctrine of precedent has allowed the law of negligent advice to develop over time.

LEGAL CASE

Joint illegal enterprise

Miller v Miller (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 and 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. It rejected the precedent set in the earlier High Court cases of *Smith v Jenkins* (1970) 119 CLR 397 and *Gala v Preston* (1991) 172 CLR 243, where it had been held that where two people are complicit as illegal users of a vehicle, one does not owe a duty of care to the other.



Source 5 The defendant Maurin Miller lost control of the car and it struck a pole

13.3 CHECK YOUR LEARNING

Define and explain

1 Distinguish between the terms **reversing** and **overruling**.

2 Explain how lower courts can avoid following a binding precedent.

3 Explain why a judge may express his or her disapproval of a binding precedent.

4 **a** Explain how a court can influence parliament to change the law. Provide an example to support your view.

b Explain how the *Wrongs (Animals Straying on Highways) Act* abolished the decision reached in the *Trigwell* case.

Synthesise and apply

5 Look back at the legal case *R v Klamo*.

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 *R v Klamo* to illustrate your points.

c Does the judgment in this case contain an example of a previous case being distinguished? Explain.

6 Look back at the legal case *Norris v Sibberas*.

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?

7 Using the decisions handed down in the *Shaddock*, *Hedley Byrne* and *Norris* cases, create a scenario in which negligence advice is given. In your scenario, the court will consider that person who gave that advice is liable. Use the legal reasoning in each of the three cases to justify your scenario.

Analyse and evaluate

8 Read the legal case *Miller v Miller*.

a Explain the outcome of this case.

b How did the decision of the High Court both reverse and overrule previous precedent?

c Would a case heard in Victoria be bound by the precedent set in *Miller v Miller*? Explain.

d Do you agree with the decision in this case? Why or why not?

e Discuss the extent to which a precedent is a final statement in law.

f Court cases are very expensive, and in this case the existing law was against the plaintiff. There was a real risk of not winning the case. Maurin Miller also might not have much money to pay in damages. Why would it be worth bringing a case like this? Would anyone other than Danelle think it was worth bringing the case to court? Explain your answer.

9 Discuss the ability of judges to change the law through the methods of overruling precedents.

Check your obook assess for these additional resources and more:

- **Student book questions**
  13.3 Check your learning
- **Going further**
  Developing the law of negligence
- **Worksheet**
  Developing precedent

13.4 STATUTORY INTERPRETATION

In addition to establishing precedents when resolving cases in which there is **no existing law** (that is, no existing statute or precedent that can be applied to resolve the case), judges can also make law when called upon to interpret the meaning of a statue (or Act of Parliament) in order to resolve a case. Such situations arise when there is a dispute over the meaning of the words and phrases contained in an Act of Parliament and the case is brought before the courts to be resolved. By giving meaning to the unclear words and phrases, judges can clarify legislation so it can be applied to resolve the dispute before them. Similarly, when interpreting legislation, judges can broaden or narrow its meaning. In doing so, the court establishes a legal principle to be followed in future similar cases which, together with the Act of Parliament, will form part of the law.

Study tip

The *VCE Legal Studies Study Design* requires you to know reasons for, and effects of, statutory interpretation. Make sure you know at least two reasons and at least two effects.

For a judge to be able to interpret a statute, and give meaning to unclear legislation, a case must be brought before the court for resolution. Then, after the judge interprets the meaning of the disputed words or phrases in the Act of Parliament, the act can be applied to resolve the case at hand. Furthermore, depending on the superiority of the court, the legal reasoning behind the judge's interpretation may set a precedent that other judges can follow in future cases when required to interpret the meaning of those words or phrases in the same act.

The newly established precedent becomes a part of the law. It will be read along with the Act of Parliament in future cases. It should be remembered, however, that the judge's interpretation of a statute provides only a statement about the meaning and application of the statute. It does not change the actual words or phrases used in the statute itself.



Source 1 Judges are often called upon to interpret the meaning of words in legislation so it can be applied to resolve the dispute before them.

Reasons for statutory interpretation

There are many reasons why courts are called upon to interpret legislation. These problems can be divided into two broad categories:

- problems that occur as a result of the drafting process, and
- problems that occur when a court is applying the Act of Parliament to resolve a case.

Problems as a result of the drafting process

Parliamentary counsel are lawyers who have the task of preparing and writing up bills to be presented and considered by the parliament. These bills are written from policy documents and instructions from members of parliament (usually government ministers).

parliamentary counsel lawyers who are responsible for drafting bills in accordance with the policies and instructions of a member of parliament

When drafting bills, parliamentary counsel are generally required to ensure they cover a wide range of situations and possibilities. This means they must be careful with the language they use. Sometimes, parliamentary counsel will need to use general terms, to ensure the bill covers a wide range of future circumstances. At other times they will need to use precise terms that clearly define the law being proposed so it cannot be misinterpreted. This makes drafting legislation a very complex task and creates a need for judges to interpret unclear legislation.

Below is an example of why precise terms need to be used to clearly define the law.

What does 'supply' really mean?

EXAMPLE

Imagine a parliamentary counsel has been instructed by the government to draft a proposed law banning one individual from 'supplying illegal drugs to another'. The everyday meaning of the word 'supply' is relatively clear. It means to hand over or deliver an item or satisfy a need. It conveys the idea of providing a good or a service that is wanted by, or meets the needs of, another person. But upon further examination, and when applied to different circumstances, the meaning of the word 'supply' may not be so clear.

For example, if Tony leaves illegal drugs in his friend Jason's car, and Jason returns the drugs, is Jason 'supplying' drugs and therefore committing a crime according to the draft law? Can returning the drugs to Tony be regarded as Jason 'supplying' drugs? Similarly, can a courier who is employed by Tony to deliver drugs to Jason be charged with 'supplying' drugs, or is Tony the 'supplier'? If Tony places the drugs in a bank deposit box for safekeeping does this mean that the bank has been 'supplied' with drugs?

Problems that could occur as a result of the drafting process are set out below.

- **Mistakes can occur during the drafting of a Bill** – Parliamentary counsel may make mistakes when drafting a bill. For example, in 2016 the Victorian Parliament passed legislation to amend the *Crimes Act 1958* (Vic) in relation to sexual offences. The previous law was mistakenly limited in scope, as it excluded sexual offences by means of technology. Changes to the law have made it an offence to use technology and applications such as Snapchat in a sexually offensive way.

In both of the cases below the specific wording of the law was called into question.

- **The act might not have taken future circumstances into account** – For example, the Australian Constitution gives the Commonwealth Parliament the power under Section 51(vi) 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'. This section does not refer to the air force because, at the time the Constitution was passed, powered aircraft had not been invented and the concept of an air force was not imagined.
- **The intention of the act might not be clearly expressed** – Sometimes a policy or instructions regarding the purpose or a proposed law may not be clearly expressed. This can lead to confusion about how it should be interpreted.
- **There might be inconsistent use of the same word in the act (giving it different meanings)** – This could occur within the act itself, or it 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 cover 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.

CASE STUDY

Missing comma in a state law costs a US dairy company

In 2017, a judge in an American court ruled that a US dairy company, Oakhurst Dairy, owed three of its truck drivers four years of wages for unpaid overtime, because the state law that listed the tasks that workers could not claim overtime payment for was missing a 'comma'.

Under the state law, workers were not entitled to claim overtime payment for undertaking tasks including 'The canning, processing, preserving … storing, packing for shipment or distribution' of various foods. Not having a comma after the phrase 'packing for shipment' meant that the job of 'packing for shipment or distribution' was one task. Given the truck drivers did not '**pack food** for shipment or distribution' but rather just **delivered the food**, the judge ruled they were not included in the overtime exemptions outlined in the relevant law and were as such entitled to be paid overtime.

While the case only involved three truck drivers, Oakhurst Dairy employed another 72 drivers who, after the ruling, may also be entitled to the unpaid overtime. That amount was estimated to be approximately $US 10 million.



Source 2 A missing comma in state law cost a US dairy company

In the legal case of *Grace v Fraser* [1982] VR 1052 the magistrate had to consider the purpose of an act.

LEGAL CASE

Failing to report an accident that occurred while not 'driving'

Grace v Fraser [1982] VR 1052

In this case, a woman was charged with not reporting an accident to the police. Her parked car had collided with another vehicle when she left it without putting on the hand brake. When the case was brought before the court, the woman claimed she had not broken the *Motor Car Act 1952* (Vic), which required drivers to report an accident to the police if property was damaged in a collision arising from the driving of a motor vehicle. She claimed that she was not **driving** the car at the time of the incident. The magistrate was required to consider the purpose of the Act and use of the term 'driving' and subsequently found the woman guilty.

Problems applying the act to a court case

Problems that could occur when a court is applying a statute to a particular court case are shown below.

- **Most legislation is drafted in general terms** – This is so it can cover a wide range of circumstances. However sometimes the terms used are so broad that they need to be interpreted so they can be applied to specific circumstances. For example, in the case of *Deing v Tarola* [1993] 2 VR 163 the court had to determine if **wearing** a studded belt was an offence under the *Control of Weapons Act 1990* (Vic) which banned the **carrying** of a 'regulated weapon'.
- **The act may have become out of date** – This means it 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 a statute attempt to cover a broad range of issues. As a result, the meaning of some 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 statute. For example, in the case of *Davies v Waldron*, the court was asked to interpret the phrase 'start to drive' found in Sections 48 and 49 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*. More details on this legal case are provided earlier in this chapter.

accused
a person charged with a criminal offence

- **The act might be silent on an issue and the courts may need to fill gaps in the legislation** – A statute tries to cover all situations that might arise in relation to the issues covered in the statute. 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 legislation that prohibit the use of certain drugs cover all possible types of drugs, even those that are newly created?
- **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.

This case is an example of the need for statutory interpretation and how judges make law through statutory interpretation.

The studded belt case

LEGAL CASE

Deing v Tarola [1993] 2 VR 163

In this case a 20-year-old man, Chanta Deing, was apprehended by the police at a McDonald's restaurant. To hold up his trousers he was wearing a black leather belt, 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 Section 6 of the *Control of Weapons Act*.

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* and the *Control of Weapons Regulations*, and then 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*.

The young man appealed against the Magistrates' Court's decision to the Supreme Court. The Supreme Court decided differently from the Magistrates' Court. The Supreme Court justice 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 including noting 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'.



Source 3 In *Deing v Tarola* the Supreme Court was required to decide on appeal whether wearing a studded belt could be interpreted as carrying a weapon.

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*, 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*.
- The Executive Council (comprising the Governor of Victoria, Premier of Victoria and senior ministers), when making the *Control of Weapons Regulations*, was outside the authority given to it by the *Control of Weapons Act* (*ultra vires*), therefore the regulation that lists studded belts as 'weapons' was invalid.

intrinsic material material (i.e. information) found within an Act of Parliament that may assist a judge to interpret its meaning

extrinsic material material (i.e. information) that is not part of an Act of Parliament, but that may assist a judge to interpret the meaning of the Act

Hansard the official transcript (i.e. written record) of what is said in parliament. Hansard is named after T.C. Hansard (1176–1833) who printed the first parliamentary transcript

law reform bodies organisations established by the state and Commonwealth parliaments to investigate the need for change in the law and make recommendations for reform

→ GOING FURTHER

Methods used by judges to interpret statutes

Over the years judges have developed certain principles and guidelines to help them interpret statutes. If the meaning of the words of an Act of Parliament 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 than the act, to discover the intention of the parliament at the time the act was passed, so they can apply the act 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.

When judges are trying to discover the intention of parliament when it made an act, they can look at a range of materials including:

- materials contained in the act itself (referred to as **intrinsic materials**) including the use of the words in both the section of the statute being interpreted and other sections, the long title, and headings, margin notes, footnotes, punctuation, and
- materials from sources outside the statute (referred to as **extrinsic materials**) including parliamentary debates (which are recorded in **Hansard**), reports from committees and **law reform bodies**, dictionaries and interpretation acts that specifically provide guidelines for judges when interpreting statutes.

The effects of statutory interpretation

Through their ability to interpret statutes, the courts play an important role in law-making. The effects of statutory interpretation are shown below.

- **Words or phrases contained in disputed acts are given meaning** – This is so that the relevant statute can be applied to resolve the case before the court.
- **The decision reached is binding on the parties** – Once a court has reached a decision on the meaning of an Act of Parliament, the parties to the case are bound by that decision until one of the parties lodges an appeal against the decision and the appeal court reverses it.
- **Precedents are set for future cases to follow** – If the interpretation of the words and phrases in an act is made by a superior court (for example, the Court of Appeal or the High Court), the reason for the decision forms a precedent that is then read together with the statute to determine the outcome of future cases. This will occur until the precedent created is extended, reversed or overruled by a higher court or overridden by parliament, which can pass a law to cancel (**abrogate**) a court's interpretation.
- **the meaning of the legislation (law) can be restricted or expanded** – If a court interprets a word or phrase narrowly, this could restrict the scope of the law. For example, the decision in *Deing v Tarola* restricted the definition of a regulated weapon to items likely to be used for an offensive or aggressive purpose only. Similarly, a broad interpretation of a word or phrase in a statute can extend the meaning of legislation to cover a wider range of circumstances or new area of law. For example, the decision in the *Tasmanian Dam* case extended the interpretation and meaning of the phrase 'external affairs' in the Australian Constitution to include areas covered by international treaties – thus allowing the Commonwealth Parliament to make laws in any area covered by an **international treaty**.

abrogate
to cancel or abolish a court-made law by passing an Act of Parliament

international treaty
a legally binding agreement between countries or intergovernmental organisations which is in written form and is governed by international law

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 it is reversed by a higher court on appeal, overruled by a higher court in a different and later case, or abrogated (cancelled) by an Act of Parliament (although parliament cannot abrogate a High Court decision involving constitutional matters).

The case of *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA 329 explored the definition of what is considered to be a bread product versus what is considered to be a biscuit product.

Bread or biscuit?

LEGAL CASE

Lansell House Pty Ltd v Commissioner of Taxation [2010] FCA 329 (9 April 2010)

Alfred Abbatangelo took the Australian Taxation Office (ATO) to court over an ATO ruling that his product – a mini ciabatta – was a biscuit, not bread. If it was bread, it attracted no GST. If it was a biscuit, Abbatangelo should have been paying GST and he would owe $85 000 to the ATO. 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 said his product was 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.



Source 4 Ciabatta – bread or biscuit?

During the 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 ATO. The mini ciabatta was treated as a cracker and the plaintiff was therefore liable to pay GST.

The case of *Mansfield v Kelly* [1972] VR 744 has similarities with *Grace v Fraser*.

LEGAL CASE

Drunk in a public place, in a motor vehicle

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 this case, 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, Section 13 of the *Summary Offences Act* is read together with the case of *Mansfield v Kelly* as the law on this issue.

13.4 CHECK YOUR LEARNING

Define and explain

1 What is statutory interpretation?

2 Explain how judges make law when they are interpreting an Act of parliament.

3 Read the legal case *Davies v Waldron*.
   - **a** Explain why the meanings of words are sometimes ambiguous. Provides examples in your answer.
   - **b** Identify the ambiguous words that were in issue in the case.
   - **c** How have these words been interpreted by the Supreme Court?

4 What does it mean to say an Act of Parliament is 'silent on an issue'?

5 Describe three possible effects of statutory interpretation.

Synthesise and apply

6 Explain how a word you know of has changed its meaning over time.

7 Read the legal case *Lansell House Pty Ltd v Commissioner of Taxation*.
   - **a** Why was it important to know whether ciabatta is a bread or a biscuit?
   - **b** In your opinion, is mini ciabatta a bread or a biscuit? Explain whether or not you agree with the decision in this case.
   - **c** Search the internet to find more information about the arguments presented in the case. Present a report giving the arguments of both sides.

8 Read the legal case *Mansfield v Kelly* and explain whether you think the case would apply to the following two scenarios, and what the outcome would be in each case:
   - **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.

9 Read the legal case *Deing v Tarola*.
   - **a** What was Chanta Deing (defendant) charged with in this case?
   - **b** Explain the finding of the Magistrates' Court. Why was the studded belt seen as a weapon?
   - **c** What did Justice Beach have to decide?
   - **d** Why was the definition of a weapon in the regulations seen as not relevant?
   - **e** Identify two types of extrinsic material used in this case.
   - **f** Could this case be used as an example of a reversed decision? Explain.
   - **g** 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*.
   - **h** What was the outcome of this case? Why was action taken to amend the law? Explain.

10 Using the internet, search for a summary of a court judgment that interpreted a statute. Write a report on the case. Include in the report:
   - the name of the court hearing the case
   - the title of the case
   - a brief summary of the facts
   - the name of the statute referred to
   - the section of the statute that was interpreted
   - whether any precedent is being referred to and if so, the title of the case referred to.

Analyse and evaluate

11 'Courts should be able to interpret statutes as and when the need arises to meet the changing needs of the community.' Discuss the extent to which you agree with this statement.

Check your obook assess for these additional resources and more:

» **Student book questions**
13.4 Check your learning

» **Worksheet**
Statutory interpretation

13.5 THE DOCTRINE OF PRECEDENT

judicial conservatism an expression used when judges adopt a narrow interpretation of the law when interpreting Acts of Parliament and deciding cases (i.e. avoid major or controversial changes in the law and not be influenced by their own political beliefs or the views of the community)

judicial activism an expression used when judges consider a range of social and political factors when interpreting Acts of Parliament and deciding cases (i.e. consider the changing political beliefs and the views of the community)

rule of law the principle that everyone in society is bound by law and must obey the law. The rule of law also states that laws should be fair and clear, so people are willing and able to obey them

Study tip

The *VCE Legal Studies Study Design* requires you to know five factors that affect the ability of courts to make law: the doctrine of precedent, judicial conservatism, judicial activism, the costs and time in bringing a case to court and the requirement for standing.

While the main role of the courts is to apply existing laws made by parliament to resolve disputes, the courts have an important role to play in law-making. As we have examined, courts are able to make common law when a case is before them. However, while courts are able to make law, their ability to do so is sometimes limited. In this chapter you will look at five of the main factors that affect the ability of courts to make law, being:

- the doctrine of precedent
- **judicial conservatism**
- **judicial activism**
- costs and time in bringing a case to court
- the requirement for standing.

In this topic you will explore the first of these factors, being the doctrine of precedent. The doctrine of precedent both enables and restricts the ability of courts to make laws.

As part of the doctrine of precedent, judges follow a process in which they follow the legal reasoning behind the decisions of higher courts when resolving disputes. This application of precedents to current cases is an important factor that helps ensure common law is **consistent** and **predictable**. It is one of the ways in which the **rule of law** is upheld, providing some certainty in the way that laws are applied.

Having lower courts follow the legal reasoning established by higher courts in the same hierarchy, in cases where the material facts are similar, ensures that:

- like cases are decided in a like manner. This enables the parties in a dispute to look back to previous cases to gain some idea of how a court might determine their case.
- legal representatives are able to give advice on the likely outcome of case, as they will have some understanding as to how the court may decide the case.
- judges have some protection and guidance, as they can refer back to previous cases and decide accordingly.
- decisions made by more experienced judges in higher courts are followed in lower courts.
- the same point is not being decided over and over again, which would be a waste of resources.

The doctrine of precedent does, however, also have limitations.

Identifying relevant precedents

While parties and judges can refer to earlier precedents for guidance, it can be difficult to locate precedents relevant to a particular case, due to the large number of cases that may have previously been decided in the particular area of law involved in the case. The large volume of existing precedents also means that finding a relevant precedent can be time-consuming and costly. Adding to this, judgments can be written in technical language and judges may give more than one reason for their decision.



Source 1 Judges refer to earlier precedents for guidance. Lawyers refer to earlier precedents when they give advice. They also need to put their arguments to the court based on the precedents.

Similarly, as we have already seen earlier in this chapter, identifying the legal reasoning behind a decision (*ratio decidendi*) can be difficult when the precedent has been established in a court of appeal with three or more judges. In these cases, lawyers 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 will be conflicting authorities. This means there will be more than one judgment on a particular issue, and most likely differences in their reasons for the decisions. If this occurs, the judge needs to decide which precedent is most appropriate to the set of circumstances before the court.

Binding precedents

The doctrine of precedent may also restrict the ability of the courts to change the law in cases where the court is bound to follow a previous precedent established by a higher court. It may also lead to an unjust outcome if courts are bound to follow an 'outdated precedent' and the affected party cannot afford to pursue an appeal to a higher court. However, lower courts can express their **disapproval of a binding precedent** which may encourage a dissatisfied party to pursue an appeal to a higher court, and be used to indicate to a higher court that the lower court believed the precedent needed to be reconsidered.

Flexibility

A strength associated with the doctrine of precedent is that it is flexible and, in certain circumstances, allows courts to avoid following, or even to change, existing precedents. For example, higher courts can reverse (on appeal) or overrule previous precedents in a later case. Judges can also avoid following an existing precedent by distinguishing between the material facts of the case before the court and the material facts of the case in which the precedent was set.



Source 2 Judges of the Victorian Court of Appeal can overrule or reverse precedents set by the Trial Division of the Supreme Court of Victoria.

However, judges in superior courts may be reluctant to reverse or overrule existing precedents. For example, in the *Trigwell* case, the High Court decided not to overrule an earlier precedent set by a state court of appeal preferring to leave the law-making to parliament in this area.

Similarly, judges in courts of the same standing, by convention, consider their own court's previous decisions to be highly persuasive and rarely overrule them (with the exception of the High Court, which will overrule its own decisions to allow the law to develop over time). Judges are not, however, bound to follow precedents from other hierarchies (such as interstate and overseas) or from lower courts in the same hierarchy.

The doctrine of precedent can also limit the ability of courts to make law because judges must wait for a relevant case to be brought before them. Also, only the superior courts (the Victorian Supreme Court or higher) can make law. This means that the courts are reliant on parties being aware of their right to pursue a matter in the courts, being willing and able to afford to bring a case before the courts, and being determined to see the action through the appeals process (which is also costly and time-consuming).

+	−
Judges can reverse precedents	Reluctance to overrule
Judges can overrule precedents	Must wait for a case to come before them
Judges can distinguish the precedent	Must be required to clarify some issue or matter

Source 3 The pros and cons of the flexibility in the doctrine of precedent

Further, judges in superior courts are restricted to making law that is needed to clarify some issue or matter raised in the case before them. Anything they say 'by the way' is *obiter dicta*.

Judges make law *ex post facto*

Another factor that limits the effectiveness of courts making law through the doctrine of precedent is that, as courts can only make law when a dispute is brought before them, courts make and clarify the law retrospectively, after the event (***ex post facto***). If the court is interpreting a statute, or considering a precedent, it can only clarify the meaning of the statute or change precedent after the dispute has come before the court. If the court is discussing a case law precedent, it can only clarify the meaning **after** the dispute has come before the court. Expansion of the law of negligence is an example. Before the 'negligent misstatement' cases such as the *Shaddock* case came before the court, no one knew how the courts would decide. Extending the law by interpreting the meaning of previous decisions more broadly allows the court to achieve a fair result for the successful party, but it also means the other party was acting within the law at the time of the incident. It is only later that the court finds that they acted outside the law.

ex post facto
a Latin term meaning 'out of the aftermath'; a legal term used to describe a law that is established in relation to an event that has already taken place

Parliament can override judge-made law

While judges can make law through the establishment of precedents, with the exception of High Court decisions in constitutional matters, parliament can always legislate to override common law. This is because parliament is our supreme law-making body. This limits the ability of judges to make and change the law.

For example, in 2015 the Victorian Parliament passed legislation which amended laws about directions given by judges to juries. One of the amendments abolished an old common law rule that a judge can direct a jury that a complainant's delay in making a complaint about a crime may cast doubt on the reliability of the complainant's evidence, and that they can take this into account when deciding whether the complainant's evidence is credible. This was seen to be particularly prejudicial and harsh in relation to complainants of sexual offence crimes. In constitutional matters, however, parliament cannot override common law.

Summary of the advantages and disadvantages of the role of the courts in law-making

A summary of the advantages and disadvantages of the role of the courts in law-making is set out in Source 4 below.

ADVANTAGES	DISADVANTAGES
• The principle of *stare decisis* ensures consistency in common law because **lower courts** must follow precedents set by **superior courts** in cases with similar material facts.	• Lower courts must follow a binding precedent even though they may consider it to be outdated or inappropriate.
• The principle of *stare decisis* can ensure predictability in common law because parties can anticipate how the law is likely to be applied to resolve their dispute by examining past cases.	• Given the large amount of precedents in existence, and the different judgments in the same case, the process of identifying the relevant precedent can be time-consuming and costly for the parties.
• Common law is flexible because judges in superior courts can overrule and reverse precedents and lower courts can avoid them through distinguishing material facts.	• Judges in superior courts may be reluctant to change an existing precedent, preferring parliament, as the supreme law-making body, to abrogate (cancel) it.
• By undertaking statutory interpretation judges can clarify unclear legislation so it can be applied to cases before the court.	• Judges can only interpret legislation when an appropriate case is bought before the court, which is generally reliant on parties being willing to pursue a dispute through the appeals process.

• By undertaking statutory interpretation judges can expand or limit the meaning of legislation.	• Judges cannot change the actual wording of legislation but rather create a precedent that is read with the existing legislation.
• By setting precedents courts can make law to complement legislation.	• Courts can only clarify the meaning of legislation after a dispute over its meaning has arisen (i.e. *ex post facto*).
• Judges are independent and impartial adjudicators who do not have political bias or feel compelled to satisfy voters when making decisions.	• Unlike members of parliament, judges are not elected by the people and as such may not represent the views and values of the community in their decisions.
• Courts can determine if parliament has made law beyond their power and declare any such law invalid. In doing so, courts provide an independent check that parliament does not exceed its law-making powers.	• Judges may be conservative and exercise restraint when resolving disputes that may lead to a controversial change in legislation.
• Judges can be an informal source of legislative change.	• Parliament can pass legislation to override common law, with the exception of decisions made in constitutional matters.

Source 4 A summary of the advantages and disadvantages of the doctrine of precedent

13.5 CHECK YOUR LEARNING

Define and explain

1 Explain how a binding precedent made in the Supreme Court (Trial Division) can restrict the ability of the lower courts to make law.

2 Outline the main reason why parliament is generally able to pass legislation to override court decisions.

3 State the meaning of the phrase 'courts make law *ex post facto*' and explain whether or not this is a strength or weakness of the courts making law.

Synthesise and apply

4 For each of the following scenarios, explain how the doctrine of precedent will both allow and restrict the courts in making or developing law.

a Mohamed has sued the State of Victoria in the Supreme Court of Victoria. An old precedent established in that same court has previously been disapproved by lower courts, and it does not work in Mohamed's favour.

b The plaintiff in a County Court case has been advised that some of the facts in its case are similar to the facts in a precedent established in the High Court, but some facts are different.

c Bernie has lost his Supreme Court case as a result of an old precedent established in the High Court. His lawyers are encouraging him to appeal.

Analyse and evaluate

5 'The doctrine of precedent always restricts the ability of the lower courts to make law.' Discuss this statement.

6 To what extent does the doctrine of precedent enable the High Court to make law? Give reasons for your answer.

Check your obook assess for these additional resources and more:

» **Student book questions**
13.5 Check your learning

» **Video tutorial**
Tackling the doctrine of precedent

13.6 JUDICIAL CONSERVATISM

judicial conservatism
an expression used when judges adopt a narrow interpretation of the law when interpreting Acts of Parliament and deciding cases (i.e. avoid major or controversial changes in the law and not be influenced by their own political beliefs or the views of the community)

law reform
the process of constantly updating and changing the law so it remains relevant and effective

judicial activism
an expression used when judges consider a range of social and political factors when interpreting Acts of Parliament and deciding cases (i.e. consider the changing political beliefs and the views of the community)

Judges can hold different views about the way they should interpret the law. **Judicial conservatism** refers to the idea that the courts should show restraint or caution when making decisions and rulings that could lead to significant changes in the law. Judicial conservatism influences the ability of the courts to make law, because judges who take a conservative approach to the way they interpret statutes will not go very far beyond the established law.

Parliament is the supreme law-making body, consisting of members who are elected by the people to make laws on their behalf. It is therefore generally accepted that the parliament has more authority for implementing major **law reform** than judges, who are not elected by the people. Judges should interpret the law, not rewrite it.

An important feature of judicial conservatism is the belief that judges should ensure their decisions are not based on their own views or political opinions. They should also not base their decisions on what they perceive to be the community's view on a given issue. Rather, they should base their decisions solely on legal considerations. They are in no position to assume to know or assess the community's views on a particular issue.

This traditional view is opposite to the concept of **judicial activism**, or the idea that judges should consider a range of social and political factors, like the views and values of the community and the need to protect the rights of the people, when interpreting Acts of Parliament and making decisions. The effect of judicial activism on the law-making ability of the courts is examined later in the next topic of this chapter.

The Honourable Susan Kiefel was appointed as Australia's first female Chief Justice of High Court. Commentators have questioned the type of High Court that she will lead.

CASE STUDY

Australia's first female Chief Justice of the High Court

In January 2017, after serving in the High Court since 2007, the Honourable Susan Kiefel was appointed Australia's first female Chief Justice of the High Court. She replaced Chief Justice French, who in accordance with the provisions of the Australian Constitution, retired upon reaching the age of 70 years. The **full bench** of the High Court is made up of seven justices (including the Chief Justice).

full bench
all seven justices of the High Court sitting to determine a case

Commentators often comment on whether the High Court is 'conservative' or 'active', based on its judges at the time. With respect to Chief Justice Kiefel, some have categorised her as conservative. In particular, Kiefel CJ often writes joint judgments with other High Court justices, and does not often dissent in cases (that is, not agree with the majority of justices). Other observers have indicated that people shouldn't assume how Kiefel CJ will decide future cases, or that we should try to label her as either conservative or active. In fact, many criticise these labels as being too simplistic and lacking in understanding of the role of the judge.



Source 1 The full bench of the High Court of Australia in 2017, after the Honourable Susan Kiefel (shown centre) was appointed as Australia's first female High Court Chief Justice.

Those who support judges adopting a more progressive, creative or 'activist' approach argue that the courts have a duty to broadly interpret Acts of Parliament in a way that recognises the rights of the people and address community concerns on a given matter. The classic case of this kind is the *Mabo* case (discussed in Topic 13.7).

Because the High Court interprets the Constitution, those who favour judicial conservatism believe the justices should limit their role as law–makers when making rulings in constitutional disputes, and be reluctant to declare Acts of Parliament invalid unless they are obviously unconstitutional. The main purpose of judicial interpretation is to give effect to what parliament intended when it passed the statute that is being interpreted.

The majority decision in the case of *Rowe v Electoral Commissioner* [2010] 243 CLR 1 is considered by some to be an example of the High Court taking an activist rather than a conservative approach.

Shannen Rowe turned 18 but was unable to vote

LEGAL CASE

Rowe v Electoral Commissioner [2010] 243 CLR 1

In Australia, the federal election process formally commences with the issuing of writs by the Governor-General (usually after being approached by the prime minister), which specify the key dates of the election like the closing date for individuals to enrol to vote and candidates to nominate and the actually polling day. In 2006, the Commonwealth Parliament passed an amendment to the *Commonwealth Electoral Act 1918* (Cth) abolishing the right of an individual to have up to seven days after the issuing of the writs to enrol to vote. After this change a person had to be enrolled to vote **prior to** the issuing of writs.

On Saturday 17 July 2010, the federal government announced an election would be held on 21 August 2010. As procedure required, the Governor-General issued the writs on the following Monday 19 July 2010, and in accordance with the 2006 changes to the *Commonwealth Electoral Act*, no enrolments to vote could be accepted after 8:00 pm on this date. Shannen Rowe, who turned 18 years of age on Friday 16 June, enrolled to vote five days after the issuing of the writs on Friday 23 July. Prior to the 2006 amendments to the *Commonwealth Electoral Act*, Rowe would have been eligible to enrol to vote. The amendments made her ineligible. This injustice led her to challenge the amendments to the *Commonwealth Electoral Act*.

Given the pending election, the High Court heard and delivered its judgment relatively quickly. On 6 August 2010, the majority of High Court justices ruled (4 to 3 in favour) that the amendments made to the *Commonwealth Electoral Act* in 2006 were invalid, allowing Rowe to vote in the August election. The Court decided that the restrictions on enrolling to vote imposed by the 2006 amendments would limit the right of the people to elect the parliament, as outlined in Sections 7 and 24 of the Constitution, which states that members of both houses of the Commonwealth Parliament be 'directly chosen by the people'.

The four justices who formed the majority decision were regarded by some as more activist in their approach by recognising the right of the people to elect the parliament, whereas the decisions of the three dissenting justices, who believed the requirement of the parliament to be 'directly chosen by the people' had not been infringed by the amendment to the *Commonwealth Electoral Act*, were considered to have adopted a more conservative approach.

Interestingly, the reason why the validity of the changes to the *Commonwealth Electoral Act* was not challenged at the time they were made in 2006 was because a person must have a standing in a case before it can be brought before the courts. That is, a person cannot challenge the validity of legislation unless they have been directly affected by it. Rowe was not affected by the 2006 amendments until she was denied enrolment in 2010. The ability of 'standing' to influence the courts' capacity to make law is examined later in this chapter.

As mentioned earlier in this chapter, judges may also follow the principle of judicial conservatism in circumstances where their interpretation of legislation may potentially lead to a major or controversial change in the law. They prefer parliament to investigate and make contentious law reform. While parliaments are able to investigate the need for law reform, through a range of methods including **parliamentary committees** and specialist bodies like the **Victorian Law Reform Commission (VLRC)**, the courts are not able to investigate the views of the public and are limited to examining the resources they have available in the court, with the exception of being able to consult **extrinsic material** when interpreting statutes. Courts are also limited to making law on issues or the part of the law that is the subject of the case before them whereas parliament can make laws for whole areas and in anticipation of future circumstances. The role of parliamentary committees and the VLRC is examined in Chapter 14.

Victorian Law Reform Commission (VLRC)
Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

Summary of judicial conservatism

A summary of the way judicial conservatism affects the ability of courts to make laws is set out in Source 2 below.

SUMMARY

- helps maintain stability in the law
- lessens the possibility of appeals on a question of law
- allows the parliament, which has the ability to reflect community views and values, to make the more significant and controversial changes in the law
- restricts the ability of the courts to make major and controversial changes in the law
- can discourage judges from considering a range of social and political factors when making law

Source 2 A summary of the way judicial conservatism may affect the ability of judges to make new laws.

13.6 CHECK YOUR LEARNING

Define and explain

1 Define the term judicial conservatism.
2 Explain how judicial conservatism can impact on the way a statute is interpreted.

Synthesise and apply

3 Read the legal case *Rowe v Electoral Commissioner*.
   a Explain what changes were made to the *Electoral Act* by the Commonwealth Parliament in 2006.
   b Explain why Rowe initiated the High Court action against the 2006 amendments to the *Electoral Act*.
   c Outline the decision of the High Court and briefly explain the legal reasoning behind the decision.
   d Explain how this case illustrates the relationship between the courts and parliament in law-making.

Analyse and evaluate

4 Discuss two strengths associated with judges exercising judicial conservatism (or restraint) when interpreting Acts of Parliament.
5 Evaluate the extent to which conservative judges limit the ability of courts to make law.

Check your obook assess for these additional resources and more:

» **Student book questions**
13.6 Check your learning

» **Going further**
Rape in marriage cases

» **Weblink**
Australian Electoral Commission – enrolling to vote

13.7 JUDICIAL ACTIVISM

Did you know?

By the end of September 2014, 242 of the 301 native title claims made throughout Australia resulted in rulings upholding the existence, or partial existence, of native title in the area claimed, meaning that native title rights exists over approximately 18% of Australia's land mass. However, most of the successful land claims have been over unwanted land; that is, land located in very remote areas of Australia, with very limited or no infrastructure (e.g. power, communication, roads and the like) and of little commercial value.

terra nullius
a Latin term meaning 'empty land'; a false common law principle that Australia belonged to no one when the British first arrived in Australia to establish a colony in 1788

Over the years, the term **judicial activism** has been defined in many ways and therefore there is no one clear definition. The term was first used in the United States back in the 1940s by an academic historian, Arthur Schlesinger Jr. He used it to refer to US Supreme Court judges who were willing to broadly interpret the rights protected in the US Constitution and make decisions to declare legislation that breached the civil rights of the American people invalid. The meaning of judicial activism then expanded to refer to judges who were willing to make rulings against the more politically conservative, or traditional mainstream view, in an attempt to protect the interests or rights of a minority party or group.

In recent years, the term judicial activism has been used to refer to the willingness of judges to consider a range of social and political factors, including community views and values and the rights of the people, when interpreting the law and making decisions. Those who disapprove of judges taking a more active role in determining and creating law have negatively defined judicial activism as judges making decisions arguably outside their legislative or constitutional power; for example, interpreting Acts of Parliament in a way that expands its meaning beyond the original intention of the parliament in an attempt to influence a change in the law. People who approve of judges taking a more active role use less negative terms such as 'progressive' rather than 'activist'.

In Australia, it was not until the 1990s that legal commentators, critics, politicians and the media started to question whether judicial activism was significantly influencing court decisions and the ability of the courts to make law. In fact, one of the first major Australia cases that raised concern about judicial activism was the case of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 in which the justices of the High Court (6:1 in favour) made a significant ruling to give Aboriginal and Torres Strait Islander peoples land rights. More specifically, the High Court justices overturned the longstanding but false legal principle that Australia was an 'empty land belonging to no one' (***terra nullius***) before British colonisation. The Court legally recognised the right of Indigenous Australians to make claims over their traditional land.



Source 1 Federal Court Justice Gilmore on his way to a traditional Indigenous welcome to country before making a native title determination on the West Kimberley's Fitzroy River, Western Australia, in 2014.

At the time of the *Mabo* decision some critics viewed it as a very clear example of improper judicial activism. They said the High Court was exercising excessive judicial creativity by establishing a law based on the political and social desire to establish land rights and recognise the rights of Indigenous Australians. Some even went so far as to say the ruling diminished the objectivity of the court. Many others, by contrast, including the Federal Government of the day, celebrated the ruling and praised the High Court justices for acting with impartiality and courageously overruling the outdated and false legal principle of *terra nullius*.

The extent to which judges should be progressive (or activist) when making decisions and establishing precedents is controversial and largely depends on the circumstances of the case before the court. While some people may consider judicial activism and the **willingness of judges to consider the need to uphold rights and recognise community values when making law** as judges overstepping their role as independent law–makers, others view it as a legitimate obligation of the court that must be exercised by judges to ensure justice is achieved.

In the *Malaysia Solution* case below the High Court exercised judicial activism by ruling against the federal government's agreement.

LEGAL CASE

The *Malaysia Solution* case

Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144

In 2011, in a case referred to as the *Malaysia Solution* case, the High Court adopted a more activist approach that recognised the rights of asylum seekers and forced the Federal Government to change their asylum seeker policy.

In short, the case involved a dispute that arose after the Commonwealth Government of the day made an agreement with the Malaysian Government, commonly known as the 'Malaysia Solution'. The arrangement involved the Malaysian Government agreeing to accept 800 asylum seekers, who were being held in detention centres by the Australian Government after arriving 'unauthorised' into Australia, in return for the Australian Government agreeing to take in 4000 refugees who were awaiting re-settlement in Malaysia.

The proposed agreement caused great controversy in Australia. Many refugee, human rights and legal organisations believed the proposal was inhumane, against the spirit of the *Convention Relating to the Status of Refugees*, also known as the Refugee Convention (under which Australia has agreed to treat refugees and asylum seekers with respect and compassion) and in breach of the *Migration Act 1958* (Cth), which among other obligations, requires asylum seekers who arrive in Australia to have legal protection from further persecution.

When determining a case in 2011, that challenged the legality of the Federal Government's 'Malaysian solution' proposal, the High Court exercised judicial activism, ruling that the proposal breached the existing *Migration Act* and was therefore illegal. The ruling recognised the right of Australian asylum seekers and increasing community concern over the relatively harsh treatment of asylum seekers.

Interestingly, after the prime minister at the time, Julia Gillard, criticised the High Court's ruling stating that the High Court had missed the opportunity to send a message to people smugglers (those who engage in the illegal transporting of people for profit) that Australia's strict asylum seeker policies would undermine their illegal activities, the then Chief Justice French defended the court's decision and its independence by stating the ruling was based on the application of the law and not influenced by party politics.

The case also illustrated one aspect of the relationship between the parliament and the courts in law–making by demonstrating the ability of the High Court to declare laws and government policy that breaches existing Australian law and human rights treaties and conventions invalid.

Summary

A summary of the way judicial activism affects the ability of courts to make laws is set out in Source 2 below.

SUMMARY
• Allows judges to broadly interpret statutes in a way that recognises the rights of the people. • Allows judges to consider a range of social and political factors and community views when making a decision, which may lead to more fair judgments. • Allows judges to be more creative when making decisions and making significant legal change (as occurred in the *Mabo* Case). • Can lead to more appeals on a question of law. • Can lead to courts making more radical changes in the law that do not reflect the community values or are beyond the community's level of comfort.

Source 2 A summary of the way judicial activism may affect the ability of judges to make new law

13.7 CHECK YOUR LEARNING

Define and explain

1 When was the term 'judicial activism' first used and what, in general, did it refer to?

2 What is generally meant by the term judicial activism in relation to the contemporary Australian legal system?

Synthesise and apply

3 Explain why the High Court's decision in *Mabo v Queensland (No. 2)* was regarded as an example of judicial activism.

4 Read the legal case *Plaintiff M70/2011 v Minister for Immigration and Citizenship*.

a Explain the Federal Government's proposal and circumstances that led to the initiation of the case in the High Court.

b Explain why the Federal Government's Malaysian Solution caused controversy among legal commentators, the media, academics and the general community.

c Outline the decision of the High Court and discuss whether it is an example of judicial activism.

d Explain how this case illustrates the relationship between the courts and parliament in making law.

Analyse and evaluate

5 Discuss the strengths associated with judges taking a more activist approach when resolving cases.

6 'Labelling judges as conservative or active is too simplistic and does not understand the role of judges'. Discuss the extent to which you agree with this statement.

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13.7 Check your learning

» **Going further**
Naming the High Court

» **Weblink**
French CJ and Judicial Activism

13.8 COST AND TIME IN BRINGING A CASE TO COURT

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

equality
one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

litigant
a person who takes a matter before the court to be resolved

legal aid
legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

As explored in Chapters 5 and 8, the cost and time involved in taking a case to court can affect the ability of the legal system to achieve the principles of justice, being **fairness**, **equality** and **access**.

These factors can also limit the law-making ability of the courts. As we know, the courts cannot make law until a case is brought before them, which is dependent upon **litigants** not only being aware of their right to pursue a matter through the courts, but also being willing and able to afford to bring a case before the courts. Furthermore, as precedents are generally established by appeal courts, litigants must be able and determined to see the action through the often costly and time-consuming appeals process.

Costs of taking a case to court

Taking a case to court can be costly and may deter those litigants who cannot afford these costs and who do not qualify for **legal aid** from pursuing their case and any subsequent appeals. As mentioned in Chapters 5 and 8, two of the main costs involved in taking a case to court include the cost of legal representation and court fees.

The cost of legal representation

For a party to have the best chance of winning a case they generally need to engage legal representation to ensure their case is prepared and presented in the best possible manner. For example, lawyers need to conduct research into the case, including researching previously established relevant precedents that may be used as either binding or persuasive on a court, analyse evidence and documents, interview and prepare witnesses, and present legal arguments and evidence to the court in accordance with the strict rules of evidence and procedure. A party that is unrepresented will be at a distinct disadvantage and the high cost of legal representation can particularly discourage people who wish to take a civil issue to court, in which precedents can be established and changed. At the same time, however, the costs involved can discourage people who have frivolous or trivial claims from using the courts to pursue those claims. The costs will also encourage people to use alternative dispute resolution methods such as mediation to resolve their claims.

Court fees

Lodging a civil case with a court incurs a number of costs including filing fees, hearing fees and jury costs. These costs can be expensive. For example, from 1 July 2017 to 30 June 2018 an application for leave to appeal to the Victorian Supreme Court of Appeal cost $3661.70, and hearing fees cost $1450.40 for every day or part day, after the first day. If a party requests a jury in the Supreme Court, it will cost $772.10 for the first day, $554.40 per day for days two to six, and $1100.40 a day from day seven onwards. These fees increase on a yearly basis.

Time involved in bringing a case to court

injunction
a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

One of the strengths associated with courts making law is that the courts have the ability to make law relatively quickly once a dispute has been brought before them.

For example, once a case is brought before a superior court, where precedents are set, the matter must continue until a decision has been made and the dispute resolved. Furthermore, judges are not required to follow lengthy procedures like those involved in the process of developing, drafting and passing a bill through parliament, including the bill being examined in general terms and great detail by both houses

of parliament. Judges can, by contrast, make decisions relatively quickly to resolve a case and create law, although judges in appeal courts, where most precedents are established, can take months to hear and determine more complex cases.

Below is an example of how judges in appeal courts can take a long time to hear more complex cases.

Asylum seeker arriving by boat

LEGAL CASE

Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42

In February 2016, the High Court of Australia ruled the Australian Government's policy to forcibly hold asylum seekers in offshore detention centres (such as in those at Manus Island, Papua New Guinea and Nauru) was lawful and made in accordance with the Commonwealth's law-making powers. In simple terms, the legal action, which was initiated by the Human Rights Law Centre and Stacks Goudkamp Solicitors on behalf of a Bangladeshi asylum seeker, aimed to challenge the constitutional validity of the Australian Government's policy to forcibly send and hold asylum seekers in offshore detention centres.

The female asylum seeker who was the focus of the dispute was being treated by the Australian Government as an unauthorised asylum seeker (who arrived by boat) who could be held in an offshore detention centre. This was despite her being confirmed as a genuine refugee by the Government of Nauru and brought to Australia, for a brief period of time, to receive medical treatment.

While the consequences of this case were important, and as such the case could not be rushed through the courts, the woman involved and other affected parties had to wait approximately nine months from the time the High Court application was made in May 2015 to the final judgment handed down in February 2016.



Source 1 In 2016, the Australian Government forcibly held asylum seekers in offshore detention centres in Nauru and Papua New Guinea.

When an urgent **injunction** is needed or there is a pressing need at a high level of community importance, courts can move quickly because judges have discretionary power and can make rulings quickly (on the spot if necessary). In the same-sex marriage case (the *Marriage Equality* case below) the High Court acted relatively fast.

The *Marriage Equality* case

LEGAL CASE

Commonwealth v Australian Capital Territory (2013) 250 CLR 441

In December 2013, the High Court acted relatively 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 *Marriage Act*. The ACT Act permitted same-sex marriage ceremonies to commence from 7 December 2013. However, on 12 December 2013, after the Commonwealth Government challenged the ACT legislation, the High Court ruled



Source 2 In 2013, Stephen Dawson MP and Dennis Liddelow became the first same-sex couple to lawfully marry in Australia. Five days later, their marriage was declared invalid by High Court ruling.

that the ACT Act could not operate concurrently with the *Marriage Act*, which was amended in 2004 to clarify that marriage could only be between a man and a woman, and subsequently declared the ACT legislation invalid. Within five days of being passed the ACT Act allowing marriage equality was declared void and approximately 27 marriages that had taken place during that short period were cancelled.

As explored in Chapters 5 and 8, many factors can increase the time it takes for the courts to resolve a dispute and make law including:

- unavoidable delays caused by various factors such as the complexity of the dispute
- complex pre-trial procedures
- lack of court resources and support services
- an increasing number of cases being heard by the courts.

Similarly, as we have seen earlier in the chapter, the large volume of common law means that it can be time-consuming and costly for parties to determine what precedents support their case.

The case below is an example of how the complexity of a dispute can lead to lengthy delays in a resolution being reached.

LEGAL CASE

Negligent driving causing paraplegia

Allen v Chadwick [2015] HCA 47 (9 December 2015)

In March 2007, Danielle Chadwick, a passenger sitting in the back seat of a car without her seatbelt fastened, was thrown from the vehicle after it collided with a tree and suffered severe spinal injuries that caused her to become a paraplegic. The driver, Alex Allen, who had only moments before chosen to take over driving from Chadwick, was estimated to have a blood alcohol reading of .229 per cent, well over the legal limit of .05, at the time of the incident.

In August 2012, Chadwick successfully sued Allen for negligence. However, while the trial judge ruled in her favour he did reduce the amount of damages awarded after finding Chadwick contributed to her injuries by failing to wear a seatbelt. Chadwick filed an appeal, claiming that after Allen chose to take over driving the vehicle, he drove so erratically that she was unable to secure her seatbelt.

In November 2014, the appeal court found in favour of Chadwick and reversed the decision of the trial judge with regard to the contributory negligence. Allen then pursued the matter further by seeking leave to appeal to the High Court of Australia.

In December 2015, nearly eight years after the incident occurred, the High Court finally resolved the case, by agreeing with the original trial judge that while Allen was negligent, his driving did not prevent Chadwick from putting on her seatbelt and as such her failure to do so amounted to contributory negligence. Chadwick was awarded damages of approximately $1.2 million.

Summary of costs and time

A summary of the way costs and time in bringing a case to court can affect the ability of courts to make laws is set out in Source 3 below.

FACTOR	SUMMARY
Costs	• Can deter litigants who cannot afford these costs, and who do not qualify for legal aid, from pursuing their case and their rights in court. • Can deter parties from pursing the appeals process. • Can discourage frivolous claims. • Can encourage parties to use alternative methods of dispute resolution and non-court institutions (e.g. VCAT and Consumer Affairs Victoria) to resolve their dispute.
Time	• Courts can resolve disputes quickly particularly where the circumstances require them to. • Not required to follow lengthy processes in deciding cases. • Some courts have suffered delays in having a case heard and determined. • Parties can be delayed in getting a case ready for trial.

Source 3 A summary of the way costs and time affect the ability of courts to make new law

13.8 CHECK YOUR LEARNING

Define and explain

1 Explain two factors that limit the ability of the courts to make law in a relatively speedy manner.

2 Describe two types of costs that may prevent a party from pursuing a case.

3 Do costs and delays affect plaintiffs just as much as defendants? Give reasons.

Synthesise and apply

4 Read the legal case *Plaintiff M68/2015 v Minister for Immigration and Border Protection*.

- **a** Do you think the High Court justices adopted a conservative or activist approach when interpreting the law? Justify your response.
- **b** Why would the plaintiff's lawyers have wanted the case resolved in a timely manner?

5 Read the legal case *Commonwealth v Australian Capital Territory*.

- **a** Briefly outline the key facts of this case and the High Court's decision, including the *ratio decidendi*.
- **b** Suggest why the decision was made relatively quickly compared to the *Plaintiff M68/2015 v Minister for Immigration and Border Protection* case.
- **c** Explain why this case did not consider Section 109 of the Australian Constitution.

6 Read the legal case *Allen v Chadwick*.

- **a** Prepare a timeline showing the significant rulings in this case from the time of the incident to the final High Court judgment.
- **b** Suggest at least three problems associated with having such a lengthy court action.

Analyse and evaluate

7 'Courts are able to make law relatively quickly.' Discuss the extent to which you agree with this statement. Use two cases you have studied to support your response.

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- » **Weblink**
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13.9 THE REQUIREMENT OF STANDING

Courts must wait until a party decides to pursue a case before they can create precedent. A party cannot take a case to a court unless the court has jurisdiction (power to hear those matters).

locus standi
a Latin term meaning 'standing in a case'; that is, the litigant must be directly affected by the issues or matters involved in the case for the court to be able to hear and determine the case

In addition, the party initiating the case must have standing (sometimes referred to as ***locus standi***) in the case to be able to pursue it. That is, the party **must be directly affected** by the issues or matters involved in the case to have the right to commence a legal proceeding in court. They must have sufficient or special interest in a case to 'stand before the court' and be heard. Having a 'special interest' in the case means that they must be explicitly more affected by the law or issues in dispute than a member of the general public. For example, the party initiating the action must stand to gain a quantifiable advantage (such as standing to gain money or property rather than just the satisfaction of winning), if they succeed in the action.

The leading case on standing, *Australian Conservation Foundation Inc. v Commonwealth* (1980) 146 CLR 493, is discussed below.

LEGAL CASE

The standing of a conservation body

Australia Conservation Foundation Inc. v Commonwealth (1980) 146 CLR 493

In this case a proposal was made to establish and operate a resort and tourist area in central Queensland. Approval was given by the Commonwealth Government under the *Environment Protection (Impact of Proposals) Act 1974* (Cth).

The purpose of the legislation was to protect the environment. The Australia Conservation Foundation (ACF) challenged the approval, saying the statement did not comply with the required administrative procedures.

The ACF argued that it had the right to sue because of its well-known interest in conservation of the environment.

The question was whether the ACF was entitled to challenge the validity of the decision. No right of the ACF had been violated, and there was no special damage to the ACF that would give them standing.

A majority of the High Court justices held that the ACF did not have standing to maintain the action and it should be dismissed. The High Court held that in cases which do not concern constitutional validity, a person who does not have a special interest in the subject matter of an action (i.e. more than some member of the general public) has no standing to sue for an injunction to prevent the violation of a public right or to enforce the performance of a public duty.



Source 1 Woodchips are still sent overseas from Australia. These woodchips are on the dock in Portland, Victoria, bound for Japan.

Justice Gibbs said 'It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty.'

Justice Stephen said 'If the present state of the law in Australia is to be changed, it is pre-eminently a case for legislation, preceded by careful consideration and report, so that any need for relaxation in the requirements for *locus standi* may be fully explored and the limits of desirable relaxation precisely defined.'

Anyone who wishes to bring a case to court must have standing, regardless of the court. However, the issue of standing is particularly important in the High Court in cases that involves challenging a Commonwealth law. This is because the High Court generally only hears cases where a person has a 'special interest' – meaning they are more affected than other members of the general public. They must show they are more affected by the law and will gain a greater material advantage (more than just winning) if the action succeeds, or will suffer a greater material disadvantage (more than just losing) if the action fails, than a member of the general public.

In the case below the High Court refused to make a ruling because the plaintiff had no 'special interest' and was not explicitly affected by the law.

The *anti-bikie laws* case

LEGAL CASE

Kuczborski v State of Queensland (2014) 254 CLR 51

In 2014, a member of the Gold Coast Hells Angel's Motorcycle club, Stefan Kuczborski, launched a test case in the High Court of Australia on behalf of 17 'outlawed' motorcycle clubs. The case challenged the constitutional validity of a range of 'anti-bikie' laws that were introduced by the Queensland Government in September 2013.

In simple terms, Kuczborski believed that a range of laws, including the *Vicious Lawless Association Disestablishment Act 2013* (Qld) (VLAD) and the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) breached basic human rights (such as the right to freedom of movement and association). These laws were introduced by the Queensland Government to protect the community from members of criminal organisations who commit serious crimes.

For example, Kuczborski argued the laws breached the right to freedom of association. The laws aimed to make it difficult for 'declared criminal organisations' (which included over 25 bikie clubs like the Bandidos, Finks, Hells Angels and Rebels) to organise criminal activities and recruit new members by banning three or more of these individuals from meeting in a public place.

In short, Kuczborski lost his case because the High Court refused to make a ruling on the grounds that he had 'no standing' in the case and therefore no right to challenge the laws through the Court. Basically, the High Court held that because Kuczborski had not been charged with any crimes under the new 'anti-bikie' laws, he had no real or 'special interest' in the subject matter of the case and as such the Court could not rule on whether the laws breached his legal rights.

While the ruling potentially allowed for another person who was ultimately charged under the new laws (and therefore deemed to have a standing in the case) to mount another legal challenge, it demonstrated the difficulty and limited ability of individuals to challenge the validity of a law if they believed it breached their basic rights and freedoms.



Source 2 Mr Stefan Kuczborski's High Court challenge of Queensland's 'anti-bikie' laws failed because the Court ruled he did not have standing in the case.

For example, in this case an individual would possibly have to actually breach the law before it could be tested in the courts.

After the High Court ruling, some legal commentators, lawyers and critics expressed the view that the courts could better serve the community if they were more willing to hear cases involving 'matters of public importance and interest', rather than refusing to rule due to a plaintiff's lack of standing.

Interestingly, in April 2016, the newly elected Queensland Government set up a taskforce to examine the anti-bikie laws, and many of them were abolished and replaced with more general laws such as banning 'people convicted of crimes' from meeting together.

The outcome of the *Kuczborski v State of Queensland* case has similarities with the legal case below, because the bishops did not have any legal, financial or special interest in the case.

LEGAL CASE

Bishops against IVF

Re McBain; Ex Parte Australian Catholic Bishops Conference (2002) 209 CLR 372

Dr McBain provided infertility treatments to single women. In 2002, a group of Catholic bishops wished to challenge a ruling made by the Federal Court in *McBain v Victoria* (2000) 99 FCR 116 which gave single women in Victoria the right to access in vitro fertilisation (IVF). The bishops brought the action on the basis that the ruling was against their religious beliefs.

The High Court ruled the bishops did not have standing in the case because they had no legal, financial (economic) or special interest in the case. Winning the case would not result in the bishops gaining a material advantage and losing the case would not cause them any disadvantage other than a sense of dissatisfaction and the costs involved in mounting the challenge. The bishops' interest in the case was based on and restricted to their religious beliefs, which did not entitle them to be treated as an aggrieved or injured party.

Summary

A summary of the way the requirement for standing affect the ability of courts to make laws is set out in Source 3 below.

SUMMARY
• Ensures cases are only brought to court by people who are genuinely affected by an issue or matter rather than wasting valuable court time and resources on listening to people who are not affected by a matter. • Encourages people not directly affected by an issue or matter to seek other avenues of redress (e.g. lobbying members of parliament, petitioning or demonstrating) rather than going to court. • Means that people who have a general interest in a case (e.g. where legislation potentially breaches individual rights) have no right to pursue a legal challenge on behalf of public interest or the common good. • Means that potential improvements to the law that could have been made by listening to those with only intellectual interest in the case are lost.

Source 3 A summary of the way the requirement for standing affects the ability of courts to make law

13.9 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by the Latin term *locus standi*.

2 Explain what is meant by having a special interest in a case.

Synthesise and apply

3 Read the legal case *Kuczborski v State of Queensland*.

- **a** Explain why Stefan Kuczborski launched a case in the High Court.
- **b** Explain the High Court's ruling in the case.
- **c** Explain one difficulty associated with challenging the constitutional validity of a law that was highlighted in this case.

4 Read the legal case *Re McBain; Ex Parte Australian Catholic Bishops Conference*.

- **a** Describe the ruling made by the Federal Court in *McBain v Victoria*.
- **b** On what grounds did the bishops lodge their case against the ruling in *McBain v Victoria*?
- **c** Explain the High Court's ruling in the case and explain whether or not you agree with the High Court's decision.

5 For each of the following scenarios, identify the parties that are likely to have standing, and those that are not. Give reasons for your answer.

- **a** Benji was on a school camp. While riding a bike as part of one of the camp activities he fell into a large ditch and suffered injuries to his left leg. A girl who watched the injury has suffered anxiety and depression as a result. Benji's teachers are furious at the camp organisers.
- **b** Emiko is a mother of three children who attend a public high school. The Commonwealth Government has just provided funding to all the public high schools in Victoria to organise morning prayers. She has challenged it on the basis that it imposes a practice of religion. Aaron, who has no children, also wishes to challenge it as he believes it is contrary to freedom of religion.
- **c** Misty and her friend Gerard were falsely imprisoned for a period of 15 hours by ransom holders. They both intend to sue, as do their friends who were waiting nearby with their children.

Analyse and evaluate

6 Discuss the extent to which the High Court's decision in the case *Re McBain; Ex Parte Australian Catholic Bishops Conference* is a final statement in law.

7 Discuss how the concept of standing can impact on the court's ability to make laws.

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  Same-sex marriage postal survey and standing
- » **Worksheet**
  Who has standing in these cases?

13.10 THE RELATIONSHIP BETWEEN COURTS AND PARLIAMENT IN LAW-MAKING

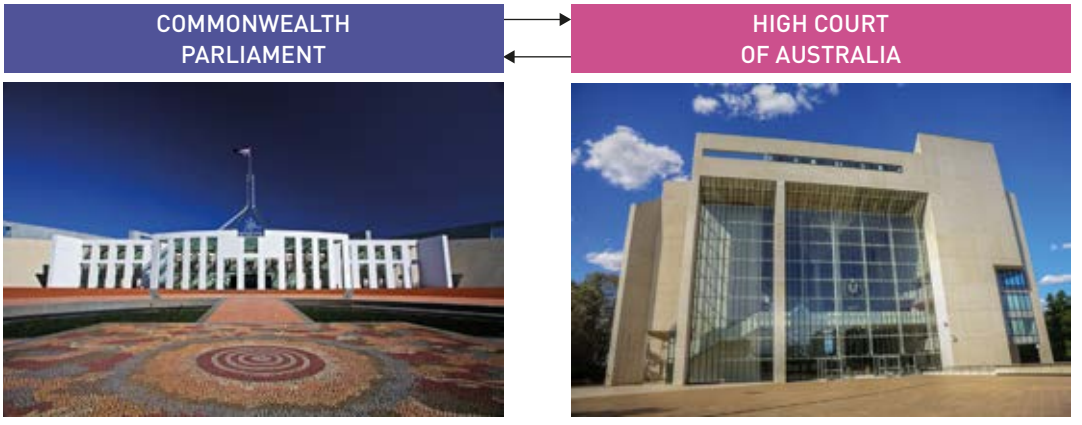
Study tip

In accordance with the *VCE Legal Studies Study Design*, you are required to know, and be able to analyse, each of the five features of the relationship between courts and parliament in law-making. You may be asked specifically about them in the end of year examination.

Courts and parliaments have an interconnected role in law-making. They must work together so that the law is flexible and can be applied to any situation that might arise. As we have seen throughout this chapter, parliament is the supreme law-making body, but courts have a **complementary role** to parliament in making laws. The courts' role is to resolve disputes and, in doing so, judges need to interpret statutes made by parliament and develop law where there is no existing law. On the other hand, parliament has the power to confirm or change the common law (though is limited in regards to constitutional matters). Parliament, as the supreme law-making body, has the power to confirm and add to the common law and override court decisions, with the exception of those involving constitutional matters resolved by the High Court of Australia. As such, the courts and parliament have an interconnected relationship.

The main five features of the relationship between courts and parliament in law–making are:

- the supremacy of parliament
- the ability of courts to influence parliament
- the interpretation of statutes by courts
- the (codification) of common law
- the abrogation of common law.



Source 1 The parliament and the courts have a complementary relationship in law–making

The supremacy of parliament

Parliament is the supreme law-making body with the ability to make and change any law within its constitutional power. It therefore has the power to pass legislation to either confirm or override (abrogate or cancel) decisions made through the courts (or common law), with the exception of High Court decisions on constitutional matters.

As the supreme law-making body, parliament is also responsible for passing legislation that establishes the courts and states the power they have to hear cases. For example, the Victorian Parliament passed the *Supreme Court Act 1986* (Vic) and the *Magistrates' Court Act 1989* (Vic) to establish the Supreme and Magistrates' Courts respectively – although both these Acts replaced previous acts that originally established these courts.

Parliament can also pass legislation to change 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* has been amended nearly every year since it was passed including amendments to create its specialist lists (like the Sexual Offences List) and divisions (like the **Koori Court** Division, the Drug Court Division and the Family Violence Court Division).

As the supreme law-making body parliament is also able to pass Acts of Parliaments that restrict the ability of the courts to make decisions with respect to certain matters. However, in accordance with the **separation of powers**, parliament must ensure that it allows the courts to remain independent and retain the power to determine if the parliament has passed laws beyond its law-making authority. For example, the courts are restricted in the sentences they can give by the maximum sentences prescribed in legislation, current court sentencing practices relating to the various offences and **mandatory minimum sentences**.

An example of the Victorian Government introducing an act which restricted the ability of the courts to make decisions regarding the sentencing of offenders can be found below.

Koori Court
a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Aboriginal people accused of committing crimes

mandatory minimum sentence
the minimum sanction, prescribed by the parliament in legislation, that must be imposed by the court

CASE STUDY

Mandatory minimum sentences

In 2016, the Victorian Government passed the *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic). The Act restricted the ability of judges when imposing sentences for aggravated home invasion (a crime where three or more offenders, armed with a weapon illegally enter premises to commit theft knowing or not considering whether or not people are home) by mandating or making it compulsory for judges to impose a minimum three-year non-parole period on convicted offenders.

Legislation that imposes mandatory sentencing is controversial as it removes the ability of the judge, to a certain extent, to consider a range of factors when imposing the sentence. These factors include the offender's personal history and circumstances, regardless of whether it was a first offence and whether the offender showed remorse, pleaded guilty, cooperated with the police and the like. It is also claimed that it may amount to the parliament imposing on the independence of judiciary by restricting the court's ability to apply legislation based on the rule of law and achievement of justice.

The ability of courts to influence parliament

Courts have the ability to indirectly influence parliament to make and change the law. Judges may make comments when handing down judgments, either as part of the reasons for their decision or as *obiter dictum*, that inspire or encourage parliament to initiate law reform. 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, or if a court acts in accordance with the principle of judicial conservatism and is unwilling to overrule or reverse a previous precedent, preferring parliament to investigate and initiate law change. For example, in the *Trigwell* case, the High Court was reluctant to set a new precedent that landowners should be responsible for damage caused by their stray animals but stated that the law should be changed by the parliament.

A court's decision may also highlight a problem or even cause public uproar that can lead to the parliament changing the law. This occurred in response to an increase in the incidence of 'one punch' killings in Victoria, including the death of David Cassai from a one-punch attack, and the perceived dissatisfaction with the sentences being imposed by the courts on offenders, as highlighted on the next page.

LEGAL CASE

Mandatory sentencing for 'one punch' attacks

DPP v Closter [2014] VSC 484 (2 October 2014)

In September 2014, 'one punch' laws were introduced into Victoria just one week after Dylan Closter was sentenced to nine years and three months in prison, with a minimum term of six years for killing David Cassai in a one-punch attack in Rye on New Year's Eve 2012. Under Victorian law it is now mandatory for those found guilty of a fatal one-punch attack to serve a minimum of ten years in jail before being eligible for parole. The legislation also introduced a 10-year minimum term for fatally kicking, punching or stabbing a person as part of a gang attack.



Source 2 Ms Caterina Politi with a picture of her son David Cassai who was killed in a one-punch attack in Rye, Victoria, on New Year's Eve 2012. The offender was sentence to a minimum of six years imprisonment.

As we examined earlier in this chapter, judicial activism can also influence parliament to change the law. For example, the High Court took an activist approach when determining the *Mabo* case. It decided to overrule a long-established common law principle that Australia was **terra nullius** ('empty land') when it was colonised by the British. In doing so it recognised the right of Aboriginal and Torres Strait Islander peoples to have native title over their traditional land. Likewise, in 2011, the *Malaysia Solution* case (examined on page 454) forced the Australian Government to change their asylum seeker policy.

The interpretation of statutes by courts

For legislation to be effective, the courts must apply the statutes to the cases brought before them. To do this, it is sometimes necessary for a court to interpret or give meaning to the words or phrases in an Act of Parliament. Courts may also be called upon to interpret the meaning of **secondary legislation**, so it can be applied to resolve disputes before them.

secondary legislation rules and regulations made by secondary authorities (e.g. local councils, government departments and statutory authorities) which are given the power to do so by the parliament. Also referred to as delegated legislation

By giving meaning to the unclear words and phrases in statutes, judges can not only clarify legislation so it can be applied to resolve the dispute before them; they can also broaden or narrow its meaning. This establishes a precedent that is followed in future similar cases and, together with the Act of Parliament, forms a part of the law.

The High Court has a particularly important role in statutory interpretation. It is the only court with the constitutional authority to interpret the meaning of the words and phrases in the Australian Constitution. It can therefore alter 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 or phrases in an Act of Parliament, however, a case must be brought before the court. As we have seen earlier in this chapter, and in Chapters 5 and 8, this can be a very expensive, time-consuming and stressful exercise, and a person needs to have standing to do so.

The codification of common law

Being the supreme law-making body, the parliament can make law that confirms a precedent set by the courts. This is referred to as codification of common law and involves the parliament passing legislation that reinforces or endorses the principles established by the court in their ruling.

For example, the Commonwealth Parliament codified (i.e. passed an Act of Parliament to reinforce or enshrine the principles established in the *Mabo* case). This included the recognition of land rights for Indigenous Australians, in the *Native Title Act 1983* (Cth). The *Mabo* case and the principles that were established are explained below.

The *Mabo* case

LEGAL CASE

Mabo v Queensland (No. 2) (1992) 175 CLR 1

In 1992, the High Court ruled that the common law of Australia recognised the right of Indigenous Australians to make claims over their traditional land and be granted native title to land. The judgment overturned a common law principle that had existed up until this time, based on an old false seventeenth-century belief referred to as *terras nullius*, that Australia was an 'empty land' and belonged to no one when the British first arrived and established colonisation in the late 1700s.

In 1982, five men who were members of the Meriam people, Eddie Koiki Mabo, Sam Passi, David Passi, Celuia Mapo Salee and James Rice, joined together to have their traditional ownership of the island of Mer in the Torres Strait legally recognised. The case, which became known as the *Mabo* case, was brought as a test case to determine the legal rights of the Indigenous Meriam people.

The *Mabo* case officially began in May 1982 when the group of Meriam men, led by Eddie Mabo, lodged the action against the Queensland Government and the Commonwealth of Australia in the High Court.

On 3 June 1992, after a 10-year struggle, the High Court gave its ruling in the *Mabo* case finding in favour of Mabo and establishing native title land rights for the Meriam people. The High Court's decision was an example of judicial



Source 3 The legal ownership of the island of Mer, was at the centre of the famous *Mabo* case that established native title land rights for Aboriginal and Torres Strait Islander peoples.



Source 4 Eddie Mabo, whose successful High Court challenge saw the legal recognition of native title land rights for Aboriginal and Torres Strait Islander peoples.

activism in that it broadly interpreted the law to protect the rights of the Meriam people and boldly overruled the common law principle of *terra nullius*, which had existed since colonisation.

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.** Sadly though, Eddie Mabo and Celuia Salee both died before the final decision was reached.

In the *Mabo* case, the High Court set the precedent that the native title of Indigenous Australians could continue to exist and be legally recognised in situations where:

- Aboriginal and Torres Strait Islander peoples had maintained their connection with the land through the years of European settlement, although native title was extinguished if the Aboriginal clan or group had ceased to acknowledge traditional laws and lost its connection to the land
- native title had not been extinguished by valid Acts of state or Commonwealth parliaments
- the content of native title could be determined according to the traditional laws and customs of the Aboriginal and Torres Strait Islander peoples.The consequences of the Mabo decision are far-reaching, with the most important being that Australia now recognises the right of Aboriginal and Torres Strait Islanders peoples to native title.

In 1993, following the High Court decision in *Mabo v Queensland (No. 2)*, the Commonwealth Parliament passed the *Native Title Act*, to confirm and enshrine the High Court's decision in legislation and establish procedures for dealing with and settling native title claims.

The purpose of the *Native Title Act* is to:

- provide for the recognition and protection of native title
- establish ways in which future dealings affecting native title may proceed and to set standards for those dealings
- establish a mechanism for determining claims to native title
- provide for, or permit, the validation of past Acts, and intermediate period Acts, invalidated because of the existence of native title.

The abrogation of common law

Parliament has the power to pass legislation which overrides (abrogates or cancels) decisions made through the courts (or common law), with the exception of High Court decisions made on constitutional matters. This may become necessary in situations where the parliament believes the courts have interpreted the meaning of the words or phrases 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. Similarly, courts can also sometimes interpret the common law in a way that is no longer considered appropriate.

Study tip

Defining and using key legal terminology is an important skill you need to master. Use the words 'codification' and 'abrogation' specifically in your answers to questions, and make sure you know what these words mean.

Jury directions in a criminal trial

CASE STUDY

In 2017 legislation was passed to amend the way judges give directions to juries in criminal trials. An old common law rule had been that a trial judge could direct a jury both that they could reach a majority verdict and that they should persevere with their attempt to reach a unanimous verdict. The Victorian Government stated that this was unhelpful and confusing to jurors.

13.10 CHECK YOUR LEARNING

Define and explain

1 Explain why parliament may be dependent on the courts in law making.
2 Suggest two reasons why parliament might decide to abrogate court-made law.
3 Explain how courts can influence the parliament to change the law. Use one case to illustrate your response.

Synthesise and apply

4 Working in groups, look at and investigate the *Mabo* case.
   a Outline how this case originated.
   b Highlight the key legal issues raised in this case.
   c To what extent was the doctrine of precedent followed in this case? Discuss.
   d Explain whether or not the High Court acted with judicial conservatism or judicial activism in this case.
   e What are the consequences of this case?
   f Explain how the case illustrates the relationship between courts and parliament in law-making.
   g 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
      - the relationship between courts and parliament in law-making.

Analyse and evaluate

5 'Courts can change how an Act of Parliament is applied.' To what extent is this statement true? Discuss.
6 Using the internet, access legislation that has been passed this year by the Victorian Parliament. Find one Act of Parliament that has abolished a common law rule (hint: search 'common law' in the statute). Prepare a summary of what the common law rule was, and why it was abolished. You may need to look beyond the statute to complete your summary.

Check your obook assess for these additional resources and more:

- **Student book questions**
  13.10 Check your learning
- **Going further**
  The failed baseline sentencing regime
- **Weblink**
  The Conversation – Mandatory sentences

CHAPTER 13

REVIEW

CHAPTER SUMMARY

The roles of the Victorian courts and the High Court in law-making

- The doctrine of precedent
- Ways judges can develop precedent or avoid following an earlier decision
  - Distinguishing
  - Reversing
  - Overruling
  - Disapproving

The reasons for, and effect of, statutory interpretation

- Reasons for the interpretation of statutes
  - The act is written in general terms
  - Mistakes can occur during the drafting process
  - The act might not have taken into account future circumstances
  - The intention might not be clearly expressed
  - Inconsistent use of word
  - Parliamentary counsel, may have used incorrect technical terms
  - A word may not be defined in the Act
  - The meaning of the words may be ambiguous or have changed
  - The Act might be silent on an issue
- Effect of interpretation by judges
  - Statute given meaning so the dispute before the court can be resolved
  - The parties to the case are bound by the decision
  - Precedents are established
  - The meaning of the law can be restricted or expanded

Factors that affect the ability of courts to make law

- The doctrine of precedent
- Judicial conservatism
- Judicial activism
- Costs and time in bringing a case to court
- The requirement for standing

Features of the relationship between courts and parliament in law-making

- The supremacy of parliament
- The ability of courts to influence parliament
- The interpretation of statutes by courts
- The codification of common law
- The abrogation of common law

REVISION QUESTIONS

1 a What is statutory interpretation? Using an example, outline one reason why a court may be required to interpret a statute.

(5 marks)

b Assume the Victorian Court of Appeal has resolved a dispute by interpreting an Act of Parliament. Describe one possible effect of the court's decision.

(3 marks)

2 Describe two features of the relationship between courts and parliament in law-making.

(5 marks)

3 Discuss the extent to which the doctrine of precedent limits the ability of the courts in law-making.

(6 marks)

4 A writer in a legal journal once wrote, 'Courts have had no influence on the laws made in Australia. If they find a problem with the statute, then they should highlight that problem for parliament to fix.' Discuss the extent to which you agree with this statement.

(8 marks)

5 Evaluate the ability of courts to influence parliament. Use an actual case to support your response.

(10 marks)

Check your obook assess for these additional resources and more:

- **Student book questions** Ch 13 Review
- **Revision notes** Ch 13
- **assess quiz** Ch 13 Test your skills with an auto-correcting multiple-choice quiz
- **Additional practice assessment task** – AB and AH case

PRACTICE ASSESSMENT TASK

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

The 'Kevin and Jennifer' case

Attorney-General for the Commonwealth v Kevin and Jennifer (2003) 172 FLR 300

Kevin was born, and registered at birth, as female. In 1995, Kevin began hormone treatment to more align his body with being male (including deepening his voice and creating coarse facial and body hair). In 1997 Kevin commenced full gender reassignment surgery.

Kevin and Jennifer (both pseudonyms) married in 1999 and had two children conceived through an IVF program. In October 1999, they applied to the Family Court of Australia asking the Court to validate their marriage – an application that was confirmed by the Family Court but challenged by the federal Attorney-General (in the Full Court of the Family Court) on the basis that Kevin, despite undergoing successful gender reassignment surgery prior to their marriage, was not a *man* for the purposes of the *Marriage Act 1961* (Cth). A successful appeal would have had the effect of making Kevin and Jennifer's marriage void.

The Court was called on to interpret the meaning of the words '**man**' and '**marriage**' as used in the *Marriage Act*.

When deciding on the meaning of '*marriage*', the Full Court of the Family Court considered the English case *Corbett v Corbett* [1970] 2 All ER 33 but chose not to follow this persuasive precedent. In that case a marriage between a woman and a man who had undergone a sex change was found to be invalid.

In outlining the reasons for its decision (the *ratio decidendi*), the Full Court of the Family Court said it interpreted a 'man' to include a person who was a man at the time of the marriage.

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.

Ultimately, the Full Court of the Family Court upheld the initial decision of the Family Court given by Justice Chisholm who, at the time of his ruling said, the question of whether someone was a man or a woman should be determined at the date of the marriage.

Practice assessment task questions

1 Referring to this case provide one reason for statutory interpretation.

(3 marks)

2 What role, if any, could the High Court have had in this case?

(2 marks)

3 Using examples of actual cases you have studied, distinguish between a court overruling and reversing a decision.

(4 marks)

4 In your view, did the Full Court adopt a conservative or activist approach in this case? Justify your answer.

(3 marks)

5 Discuss the extent to which the interpretation of the *Marriage Act* in this case will impact on future cases.

(5 marks)

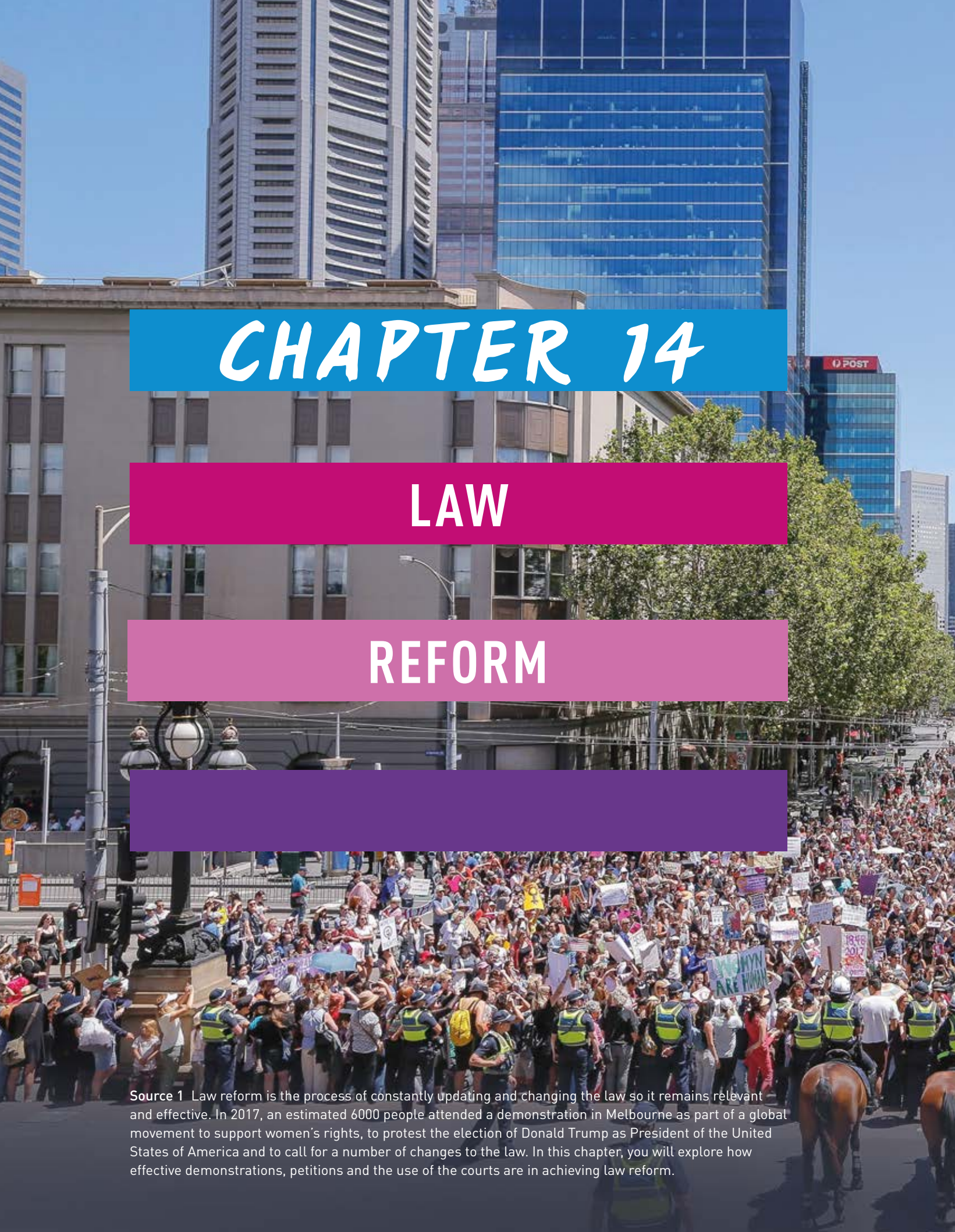
6 Evaluate the ability of the courts to change the *Marriage Act*.

(8 marks)

Total: 25 marks

CHAPTER 14

LAW REFORM



Source 1 Law reform is the process of constantly updating and changing the law so it remains relevant and effective. In 2017, an estimated 6000 people attended a demonstration in Melbourne as part of a global movement to support women's rights, to protest the election of Donald Trump as President of the United States of America and to call for a number of changes to the law. In this chapter, you will explore how effective demonstrations, petitions and the use of the courts are in achieving law reform.



OUTCOME

By the end of **Unit 4 – Area of Study 2** (i.e. Chapters 12, 13 and 14), you should be able to discuss the factors that affect the ability of parliament and courts to make law, evaluate the ability of these law-makers to respond to the need for law reform, and analyse how individuals, the media and law reform bodies can influence a change in the law.

KEY KNOWLEDGE

In the chapter, you will learn about:

- reasons for law reform
- the ability and means by which individuals can influence law reform including through petitions, demonstrations and the use of the courts
- the role of the media, including social media, in law reform
- the role of the Victorian Law Reform Commission and its ability to influence law reform
- one recent example of the Victorian Law Reform Commission recommending law reform
- the role of one parliamentary committee or one royal commission, and its ability to influence law reform
- one recent example of a recommendation for law reform by one parliamentary committee or one royal commission
- the ability of parliament and the courts to respond to the need for law reform.

KEY SKILLS

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

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- explain the reasons for law reform, using examples
- analyse the influence of the media, including social media, in law reform, using examples
- discuss the means by which individuals can influence law reform, using examples
- evaluate the ability of law reform bodies to influence a change in the law, using recent examples
- evaluate the ability of parliament and the courts to respond to the need for law reform
- synthesise and apply legal principles to actual scenarios.

KEY LEGAL TERMS

committee system a system used by federal and state parliaments in Australia that involves the use of separate working parties (i.e. committees) to investigate a wide range of legal, social and political issues and report back to the parliament about the need for law reform

demonstration a group of people who gather to protest (i.e. express their common concern or dissatisfaction with) an existing law as a means of influencing law reform

Hansard the official transcript (i.e. written record) of what is said in parliament. Hansard is named after T.C. Hansard (1176–1833) who printed the first parliamentary transcript

law reform bodies organisations established by the state and Commonwealth parliaments to investigate the need for change in the law and make recommendations for reform

parliamentary committee a small group of members of parliament who consider and report on a single subject in one or both houses. Committee members can come from any party

petition a formal, written request to the government to take some action or implement law reform

royal commission the highest form of inquiry into matters of public concern and importance. Royal commissions are formal public inquiries conducted by a body formed to support the work of a person (or persons) (being the commissioner(s)) given wide powers by the government to investigate and report on an important matter of public concern

terms of reference instructions given to a formal body (e.g. a law reform body or royal commission) to investigate an important matter. Terms of reference set out the precise scope and purpose of the inquiry and the date by which the final report must be completed

Victorian Law Reform Commission (VLRC) Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

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14.1 REASONS FOR LAW REFORM

Study tip

The *VCE Legal Studies Study Design* expects you to know examples of the reasons for law reform. You should create a folder and start collecting examples of law reforms. For each example you should:

- explain the actual change in the law
- outline the reasons for the law reform
- examine the pros and cons of the law reform.

You should also keep a list of proposed changes in the law. As you collect your examples of changes or proposed changes in the law, you should file them under headings relevant to Unit 4.

laws
legal rules made by a legal authority that are enforceable by the police and other agencies

social cohesion
a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

The main aim of **laws** is to protect our society and keep it functioning. Laws also aim to protect individual rights and stop behaviour that will negatively affect the peace and good order of society. A society in which people respect and obey the law will be more peaceful and have greater **social cohesion** than a lawless society where everyone does what they like.

Clearly stated laws are therefore needed to provide guidelines of acceptable behaviour to prevent or minimise conflict within society. Given that conflict will inevitably arise, the law must also provide ways to resolve disputes.

To be effective, laws need to:

- be known by the community
- be easily understood
- be able to be changed
- be acceptable to individuals within society and society as a whole
- be enforceable.

These are characteristics of effective laws. If a law is missing one or more of these characteristics, it probably will not be effective.

Furthermore, if a law does not reflect the views and values held by the majority of people within society, people may be inclined to ignore or even break it. It is therefore essential that laws can be altered to keep up with current community views and values (as well as other changes that take place within society). The process of changing the law is referred to as law reform. Law reform must continually take place to ensure our laws remain relevant and effective.

There are many reasons why law reform is necessary. These include:

- changes in beliefs, values and attitudes
- changes in social, economic and political conditions
- advances in technology
- greater need for protection of the community
- greater awareness of the need to protect rights
- greater need to provide improved access to the law
- encouraging changes in values in society
- greater need to clarify, simplify or expand unclear laws.

A brief explanation of each of these reasons, with examples, is provided below.

Changes in beliefs, values and attitudes

In any society, values and attitudes change over time. If the law is to remain relevant and acceptable to the majority of people, it must keep up with – and reflect – these changes. On the other hand, rapid changes to the law, which impose change before the community is ready to accept it, may be met with resistance. While most people in our community are generally law-abiding citizens, they will be reluctant to believe in – and obey – laws that do not reflect their basic beliefs and standards.

Sometimes community values change as knowledge increases and society becomes more educated and aware. For example, community views on the banning of cannabis have changed over time as the benefits of using small amounts of marijuana to relieve severe pain have become more widely known. As a result, Victorian laws have been changed to allow for the use of medical cannabis to treat certain types of severe illnesses such as multiple sclerosis and epilepsy.

Likewise, as society has become more aware of the health risks associated with smoking, our attitudes towards smoking and the tobacco industry have changed. A range of anti-smoking laws have been introduced throughout Australia. In 2007, Victoria's law was changed to prohibit smoking in enclosed public place (e.g. restaurants and office buildings).

Changing a law because of changing values, beliefs or views can, however, result in another problem that requires additional law reform. For example, when smoking was banned inside public buildings, workers who smoked would go outside for a cigarette and hang round the doorways, creating clouds of smoke for others to walk through. The *Tobacco Amendment Act 2016* (Vic) made further amendments to the laws. Smoking in certain outdoor dining areas is prohibited, and the sale, promotion and use of e-cigarettes and products are now regulated.

The price paid by individuals to achieve these laws is a loss of personal freedom to smoke anywhere they like. However, the restrictions were for the greater good of society. At first some smokers complained, but people have adjusted to the new laws. In this way changes in the law can encourage further changes in values.

Society's increasing awareness of animal welfare issues has resulted in Australian laws being changed to help prevent animal cruelty.

Oscar's Law

CASE STUDY

In recent decades, public awareness of animal welfare issues in Australia has increased dramatically and people have become more concerned with protecting the rights of animals. As a result of these changing attitudes, our laws have also changed in an attempt to reduce cruelty to animals and offer them protection under the law.

Since 2010, a number of laws have been changed or introduced in Victoria to help prevent cruelty to dogs and cats. In particular, laws to regulate the activities of so-called 'puppy factories' have received much media attention. 'Puppy factories' are businesses that mass-produce puppies, often in poor and overcrowded conditions, so they can be sold at a profit. The laws regulating puppy factories are referred to as Oscar's Law after a dog named 'Oscar', who was rescued by animal welfare campaigner Debra Tranter after being badly treated in a puppy factory.

Over recent years the government has examined altering existing animal protection laws to regulate breeding and the sale of dogs and cats in pet shops, although change is slow. For example, the Domestic Animals Amendment (Puppy Farms and Pet Shops) Bill 2016 (Vic) failed to pass through Victorian Parliament due to strong objections from breeders. The Bill was aimed at limiting the number of fertile female dogs that can be kept by commercial breeders and further regulating the advertising and sale of dogs and cats in pet shops.



Source 1 When rescued, Oscar weighed only 1.6 kilograms. After being treated by a vet and adopted by a loving carer, he became the 'poster boy' for a campaign to abolish puppy factories.

In the past, the right to equal treatment before the law has not extended to LGBTIQ people. However, this is gradually changing.

The case study below highlights some of the law reforms that have been made to ensure LGBTIQ people are treated equally before the law.

CASE STUDY

Equality for LGBTIQ people

Over the years there has been a gradual shift in recognition and understanding of members of our community who are lesbian, gay, bisexual, transgender, intersex and queer (i.e. LGBTIQ people). Many people have become more accepting of same-sex relationships, and many laws have changed to give LGBTIQ people the same rights as heterosexual people.

The *Relationships Act 2008* (Vic) was introduced to allow two adults (regardless of their gender) who are not married to each other but are a couple (according to stated conditions) to register as being in a 'domestic relationship' with the Victorian Registry of Births, Deaths and Marriages.

By registering, the couple gain legal proof of their relationship for the purposes of Victorian law.

In 2016, this law was amended so that couples that have their relationship formally recognised in other states of Australia or had married in countries that have legally recognised same-sex marriages (e.g. Canada, United Kingdom, Netherlands, Scotland and South Africa) are automatically considered to be in a domestic relationship in Victoria.

To achieve such changes in the law, LGBTIQ groups have kept constant pressure on governments (e.g. through demonstrations and lobbying parliamentarians). Mainstream media has been largely sympathetic, and media coverage has increased awareness. By 2015, society was generally more accepting of same-sex relationships. Those who were more progressive kept pointing out that a person's sexual orientation or gender identity is separate from parenting ability. Those people believe that gender identity does not affect a person's ability to be a loving and caring parent.

The Victorian Parliament accepted the progressive view, and passed the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) to allow LGBTIQ couples to apply to lawfully adopt children in Victoria.

In 2016 the Victorian Premier, Daniel Andrews, offered a formal apology (in the parliament) to LGBTIQ people who had been convicted (or found guilty) of homosexuality, which was a criminal offence under Victorian law prior to 1981.



Source 2 The rainbow flag has become a well-known symbol of the fight for equality by LGBTIQ communities around the world.

On the other hand, for some members of society the law is changing faster than they are comfortable with, moving ahead of social acceptance. These people may be strongly religious or socially conservative (like the anti-abortion protesters discussed in Topic 14.3). If they feel they are in a minority, or are strongly criticised for disagreeing, they may just remain quiet.

In May 2017 the tennis champion Margaret Court, who is a church pastor, said she would refuse to fly Australia's national airline Qantas because it supported same-sex marriage. She was immediately placed under heavy pressure through the regular media and social media.

Changes in social, economic and political conditions

Law reform is a process that never ends. Our laws need to be continually reformed to make sure they remain relevant and keep up with changes that occur as a result of changing social, economic, and political circumstances. Each of these is discussed below.

Changing social conditions

As Australia's population grows and changes, it is inevitable that some laws will need to change to ensure we can all live together peacefully and maintain our basic standard of living. Expected changes to our social structure over the next 35 years include that our population will reach 40 million by 2055 and that the average life expectancy of a baby born during that year will be to live to their mid-nineties. This has implications for law reform in many areas including health care, taxation, welfare payments (including the aged pensions) and the environment. An increasing population can lead to increased crime and the need for improved law enforcement infrastructure or agencies (including the police, courts and prisons) and more effective procedures within those agencies.

Some examples of other social changes that have prompted law reform include:

- increases in reported domestic violence
- binge drinking
- gang-related crime
- online gambling
- the obesity epidemic.

Changing economic conditions

Australia's economy is continually changing. In particular, technology and globalisation create issues that need to be addressed by the law. Governments need to monitor and change the laws that regulate the buying, selling and production of goods and services across different areas of the economy such as banking and finance, mining, manufacturing and agriculture.

Sometimes two or more largely unrelated trends interact to create a new issue that requires law reform. For example, changes in the workforce (e.g. an increase in part-time and casual employment) and in consumer trends (e.g. online shopping) necessitate changes in the law in both areas. In this case, that includes changing laws relating to industrial relations (i.e. wages and workplace conditions), consumer protection and banking (e.g. enforcement of guarantees and credit card laws) and international trading (e.g. the regulation of imports and exports).

For example, in 2016 the *Competition and Consumer Amendment (Country of Origin) Act 2017* (Cth) improved Australia's consumer laws. The Act simplified the test used to justify claims that products are 'made in' a particular country (e.g. labelled as 'Made in Australia').

Similarly, the *Food Amendment (Kilojoule Labelling Scheme and Other Matters) Act 2016* (Vic) changed the law to require fast food outlets to state the kilojoule (i.e. energy) content of each item on their menu at the point of sale. Supermarkets must also label pre-prepared 'ready to eat' and unpackaged food items.



Source 3 As a result of law reforms introduced in 2016, fast food outlets now need to state the energy content (i.e. calories) of meals on their menus.

Changing political conditions

Changing domestic circumstances (within Australia) as well as international circumstances or global events often influence law reform. One is the threat of terrorist attacks throughout the world. Another is international conflict: local wars cause a rise in the level of global refugees. The federal government monitors both so it can alter our anti-terrorism and migration laws if necessary. The recent trend has been to make these laws increasingly harsh as highlighted in the case study below.

CASE STUDY

A person 'of character concern'

Australia's *Migration Act 1958* (Cth) has been amended many times to reflect changing global and local political conditions.

The Minister for Immigration can cancel the visa of a non-citizen for people of bad character. In 2004 the Act was amended to specifically define what is meant by a person 'of character concern' (in a new Section 5C). The minister's grounds for judging a person to be 'of concern' included having a 'substantial criminal record' (having been sentenced to **two years of imprisonment**) or being at 'significant risk' of committing criminal acts, causing danger, stalking, vilifying, or causing discord.

In 2014 this section was changed by reducing the definition of 'a substantial criminal record' to a sentence of imprisonment of **12 months**.

In 2017 the same section was changed again. The words **significant risk** were changed to just **risk**, and a much wider range of behaviour was defined as making someone a person 'of concern'. This included having been charged with a serious offence (but not necessarily convicted).



Source 4 Recent advances in drone technology, together with the widespread availability of drones, have created a host of new challenges for law-makers to deal with.

Advances in technology

Technology is constantly improving and opening up possibilities that have not previously been imagined. As it improves, our laws need to be altered and updated. Some laws will control and regulate new inventions and opportunities. Others will reduce the likelihood of people being harmed or exploited. For example, the increasing range and use of mobile devices and equipment (e.g. laptops, smart phones, smart watches and drones) have created new problems that the law needs to address. These include cyber-bullying, cyber-stalking, identity theft, online scams, invasion of privacy and noise pollution caused by remotely piloted aircraft.

Technology also makes it easier to pass on private information, creating a need to protect the privacy of financial and medical records. Law reform has occurred at both state and Commonwealth levels – for example, in the *Health Records Act 2001* (Vic) and the *Privacy Act 1988* (Cth).

Scientific and medical advancements also create the need for law reform. For example, the Human Genome Project, completed in 2003, dramatically increased genetic knowledge. Whole new areas of research opened up, but they created new areas of uncertainty in the law. Who owns our genes? Who can share our genetic information? Can genes be patented (a monopoly given to an inventor)?

Gene patenting has a bearing on the detection and treatment of a vast range of illnesses and medical conditions and must be adequately regulated. Genetic testing companies must also be regulated to ensure an individual's genetic information remains private and not sold to third parties such as prospective

employers and health insurance companies. Patent law is a Commonwealth area of responsibility. The *Patents Act 1990* (Cth) is the main Act which governs the law related to patents. An example of genetic testing resulting in a need for law reform is explored in the legal case below.

Ownership of breast cancer gene codes

LEGAL CASE

D'Arcy v Myriad Genetics Inc (2015) 325 ALR 100

In 2015, the High Court of Australia ruled in favour of Ms Yvonne D'Arcy, a 69-year-old grandmother and breast cancer survivor who had taken legal action against US biotechnology company Myriad Genetics. Myriad claimed it could take out a patent to own the BRCA1 gene mutation that increases a woman's risk of developing ovarian and breast cancer.

By contrast, D'Arcy argued that even though the company had undertaken research to locate and identify the BRCA1 mutation, it could not **own** it, because the genetic material already existed in nature. The information it contained could only be discovered; it was not a newly invented way of manufacturing a product (to get a patent you need more than a discovery or an idea). In simple terms, the High Court agreed with D'Arcy and ruled that Myriad Genetics could not patent and own the BRCA1 gene.

Allowing a company to own a gene could potentially limit the ability of an individual to use their genetic information without the company's permission.

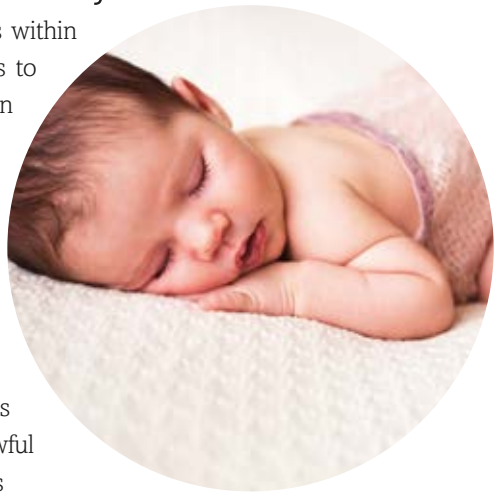


Source 5 Yvonne D'Arcy took legal action against Myriad Genetics over ownership of the BRCA1 gene mutation.

Greater need for protection of the community

Law reform must continually occur to make sure individuals and different groups within our community are protected and feel safe. One of the major roles of the law is to protect individuals from harm. 'Harm' can include physical harm (e.g. broken bones from violent assault), emotional harm (e.g. the destruction of self-esteem and depression that can come from bullying, sexual harassment or neglect) or economic harm or financial damage (e.g. exploitation through unfair workplace and trading practices).

Some people within our community also have specific needs and rights that must be protected, especially if they are unable to protect themselves (e.g. children, powerless workers, consumers, people with disabilities and those who may suffer discrimination on the basis of their race, religion, gender or sexuality). Even animals and the environment need protection. Laws are therefore needed to make unlawful those actions that may harm individual members of the community, specific groups within our community, and the community as a whole. As new situations arise, new laws are required. For example, in 2016 the *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic) introduced new carjacking and home invasion laws, including more severe penalties for offenders. These laws were to help protect the community after a dramatic increase in those crimes.



Source 6 Some people within our community have specific needs and rights that must be protected, especially if they are unable to protect themselves.

Greater awareness of the need to protect rights

Over the last 30 years the law relating to equal opportunity has changed a number of times to protect individuals from discrimination. The laws make it unlawful to discriminate a person on a range of grounds such as on the basis of age, gender, impairment, pregnancy or race. However, law reform in this area can be slow and controversial. For example, in 2016 the Victorian Government's attempt to change the *Equal Opportunity Act 2010* (Vic) to remove the exemption that allows for religious organisations (e.g. schools) to discriminate against prospective employees on the grounds of their religious beliefs, sexual orientation or gender identity was defeated in the Victorian Parliament (in the **Legislative Council**).

Legislative Council
the upper house of the Victorian Parliament

Koori Court
a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Aboriginal people accused of committing crimes

criminal justice system
a set of processes and institutions used to investigate and determine criminal cases

Greater need to provide improved 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 can be intimidating. To assist people in their efforts to seek a just resolution to disputes that arise, the law has been changed to provide more effective access to the law. For example, the *Courts and Sentencing Legislation Amendment Act 2012* (Vic) created a Melbourne County **Koori Court** for the sentencing of Indigenous offenders in specific circumstances to improve their access to more fair and culturally relevant justice. More recently, in 2016, a County Koori Court was established in Mildura.

In civil cases the courts have shown a continued commitment to address the problems of access to justice and delay. For example, in 2016 the Victorian Department of Justice and Regulation completed an Access to Justice Review. The report made 60 recommendations for change to improve access to justice for all Victorians including members of our Aboriginal and Torres Strait Islanders community who need specific support and services to make sure they can engage with the **criminal justice system** and receive a fair and just outcome. Possible reforms to improve access included:

- developing a self-representation service to assist people who are not represented by lawyers
- improving the availability of interpreters within the court system and at VCAT
- developing an online system for the resolution of small civil claims.

In May 2017 the Victorian Government announced that it accepted a vast majority of the recommendations and proposed funding to implement many of them.

Encouraging changes in society values

Sometimes law-makers change the law to encourage a change in society's values. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) seeks to educate the community on rights and tolerance, generate respect for diversity, and promote understanding of the balance between rights and responsibilities. The Charter gives legislative protection for 21 separate human rights for Victorians, and sets out the responsibilities of governments, organisations and citizens in the general community.

The law-makers have also encouraged a change in values in relation to discrimination by passing the *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic). This Act makes it unlawful to discriminate against a person on the grounds that they were once convicted under the old laws that banned homosexuality, with a penalty of up to 20 years **imprisonment**. South Australia was the first state to decriminalise homosexual acts, and Victoria followed in 1980.

Over recent years both Commonwealth and State **governments** have also tried to change values and attitudes towards domestic violence. They have introduced a range of laws to increase awareness of the harmful effects, and reduce the incidence, of domestic violence (e.g. violence within families).

imprisonment
a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

government
the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

Greater need to clarify, simplify or expand unclear law

For a law to be effective it must be easily understood by all members of the community. Sometimes laws are complex and contain 'legal jargon' or specific terminology that cannot be understood by ordinary members of the community. These laws may need to be simplified or rewritten in plain English to be more accessible to people who have no legal training.

Some laws lack depth at the time they are written (e.g. if they were rushed through the parliament) and need to be changed to provide greater detail and clarity.

Governments also undertake law reform to ensure laws are consistent throughout a state or nation. For example, in 2015 a new law, the *Legal Profession Uniform Law Application Act 2014*, was adopted in Victoria and New South Wales in an attempt to have more consistency within the legal profession between the two states. Among other things, the law requires lawyers to make sure certain clients reasonably understand any legal action they suggest, and the estimated cost of taking that action.

14.1 CHECK YOUR LEARNING

Define and explain

1 **a** Why is it necessary for a society's legal system to reflect the values of that society?

b Using two current examples, explain how changes in beliefs, values and attitudes over time can influence the need for law reform.

2 Why have advances in technology brought about the need to change the law? Provide a recent example of a law that has changed to accommodate changes in technology.

3 Explain two other reasons why laws need to change, and give an example of a recent change in the law for each.

Synthesise and apply

4 Read the example 'A person 'of character concern'', about the *Migration Act* amendments.

a How often has Section 5C been changed?

b Why do you think the government introduced the definition in Section 5C in 2004?

c Do you think the reforms made in 2014 and 2017 will be effective in making the Australian community safer? Justify your response.

d Suggest two other reforms that you believe would provide greater protection to our community and make society safer. Give reasons for your suggestions and suggest any problems associated with your ideas.

e Why is it necessary for laws to be accepted in society? Would the Australian community accept the law reforms you suggested? Explain.

Analyse and evaluate

5 Research two media resources related to a proposed change in the law and suggest reasons for the proposed change in the law.

6 Should the Government introduce law reform with the aim of encouraging a change in community views? Discuss.

Check your obook assess for these additional resources and more:

- **Student book questions**
  14.1 Check your learning
- **Video tutorial**
  Introduction to Chapter 14
- **Worksheet**
  Reasons for law reform
- **Weblink**
  Oscar's law

14.2 INDIVIDUALS INFLUENCING LAW REFORM THROUGH PETITIONS

People in our community can influence a change in the law in many ways. One of the common ways individuals can try and raise awareness of the need for law reform and influence change is by starting or signing a **petition**.

petition
a formal, written request to the government to take some action or implement law reform

Petitions are most effective when large numbers of people sign it. This means they rely on being supported by a large amount of interested individuals. A single individual with a grievance or an idea for reform would do better taking the problem to a member of parliament, or making a claim through a body such as a tribunal.

→ GOING FURTHER

In addition to these means of influencing law reform, individuals can also:

- make contact with their local member of parliament to express their concerns and show their dissatisfaction with the existing parliamentarians
- join or form their own political party or lobby/protest group
- make suggestions to formal **law reform bodies** during their investigative processes
- risk receiving a **sanction** by defying or breaking the existing law to express their dissatisfaction.

law reform bodies
organisations established by the state and Commonwealth parliaments to investigate the need for change in the law and make recommendations for reform

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person found guilty of a criminal offence

Petitions

A petition is a formal, written request to the parliament for action in relation to a particular law that is in need of reform. It usually has a **collection of signatures** on it, which have been gathered from supporters, but even a single individual can petition the parliament.

There is no minimum number of signatures. Once the organisers feel that a petition has a satisfactory number of signatures, they forward it to a local member of parliament to table (i.e. present) at the next sitting of parliament. This is the only way an individual or pressure group can directly put their concerns or complaints before the parliament.

Petitions can be presented in two different formats:

- **print petitions** – traditional paper petitions collected in person and signed with physical signatures
- **digital petitions** – e-petitions (or online petitions) collected online and signed using email addresses or digital signatures.

A petition will appear more representative of the community 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. This is important because members of parliament, in accordance with the principle of **representative government**, aim to make laws that reflect the views and values of the majority of people rather than a few individuals.

representative government
a political system in which the people elect members of parliament to represent them in government

Legislative Assembly
the lower house of the Victorian Parliament

Paper petitions

Every page of a paper petition must contain the same information (what is being sought, and the circumstances), and the signatures must be original. Each house of parliament has different requirements and procedures regarding the format and tabling of petitions.

Traditionally, all Australian parliaments only accepted paper petitions. The **Legislative Assembly** of Victoria still accepts only paper petitions.

E-petitions

More recently, e-petitions (often called digital petitions) have become a popular way for individuals to raise awareness and express their desire for change. The Commonwealth Parliament and some state parliaments have introduced this reform and now accept both paper and e-petitions. At a federal level, the **House of Representatives** started to accept e-petitions in 2016.

The **Senate** makes no distinction between paper and digital petitions. However, if signatures have been collected by e-mail, problems with multiple forwarding and comments in emails can lead to an incorrectly presented petition. The Senate recommends placing the text of the petition on an internet page and inviting people to *sign* by submitting their names and e-mail addresses.

In Victoria in November 2016, a committee of the Legislative Council proposed to introduce e-petitions. A new Standing Order 10.10 came into effect after a pilot system was run on the Legislative Council page of the Parliament of Victoria website. Petitions may only be presented to the Council by a member of the Legislative Council. Like petitions to the Commonwealth Parliament, any number of people may sign.

Members of the public can view a list of current petitions and add their signatures. This may help e-petitions gain larger numbers of signatures than paper petitions.

The case study below is an example of a petition that was forwarded to Nina Springle MLC to be presented to the Legislative Council of Victoria.

House of Representatives
the lower house of the Commonwealth Parliament

Senate
the upper house of the Commonwealth Parliament

CASE STUDY

Petition to ban plastic bags

In August 2016, a group of environmental campaigners called Plastic Bag Free Victoria presented a petition with over 11 000 signatures to Greens Member of the Legislative Council, Nina Springle. The campaigners demanded the law be changed to ban single-use plastic shopping bags, which increase landfill, pollute oceans and threaten sea life and birds. Queensland and Western Australia have introduced laws which will ban single-use plastic bags from 2018 and it is hoped other states will follow.



Source 1 Over the years, numerous petitions have called for a ban on single-use plastic bags because they are very harmful to marine animals around the world such as sea turtles.

Petitions may be in relation to an issue of general interest (e.g. to prevent logging of certain forests or euthanasia in limited circumstances) or an issue relevant to a small group of people (e.g. the need for a supervised school crossing in a local area). Each year the parliament may also be presented with a number of petitions on the same subject.

Regardless of its type, the form and content of a petition must follow the rules set out by the parliament to which it is being presented. For example, a petition presented in the Victorian Parliament must, among other requirements:

- be addressed to only one house of parliament
- refer to a matter that is within the power of the parliament to address
- contain a brief paragraph stating the reasons for the petition
- contain a request for parliament to take action
- be legible and not contain any offensive or disrespectful language
- be presented or tabled in parliament by a member of parliament (although this can be any member. That is, it does not have to be the petitioner's local member).

Did you know?

A famous petition to the Commonwealth Parliament was presented on paper surrounded by bark paintings. It was submitted on behalf of the Yolgnu people of Yirrkala, NT. Their traditional land was under threat from mining. The parliament responded by setting up a select committee to investigate.

Similar rules apply to petitions presented in the Commonwealth Parliament, which are available on the Parliament of Australia website. The House of Representatives has a **Standing Committee on Petitions** to receive and process all petitions presented to the House, so that they meet the petition requirements. The person making the petition (either an individual or someone on behalf of a group) will also be contacted by the Committee to inform him or her of the response of the House.

In recent years, many thousands of people have signed petitions about live animal export. These petitions, tabled in the House of Representatives, attempt to influence a change in the law to abolish the exporting of live animals. Each year Australia exports over 3 million live animals (including cattle, sheep and goats) to overseas countries. Long distances are involved, and many of these animals suffer stress and injuries (such as dehydration from being deprived of food and water and kept in high temperatures with poor ventilation, and bruises from being restricted in very small areas). Others, in opposition, note that live animal exports contribute significantly to the Australian economy, including in relation to employment. In 2016, the petition in Source 2 was tabled in the House of Representatives requesting the Federal Government ban live animal exports.

EXTRACT

Petition – House of Representatives

Live Animal Export

To the Honourable the Speaker and Members of the House of Representatives.

Petition calling for an end to live animal export. This petition of the undersigned citizens of Australia calls on the House of Representatives to end the export of live animals for slaughter. We the undersigned therefore call on the House to end this trade and, in so doing, restore Australia's reputation as a compassionate and ethical nation.

from 6,661 citizens



Source 2 Petitions about the cruelty to animals involved in shipping them overseas under harsh conditions to countries where they are slaughtered inhumanely.

Source: Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, 10 October 2016, 1198 (Ross Vasta).

Are petitions effective?

While petitions are a relatively simple and inexpensive way for people to influence a change in the law, once they are tabled in parliament there is no guarantee that parliament will introduce the desired change. If there is no other pressure, petitions can fail to gain attention. The impact of the petition can also depend on the passion and profile of the member of parliament who presents it.

A summary of some of the strengths and weaknesses associated with using a petition to influence law reform is set out in Source 3.

STRENGTHS	WEAKNESSES
Petitions are a relatively simple, easy and inexpensive way for people to show their desire for a change in the law.	Some people are reluctant to place their name, address or email address on a petition and can find requests to do so an imposition.
Members of parliament are more likely to consider law reform that has strong support within the community.	Good ideas may be overlooked if there is no other community pressure beyond the petition.
Petitions are more likely to be effective if they are signed by many people.	The influence of the petition may depend upon who tables it and their influence within the parliament.
The acts of creating petitions and gathering signatures can generate public awareness of an issue and support for the desired legislative change.	Parliaments receive hundreds of petitions each year and there is no guarantee or compulsion for the suggested law reform to be adopted.
Once a petition has been given to a member of parliament they must present the petition in parliament. Even if it is not initially successful in generating law reform, the tabling of the petition can help gain the attention of other members of parliament and the media, which can then generate further community support.	Many petitions do not gain public and media attention after being tabled.
An e-petition enables members of the public to submit and sign petitions online, and to track their progress. A wider pool of signatories may find petitions online.	Some people may sign a paper petition more than once, which compromises the integrity of the petition.
	Opposing petitions (putting opposite points of view) can lower the impact of a petition.

Source 3 The strengths and weaknesses of petitions in influencing law reform

14.2 CHECK YOUR LEARNING

Define and explain

1. What is an e-petition?
2. Provide two examples of petitions submitted to either the Victorian Parliament or the Commonwealth Parliament.
3. Where does a petition get tabled, and how?

Synthesise and apply

4. Briefly explain how to submit an e-petition in the House of Representatives. For information, go to the Parliament of Australia website on your obook assess. Select Petitions from the Parliamentary Business menu. Under the heading 'House of Representatives' select 'Sign an e-petition' and then select 'How do I sign an e-petition?'
5. Investigate a petition on the internet. You could go to the Parliament of Australia or Parliament of Victoria websites. A link is provided on your obook assess. At the Parliament of Victoria website, select Hansard from the main menu. Select Quick Search and type in 'petitions'. Choose a petition and explain what you think the government's response to that petition should be.

Analyse and evaluate

6. Evaluate two strengths associated with starting a petition to influence a change in the law.

Check your obook assess for these additional resources and more:

- **Student book questions**
  14.2 Check your learning
- **Sample**
  Petition
- **Weblink**
  Change.org: Educate children about domestic violence and how to seek help
- **Weblink**
  Parliament of Australia

14.3 INDIVIDUALS INFLUENCING LAW REFORM THROUGH DEMONSTRATIONS

demonstration
a gathering of a group of people to protest or express their common concern or dissatisfaction with an existing law as a means of influencing law reform

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

One of the common ways individuals in our community can influence a change in the law is by organising or participating in a public **demonstration**.

Demonstrations are most effective when large numbers of people rally in support. This means they rely on being supported by a large amount of interested individuals or a focused **pressure** (or protest group).

Demonstrations

Demonstrations (also referred to as protests or rallies) occur when a group of people gather together to express their common concern or dissatisfaction with an existing law. It can be an effective way for individuals and pressure groups to influence law reform by alerting the government to the need for a change in the law. They can also raise awareness of the need for legislative change within the community, which generates further support for the change. To be effective, however, demonstrations need to attract large numbers of people and positive media coverage, as members of parliament are more likely to implement law reform that has significant support. They are also more likely to associate themselves with positive campaigns that may increase their popularity with voters, rather than ones that cause conflict, public inconvenience or violence.

Demonstrations 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.

One example includes the growing number of people who demonstrate on 26 January, the day celebrated as Australia Day.

CASE STUDY

Australia Day or Invasion Day?

On 26 January each year, demonstrations take place across Australia to protest the Australia Day celebrations held on the anniversary of the arrival of the British, and the colonisation of Australia. For many Australians, and particularly many Indigenous Australians, holding a celebration of Australia on this date is considered inappropriate and even offensive, because it commemorates a day of sorrow when Aboriginal Australians lost their independence and sovereign right to control their land, culture and families. Australia Day is therefore often referred to as 'Invasion Day'.



Source 1 While most Australians celebrate Australia Day on 26 January each year, more and more people are now beginning to call it 'Invasion Day' because it commemorates the arrival of European settlers and the loss of rights and freedoms for Indigenous Australians. In 2017, tens of thousands of people gathered in Melbourne's CBD for an 'Invasion Day' rally.

Each year demonstrations take place to raise community awareness of the suffering of Indigenous Australians since colonisation, and to increase support for changing the celebration of Australia to a more appropriate and inclusive date. The demonstrations also seek to influence law reform in relation to Indigenous Australians, such as creating a treaty which governs the relationship with Indigenous Australians.

Sometimes people are driven to demonstrate because of a change in society that has negatively affected their livelihoods. The effect of Uber on licensed taxi drivers is one example.

CASE STUDY

Taxi industry reforms

In February 2017, dozens of taxi drivers joined together one morning during the busy peak hour traffic to drive slowly over Melbourne's Bolte Bridge. This was to express their dissatisfaction with proposed government changes to the taxi industry, including legalising the Uber ride sharing service. After crossing the bridge the drivers, who believed the proposed changes would unfairly destroy their businesses and livelihoods, progressed to Parliament House, where they were joined by about 200 other protesters.

One concern of the taxi drivers was that the government's deregulation of the industry included abolishing the existing 'taxi licencing scheme'. This required taxi drivers to obtain a licence to operate the business.

While the demonstration achieved the aim of generating community awareness and support for the taxi drivers' concerns, and gained significant media coverage (particularly on local and national morning television and radio programs), it did cause inconvenience to morning commuters, who were stuck in traffic jams. This may have lessened its effectiveness.



Source 2 Melbourne taxi drivers protesting against what they believed to be unfair changes in the regulation of the taxi industry that could send many of them broke.

Sometimes people take part in demonstrations to influence law reform in relation to matters that affect them personally. In March 2017, thousands of union workers rallied in Melbourne against proposed changes to Sunday and public holiday pay rates for workers in the retail, hospitality, pharmacy and fast food industries. Many stated that they would be deeply affected by the cuts, as they relied on penalty rates to survive.

Are demonstrations effective?

Demonstrations have the potential to generate great interest, and public awareness of issues, particularly if they attract large numbers. People who have not been educated about the issue or are unaware of it may start to think about and form their own view, which can further influence others, or change the way they vote in an election. However, if the demonstrations become violent or cause inconvenience to the public, support for the suggested law reform may decrease.

The strengths and weaknesses associated with demonstrations as a means of influencing law reform are set out in Source 3.

STRENGTHS	WEAKNESSES
Demonstrations that attract large numbers of participants can attract free positive media attention. Members of parliament are more likely to consider law reform that has strong support within the community.	Demonstrations can be less effective and even decrease support for a law change if they cause public inconvenience, become violent or lead to breaches of the law. Further, any negative media attention may decrease the credibility of a demonstration and the likelihood of members of parliament supporting the cause.
Demonstrations can gain the support of members of parliament who want to 'adopt a cause' – particularly one that might improve their public profile or image.	Demonstrations can be difficult and time-consuming to organise and attendance can be affected by factors like the location and weather.
Demonstrations can raise social awareness, making members of the public think about the issue for the first time. This can bring change over time.	Demonstrations are often single events that may not generate ongoing support for the desired law reform.
An effective demonstration will focus on something that can be directly changed.	A demonstration about something that cannot be changed in Australian law will be less effective (e.g. demonstrating against Donald Trump's treatment of women). However, they may still attract attention (even wide global attention) and may have a longer term influence.

Source 3 The strengths and weaknesses of the use of demonstrations to influence law reform

14.3 CHECK YOUR LEARNING

Define and explain

1 Using an example, define the term 'demonstration'.
2 Describe two recent demonstrations that have taken place in Melbourne, and describe what they were demonstrating about.
3 How do demonstrations influence law reform?

Synthesise and apply

4 Conduct some online research to investigate a demonstration that has taken place recently.
   a Describe the approximate size of the demonstration, its location and any other relevant information.
   b What type of change in the law is the demonstration trying to influence?
   c How far could the influence of the demonstration spread? Explain why you think this might be a local issue or a global issue.

Analyse and evaluate

5 To what extent do you think a demonstration is likely to be a successful method of influencing law reform? Discuss.

Check your obook assess for these additional resources and more:

» **Student book questions**
14.3 Check your learning

» **Video tutorial**
How and when should acronyms be used in answers?

» **Weblink**
The Conversation: What do we want? Charting the rise and fall of protest in Australia

14.4 INDIVIDUALS INFLUENCING LAW REFORM THROUGH THE COURTS

People in our community can influence a change in the law in many ways. A common way individuals can try and raise awareness of the need for law reform is by challenging the law in the courts.

The use of the courts

Individuals can be instrumental in bringing about a change in the law by taking a matter to court. In taking the case to court, they will usually be trying to prove their own claim rather than trying to change the law, but if an unclear point of law is clarified or established in the process, then their case has played a part.

If the parliament has passed a law that is unclear or unfair, the legislation can be challenged through the court system in the hope that a judge will interpret and clarify the meaning of the law in their favour. However, with the exception of **High Court** rulings in constitutional disputes, parliament can always pass legislation to override a court decision.

High Court
the ultimate court of appeal in Australia and the court with the authority to hear and determine disputes arising under the Australian Constitution

The role of the courts in influencing a change in the law can also be limited in other ways. First, they can only influence change if a case comes before them. Second, they can only rule on the issues directly involved in that case.

Finally, the courts can only decide a point of law or case when people are prepared to challenge existing law in the courts. People can be deterred or put off taking a case to court by the high costs involved (e.g. the cost of engaging legal representatives), the amount of time the case may take and the uncertainty of the outcome. They must also have standing to be able to initiate a court action.

The case of *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490 is an example of an individual trying to influence change by challenging a law in the courts.

LEGAL CASE

Gender recognition

NSW Registrar of Births, Deaths and Marriages v Norrie (2014) 250 CLR 490

Norrie, an individual who does not identify as being either male or female, undertook court action against the decision of the New South Wales Registry of Births, Deaths and Marriages to not allow Norrie to register as being of 'non-specific' sex. The Registry claimed that in accordance with the *Births, Deaths and Marriages Registration Act 1995* (NSW) they only had the power to change a person's sex from male to female or vice versa.

The case was ultimately resolved by the High Court in *NSW Registrar of Births, Deaths and Marriages v Norrie*, which ruled that the Registry did have the power to record Norrie's sex in a gender-neutral way.



Source 1 Norrie, who does not identify as either male or female, tested the law in court.

Following this case, the Victorian Government introduced the Births, Deaths and Marriages Registration Amendment Bill 2016 (Vic) in an attempt to change the law to allow people who do not identify as being either male or female, to change their sex on their birth certificate without having to undergo medical surgery to affirm their sex and be unmarried.



Source 2 Senator Janet Rice and her spouse, a Nobel Prize-winning scientist, Penny Whetton, who have faced legal difficulties since Penny transitioned from male to female during their marriage.

While the proposed law change had the support of various organisations including the Australian Human Rights Commission, it did not gain a majority of votes in the upper house and was defeated. In her parliamentary speech opposing the bill, member of parliament Dr Carling-Jenkins commented that if the bill were adopted it would 'cause a dangerous shift from treating a person's sex as a question of verifiable fact to treating sex as a question of personal belief'.

Senator Janet Rice expressed public support for the bill by sharing her personal story. Rice's spouse Penny transitioned from male to female 14 years into their 30-year marriage. In accordance with Victorian law Penny is not able to change her Victorian birth certificate from male to female while she remains married to Janet, despite being granted an Australian Passport that identifies her as female.

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

Individuals may also challenge an existing law in the hope that a judge might rule that it has been made ***ultra vires*** or beyond the power of the parliament and declared invalid. They may also challenge actions taken by government employees that breach human rights. For example, the placement of children into adult prisons in Victoria has resulted in a number of court challenges. As well as deciding on the case, judges can make suggestions that a law needs to be changed.

LEGAL CASE

Children in adult prisons

Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2) [2017] VSC 251 (11 May 2017)

Between December 2016 and May 2017, the Supreme Court of Victoria ruled on two occasions that to detain children in an adult prison was a breach of human rights, and unlawful. The case arose after the Victorian Government transferred a group of teenage offenders to Barwon Prison, a maximum-security prison for adults, following a series of riots that damaged sections of the Parkville Youth Detention Precinct. The government claimed it was forced to temporarily house some young offenders at Barwon Prison, in a section separate from adult offenders, while it was repairing the centre because all other youth facilities were full.

By contrast, lawyers from the Human Rights Law Centre (HRLC), who acted on behalf of a group of youths being held at the prison, claimed the government's policy was a gross breach of human rights and would cause physical and mental harm to the young offenders. During the trial the court heard allegations that, in addition to being locked in their cells for up to 23 hours a day, some youths had been subject to capsicum spray.

In 2016 the Supreme Court found in favour of the youths, declaring the detainment of children in an adult prison unlawful (in *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 (21 December 2016)). However, the government avoided the ruling by reclassifying a separate area of the Prison and establishing various facilities, so it could specifically operate as a 'youth justice and remand centre'. This action promoted the HRLC to launch another court challenge on behalf of the young offenders.

In May 2017, the Supreme Court of Victoria once again ruled the detainment of children in an adult prison was a breach of human rights and unlawful and the government was forced to remove the young offenders from Barwon Prison.

Is using the courts effective?

While challenging the law in the courts can lead to a change in the law, it can be an expensive and time-consuming way for an individual to influence law reform and there is no certainty in the outcome of any case. The strengths and weaknesses associated with challenging a law in the courts to influence law reform are set out in Source 3 below.

STRENGTHS	WEAKNESSES
Challenging an existing law in a higher court can enable a vague or unclear law to be clarified.	Courts are limited in their ability to change the law because they can only do so when a case comes before them and only in relation to the issues in the case.
Even if a court challenge is unsuccessful it may gain significant media coverage and help increase awareness of the possible need to change a law.	Individuals can be reluctant to challenge a case because it can be expensive and time-consuming and a successful outcome cannot be guaranteed.
Judges are politically independent and determine cases based on the merits rather than electoral consequences (i.e. gaining voter support).	With the exception of High Court disputes involving the interpretation of the Constitution, a judge-made law can be overridden (abrogated) by parliament.
Judges can rule that legislation made outside the power of the parliament is invalid.	Judges must wait for a party to challenge the authority of parliament to legislate before they can make a ruling and declare legislation invalid.
Judges' decisions and comments made in court can encourage parliament to change the law.	Judges are unelected and their decision and comments may not necessarily represent the views and values of the community.

Source 3 The strengths and weaknesses of using the courts to influence law reform

14.4 CHECK YOUR LEARNING

Define and explain

1 Explain how an individual can influence law reform through the courts.

2 Provide two examples of individuals seeking to reform the law by using the courts.

Synthesis and apply

3 In the following scenarios, should the person initiate a claim in court to change the law? Refer to a case you have studied.

a Andrew has been imprisoned for various offences. He has been transferred from Loddon Prison to Barwon Prison and is amongst the most serious offenders. He believes this is a breach of his rights.

b Ursula wants to be registered in Victoria as neither male nor female, but this has been rejected.

Analyse and evaluate

4 Using one example to support your response, discuss the effectiveness of challenging a law in the courts to bring about a change in the law.

Check your obook assess for these additional resources and more:

- **Student book questions**
  14.4 Check your learning
- **Worksheet**
  The use of courts
- **Weblink**
  Climate case: The student v the minister

14.5 THE ROLE OF THE MEDIA IN LAW REFORM

social media
a range of digital tools, applications and websites used to share information in real time between large groups of people (e.g. Facebook, Twitter, Instagram and Snapchat)

The media, both traditional media (newspapers, television and radio) and **social media**, have an important role to play in influencing changes in the law. Social media includes communicating information using a huge range of internet tools, applications and platforms, and over recent years the use of platforms (Facebook, Twitter, Instagram, Snapchat, LinkedIn) and bookmarking sites (Pinterest, Reddit, Delicious, Digg) have gained significant popularity. The sharing they allow through web pages, blogs, videos and images was unimaginable 25 years ago. Information, comments, views and opinions can now be communicated by any individual or group to potentially millions of people almost instantaneously and with limited restrictions or censorship. This makes social media an important way for individuals and pressure groups to gain awareness of an issue and support for law reform. Members of parliament, political parties, pressure groups and individuals can all take advantage of it.

Did you know?

In July 2016, the fatal shooting of a 32-year-old African-American man Philando Castile by a policeman in the United States of America was live streamed online. The policeman mistakenly thought Mr Castile was reaching for a handgun rather than his wallet. The streaming caused great controversy. It inspired demonstrations that highlighted alleged discrimination within the American criminal justice system, as well as public protests which emphasised the need for greater respect of law enforcement officers.

How social media and traditional media can influence law reform

Individuals and groups can use both traditional and social media to help generate community interest in, awareness of and support for a desired law change. This is important, as law reform campaigns that attract maximum community interest and support are the most likely to attract the attention of members of parliament who are in a position to directly influence a change in the law.

Social media

Social media has the ability to create interest in, and raise awareness of, legal issues on a massive scale. People are able to share their views and opinions with the entire community by using a vast range of social media platforms, sites and blogs (like Facebook, Twitter, Instagram, Pinterest and Reddit). Through the use of social media platforms, individuals, specific interest or pressure groups, parliamentarians and even traditional media organisations (like television broadcasters, radio programs and newspapers) now have the ability to communicate their opinions to a broader audience and with greater speed than at any time in history. For example, during 2016, Facebook averaged approximately 15 million users per month. Similarly, YouTube was accessed approximately 14.5 million times per month. In June 2017, Facebook announced that it had reached 2 billion monthly active users worldwide.

Images, videos and live streaming of events can be used to generate great interest in and awareness of legal and political issues and the need for law reform. The increasing use of mobile devices (such as smart phones, smart watches and tablets) allows most people to have the ability to capture and broadcast footage. Demonstrations and events can be captured on video or streamed live to help gain support for law reform. For example, footage of crime, cruelty to live export animals and conditions in detention centres for asylum seekers have all been placed on social media to gain support for law reform in these areas.

The case study on the next page is an example of media being used to gain support for asylum seeker law reforms.

'Chasing Asylum'

CASE STUDY

In 2016, Australian film maker, Eva Orner, produced a film called 'Chasing Asylum' to show and raise awareness of the sad and distressing plight of people who have been forced to leave their home countries (due to war and fear of their lives) and were seeking asylum in Australia. The film follows the story of a group of asylum seekers and shows some of the difficulties they face while away from family and friends. It also contains footage, secretly filmed, of the poor conditions in the Australian detention centres at Nauru and Manus Island.

The film was marketed as 'The film the Australian Government doesn't want you to see'. It was made by Ms Orner to raise community awareness of treatment of asylum seekers and place pressure on the Australian Government to change the laws relating to the detainment and treatment of asylum seekers in Australia.

While the film was released in cinemas, it generated great interest in the traditional and social media. Clips were circulated on social media platforms like YouTube and Facebook. It was also discussed on television and radio programs, including the ABC's *Q&A* and *Radio National* programs and Network 10's *The Project*, and in a range of newspaper and media sites. A Facebook page, Twitter account and website (www.chasingasylum.com.au) were also created. People are encouraged on those sites to undertake other action to influence a change in asylum seeker laws, such as by signing an online petition, writing to their local member of parliament, donating to a local refugee camp or volunteering with a local refugee group.



Source 1 'Chasing Asylum' is a film and law reform campaign. It was designed to increase community awareness and support for law reform so that people seeking asylum in Australia are always treated with dignity and humanity.

Social media also connects people around the world and can be used to inform a global audience, including national and state governments, about a range of legal issues and perceived injustices. This information can provoke and inspire people to undertake action on global issues by influencing law reform at a local level. For example, many environmental groups within Australia, such as the Australian Conservation Foundation, the Green Energy Council and the Youth Climate Change Coalition, use social media to gain support for law reform in a range of areas including reducing global warming and achieving sustainable global food production.

Social media is also influential in law reform because users can directly access a political party, politician or local member of parliament via their website, Facebook page and Twitter or Instagram account to gain an insight into their views and opinions on various legal issues and receive up-to-date information. In this way, the public can more directly interact with members of parliament and make them more accountable for their actions.

Similarly, social media is becoming a significant source for breaking news, announcements and discussions on a wide range of political, social, environmental and commercial topics. Most politicians at federal and state levels use social media platforms such as Facebook and 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.



Source 2 Members of the Youth Climate Change Coalition demonstrating for law reform to address the global climate crisis.

Traditional media

traditional media conventional ways of communicating information to the mainstream public, being newspapers and magazines, television and radio, that were relied on before the internet

Traditional media generally refers to newspapers, television and radio. These were the main means by which people obtained news and information before the twenty-first century. In Australia, while there has been a rapid growth in social media over the last decade, approximately 52 per cent of Australians still rely on traditional media, with another 21 per cent gaining their news online through the apps and websites of these traditional media mediums rather than via social media.

Traditional media has an important role in influencing law reform through its ability to examine, discuss and inform people about legal issues and possible changes to the law. Newspapers, television and radio are still a major source of news within our community, being accessed by millions of readers, viewers and listeners each week, and have the ability to shape the views and attitudes of their audience depending on the manner in which they present a legal or political issue or argument. Television programs such as *Sunrise*, *Today*, *The Project, Lateline*, *7.30*, *Foreign Correspondent*, *Q&A*, and *A Current Affair* often contain segments about the need for law reform and possible changes to the law. They also provide a forum for political parties and parliamentarians to outline their policy stance on law reform, explain their actions and be held accountable for their views on law reform.

Many television programs also investigate problems in our community to inform the public of injustices and the need for changes in the law. These programs, such as the ABC's *Four Corners* or the Nine Network's *60 Minutes*, can influence public opinion and assist governments in deciding whether or not there is sufficient community support for a change in the law.

Did you know?

Traditional media is still influential. In 2016, more than 3 million Victorians read content from the *Herald Sun* newspaper, in print or online, and 2.9 million read content from *The Age*.

CASE STUDY

TV program highlights problems with youth detention

In August 2016, a Police Youth Detention Task Force was set up to investigate the treatment of children in youth detention centres in the Northern Territory after the ABC broadcast a *Four Corners* program alleging young offenders were being denied their basic rights and detained in poor and cruel conditions.

The program, titled *Australia's Shame*, alleged that children as young as 10 years old were being held in harsh conditions in youth detention centres and others, aged only 13 years, were being held in solitary confinement with no access to running water or adequate sunlight. The program showed disturbing footage, including that of one young offender being forcibly strip-searched by detention centre staff.

Within a week of the program being broadcast, a police taskforce was set up to review all reports of incidents involving young offenders that had occurred over the previous decade at two specific detention centres in the Northern Territory (i.e. the Don Dale and Alice Springs Detention Centres).



Source 3 Don Dale Youth Detention Centre in the Northern Territory

The federal government also announced a Royal Commission into the Protection and Detention of Youth in the Northern Territory to examine the treatment of youth in these facilities. The royal commission has the role of investigating youth detention centres and gathering evidence to discover where the system has broken down. It will make recommendations for law reform aimed at improving the policies and practices in youth detention centres and protecting the rights of youth offenders. Royal commissions are examined in more depth later in this chapter.

One problem with traditional forms of media, however, is that they may not always present information in an unbiased and independent manner in preference to reflecting the vested political interests of their owners. Television and radio producers and newspaper editors can manipulate content in an attempt to alter the community's perception of and discredit a particular individual or pressure group if the owners of their media organisation do not support their views. For example, producers can edit footage of a largely peaceful demonstration and choose to broadcast one brief moment of conflict between a few protesters and police in an attempt to alter the viewer's perceptions. Likewise, more broadcasting time can be given during radio and television interviews to individuals, pressure groups and parliamentarians who support the views held by the owners of the media organisation on which they are appearing.

The high concentration of ownership in the traditional media may also decrease its independence and give the owners of media organisations excessive power and too much ability to influence community views on controversial legal issues, law reform and even the way people vote in elections. For example, in Australia the two biggest and most influential media organisations, *News Limited* and *Fairfax* (which account for approximately 85 per cent of all newspaper sales in Australia), as well as the ABC, are often criticised for showing political bias as summarised in Source 4 below.

MEDIA ORGANISATION	PUBLICATIONS PROGRAMS	PERCEIVED POLITICAL BIAS
News Limited	*The Australian* *Daily Telegraph* (Sydney) *Herald Sun* (Melbourne)	• generally recognised for supporting the Liberal–National coalition
Fairfax Media	*The Age* *Sydney Morning Herald*	• generally recognised as being left-wing and pro-Labor
ABC	*ABC News* *Lateline* *Q&A*	• often viewed as being pro-Labor and the Australian Greens

Source 4 Perceived biases of some traditional media organisations

CASE STUDY

Media influence in elections

Over the years, various media organisations have been accused of showing particular bias for and against certain political parties during federal election campaigns. For example, during the 2016 federal election campaign, News Corp Australia was accused of biased anti-Australian Labor Party reporting, aimed at ensuring the Liberal–National Coalition was re-elected into government.

News Corp Australia is mainly owned by News Limited, a media organisation which has the ability to influence a large number of voters. It sells approximately 60 per cent of the nation's daily newspapers – or approximately 17 million newspapers per week. The CEO of News Limited is Rupert Murdoch, who has long been accused by some political commentators of prompting anti-Labor reporting in News Corp newspapers because various Labor policy initiatives would have disadvantaged his business interests.



Source 5 The headline on the front page of the *Daily Telegraph* the day before the 2016 federal election. The Liberal–National coalition went on to win government by just one seat.

Examples of negative media coverage in News Corp publications prior to the 2016 federal election included a front-page cover of the *Daily Telegraph* displaying a cartoon of the Leader of the Australian Labor Party, Bill Shorten, being likened to 'Pinocchio' for allegedly telling deliberate lies to gain power.

Traditional media can also influence law reform by broadcasting or publishing public opinion. For example, many newspapers publish emails and letters received from individual members of the public, pressure groups, and politicians on a daily basis as a means of generating discussion or influencing community views. Members of the community can also leave remarks in online comment forums, and write short articles in the hope their views and opinions will be published. Publication of such emails, letters, comments and articles 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.

The case study below highlights how articles can alert the public to a suggested change in the law.

CASE STUDY

Anti-abortion laws

In May 2016, Fiona Patten, Leader of the Australian Sex Party (to be renamed the Reason Party) and a member of Victoria's Legislative Council, wrote an article that was published in the Melbourne *Herald Sun* newspaper. In it she stated her opposition to the Infant Viability Bill 2015 (Vic) that had been introduced by the sole member of the Democratic Labour Party, Dr Rachel Carling-Jenkins, into parliament in an attempt to change Victoria's abortion laws. The bill, which was ultimately not successful, proposed changing the law so that abortions would not be available to women in Victoria from the 20th week of their pregnancy. The existing law makes abortion legal in Victoria up to 24 weeks.

In her article Ms Patten outlined what she believed would be the negative consequences associated with passing the bill. Ms Patten's article prompted a variety of comments, both in print and online, from those who supported and those who disagreed with her opinion. This included a response from 'Kathleen' who expressed the view that more than the mother's rights or interests should be considered when determining an abortion:

> If we are to base all decisions on science rather than emotion and 'belief', then the human (yes, human) that is residing inside of the mother's body has its own DNA. That which is partially contributed to by a father. There are three people involved here. Each has rights. – Kathleen.

Is the media effective in influencing law reform?

The media, both traditional and social, can be effective in influencing law reform. Newspapers, television, radio and social media platforms provide a vital way for individuals, organisations and pressure groups to gain community support for their desired law reform to attract the attention of a parliamentarian. Law-makers themselves, particularly parliamentarians and government departments and bodies, also often monitor traditional and social media coverage to gauge or measure public opinion and public responses to recent and proposed law reform.

Most parliamentarians and political parties also have websites and social media accounts. They use them to communicate with the public, and influence change. In fact the dramatic rise in the use of social media platforms over the last decade has increased people's ability to become informed about legal issues and possible law reform.

However, one problem with the media, particularly social media, over recent years is that information is presented in a more visual manner, which can portray complex legal issues in a simplistic way. This means individuals may make decisions about law reform without having a basic understanding of the issue involved. Social media platforms (such as Facebook and Twitter) are highly visual and can include graphic images and live streams that evoke emotional responses based on limited facts and knowledge.

Likewise, people who place information, opinions, images and videos on social media do not generally follow codes of ethics that are subscribed to by many reputable traditional media organisations and journalists. Therefore, much information on social media may not be accurate or authenticated. Excessive exposure to graphic or vivid images, both in the social and traditional media, may also cause people to feel overwhelmed and become desensitised to social, political and legal injustices.

14.5 CHECK YOUR LEARNING

Define and explain

1 Define the terms traditional media and social media.
2 Explain how social media can be used to influence a change in the law. Provide two examples to support your response.
3 Explain three ways the traditional media can be used to influence the government to initiate a change in the law. Provide examples to support each of the three ways.

Synthesise and apply

4 Select one law reform that you believe the Victorian or Federal Government should introduce.
   a Describe the law reform and give reasons why you think it should be introduced.
   b Outline possible objections to the proposed law reform.
   c Imagine you had to design a campaign to increase community awareness, and support for the proposed law reform. What would you do? What methods would you use to influence a change in the law?
   d Write an email to the editor of a daily Victorian newspaper to convince other readers to support the proposed law reform. Your email cannot be more than 300 words.
5 Talkback radio programs are a popular forum for discussion about legal issues and law reform. Using the internet, find one Melbourne talkback radio program. Describe two recent or possible changes to the law that have been discussed on the program you select.
6 Prepare a list of the strengths and weaknesses associated with using the traditional media to gain support for their law reform.

Analyse and evaluate

7 Select one political party that exists in Australia, or one parliamentarian, and investigate how they use the media to win electoral support or support for their party's suggested law reforms. A list of registered political parties is available on the Australian Electoral Commission website. A link is provided on your obook assess.
8 Discuss the ability of the Australian media to influence public views and attitudes towards law reform. Provide two recent examples to support your view.
9 Select one current law reform issue and follow its progress. What methods are those who are agitating for change using to gain support? How often is the proposed law reform being mentioned in both the traditional and social media? Is media coverage positive or negative?

   You may wish to examine proposed law reform relating to criminal offences, procedures or sanctions; puppy factories; global warming; marriage equality; euthanasia; abortion; safe injection rooms; illicit drugs; children in detention centres or asylum seekers.

Check your obook assess for these additional resources and more:

» **Student book questions**
14.5 Check your learning

» **Weblink**
Chasing Asylum trailer

14.6 THE VICTORIAN LAW REFORM COMMISSION

Members of parliament often lack the time and resources to undertake a thorough investigation of an issue. In situations like this, parliaments may prefer to pass the investigation of the need for law reform to an independent **law reform body** that can conduct its own investigations and make recommendations for changes to the law.

Formal law reform bodies are organisations established 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.

Victorian Law Reform Commission (VLRC) Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

The **Victorian Law Reform Commission (VLRC)** is Victoria's leading independent law reform organisation, which reviews, researches and makes recommendations to the Parliament of Victoria about possible changes to Victoria's laws.

The role of the VLRC

The Victorian Parliament established the VLRC in 2001 by passing the *Victorian Law Reform Commission Act 2000* (Vic). The VLRC was therefore created by **statute**, and obtains its powers and functions through that statute.

The VLRC aims to assist the Victorian Government in continuing to provide a fair, inclusive and accessible legal system by investigating the need for change in Victorian laws and providing the government impartial advice and recommendations for change.

While the VLRC was created and is funded by the Victorian Government, it is an independent organisation that is not involved in the political process or influenced by the policies of the government or political parties.



Source 1 The Victorian Law Reform Commission is an organisation that reviews and researches possible changes in Victorian laws.

In general terms, the VLRC monitors and coordinates law reform activity in Victoria and investigates and advises the Victorian Government on ways to update and improve Victorian law. When conducting its investigations, the VLRC engages in community-wide consultation and debate to ensure its recommendations for changes to the law meet the needs and desires of the Victorian community. For example, the VLRC will respond to issues and concerns raised by individuals and pressure groups, and consider newly emerging rights and responsibilities.

Section 5 of the *Victorian Law Reform Commission Act* sets out the specific roles of the VLRC:

- **inquiry** – To examine and report on any proposal or matter referred to it by the Victorian Attorney-General and make recommendations to the Attorney-General for law reform. This includes conducting research, consulting with the community and reporting on law reform projects. An example of a **terms of reference** is provided on the next page.
- **investigation** – To investigate any relatively minor legal issues that the VLRC believes is of general concern within the community and report back to the Attorney-General with suggestions for law reform. This means that in addition to its main role of examining legal issues and matter referred by the Attorney-General, the VLRC can also examine minor issues without a reference, provided the

Study tip

The VLRC website provides information on all their law reform projects. It also has an excellent student resources section that contains a booklet that examines the VLRC's role and the way it works, case studies and a poster. A link to the website is provided on your obook assess.

statute a law made by parliament; a bill which has passed through parliament and has received royal assent (also known as a statute)

terms of reference instructions given to a formal body (e.g. a law reform body or royal commission) to investigate an important matter. Terms of reference set out the precise scope and purpose of the inquiry and the date by which the final report must be completed

review will not consume too many of its resources. Any member of the public can make a suggestion for it to undertake an investigation into a minor area of general community concern.

- **monitoring** – To monitor and coordinate law reform activity in Victoria, including making suggestions to the Attorney-General that he or she refers a legal issue or matter relating to law reform to it for investigation. In other words, after consultation with various groups and other law reform bodies, the VLRC may suggest to the Attorney-General new references relating to areas where law reform would be desirable.
- **education** – To undertake educational programs and inform the community on any area of the law relevant to its investigations or references. This means the VLRC has a responsibility to deliver programs to help inform the community about its work. One way the VLRC achieves this is by visiting schools throughout Victoria to talk to students about its role and past and current projects. It also provides a vast range of information about its investigations and references on its website.

EXTRACT

Adoption Act: Terms of Reference

At the time of its introduction, the *Adoption Act 1984* represented a significant change in Victorian adoption policy.

The government recognises that adoption is complex, and past adoption practices have resulted in significant trauma for people affected by those practices. The government also acknowledges the positive experience of adoption for many Victorian children, adult adopted people and their families.

To ensure that the *Adoption Act*, now over 30 years old, meets the needs of the children and families it affects, it is time to review the Act to ensure:

- the best interests of the child are paramount
- it is consistent with contemporary law in relation to family and community
- it operates harmoniously with other relevant areas of law that have developed since the introduction of the *Adoption Act*
- it is structurally sound and in accordance with contemporary drafting practice.

Accordingly, the Victorian Law Reform Commission ('the Commission') is requested to provide recommendations to government on the modernisation of the *Adoption Act 1984* and the Adoption Regulations 2008.

The Commission should consider and provide recommendations to government on opportunities to amend adoption law to:

1 ensure the best interests and rights of the child are the foremost consideration in any decision made under the *Adoption Act*
2 better reflect community attitudes and contemporary law in relation to family, for example, the way a child's identity is reflected on a child's birth certificate, or ensuring requirements in relation to prospective parents' relationship status or living arrangements are consistent with current Victorian law
3 uphold principles set out in the Charter of Human Rights and Responsibilities and the United Nations Convention on the Rights of the Child
4 improve the operation of the *Adoption Act* and Adoption Regulations including, but not limited to:
   a addressing any gaps in current information provisions

b clearly articulating legislative practice and procedural requirements, for example in relation to assessment of adoption applicants

c ensuring the Act uses clear, contemporary language.

In making recommendations, the Commission should ensure amendments are capable of harmonious operation with other relevant Victorian and Commonwealth legislation.

The Commission should not consider:

1 intercountry adoption programs or commercial surrogacy: these matters are more appropriately considered at a national level

2 adoption by same-sex couples: the government made an election commitment to legislate to allow same-sex adoption. This commitment has been delivered by the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* and is not within the scope of this review

3 contact statements: the government made an election commitment to legislate to remove contact statements. This commitment has been delivered by the *Adoption Amendment Act 201*5 and is not within the scope of this Review.

The Commission is asked to report by 28 February 2017.

Source: Victorian Law Reform Commission, Review of the Adoption Act 1984 (February 2017) < http://lawreform.vic.gov.au/sites/default/files/VLRC_Adoption_Report_forweb.pdf>.

The case study below is an example of the VLRC reporting on a matter and making recommendations for law reform.

CASE STUDY

Jury empanelment

In 2014, the VLRC reviewed the jury empanelment process in Victoria to ensure it was operating in a just, effective and efficient way. 'Jury empanelment' refers to the process of selecting a jury, from a jury pool, for a trial.

After conducting an examination of the jury empanelment process, including consulting with and receiving submissions from interested individuals, experts and relevant organisations (including legal representatives, County and Supreme Court judges, the Juries Commissioner, the Director of Public Prosecutions and the Law Institute of Victoria), the VLRC's final report included 16 recommendations for law reform to improve the empanelment process. Some of the main recommendations included:

- to reduce the number of peremptory challenges to jurors without reason in a criminal trial for a single accused from six to three, and in a civil trial from three to two for each party in an attempt to lessen the opportunity for a party to decrease the representativeness of the jury.
- to identify prospective jurors by number only, in both criminal and civil cases, to improve procedural fairness and better protect jurors by not announcing their name in court.
- to abolish the practice of balloting-off jurors in trials where additional jurors have been empanelled, because this increased stress on individual jurors and negatively affected the dynamics of the entire jury.

Crimes (Mental Impairment)

CASE STUDY

In 2014, the VLRC reviewed the operation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to determine how well the Act was working and whether or not it needed to be changed. The Act governs what happens in cases where the accused had a mental impairment at the time of committing an offence or was mentally impaired at the time of the trial. For example, what happens when an accused is suffering from a mental illness or intellectual disability to the extent that they cannot participate in the trial (i.e. are regarded as being 'unfit for trial') or cannot be held criminally responsible for their criminal actions?

During its investigations, the VLRC held 55 consultations with relevant experts and received 34 submissions from interested parties and relevant organisations including the Australian Clinical Psychology Association, the Victorian Equal Opportunity and Human Rights Commission, Victoria Legal Aid, Forensicare Patient Consulting Group, Youthlaw and from numerous doctors, health professionals and other individuals.

The final report contained 107 recommendations including:

- Revising the legal tests for determining whether an accused is fit to stand trial and adding a precise definition of mental impairment to the Act to ensure the law was clear and just.
- Increasing the acknowledgment of and improving the level of support offered to victims and family members involved in such cases.
- Removing the jury from determining whether a person is unfit to stand trial, and providing that judges and magistrates make that determination.

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 that the VLRC follows is that it:

- undertakes initial research and consultation with experts in the law under review and identifies the most important issues
- publishes an issues or discussion paper (called a consultation paper) which explains the key issues in the area under review and poses questions about what aspects of the law should be changed and how for community consideration
- holds consultations and discussions with, and invites submissions (which can be made in writing, online or by speaking to a Commission staff member) from, parties who are affected by the area under review and members of the Victorian community. Members of the community may include interested individuals, pressure groups, organisations and, in particular, people from marginalised groups such as those from non-English-speaking backgrounds, people with disabilities, Indigenous people and people living in remote communities
- asks experts to research areas requiring further information and, when desired, publishes these findings in an **occasional paper**
- publishes 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
- presents the final report to the Attorney-General, who will then table it in the Victorian Parliament. The parliament may decide to implement some or all of the VLRC's recommendations by incorporating them into a bill, but it is not bound to do so.

Study tip

The *VCE Legal Studies Study Design* states that you should know recent examples of law reform bodies recommending legislation change from the last four years. You should review the VCAA advice (available on their website) about the use of recent recommendations.

Recent VLRC projects

Since its creation in 2001, the VLRC has conducted numerous investigations and made hundreds of recommendations to help ensure Victoria's laws remain relevant and fair. In the first 15 years of its operation it received 36 references from the Victorian Attorney-General to investigate major areas of law reform and undertook another seven minor community law reform projects with the government adopting all or some of the VLRC's recommendations in approximately 70 per cent of cases. The VLRC website contains information on each of these completed and current projects.

Some recent completed projects include an examination of:

- medicinal cannabis
- adoption laws
- funeral and burial instructions
- family violence and *Victims of Crime Assistance Act 1996* (Vic)
- litigation funding.

The below case study explores the VLRC's investigation into Victoria's adoption laws.

CASE STUDY

Investigating Victoria's adoption laws

In 2017, the VLRC completed an inquiry into Victoria's adoption laws after receiving a reference from the Attorney-General asking it to make recommendations to improve and update the *Adoption Act 1984* (Vic) and the *Adoption Regulations 2008* (Vic). Some of the areas the VLRC examined during its inquiry included the way a child's identity is revealed on their birth certificate and the process of assessing prospective adoption applicants. For example, the Commission examined whether the legal requirement that single people could only adopt a child if there were special circumstances in relation to the child that made the adoption 'desirable' was in the best interest of the child and needed to be changed.

Social changes have also affected end-of-life decisions. Many more people divorce and remarry. Blended families and marriage across different cultural groups mean that people have different ways of doing things, including funerals, religious services, and whether burial or cremation is appropriate. The law needs to keep up with these changes. An example of this is the VLRC's reform project on funeral and burial instructions.

CASE STUDY

Community law reform project on funeral and burial instructions

In December 2016, the VLRC completed a community law reform project on Funeral and Burial Instructions in response to community concern. It undertook the project after receiving a request from a member of the community who was disturbed that the wishes of a deceased family member regarding the disposal of her body were not followed by the executors of her estate (i.e. those people who were chosen to ensure her will and wishes were carried out after she died).

One area the VLRC examined during its inquiry was whether the law needed to be changed so the wishes of a deceased person regarding the rituals surrounding the disposal of their

body (e.g. their funeral service) and the disposal of their body or remains (e.g. their burial or cremation) should be legally binding.

The final report made 25 recommendations, one of which was that a person should be able to leave binding funeral and burial instructions.

One of the VLRC's most high-profile reports was in relation to the use of medicinal cannabis, which resulted in the Victorian Parliament adopting the vast majority of its recommendations in 2016.

Medicinal cannabis

CASE STUDY

In April 2016, the Access to Medicinal Cannabis Bill 2015 (Vic) was passed by the Victorian Parliament to allow for the lawful cultivation and manufacture of medicinal cannabis and allow some individuals to use medicinal cannabis products in exceptional circumstances from 2017.

The new law was introduced after the Attorney-General gave a reference to the VLRC to examine whether the law should be changed to allow the use of medicinal cannabis in exceptional circumstances (e.g. for the treatment of severe pain from diseases like cancer, HIV or AIDS and multiple sclerosis) and for the treatment of epileptic conditions.

While undertaking the project, the VLRC held nine community-based consultations and received 99 submissions from a wide variety of sources including interested individuals, doctors and specialists, and health organisations such as Cancer Council Australia, AMA (Australian Medical Association) Victoria, MS (Multiple Sclerosis) Australia and the Victorian Drug and Alcohol Association, and other organisations including Victoria Police and Family Voice Australia.

After the VLRC's final report was tabled by the Attorney-General, the Victorian Parliament accepted 40 of the 42 recommendations and introduced the significant changes to the law.



Source 1 After new laws were introduced in Victoria, Ally Tregent's daughter Gemma, aged 5 years, was one of the first people to be treated with medicinal cannabis in the hope it will control and minimise her epileptic seizures.

The ability of the VLRC to influence law reform

The VLRC has an important role in reviewing Victorian law. It makes sure the Victorian Parliament is provided with independent advice and recommendations for law change. However, it has limited scope to investigate major issues other than those referred by the Attorney-General. The Victorian Parliament is not required to introduce any of its final recommendations.

The strengths and weaknesses of the ability of the VLRC to influence law reform is set out in Source 2.

STRENGTHS OF THE VLRC	WEAKNESSES OF THE VLRC
As the government asks the VLRC to investigate the need for law change in specific areas, the government should be more likely to act on the VLRC's report and recommendations.	The VLRC can only investigate issues referred to it by the government or minor community law reform issues that will not consume too many resources.
The VLRC has the ability to measure community views on areas of investigation by holding consultations and receiving public submissions.	There is no obligation on the part of the parliament to support or introduce law reform to adopt any of the recommendations made by the VLRC.
The VLRC is able to investigate an area comprehensively so the government can initiate a new law that covers a whole issue, such as the Access to Medicinal Cannabis Bill 2015, which was the outcome of the VLRC's report on medicinal cannabis.	The VLRC's investigations can be time-consuming and costly.
The VLRC has the power to make recommendations on relatively minor legal issues without any reference from the Attorney-General, which can lead to important law reform. For example, a review in 2001 on bail resulted in changes to the *Bail Act 1977* (Vic).	The VLRC is limited by its resources, and therefore can only undertake investigations into minor legal issues if it does not require a significant deployment of those resources.
The VLRC is independent of parliament, thus ensuring it remains objective and unbiased in making its recommendations.	The VLRC is constrained by the references with which it is provided by the Attorney-General on major issues of law reform (i.e. it will generally be limited by those references, even if the VLRC considers there are other areas of reform required in that particular matter).
Statistics suggest that the VLRC can be highly influential on the Victorian Parliament. All or some of its recommendations are adopted in approximately 70 per cent of cases.	

Source 2 The strengths and weaknesses of the VLRC to influence law reform

14.6 CHECK YOUR LEARNING

Define and explain

1 When and how was the VLRC established?

2 Describe the role of the VLRC.

Synthesise and apply

3 Read the case study 'Investigating Victoria's adoption laws'.

- **a** Suggest why the Victorian Government may have asked the VLRC to investigate changes to Victoria's adoption laws.
- **b** Describe three specific areas the VLRC was required to examine during their investigations.
- **c** What type of instructions are included in a terms of reference?

4 Go to the VLRC website. A link is provided on your obook assess. View or download a copy of the VLRC's Medicinal Cannabis Report (available under the 'completed projects' menu).

- **a** Briefly explain the main areas the VLRC was required to examine during their investigations into medicinal cannabis.
- **b** How long did the VLRC take to complete its investigation into medicinal cannabis?
- **c** State how many written submissions the VLRC received during their investigations and identify the names of five individuals or organisations that made submissions.
- **d** Explain two other ways the VLRC gained input from members of the community about their views on changing the laws relating to the use of medicinal cannabis.
- **e** Describe three of the main recommendations made by the VLRC.
- **f** Do you support or oppose the law reform that allowed for some individuals to use medicinal cannabis products in exceptional circumstances from 2017? Give reasons for your response.

5 Visit the VLRC website. A link is provided on your obook assess. Click on the 'All Projects' menu. Complete the following tasks:

- **a** Investigate one current project being undertaken by the VLRC and prepare a summary that:
  - identifies the name of, and date the Commission received, the reference
  - outlines the areas or matters under review
  - identifies and describes the stage which the Commission is currently working on in terms of the progress of the reference.
- **b** Investigate and prepare a summary of one recently completed project. Your summary should include identifying details (names, dates, three recommendations made, names of three interested parties, three recommendations adopted by the government, whether you agree with the recommendations and changes).

Analyse and evaluate

6 Using one recent example, evaluate the VLRC in light of its ability to influence parliament to change the law.

Check your obook assess for these additional resources and more:

- » **Student book questions**
  14.6 Check your learning
- » **Sample**
  Submission to a VLRC
- » **Weblink**
  Victorian Law Reform Commission

14.7 PARLIAMENTARY COMMITTEES

As we have learnt, Australia's parliamentary system is based on various principles, and works in a way to ensure our federal and state parliaments can effectively perform their main role – i.e. to make and change the law.

For example, our parliamentary system is based on the principle of representative government, which ensures that our members of parliaments make laws on behalf of the voters and which reflect the prevailing views and values of the majority of society (or they risk not being re-elected).

Likewise, having a bicameral system of parliament ensures that any proposed changes to the law (i.e. bills) are thoroughly discussed and debated by both houses of parliament before becoming law.

Another important feature of the Australian parliamentary system is that it includes a **committee system**, meaning the federal and state parliaments have an extensive range of committees that can investigate a wide range of legal, social and political issues and concerns and report back to the parliament about the need for law reform.

Study tip

The *VCE Legal Studies Study Design* requires you to know **either** one parliamentary committee, **or** one royal commission, and **one** recent example of either one or the other. In this topic you will look at parliamentary committees, and in the next topic you will look at royal commissions, but you can only be assessed on one.

committee system
a system used by federal and state parliaments in Australia that involves the use of separate working parties (i.e. committees) to investigate a wide range of legal, social and political issues and report back to the parliament about the need for law reform

parliamentary committee
a small group of members of parliament who consider and report on a single subject in one or both houses. Committee members can come from any party



Source 1 In 2017, the Victorian Government rejected a recommendation made by a parliamentary committee to lower the driving age from 18 to 17 years, in line with all other states and territories in Australia.

The committee system

A **parliamentary committee** is a specific group of government and non-government members of parliament who are given the responsibility of investigating a specific issue, policy or proposed law (bill) and reporting their findings and recommendations for law reform back to the entire parliament. They are often established so an issue of state, national or community interest can be examined more efficiently (i.e. more quickly, more economically and in greater detail) than it could be if all members of parliament were involved in the investigation.

The committee system is an important feature of our parliamentary system because it allows members of parliament to examine and evaluate the need for law reform. It also provides a way for members of the community to give input into the issues being investigated and have their views considered in the parliamentary decision-making process. Unlike law reform bodies, the committee is made up of members of parliament.

When a parliamentary committee investigates a specific issue or matter, one of its main roles is to consult with and consider the views of the community, including interested individuals and experts, pressure groups, business groups and organisations and government departments.

Another benefit of parliamentary committees is their final reports enable the parliament to be more informed before making important decisions like determining whether to support a bill. Parliamentary committees can also be established to provide a check on the government's activities because they have the power to call individuals, experts and people who work in government departments to give evidence and answer questions in relation to the specific area under investigation.

Study tip

If you choose to focus on a parliamentary committee rather than a royal commission, you must know a recent example of a parliamentary committee recommending law reform. Choose a committee to focus on, then go onto the relevant parliament website and find a recent inquiry they have completed, remembering that recent means four years.

There are many different types of parliamentary committees throughout the federal and state parliaments. For example, committees can consist of members from both houses of parliament or just one house, and may be an ongoing committee, or a temporary one to investigate one specific issue. Committees may also vary in size, though Victorian parliamentary committees usually consist of six to ten members of parliament plus a number of parliamentary employees, called a secretariat, who provide administrative support and help run hearings. At federal level, committees generally range from seven to 32 members and, like at state level, is considered one of the duties of an elected member of parliament.

Study tip

The *VCE Legal Studies Study Design* requires you to be able to evaluate the ability of the law reform bodies to influence a change in the law, using recent examples.

Processes used by parliamentary committees

While there are different types of parliamentary committees, with each performing specific tasks and functions, most committees have similar processes and procedures. In general, parliamentary committees follow the following processes:

- First, when parliament decides to have a committee investigate a particular issue or matter, the committee will be given terms of reference which specify the precise purpose of the inquiry, the specific issues that must be investigated and the date by which the final report must be completed.
- Once the terms of reference are established the committee often uses the **media to publicise their investigations and seek input**, via written submissions, from interested individuals, experts, groups and organisations within the community. This includes advertising in the traditional media like newspapers, and using the internet and social media.
- Committees will also usually hold **formal public (or on occasion private) hearings**. The committee will invite a range of people (e.g. experts in the matter under review and representatives from different interested groups) to provide their input and give **evidence** relating to the matter under investigation and answer specific questions from committee members. Most committees have the power to call or require certain individuals and experts, like people who work in government departments, to give evidence, answer specific questions and explain their actions. If a person who is called to give evidence to a committee refuses to attend or answer specific questions, he or she can receive a formal reprimand or be prosecuted and receive a **fine** or term of imprisonment.
- Once all of the submissions have been received and considered and hearings have concluded the committee will prepare a written report. The report will contain recommendations for law reform or actions and will be presented to the parliament for consideration. Generally all written submissions and hearings are published in **Hansard** and made public on the parliament's website.

evidence
information used to support the facts in a legal case

fine
a sanction that requires the offender to pay an amount of money to the state

Hansard
the official transcript (i.e. written record) of what is said in parliament. Hansard is named after T.C. Hansard (1176–1833) who printed the first parliamentary transcript

Specific committees and recent examples

The four main types of parliamentary committees in both the Victorian and Commonwealth parliaments are:

- standing committees
- select committees
- joint investigatory committees
- domestic committees.

Standing committees

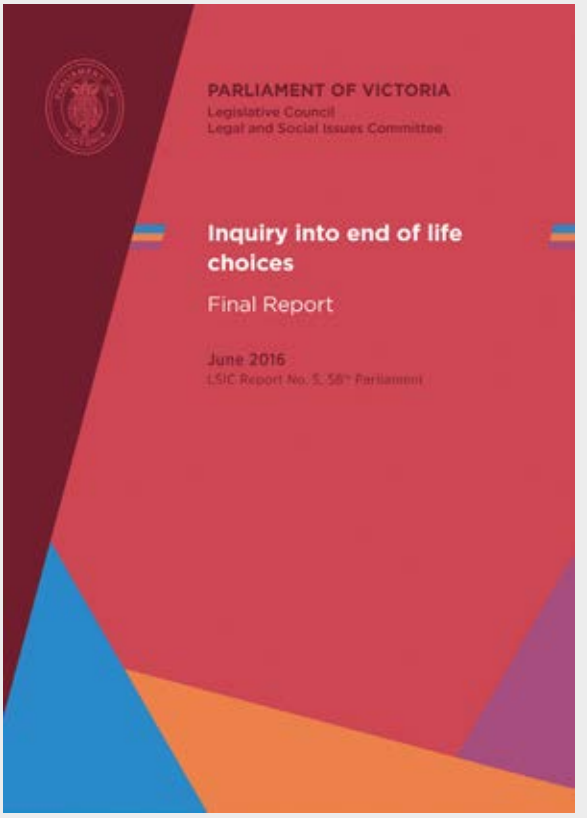
Standing committees are parliamentary committees that are appointed for the life of a parliament (and then usually re-established in successive parliaments) to investigate a range of specific issues and provide an ongoing check on government activities. They are ongoing, not temporary, committees. For example, the Victorian Standing Committee on Legal and Social Issues is an ongoing Victorian parliamentary committee that inquires into and reports on any proposal or matter concerned with community services, education, gaming, health, and law and justice.

CASE STUDY

End-of-life choices

In 2016, the Victorian Standing Committee on Legal and Social Issues presented its final report on its inquiry into end-of-life choices. In this inquiry, the Committee investigated and considered the need for law reform in Victoria to allow individuals to make informed decisions regarding the management of the end of their own life.

The Committee was given one year to conduct its investigations. During this time it received over 1000 submissions from interested individuals, pressure groups (such as Action for Life, the Australian Christian Lobby and Right to Life Australia) and other organisations and political parties (including the Australian Medical Association, various churches, the Voluntary Euthanasia Party and Civil Liberties Australia). The Committee also held various hearings over a number of days at which experts (including a range of health care professionals) and selected organisations presented evidence and answered questions.



Source 2 The Victorian Standing Committee on Legal and Social Issues released its final report on its inquiry into end-of-life choices in 2016.

After extensive consultations, the Committee presented its final report. It made a number of recommendations, including the need to introduce laws to recognise advance care orders, provide more community services and improve the provision of specialist palliative care or, in simple terms, the provision of practical, physical, emotional and spiritual care for people with an incurable or life-limiting illness.

Select committees

Select committees are parliamentary committees that are appointed to investigate a specific issue as the need arises. Once the inquiry is completed the committee ceases to exist. Select committees are made up of members from only one house of parliament.

The case study below is an example of a Senate select committee.

CASE STUDY

Select committee investigates a same-sex marriage issue

In November 2016, the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill was set up by the Senate to investigate a bill relating to changing the law to allow same-sex marriage. The Committee was given the task of examining the proposal

that, if the law were to change to allow for marriage equality, it would include provisions to allow for ministers of religion, marriage celebrants and religious bodies to refuse to conduct same-sex marriages, and the impact of exemptions on our anti-discrimination laws to allow for such refusal.

The Select Committee on the Exposure Draft was given two and a half months to conduct its investigations and report back to the parliament with recommendations concerning the bill. During its investigation, the Committee accepted submissions from the community on the precise issues being examined but decided not to publish any campaign letters or petitions received.

In simple terms, after conducting its inquiries, the Senate Select Committee recommended that it would be appropriate to offer a range of protections to allow freedom of religion when legislating to allow same-sex marriage. Protections may include allowing ministers of religion and religious marriage celebrants to have the option to choose not to marry same-sex couples.

Joint investigatory committees

Joint investigatory committees are parliamentary committees that are appointed each parliamentary term to examine a range of different issues or matters. They are, as the name suggests, made up of members of parliament from both houses.

In Victoria a number of joint investigatory committees are appointed under the *Parliamentary Committees Act 1968* (Vic). Joint committees are usually longstanding committees (i.e. standing committees) that investigate issues on behalf of parliament. They can also be select committees to investigate a particular issue. Examples of joint investigatory committees of the Victorian Parliament include the:

- Scrutiny of Acts and Regulations Committee
- Law Reform, Road and Community Safety Committee
- Environment, Natural Resources and Regional Development Committee
- Economic, Education, Jobs and Skills Committee.

An example of a Scrutiny of Acts and Regulations Committee investigation is provided in the case study below.

CASE STUDY

The Scrutiny of Acts and Regulations Committee inquiry into safe injection clinics

In Victoria, the Scrutiny of Acts and Regulations Committee considers all bills introduced into the Legislative Council or the Legislative Assembly. It then reports to the Victorian Parliament on whether the bill impacts on certain rights and freedoms, including whether it directly or indirectly:

- trespasses unduly on rights or freedoms
- makes rights, freedoms or obligations dependent on insufficiently defined administrative powers or 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 *Privacy and Data Protection Act 2014* (Vic) or the privacy of health information within the meaning of the *Health Records Act*

- 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 Act*.

In 2016–17 the Scrutiny of Acts and Regulations Committee examined a range of bills introduced into the Victorian Parliament including the:

- Summary Offences Amendment (Begging or Gathering Alms) Bill 2016 (Vic)
- Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic)
- *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic).

In February 2017, the Scrutiny of Acts and Regulations Committee was required to undertake an inquiry into the Drugs, Poisons and Controlled Substances Amendment (Pilot Medically Supervised Injecting Centre) Bill 2017 (Vic). The Bill was introduced into the Legislative Council as a private members' bill by the leader of the Australian Sex Party (to be renamed the Reason Party), Fiona Patten. The Bill proposed to change the law to allow a medically supervised drug injecting centre to be opened in Richmond, an inner-city suburb of Melbourne, on a trial basis for 18 months. The controversial proposal would provide a safe injecting room for heroin addicts in an attempt to control drug use and save lives.

Any proposal to allow medically supervised drug injecting centres inevitably causes great debate within our community as opponents of such centres often claim there is no such thing as a 'safe injecting room', and is simply assisting in perpetuating or propping up an evil drug industry. However, there is evidence to suggest that safe injecting rooms can reduce the spread of diseases like hepatitis and HIV and can promote safe disposal of used needles, decrease deaths from drug overdoses and encourage and increase the amount of people who seek and attend drug rehabilitation treatment facilities and other health services.



Source 3 The first medically supervised injecting room in Australia was set up on a trial basis in Sydney's Kings Cross in 2001.

The Committee investigated specific areas of the Bill to ensure it did not unduly trespass on rights and freedoms, and was compatible with the human rights set out in the Charter of Human Rights and Responsibilities. For example, the Committee investigated whether the provision that children be excluded from the part of the injection centre where drugs would be administered or dispensed was compatible with the right of children to protection that is in his or her best interests.

Domestic committees

Domestic committees are parliamentary committees appointed to specifically examine issues and matters that relate to the internal operations and practices of parliament, including administrative and procedural matters. They are made up of members of one house. For example, the Legislative Assembly has a Privileges Committee that meets when required to investigate complaints relating to breaches of parliamentary privilege in the lower house of the Victorian Parliament.

Similarly, the Commonwealth Parliament has a range of domestic committees such as the House of Representatives Appropriations and Administration Committee, which considers matters relating to funding the operation of the Department of the House of Representatives.

Below is an example of a matter that the House of Representatives Appropriations and Administration Committee approved.

CASE STUDY

Upgrade of parliament security approved by parliamentary committee

In 2015 the House of Representatives Appropriations and Administration Committee approved the spending of $2 million to upgrade the security around Parliament House in Canberra, which included building two bulletproof gatehouses and erecting a 2.6 metre steel security fence around the boundary of the ministerial wing which contains the Prime Minister's office.

The construction of the fence created controversy. Some people claimed it prevented people approaching the people's parliament. Others said it detracted from the architectural design of the parliament, which was intended to express the sentiment that parliament is representative of and open to the people, not above them or fenced off from them.



Source 4 High steel fencing around Parliament House has been installed to provide security for members of parliament and government workers.

The main types of parliamentary committees are summarised in Source 5 below.

TYPES OF PARLIAMENTARY COMMITTEES	DEFINITION
Standing committees	Standing committees are ongoing committees that are set for the life of a parliament and are usually re-established in successive parliaments. Standing committees provide an ongoing check on government activities.
Select committees	Select committees are set up by the parliament to examine specific issues as the need arises. Once an investigation is completed, and the committee has reported to parliament, the committee ceases to exist.
Joint investigatory committees	Joint committees are made up of members from both houses. While joint committees may be standing or select committees they are usually standing committees that investigate issues on behalf of parliament.
Domestic committees	Domestic committees are parliamentary committees appointed to specifically examine issues and matters that relate to the internal operations and practices of parliament, including administrative and procedural matters.

Source 5 The main types of parliamentary committees

The ability of parliamentary committees to influence law reform

Parliamentary committees have an important role in investigating specific issues, policies and legal matters, reviewing existing law and reporting their findings and recommendations for law reform to the parliament. They also play a vital role in ensuring that bills do not breach or impose on our basic rights and freedoms and making sure the government is provided with independent advice and recommendations for law change.

One problem however, is that, like the VLRC, parliamentary committees only have the power to investigate issues within their specific terms of reference and the government and parliament are under no compulsion to adopt their advice or final recommendations. Likewise, parliamentary committees can be costly and time-consuming although, unlike the VLRC, they have the power to request that specific individuals and representatives of organisations appear at hearings to give evidence and answer questions, which enables them to gain extensive and valuable information for their consideration.

The ability of parliamentary committees to influence law reform is summarised in Source 6.

STRENGTHS OF PARLIAMENTARY COMMITTEES	WEAKNESSES OF PARLIAMENTARY COMMITTEES
Committees can investigate a wide range of legal, social and political issues and concerns and report back to the parliament about the need for law reform.	Due to limited resources a committee cannot be formed to examine all worthy issues and concerns.
Committees can examine issues more efficiently (i.e. more quickly, more economically and in greater detail) than having the entire parliament involved in the investigation.	Committee investigations can be time-consuming and costly.
Committees allow members of parliament to be involved in investigations and gain knowledge, expertise and understanding in the area of suggested law reform.	The large number of committees and the time commitment involved may deter some members of parliament from sitting on committees.
Committees provide a way for members of the community to give input into the issues being investigated and have their views considered in the parliamentary decision-making process.	Members of the governing party may dominate the composition and findings of a committee or use them as a distraction or way of avoiding other controversial legislation or parliamentary issues.
The final reports prepared by committees enable the parliament to be more informed before deciding whether or not to support a bill.	There is no obligation on parliament to support or introduce law reforms suggested by a committee, although this may be more likely given that committees consist of members of parliament.

Source 6 The strengths and weaknesses of parliamentary committees in influencing law reform



Source 7 A parliamentary committee in action

14.7 CHECK YOUR LEARNING

Define and explain

1 What are parliamentary committees?
2 Distinguish between standing and select parliament committees.
3 Describe three benefits of parliamentary committees.
4 Provide one similarity and one difference between the VLRC and a parliamentary committee.

Synthesise and apply

5 Explain what is meant by the statement 'Parliamentary committees help support a democratic parliamentary system'.
6 Prepare a flow chart that describes the basic process followed by a parliamentary committee when undertaking a specific inquiry.
7 Visit the Victorian Parliament website. A link is provided on your obook assess. List the names of three bills that have recently been investigated by the Scrutiny of Acts and Regulations Committee. Select one of these investigations and prepare a brief summary that outlines the proposed change in the law and the findings and recommendations of the committee.

Analyse and evaluate

8 Conduct research into one other current Victorian state or Commonwealth parliamentary committee.
   a Describe the role of the committee and discuss the ability of this committee to influence a change in the law.
   b Briefly describe one inquiry the committee has recently undertaken.
   c Explain at least one recommendation for law reform made by the parliamentary committee.
   d In your view, is this committee more or less effective in making this recommendation than a formal law reform body such as the VLRC? Give reasons.

Check your obook assess for these additional resources and more:

» **Student book questions**
14.7 Check your learning

» **Weblink**
Victorian Parliament

» **Weblink**
Commonwealth Parliament

14.8 ROYAL COMMISSIONS

royal commission
the highest form of inquiry into matters of public concern and importance. Royal commissions are formal public inquiries conducted by a body formed to support the work of a person (or persons) (being the commissioner(s)) given wide powers by the government to investigate and report on an important matter of public concern

Royal commissions are major public inquiries established by the government to investigate something of public importance or concern in Australia, on any topic.

These Commissions are called 'royal' commissions because they are created by Australia's head of state (i.e. the Queen) through her representatives. They are one of the oldest forms of inquiry. The inquiry is given 'terms of reference' (a description of what it is asked to inquire into) and asked to report on its findings and make recommendations.

Royal commissions are given special investigatory powers, including the power to **summon** (i.e. compel) people to attend hearings, give evidence under oath, and be subject to cross-examination.



Source 1 A snapshot of a hearing held for the Royal Commission into Institutional Responses to Child Sexual Abuse.

Study tip

The Australian Parliament website contains a full list of all of the royal commissions that have taken place at the federal level. A link is provided on your obook assess.

governor
the Queen's representative at the state level

Governor-General
the Queen's representative at the Commonwealth level

Establishment of royal commissions

Royal commissions can be established at both the state and Commonwealth level.

The power to establish a royal commission is provided by statute. At the Commonwealth level, the power to issue a royal commission is given to the Governor-General through the *Royal Commissions Act 1902* (Cth). At the Victorian level, the power to establish a royal commission is given to the **governor** under the *Inquiries Act 2014* (Vic).

Royal commissions are therefore set up by the executive branch of government (i.e. the **Governor-General** [at federal level] or the Governor [at state level] on behalf of the Queen). However, the Queen's representative acts on the advice of the government ministers. Therefore, in reality, it is the government that initiates a royal commission in response to a major issue of public interest or concern.

For example, in 2013 the then Governor-General, Her Excellency Quentin Bryce, established the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse on the advice of the Federal Government to investigate sexual abuse of children within Australian institutions including schools, childcare, religious and sporting organisations.

In addition to advising the Governor-General or governor on the establishment of a royal commission, the government also provides funding for royal commissions and determines their terms of reference and length.

Issuing a royal commission

As a royal commission is a temporary form of inquiry, and can be expensive, they are established on an ad-hoc basis and look into matters of significant importance, and often matters surrounded by controversy.

The Queen's representative must first issue a **letters patent**. The letters patent will specify the person or persons who are appointed to constitute the royal commission, as well as which of those persons (if

there is more than one) will chair the royal commission. The letters patent must also specify a time by which the royal commission is to report on its inquiry and the terms of reference.

The chairperson of the royal commission will then engage people to assist the royal commission.

Processes used by royal commissions

Once a royal commission has been established and the letters patent has been issued, the commission conducts an extensive investigation of the matter of public interest or concern by undertaking a range of tasks. For example, the commission may:

- prepare an **issues paper**. This paper outlines the matter or concern being investigated by the royal commission, poses questions relating to possible reforms that could be implemented to address the areas of concern and seeks and provides guidance for individuals and organisations that wish to make a written submission. For example, the Victorian Royal Commission into Family Violence prepared an issues paper to explain the concerns being examined by the royal commission. It encouraged any individual or organisation affected by family violence or has ideas that might assist the work of the royal commission (e.g. health professionals, childcare and social welfare workers, law enforcement agencies and educational institutions like schools and universities and different religious and community groups) to make a written submission
- conduct **consultation sessions** to gain input, views and opinions from a range of individuals and organisations that have an interest in the area being investigated. For example, the Victorian Royal Commission into Family Violence held 44 group consultation sessions attended by over 850 people. These included victims, perpetrators, prisoners, community and religious leaders, and representatives of disadvantaged groups such as Indigenous Australian women and children, women with disabilities and people from the LGBTI community
- hold public hearings or sit in private to gain evidence relevant to the terms of reference. Royal commissions have extensive powers, to seize and gain evidence at their hearings. For example, they can summons or compel people to attend, give evidence under oath or affirmation and be subject to cross-examination. The Royal Commission into Institutional Responses to Child Sexual Abuse held a number of formal public hearings to examine evidence about how different institutions (like the Catholic Church, Scouts Australia, the YMCA, and the Salvation Army) responded to allegations of specific cases of child sex abuse within their organisations.

Once an investigation is complete and evidence and submissions have been considered, the royal commission will prepare a report on their findings and make recommendations on ways to address the matter under investigation. This might include recommendation for changes in government policy, administrative systems and changes in the law and legal system. The royal commission also has the power to recommend that an individual be prosecuted for unlawful conduct, although the Director of Public Prosecutions (DPP) is not required to act on these recommendations. The DPP may not do so in cases where, for example, an individual has been forced to give self-incriminating evidence in a manner that would not be admissible in a traditional court.

Examples of royal commissions

Over the years, there have been more than 130 royal commissions at the Commonwealth level on a range of issues of significant public interest or concern. Not including more recent Commonwealth royal commissions, these include the following:

- Aboriginal Deaths in Custody (1987–91)
- Building and Construction Industry (2001–03)

Did you know?

Australia's first ever royal commission was held in 1902, just one year after the Federation of Australia. It was held in response to a public outcry after 17 Australian soldiers died returning home from the Boer War in South Africa and its purpose was to investigate transport arrangements.

By 2017 there had been a total of 133 royal commissions in Australia on a range of issues from Aboriginal deaths in police custody and drug trafficking to nuclear testing and secret intelligence services.

Did you know?

The *Royal Commission Act* was amended in 2013 to enable the Royal Commission into Institutional Responses to Child Sexual Abuse to hold private sessions. These types of sessions are unique to this particular royal commission so that commissioners could hear from survivors in private.



Source 2 The public hearing into the nature, cause and impact of child sexual abuse was one of many public hearings held during the Royal Commission into Institutional Responses to Child Sexual Abuse.

- Trade Union Governance and Corruption (2014–15)

Not including more recent ones, some of the Victorian royal commissions over the years have included inquiries into:

- the failure of Kings Bridge (a bridge in Melbourne which collapsed in 1962) (1962–63)
- the collapse of the West Gate Bridge (1971–72)
- the Esso Longford Gas Plant accident (1998–99).

The most significant Victorian royal commissions held in Victoria over recent years were the:

- **Bushfires Royal Commission** – This was established in 2009 to investigate the causes and responses to the devastating 'Black Saturday' bushfires in which over 100 people lost their lives and thousands of properties were destroyed in February 2009. The Commission recommended law reform to improve future responses to bushfires.
- **Royal Commission into Family Violence** – This was established in 2014 to conduct investigations and make recommendations for changes to government policy, administrative procedures and the law to reduce and eliminate family violence, build respectful family relationships and ensure the safety of people who are or have been affected by family violence. Further details are provided below.

Recent royal commissions

Recent royal commissions include:

- the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse (2013–17)
- the Commonwealth Royal Commission into Child Protection and Youth Detention Systems of the Government of the Northern Territory (2016–18)
- the Victorian Royal Commission into Family Violence (2015–16).

Focus: Royal Commission into Family Violence

In February 2015 the then Victorian Governor, His Excellency the Hon. Alex Chernov, established the Royal Commission into Family Violence, on the advice of the Victorian Government. Former Supreme Court Justice Marcia Neave was appointed as Commissioner (together with two Deputy Commissioners) to oversee the Royal Commission. While the Royal Commission had specific terms of reference, in general it was required to investigate and make recommendations on how best to change government policy, administrative procedures and the Victorian law to:

- reduce and eliminate family violence within the Victorian community
- prevent the occurrence and escalation of family violence
- build respectful family relationships
- increase awareness of the extent and effects of family violence
- ensure the safety of people who are or may be affected by family violence, by assisting with early intervention before the violence begins, providing effective responses to families that report violence and to support those who have been affected by family violence.

The royal commission undertook 12 months of investigations, which included conducting several days of hearings and receiving approximately 1000 submissions from a range of individuals and organisations (such as the Australian Institute of Family Studies, the Human Rights Law Centre, Victoria Police, Victoria

Legal Aid, the Alannah and Madeline Foundation, the Salvation Army and Lifeline Australia). It provided its final report in March 2016.

The report contained 227 recommendations aimed at improving the way our government and institutions (like the police, courts, government departments, Corrections Victoria, medical services and support agencies) respond to family violence. Some of the recommendations included:

- changing the laws to improve the provision of Support and Safety Hubs in local communities, to make it easier for victims to seek and find help
- introducing new laws to make sure that the privacy considerations of perpetrators are not put before the victims' safety. For example, allowing a Central Information Point to store information about perpetrators that can be accessed when necessary by Support and Safety Hubs
- increasing the funding for more support services for victims and families
- changing the law to improve the ability of the legal system to effectively deal with family violence by providing more specialist family violence courts (to resolve criminal, civil and family law matters)
- introducing family violence training for all key workforces like hospitals and schools (including expanding the provision of respectful relationships education programs in schools)
- establishing an independent Family Violence Agency to hold government to account. Interestingly, in 2016, the Victorian Parliament passed the *Family Violence Reform Implementation Monitor Act 2016* (Vic) to create and outline the powers of a Family Violence Reform Implementation Monitor. The Monitor will provide a check on government to ensure the Royal Commission recommendations that the government has agreed to have been implemented.

As explained in the case study below, domestic violence campaigner Rosemary (Rosie) Batty used her public profile to support the Royal Commission into Family Violence.

Did you know?

Family violence against women is a significant problem within our community. On average, at least one woman is killed by her partner or a former partner each week in Australia. One in three women also report having experienced physical violence since the age of 15.

'Never Alone'

CASE STUDY

2015 Australian of the Year, Rosie Batty, continues to use her public profile and work tirelessly to raise awareness of the extent and impact of domestic violence in our community (and need to implement law reform in this area). Rosie's campaign began after her much-loved son Luke (aged 11) was tragically murdered by his father, Greg Anderson, while he attended cricket practice on the Mornington Peninsula (Victoria) in February 2014. Mr Anderson was shot dead by police shortly after the attack.

In June 2015, Rosie launched a website called 'Never Alone'. The website gives victims of family violence a voice within the community and seeks to place pressure on the government to address the 'domestic violence epidemic'. This includes putting pressure to make changes to the law such as improving the way the legal system treats family violence issues, creating a family law system that 'puts the interests of kids first', increasing government funding for support and crisis services for women and children and assisting a cultural change in community attitudes.

You can visit the 'Never Alone' website to find out more about Rosie Batty and family violence



Source 3 Rosie Batty was Australian of the Year in 2015 for her tireless work promoting awareness of family violence within our community and the need for law reform.

in Australia. You may wish to sign the petition urging the Australian Government to change Australia's family law system to make sure children and their families are kept safe.

The Victorian Government has since committed to implementing all 227 recommendations. It has a website at which members of the public can track the progress of the implementation of all recommendations.

In 2017, the Victorian Parliament passed the *Family Violence Protection Amendment Act 2017* (Vic) which reformed the law in response to the Royal Commission. These reforms included amending the *Criminal Procedure Act 2009* (Vic) to allow the use of video and audio-recorded evidence in family-related criminal proceedings involving either adults or children.

The ability of royal commissions to influence law reform

Governments can often use the findings and recommendations of royal commissions to justify the need to make changes in the law and government policy. Royal commissions can also be important in raising community awareness and interest in a particular area of community concern and encouraging individuals and groups to not only make submissions to the royal commission but also undertake their own initiatives (including undertaking petitions and demonstrations and using the media) to influence a change in the law.

However, one problem associated with royal commissions is that they may lose credibility in situations where the government of the day, which determines the terms of reference, chooses not to include any areas that might be potentially politically damaging for them (i.e. may lead to a loss of voter support) or focuses on areas that might gain voter support. Similarly, as mentioned above, a royal commission may lose credibility if too many witnesses are summoned to give evidence against their will and forced to answer questions that would not be permitted in a traditional courtroom. If the public loses confidence in the methods used by a royal commission to gain evidence and information they may be less willing to support any recommendations made for changes to the law.

The ability of royal commissions to influence law reform is summarised in Source 4.

STRENGTHS OF ROYAL COMMISSIONS	WEAKNESSES OF ROYAL COMMISSIONS
Because the government asks royal commissions to investigate something important, the government may be more likely to act on the royal commission's report and recommendations.	Royal commissions can be used as a tool against political opponents. They can also be used to avoid getting on with difficult legislation.
Royal commissions can measure community views on areas of investigation by holding consultations and receiving public submissions.	There is no obligation on the part of the parliament to support or introduce law reform to adopt any of the recommendations made by royal commissions.
Royal commissions can investigate an area comprehensively so the government can initiate a new law that covers the area inquired about.	Royal commission investigations can be time-consuming and costly. They take on average two to four years to complete, and are infamously expensive (one of the more expensive ones cost $60 million).

STRENGTHS OF ROYAL COMMISSIONS	WEAKNESSES OF ROYAL COMMISSIONS
Royal commissions have the power to call anyone to appear before them to give evidence.	The extent to which a royal commission can influence law reform is mixed, and depends on matters such as the subject matter and whether there is bipartisan support for the reform.
Royal commissions are independent of parliament, and more likely to remain objective and unbiased in making their recommendations.	The ability of the royal commission to influence law reform depends on the timing of its reporting and its terms of references. For example, if they are to report immediately after an election, its influence might be diminished.

Source 4 The strengths and weaknesses of royal commissions in influencing law reform

14.8 CHECK YOUR LEARNING

Define and explain

1 What is a royal commission?

2 Explain why royal commissions are considered the most serious and important types of inquiry into matters of public interest or concern.

3 Describe two differences between a royal commission and a parliamentary committee.

Synthesise and apply

4 Prepare a chart that describes the main processes followed by a royal commission.

Analyse and evaluate

5 Go to the Commonwealth Parliament's website. A link is provided on your obook assess. Enter the term 'royal commissions' in the search engine. Once you arrive at the 'Royal Commissions and Commissions of Inquiry' page, complete the following tasks:

a Select and investigate one royal commission that has been undertaken within the last four years and prepare a summary that:

- states the name and length of the royal commission and outlines the areas or matters of public interest that are under review
- identifies five individuals or organisations that made written submissions to the commission and five individuals or organisations that gave evidence at public hearings
- provides three recommendations for law reform suggested by the royal commission. Explain whether or not you agree with each recommendation.

6 Using one recent example, evaluate the ability of royal commissions to influence a change in the law.

Check your obook assess for these additional resources and more:

- **Student book questions**
  14.8 Check your learning
- **Video tutorial**
  How to find recent examples online
- **Weblink**
  Royal Commission into Institutional Responses to Child Sexual Abuses
- **Weblink**
  'Never alone'

14.9 THE ABILITY OF PARLIAMENT AND THE COURTS TO RESPOND TO THE NEED FOR LAW REFORM

Despite having some limitations, both parliament and the courts have the ability to respond to the need for law reform. They also complement one another in their ability to change the law to meet the changing demands and needs of the community.

Study tip

Make sure you are able to evaluate the ability of both parliament and courts to respond to the need for law reform, which includes considering its strengths and weaknesses. Recent examples are a good way to demonstrate strengths and weaknesses.



Source 1 The Australian Parliament and the High Court of Australia. They have complementary roles in law reform.

In this topic you will consider the ability of the parliament and the courts to respond to the need for law reform. This may be because of recommendations made to them by law reform bodies, commissions or committees which recommend changes in the law, or because individuals or the media have highlighted the need for change.

The ability of parliament to respond to the need for law reform

Parliament, as the supreme law-making body, is able to make new laws and change existing laws in response to changing needs and demands. It can ensure the law is kept up to date with and reflects changes in society, the development of new technologies, and ever-changing domestic, international, economic and political circumstances.

Some of the features of parliaments that enable them to respond to law reform are set out in Source 2.

However, at the same time, parliament also has some limitations in its ability to change the law.

Parliament is an elected and supreme law-making authority

One of the main strengths of the state and Commonwealth parliaments is that they are supreme law-making bodies, with the power to make and change any law within their own jurisdiction or area of law-making power. This notion that parliament is a supreme law-making body is also sometimes referred to as **sovereignty of parliament**, and means that the parliaments have overriding authority when exercising the law-making powers given to them. Parliaments are not bound by previous Acts of Parliament and can change or amend existing law whenever the need arises.

abrogate
to cancel or abolish a court-made law by passing an Act of Parliament

Furthermore, while courts can change the meaning of the law through their interpretation of the words and phrases in an Act of Parliament, parliaments can **abrogate** or cancel law made by courts

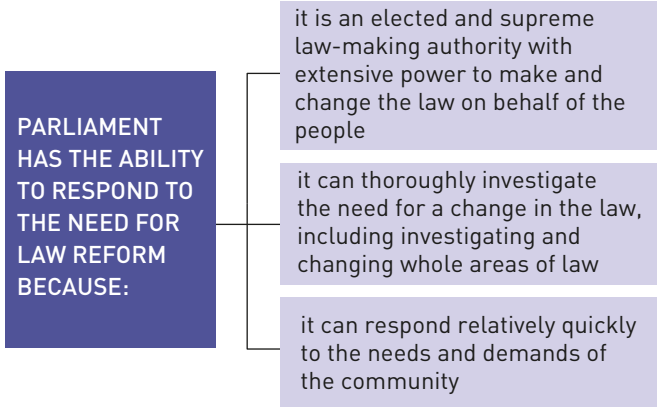
(except for decisions made by the High Court in relation to constitutional matters), or pass a statute to reinforce (**codify**) court-made law. However, parliament is not able to change law if it is considered to be *ultra vires* or outside their law-making powers.

codify (codification) to collect all law on one topic together into a single code or statute

The state and Commonwealth parliaments are elected by the people to make laws on their behalf. As such, the parliaments have an ability and responsibility to change the law so that it reflects the changing views, values and needs of the people. However, members of parliament may be reluctant to respond to demands to change the law in situations where there are conflicting community views on an issue or they fear losing voter support. For example, state parliaments have generally been reluctant to introduce controversial laws allowing people the right to make end-of-life decisions (euthanasia) despite opinion polls suggesting the reform has the support of the majority of people. This reluctance may be due to members of parliament fearing they may lose the electoral support of a vocal minority or being unwilling to vote against their party's policy stance.

Similarly, because elections are held every three (federal) or four years (state) years, members of parliament can be reluctant to support changes in the law in situations where the benefits of the law reform will not be seen by the voters for many years. For example, the benefits of changing the law to encourage more environmentally sustainable forms of energy or mineral exploration may take many years to be quantified and evident to voters, which may not necessarily help members of parliament win or retain their seats at a forthcoming election.

The ability of parliament to respond to the need for law reform may also be diminished by financial or budget restrictions. For example, implementing law reform to improve the conditions in youth and asylum seeker detention centres or provide more support for people affected by or at risk of family violence can be very costly and, as with all spending, involve an opportunity cost (i.e. spending money in one area surrenders the ability to spend it in another area).



Source 2 Three features of parliaments that enable them to support law reform

Parliament can investigate the need for law reform

Another reason why parliament is effectively able to respond to the need for law reform is because it is able to thoroughly investigate the need for a change in the law, and measure public support for any proposed change. It can also investigate and change whole areas of law.

For example, both the state and Commonwealth parliaments have the ability to initiate royal commissions and have an extensive committee system that allows for parliamentary committees to be set up to investigate issues and areas of potential law reform. These investigatory bodies are also able to obtain community input on the need for law reform through a variety of measures including public hearings, consultation meetings and written submissions in response to discussion or issues papers. Furthermore, as committees are usually made up of members of the government, opposition and the crossbench, their findings usually have bipartisan support (i.e. support of both major parties).

One problem with parliamentary inquiries and royal commissions, however, is that their investigations can be very time-consuming (for example, may take years) and parliament is not compelled to adopt any of their recommendations.

Parliaments also have the ability to obtain recommendations from independent law reform bodies (like the VLRC) to investigate, report and make recommendations for changes to the law and has the ability to listen to and be influenced by people who elected it, to determine whether or not law reform is necessary. For example, individuals and pressure groups can use petitions, demonstrations and commentary in traditional and social media to influence the parliament to implement a change in the law.

Parliament can respond quickly

Parliament also has the ability to respond to the need for law reform relatively quickly, especially compared to the courts, because they do not have to wait for a conflict to arise or an issue to be brought before them before initiating a change in the law and can change the law in anticipation of future needs. Parliament can also delegate its law-making powers to **subordinate authorities** (like local councils, government departments, statutory authorities such as Australia Post and the Australian Broadcasting Corporation Board) to make rules and regulations on their behalf – referred to as **secondary legislation** (or delegated legislation).

subordinate authorities secondary bodies that have been given the power by parliament to make rules and regulations by parliament.

secondary legislation rules and regulations made by secondary authorities (e.g. local councils, government departments and statutory authorities) which are given the power to do so by the parliament. Also referred to as delegated legislation

Other than local councils, however, subordinate authorities are not elected bodies and as such may not have the desire to listen to the views of their community and implement law reforms that reflect the community needs as elected members of parliament do. Furthermore, subordinate authorities may not feel the compulsion to consult with members of their communities about the need to change the law or discuss and debate proposed changes to rules and regulations.

The process of changing a law through parliament is very time-consuming because a proposal for change must pass through several stages of discussion and debate in both houses of parliament and parliamentary sitting days are limited. For example, in 2016 the House of Representative and the Senate generally only sat for 42 and 51 days respectively.

For example, it can be difficult for the government of the day to implement changes in the law if they do not have a majority of support in the upper house of parliament (a situation referred to as a **hostile upper house**) as the opposition and crossbench has the power to block their proposed law changes or force amendments to original proposals. Similarly, a minority government (i.e. a government that does not have a majority in the lower house and relies on the support of members of the crossbench to get bills passed) may also have difficulty implementing their law reform agenda and be forced to amend their policies in an attempt to gain the vital support of independent members and minor parties.

hostile upper house a situation in which the government does not hold a majority of seats in the upper house and relies on the support of the opposition or crossbench to have their bills passed

The case study below explores some of the difficulties a minority government may face in implementing their law reform agenda.

CASE STUDY

The Gillard Government (2010–2013)

After the federal election in 2010, and for the first time for 70 years, neither major political party won a clear majority in the House of Representatives and was able to form government in their own right. In fact, both the Australian Labor Party (ALP) and the Liberal–National Coalition won 72 of the 150 seats with the remaining six seats held by four independent members of parliament, one member of the Australian Greens and



Source 3 Australia's first female prime minister, Julia Gillard, was the leader of a federal minority government between 2010 and 2013.

a Western Australian National party member (who generally supports the Liberal–National Coalition). The ALP was able to form a minority government with the promised support of the one member of the Australian Greens and three of the four independent members – which gave the ALP 76 votes in the 150 seat lower house – enabling them to get their policy agenda and bills passed through the lower house.

The minority ALP government, however, faced many problems during its three-year term including the fact that it was forced on various occasions to change its policies and election promises to maintain the support of the lower house crossbench and also have their bills passed by a hostile Senate. This made it difficult, on occasion, for the government to fully respond, as it might have desired to address the need for law reform. Most famously, the Gillard Government was forced to break its election promise not to introduce a carbon tax, although other major reforms like the introduction of plain packaging for cigarettes and paid parental leave were successfully introduced during the government's term in office.

Finally, sometimes the need to change the law can occur so rapidly that it can be difficult for the government of the day to keep up with the need for changes in the law. For example, science, technology and medical advancements take place at such a rapid pace that governments cannot investigate the need for change in the law and gather community opinions quick enough to keep pace with the change.

Subordinate authorities, like local councils, are often more assessable to the general public than parliament and are more able to accurately measure the need for law reform in local communities and with regard to confined issues. They also may have more localised and specialised expertise in specific areas or fields and can more effectively make and change the laws in their particular field. Other factors that can inhibit the speed with which parliament can respond to the need for change in the law including the composition of parliament, the limited number of sitting days and the urgent need for law reform in some cases.

The strengths and weaknesses of parliament in its ability to respond to the need for law reform are set out in Source 5 below.



Source 4 Subordinate authorities such as Australia Post can make delegated legislation on behalf of parliament

STRENGTHS	WEAKNESSES
Parliament is an elected supreme law-making body with the power to make and change any law within their own jurisdiction or area of law-making power.	Parliament is not able to change law if it is *ultra vires* or outside their law making powers.
Parliament can make and change laws as the need arises to ensure the law reflects the changing needs, views and values of society.	Members of parliament may be reluctant to legislate in areas where there are conflicting community views, or the benefits will not be seen for many years, through fear of losing voter support.
Parliament can ask the VLRC the establish committees and royal commissions to thoroughly investigate the need for a change in the law.	Reforming the law can be very time-consuming (given a proposal for change must pass through several stages of discussion and debate in both houses of parliament and parliamentary sitting days are limited) and expensive.

cont.

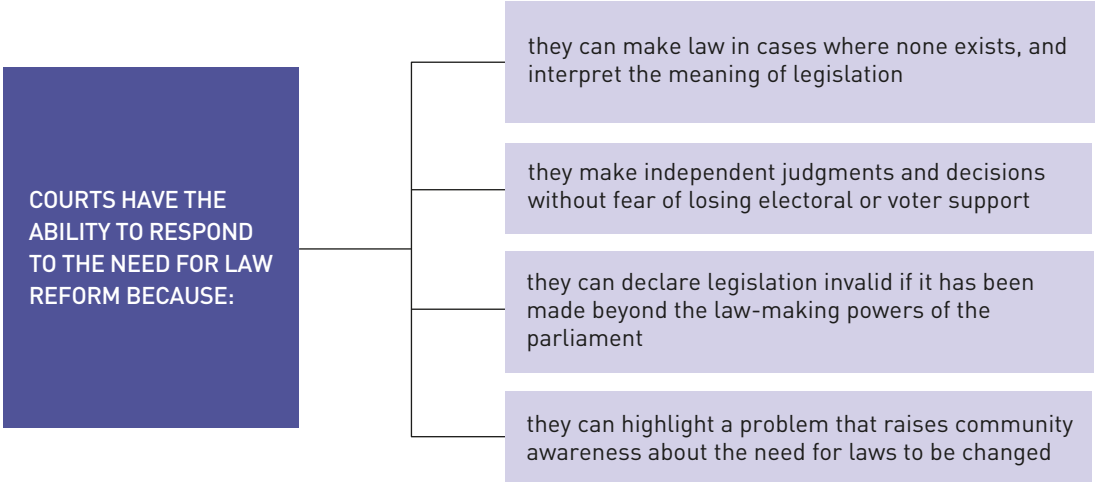
STRENGTHS	WEAKNESSES
Parliaments can abrogate common law (except for decisions made by the High Court in relation to constitutional matters).	Parliaments may abrogate an independent and valid common law to gain political advantage and voter popularity.
Parliament can respond quickly to the need for law reform compared to the courts because they do not have to wait for a conflict to arise or an issue to be brought before them before initiating law reform and can change the law in anticipation of future needs.	Legislative reform can be obstructed if the government does not have a majority in the upper house or a minority government does not have the support of the crossbench.

Source 5 The ability of the parliament to respond to the need for law reform

The ability of the courts to respond to the need for law reform

While their role in law-making is somewhat limited (in comparison to parliament), courts can still play an important role in influencing changes in the law.

Some of the features of the courts that enable them to respond to law reform are set out in Source 6.



Source 6 Four features of courts that enable them to support law reform

Courts can make law where none exists, and interpret legislation

statutory interpretation the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. statute) so it can be applied to resolve the case before them

If an individual party is willing to try and influence a change in the law by undertaking court action, judges can establish law in areas where none exist and change the meaning of existing laws through **statutory interpretation**. However, with the exception of High Court rulings in constitutional disputes, parliament can always pass legislation to override a court decision.

Judges in superior courts may be reluctant to change the law (by overruling and reversing existing precedents or broadly interpreting legislation), preferring to leave the law-making to parliament. For

example, as mentioned in Chapter 13, in the *Trigwell* case (*State Government Insurance Commission v Trigwell* (1978) 142 CLR 617) the High Court preferred not to overrule an earlier **precedent** set by the Supreme Court of Appeal to make landowners responsible for their livestock (animals) that stray onto highways causing road accidents – stating the law should be changed by the parliament.

precedent
a legal case (or ruling) that establishes a principle or rule (i.e. a court decision that is followed by lower courts in the same hierarchy in cases where the material facts are similar)

While courts can play a role in influencing changes in the law through the ability of higher courts to change existing precedents and interpret the meaning of legislation, their ability to do so is limited because courts can only change the law when a case is brought before them and in relation to the issues involved in that case. This is reliant on individuals and organisations being willing to undertake costly, time-consuming and often stressful court action and pursue the appeals process with no guarantee of a successful outcome. However, even if a court challenge is unsuccessful it may gain significant media coverage and help increase awareness of the possible need to change a law.

Judges make decisions without fearing the loss of voter support

Judges are politically independent and may be more willing to make a 'controversial' ruling that changes the law than members of parliament who may fear electoral backlash (i.e. the loss of voter support). For example, the High Court's decision in the *Mabo* case (*Mabo v Queensland (No 2)* (1992) 175 CLR 1) recognising limited land rights for Indigenous Australians established a new area of law that was later enshrined in the *Native Title Act 1993* (Cth) by the Australian Parliament.

However, judges still need to wait for a case to come before them to be able to make a ruling. Even if a case is brought before them, judges are restrained by considering the legal issues in dispute. See for example, the case of *Commonwealth v Australian Capital Territory* [2013] HCA 55 (12 December 2013). In that case, the High Court could not make any legal determination on whether same-sex marriage ought be allowed in Australia. Rather, it was limited to legal issues that it has been asked to consider.

High Court limited to determining legal issues

LEGAL CASE

Commonwealth v Australian Capital Territory [2013] HCA 55 (12 December 2013)

In this case, the High Court had to determine whether the *Marriage Equality (Same Sex) Act 2013* (ACT), being an Act of the Australian Capital Territory, was inconsistent with the *Marriage Act 1961* (Cth) by reason of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). In a joint judgment, in which the High Court found that there was inconsistency, the Court stated in the first paragraph:

> The only issue which this Court can decide is a legal issue. Is the *Marriage Equality (Same Sex) Act 2013*, enacted by the Legislative Assembly for the Australian Capital Territory, inconsistent with either or both of two Acts of the Federal Parliament: the *Marriage Act 1961* and the *Family Law Act 1975*? That question must be answered "Yes". Under the Constitution and federal law as it now stands, whether same-sex marriage should be provided for by law (as a majority of the Territory Legislative Assembly decided) is a matter for the Federal Parliament.

Study tip

When answering a question make sure you address the task words. For example, when you are asked to evaluate a strength, principle or concept you are required to provide more than an explanation. An evaluation requires a consideration of both strengths and weaknesses. You should also provide a concluding and meaningful statement or judgment about the overall benefit or worth of what is being evaluated.

Judges can declare legislation invalid if it was made *ultra vires*

While parliament is the supreme law-making body and can pass legislation to override or abrogate court-made law, the courts can respond to the need for law reform by declaring legislation invalid if it has been made *ultra vires* or beyond the law-making powers of the parliament. However, the courts must wait for the relevant legislation to be challenged in the courts.

For example, in resolving a constitutional dispute, the High Court could determine that the Commonwealth Parliament has legislated outside its specific law-making powers and declare such legislation invalid. It can similarly declare government policy to be unconstitutional if it is inconsistent with existing legislation. This occurred in the case known as the *Malaysian Solution* case where the High Court ruled that an executive (government) decision to send asylum seekers to Malaysia was invalid because it was inconsistent with the *Migration Act*.

Courts can highlight a problem and raise community awareness about the need for change

This can occur when a court makes a ruling which then generates community controversy, or highlights a problem that requires parliament's intervention. This occurred in a case that involved what ultimately became known as 'Brodie's Law'.

CASE STUDY

Brodie's Law

In 2011, the *Crimes Amendment (Bullying) Act 2011* (Vic) was passed by the Victorian Parliament in response to a court case. The Act became known as 'Brodie's Law' after the young waitress who tragically ended her life after being subjected to 'persistent and vicious' workplace bullying at Cafe Vamp in Hawthorn, Victoria.

Brodie's parents commenced a campaign to influence a change in the law after the five defendants in this case pleaded guilty to workplace offences under the *Occupational Health and Safety Act 2004* (Vic) and were fined a total of $335 000 rather than going to prison. The perceived leniency of the sentence caused great concern within the community and ultimately the Victorian Parliament responded by changing the *Crimes Act* to allow a maximum of 10 years imprisonment for bullying.



Source 7 Damian and Rae Panlock on the steps of parliament after the passing of Brodie's law. Courts may highlight problems which inspire parliament to change the law.

The strengths and weaknesses of courts in its ability to respond to the need for law reform are set out in Source 8 on the next page.

STRENGTHS	WEAKNESSES
Courts can make law where none exists and give meaning to unclear legislation so it can be applied to resolve the case at hand.	Judges in superior courts may be reluctant to change the law (by overruling and reversing existing precedents or broadly interpreting legislation), preferring to leave the law-making to parliament.
Decisions and comments made by judges can indirectly influence the parliament to changing the law (e.g. *Mabo* case) by enshrining court decisions.	Judges in superior courts can only make law (including interpret legislation) when a case is brought before them and in relation to the issues involved in that case. This is reliant on parties being willing and financially able to pursue a case.
Judges are independent from the parliament and can make decisions without fearing the loss of voter support.	Judges are not elected by the people and may make decisions that do not reflect the views and values of the community.
Judges can declare legislation invalid if it was made *ultra vires*.	Some judges can adopt a more conservative, rather than activist, approach and more narrowly interpret legislation in cases where their decisions will lead to major or controversial law change.
Courts can make a ruling that highlights a problem and raise community awareness for the need for law change.	Parliament may abrogate (or cancel) common law (other than cases involving the interpretation of the Constitution).

Source 8 The ability of the courts to respond to the need for law reform

14.9 CHECK YOUR LEARNING

Define and explain

1. Explain how being an elected and representative body can assist the ability of the parliament to respond to the need for law reform.
2. Explain how the composition of parliament can limit its ability to respond to the need for law reform.
3. Describe three ways the courts can respond to the need for law reform.
4. Explain two limitations on the ability of the courts to respond to the community's need and desire for law change.

Synthesise and apply

5. In what ways does parliament have access to expert information and public opinion? How can this assist in the law-making process?
6. Prepare a table that summarises the main ways in which both the parliament and the courts can respond to the need for law reform and their limitations.

Analyse and evaluate

7. Discuss how delegating its law-making powers can enable parliament to more effectively respond to the need for law reform.
8. Evaluate the extent to which parliament is able to respond to the need to change the law. Use two examples to illustrate your response.
9. To what extent are judges able to respond to the community's desire for law reform? Discuss.

Check your obook assess for these additional resources and more:

- **Student book questions**
  14.9 Check your learning
- **Video tutorial**
  Developing good exam technique
- **Weblink**
  Malaysia Solution
- **Weblink**
  Brodie's Law

CHAPTER 14

REVIEW

CHAPTER SUMMARY

Reasons for law reform

- Changing views and moral values
- Changes in social, economic and political Circumstances
- Advances in technology
- Need for community protection
- Greater awareness of protection of rights
- Need for improved access to law
- Encouraging changes in values in society
- Need to clarify, simplify or expand unclear law

The ability and means by which individuals can influence law reform

- Starting or signing a petition
- Demonstrations
- Challenging the law in the courts.

The role of the media, including social media, in law reform

- Social media
- Traditional media

Victorian Law Reform Commission

- The role of the VLRC
- Processes used by the VLRC

Parliamentary committees

- The role of the parliamentary committees
- Processes used by parliamentary committees

Royal commissions

- The role of the royal commission
- Processes used by royal commissions

The ability of parliament to respond to the need for law reform

- Parliament is an elected and supreme law-making authority which has extensive power to make and change the law on behalf of the people
- Parliament is able to thoroughly investigate the need for a change in the law including being able to investigate and change whole areas of law
- Parliament can respond relatively quickly to the need for law reform

The ability of courts to respond to the need for law reform

- Courts can make law in cases where none exists and interpret the meaning of parliamentary legislation
- Courts can make independent decisions without the fear of losing electoral or voter support
- Courts can declare parliamentary legislation invalid if it has been made *ultra vires* or beyond the law-making powers of the parliament
- Courts can highlight a problem that raises community awareness for the need for law change.

obook

Check your obook assess for these additional resources and more:

- **Student book questions** Ch 14 Review
- **Revision notes** Ch 14
- **assess quiz** Ch 14 Test your skills with an auto-correcting multiple-choice quiz

REVISION QUESTIONS

1 Using one recent example, define the term 'petition'.
(2 marks)

2 Describe how social media can be used to influence a change in the law.
(3 marks)

3 Explain two reasons for law reform. Provide one example of a recent change for each reason to support your response.
(6 marks)

4 Compare the role of a parliamentary committee to that of a royal commission.
(5 marks)

5 Evaluate the effectiveness of petitions or demonstrations as a means used by individuals to try to influence law reform.
(6 marks)

6 'Without the Victorian Law Reform Commission, the Victorian Parliament would not be able make laws that reflect the views of the community.' To what extent do you agree with this statement? Give reasons for your answer.
(7 marks)

7 To what extent do you think that law-making through parliament is an effective method of changing the law? Discuss.
(8 marks)

8 Discuss the ability of parliament to change the law. In your answer, refer to one recent example of an individual influencing legislative change.
(10 marks)

PRACTICE ASSESSMENT TASK

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

Practice assessment task questions

1 Other than changes in technology, explain two reasons why a law may need to be changed. Provide contemporary examples to illustrate your answer.
(4 marks)

2 Explain two ways the media can influence law reform.
(3 marks)

3 Using one recent example, explain the role of the Victorian Law Reform Commission.
(5 marks)

4 Evaluate the effectiveness of petitions or demonstrations as a method of influencing law reform.
(3 marks)

5 In a recent online article a legal commentator recently stated 'Neither the parliament or the courts have the ability to adequately respond to the need for law reform'. Discuss the extent to which you agree or disagree with this statement. Explain the role of one parliamentary committee in your response.
(10 marks)
Total: 25 marks

PRACTICE ASSESSMENT TASK

UNIT 4 – Area of Study 1

Practice assessment task questions

1 In law-making, identify one role played by:
- **a** The House of Representatives
- **b** The Governor-General.

(2 marks)

2 Distinguish between exclusive powers and concurrent powers. In your answer, identify one example of each type of power.

(4 marks)

3 Explain what is meant by 'double majority' in the context of a referendum.

(4 marks)

4 Describe two roles played by the Senate in law-making.

(4 marks)

5 'The separation of powers offers important checks and balances on the operation of parliaments in Australia.' Discuss this statement.

(5 marks)

6 With reference to one case that you have studied this year, describe the significance of Section 109 of the Australian Constitution.

(5 marks)

7 'The bicameral system is a vital means of providing a check on the operation of government in Australia.'
- **a** To what extent do you agree with this statement? Give reasons.

(5 marks)
- **b** In circumstances where the federal government has a majority in the Senate, to what extent could it be argued that there are reduced checks on parliament as a law-maker? Justify your response.

(5 marks)

8 'The role of the High Court in interpreting the Constitution provides an effective system of checks and balances on law-making by parliament in Australia.'

Discuss the above statement with reference to the *Lange*, *Wotton* or *Monis* case.

(6 marks)

9 'The High Court has broadly interpreted the term 'external affairs' and in doing so has given the Commonwealth Parliament too much power'. Discuss the extent to which you agree with this statement.

(10 marks)

Total: 50 marks

PRACTICE ASSESSMENT TASK

UNIT 4 – Area of Study 2

R v Klinkermann [2013] VSC 65 (25 February 2013)

In May 2015 the Legal and Social Issues Committee of the Victorian Parliament was asked to conduct an inquiry into the need to change Victorian laws to allow citizens to make informed decisions regarding their own end-of-life choices.

After 10 months of investigation, the Committee recommended that the Victorian law be changed to allow doctor-assisted dying in Victoria under a strict set of guides. In other words, the Committee recommended the law be changed to allow a competent adult to take medication

(prescribed by a doctor) to end their own life, provided the adult meets strict criteria including being of sound mind, is in the final weeks or months of life and is suffering a serious and incurable illness or condition.

Assisted dying differs from euthanasia, in that euthanasia involves the doctor actually giving or administering the medication that ends the life of the patient rather than the patient taking the medication themselves.

Legislative reform concerning end-of-life choices has been slow in Australia despite opinion polls indicating that a significant majority of Australians support legalising some form of assisted dying. By contrast, over the last decade, the legal system has increasingly taken a more compassionate approach when dealing with cases involving euthanasia. Prosecutions are rare and in cases that have been pursued, judges have imposed relatively lenient sentences. For example, in 2013, a 73-year-old man who pleaded guilty to the attempted murder of his 84-year-old wife, after trying to ease her suffering and end both of their lives, was spared imprisonment and ordered to serve an 18-month supervised community correction order. Supreme Court Justice Betty King showed mercy when imposing the sentence and accepted that the offender was acting out of love for his wife, who was suffering from dementia and Parkinson's disease and was unable to orally accept food or adequately communicate. When passing sentence, Justice King commented that with Australia's ageing population, the problems surrounding assisted dying would continue to increase. She emphasised, however, that, under the current law, individuals are not permitted to end the life of another person regardless of their personal views and circumstances. Interestingly, Justice King also commented that a suspended sentence would have been an appropriate sanction to be imposed on the accused but they had just been abolished as a sentencing option in Victoria.

Practice assessment task questions

1 What is a 'conscience vote'? Do you think a conscience vote on an assisted dying bill would guarantee its success through the parliament? Justify your answer.

(5 marks)

2 With reference to law reform to legalise assisted dying, explain one reason why laws need to change.

(3 marks)

3 Choose either one parliamentary committee or one royal commission. Explain its role and how it assists the achievement of a representative government.

(5 marks)

4 Undertake some research to help you answer the following questions:

a Identify the name and main purpose of the Victorian bill to allow for assisted dying.

(2 marks)

b Provide two reasons for and two reasons against introducing legalisation which legalises assisted dying. You may wish to scan the Legal and Social Issues Committee's Inquiry into End-of-Life Choices Final Report (June 2016) to gain information on this issue.

(8 marks)

c Identify two pressure groups that support or oppose legalising assisted dying. Briefly explain how each of these groups attempts to influence the parliament to change or maintain the law.

(6 marks)

5 Outline the basic facts of *R v Klinkermann* and explain whether you agree with the sentence imposed by Justice King. Give reasons for your response.

(5 marks)

6 Discuss the extent to which the passing of legislation in relation to assisted dying and euthanasia in Australia highlights the strengths of parliament as a law-maker.

(6 marks)

7 With reference to the above case study, discuss the ability of the courts to influence a change in the law.

(10 marks)

Total: 50 marks

GLOSSARY

A

abrogate
to cancel or abolish a court-made law by passing an Act of Parliament

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

accessorial liability
a way in which a person can be found to be responsible or liable for the loss or harm suffered to another because they were directly or indirectly involved in causing the loss or harm (for example, they encourage another person to cause that harm)

accused
a person charged with a criminal offence

Act of Parliament
a law made by parliament; a bill which has passed through parliament and has received royal assent (also known as a statute)

adverse costs order
a court order (i.e. legal requirement) that a party pay the other party's costs

aggravating factors
circumstances considered in sentencing that can increase the seriousness of the offence or the offender's culpability (i.e. responsibility) resulting in a more severe sentence

alternative dispute resolution methods
ways of resolving or settling civil disputes that do not involve a court or tribunal hearing (e.g. mediation, conciliation and arbitration); also known as appropriate dispute resolution

appeal
an application to have a higher court review a ruling (i.e. decision) made by a lower court

appellant
a person who appeals a ruling or decision (i.e. a person who applies to have the ruling of a lower court reviewed or reversed by a higher court)

appellate jurisdiction
the power of a court to hear a case on appeal

arbitral award
a legally binding decision made in arbitration by an arbitrator

arbitration
a method of dispute resolution in which an independent person (known as an arbitrator) is appointed to listen to both sides of a dispute and make a decision that is legally binding on the parties. The decision is known as an arbitral award

arbitrator
the independent third party (i.e. person) appointed to settle a dispute during arbitration; arbitrators have specialised expertise in particular kinds of disputes between the parties and make decisions that are legally binding on them. The decision is known as an arbitral award

associate judge
a judicial officer of the Supreme Court of Victoria who has power to make orders and give directions during the pre-trial stage of a proceeding. Associate judges also have some powers to make final orders in particular types of proceedings

Australian Bar Association, the
the main organisation that represents barristers in Australia. It aims to promote the rule of law and advocates for fair and equal access to justice for all

Australian Constitution, the
a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

B

bail
the release of an accused person from custody on condition that they will attend a court hearing to answer the charges

balance of power
(between political parties) if no single party has a majority of seats in the lower house of parliament, the crossbenchers may be able to vote in a bloc (together) to reject government bills so they do not pass

balance of probabilities
the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

barrister
a legal professional who is engaged by a party's solicitor. One of the roles of the barrister is to advocate (argue) the party's position at formal hearings

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

bicameral parliament
a parliament with two houses (also called chambers). In the Australian Parliament, the two houses are the Senate (upper house) and the House of Representatives (lower house). In the Victorian Parliament the two houses are the Legislative Council (upper house) and the Legislative Assembly (lower house)

bill of rights
a document that sets out the basic rights and/or freedoms of the citizens in a particular state or country

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

binding precedent
the legal reasoning for a decision of a higher court that must be followed by a lower court in the same jurisdiction (i.e. court hierarchy) in cases where the material facts are similar

burden of proof
the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

C

Cabinet
the policy-making body made up of the prime minister (or premier at a state level) and a range of senior government ministers in charge of a range of government departments. Cabinet decides which laws should be introduced into parliament

case management
a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (such as an order that the parties attend mediation)

civil dispute
a dispute (i.e. disagreement) between two or more individuals (or groups) in which one of the individuals (or groups) makes a legal claim against the other

civil law
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

class action
see representative proceeding

coalition
an alliance of two or more political parties that join to form government

codify (codification)
to collect all law on one topic together into a single statute

coercive power
the authority to compel an individual to do something (e.g. participate in an inquiry and give evidence under oath or affirmation)

cognitive impairment
an issue with brain functioning that can affect thinking, memory, understanding or communication (for example, an acquired brain injury or dementia)

committal hearing
a hearing that is held as part of the committal proceeding. At the committal hearing, the magistrate will decide whether there is sufficient evidence to support a conviction for the offence charged

committal proceeding
the processes and hearings that take place in the Magistrates' Court for indictable offences

committee system
a system used by federal and state parliaments in Australia that involves the use of separate working parties (i.e. committees) to investigate a wide range of legal, social and political issues and report back to the parliament about the need for law reform

common law
law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

community correction order (CCO)
a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

community law reform project
a minor investigation of an area or issue of law reform undertaken by the Victorian Law Reform Commission (VLRC) without a reference from the Attorney-General

community legal centre (CLC)
an independent organisation that provides free legal services to people who are unable to pay for those services. Some are generalist CLCs and some are specialist CLCs

complainant
a person against whom an offence is alleged to have been committed (a person who has complained to the police)

complaints body
an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

compulsory conference
a confidential meeting between the parties involved in a dispute (in the presence of an independent third party) to discuss ways to resolve their differences

conciliation
a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution

conciliator
the independent third party in a conciliation who helps the parties reach an agreement that will end the dispute between them. The conciliator can make suggestions and offer advice to assist in finding a mutually acceptable resolution but the parties reach the decision

concurrent powers
powers in the Australian Constitution that may be exercised by both the Commonwealth and one or more state parliaments (as opposed to residual powers and exclusive powers)

conscience vote
a vote in parliament by its members in accordance with their moral views and values (or those held by the majority of their electorate) rather than in accordance with party policy

constitution
a set of rules that establishes the nature, functions and limits of government

constitutional monarchy
a system of government in which a monarch (i.e. a king or queen) is the head of state and a parliament makes the laws under the terms of a constitution

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

counterclaim
a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

Court Services Victoria
an independent body that provides services and facilities to Victoria's courts and the Victorian Civil and Administrative Tribunal

criminal justice system
a set of processes and institutions used to investigate and determine criminal cases

criminal law
an area of law that defines a range of behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

crossbenchers
independent members of parliament or members of minor parties (i.e. not members of the government or opposition). They are named after the seating area provided for them, called the 'crossbenches'

cross-examination
the questioning of a witness called by the other side in a legal case

D

damages
the most common remedy in a civil claim; an amount of money that the court (or tribunal) orders one party to pay to another

defence
a document filed by the defendant which sets out a response to each of the claims contained in the plaintiff's statement of claim; part of the pleadings stage of a civil dispute

defendant
(in a civil case) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

democracy
a system of government in which members of parliament are voted into office by the people, and represent the wishes of the people

demonstration
a group of people who gather to protest (i.e. express their common concern or dissatisfaction with) an existing law as a means of influencing law reform

denunciation
one purpose of a sanction; a process by which a court can demonstrate the community's disapproval of the offender's actions

deterrence
one purpose of a sanction; a process by which the court can discourage the offender and others in the community from committing similar offences

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

directions hearing
a pre-trial procedure at which the court gives instructions to the parties about time limits and the way the civil proceeding is to be conducted

Director of Public Prosecutions (DPP)
the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

disability
a total or partial loss of bodily or mental functions, or a disease or illness that affects a person's body, learning or thought processes

disapproving a precedent
when a court expresses dissatisfaction of an existing precedent but is still bound to follow it

disbursements
out of pocket expenses or fees (other than legal fees), incurred as part of a legal case. They include fees paid to expert witnesses, court fees, and other third party costs such as photocopying costs

discovery
a pre-trial procedure which requires the parties to list all the documents they have that are relevant to the case. Copies of the documents are normally provided to the other party

distinguishing a precedent
the process by which a lower court decides that the material facts of a case are sufficiently different to that of a case in which a precedent was established by a superior court so that they are not bound to follow it

doctrine of precedent
the common law principle by which the reasons for the decisions of higher courts are binding on courts ranked lower in the same hierarchy in cases where the material facts are similar

double majority
a voting system that requires a national majority of all voters in Australia and a majority of electors in a majority of states (i.e. four states); a double majority is required for a change to be made to the Australian Constitution at a referendum

E

equality
one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage

evidence
information used to support the facts in a legal case

ex post facto
(pronounced ex post FAK·toh)
a Latin term meaning 'out of the aftermath'; a legal term used to describe a law that is established in relation to an event that has already taken place

examination-in-chief
the questioning of one's own witness in court in order prove one's own case and disprove the opponent's case

exclusive jurisdiction
the lawful authority or power of a court, tribunal or other dispute resolution body to decide legal cases to the exclusion of all others

exclusive powers
powers in the Australian Constitution that only the Commonwealth Parliament can exercise (as opposed to residual powers and concurrent powers)

Executive Council
a group consisting of the prime minister and senior ministers (at the Commonwealth level) or premier and senior ministers (at the state level) that is responsible for administering and implementing the law by giving advice about the government and government departments

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

expert evidence
statements of fact given by an independent expert about an area within his or her expertise

express rights
rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

extrinsic material
material (i.e. information) that is not part of an Act of Parliament, but that may assist a judge to interpret the meaning of the Act

F

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

Federation of Australia
the union of sovereign states that gave up some of their powers to a central authority to form Australia

fine
a sanction that requires the offender to pay an amount of money to the state

full bench
all seven justices of the High Court sitting to determine a case

G

generalist CLC
a community legal centre that provides a broad range of legal services to people in a particular geographical area of Victoria

government
the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

governor
the Queen's representative at the state level

Governor-General
the Queen's representative at the Commonwealth level

group member
a member of a group of people who are part of a representative proceeding (i.e. class action)

guilty plea
when an offender officially admits guilt which is then considered by the court when sentencing

H

Hansard
the official transcript (i.e. written record) of what is said in parliament. Hansard is named after T.C. Hansard (1176–1833) who printed the first parliamentary transcript

hearsay evidence
evidence given by a person who did not personally witness the thing that is being stated to the court as true

High Court
the ultimate court of appeal in Australia and the court with the authority to hear and determine disputes arising under the Australian Constitution

hostile Senate
see hostile upper house

hostile upper house
a situation in which the government does not hold a majority of seats in the upper house and relies on the support of the opposition or crossbench to have their bills passed

House of Representatives
the lower house of the Commonwealth Parliament

Human Rights Charter
the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Its main purpose is to protect and promote human rights

hung parliament
a situation in which neither major political party wins a majority of seats in the lower house of parliament after an election

I

implied rights
rights not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

imprisonment
a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

income test
the test applied by Victoria Legal Aid (VLA) to determine if a duty lawyer can represent an accused. The test is satisfied when the accused can show they have limited income (e.g. their primary source of income is social welfare provided by government)

independents
individuals who stand as candidates in an election but do not belong to a political party

indictable offence heard and determined summarily
a serious offence which can be heard and determined as a summary offence if the court and the accused agree

indictable offence
a serious offence generally heard before a judge and a jury in the County Court or Supreme Court of Victoria

injunction
a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

international declaration
a non-binding agreement between countries which sets out the aspirations (hopes) of the parties to the agreement

international treaty
a legally binding agreement between countries or intergovernmental organisations which is in written form and is governed by international law

intrinsic material
material (i.e. information) found within an Act of Parliament that may assist a judge to interpret its meaning

J

judgment
a statement by the judge at the end of case that outlines the decision and the legal reasoning behind the decision

judicial activism
an expression used when judges consider a range of social and political factors when interpreting Acts of Parliament and deciding cases (i.e. consider the changing political beliefs and the views of the community)

judicial conservatism
an expression used when judges adopt a narrow interpretation of the law when interpreting Acts of Parliament and deciding cases (i.e. avoid major or controversial changes in the law and not be influenced by the views of the community)

judicial power
the power (authority) given to courts and tribunals to enforce the law and settle disputes

judiciary
a legal term used to describe the courts and tribunals (which have the power to apply and interpret the law)

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. verdict)

K

Koori Court
a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Aboriginal people

L

Law Council of Australia
the peak national representative body of the Australian legal profession. It advocates on behalf of the legal profession at a national level about issues such as access to justice

Law Institute of Victoria (LIV)
the legal body which represents lawyers in Victoria and provides professional development relating to their practice

law reform bodies
organisations established by the state and Commonwealth parliaments to investigate the need for change in the law and make recommendations for reform

law reform
the process of constantly updating and changing the law so it remains relevant and effective

laws
legal rules made by a legal authority that are enforceable by the police and other agencies

lawyer
a general term used to describe somebody who has been trained in the law and is qualified to give legal advice (a barrister or a solicitor)

lay evidence
evidence given by a layperson (i.e. an ordinary person) about the facts in dispute

lead plaintiff
the person named as the plaintiff on behalf of the group members in a representative proceeding (i.e. class action)

legal aid
legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

legal citation
the system used to refer to legal documents and sources such as cases and statutes

Legislative Assembly
the lower house of the Victorian Parliament

Legislative Council
the upper house of the Victorian Parliament

legislative power
the power to make laws, which resides with the parliament

legislature
a legal term used to describe the parliament (which has the power to make the law)

liability
legal responsibility for one's acts or omissions

limitation of actions
the restriction on bringing a civil claim after the allowed time

litigant
a person who takes a matter before the court to be resolved

litigation funder
a third party who pays for some or all of the costs and expenses associated with initiating a claim in return for a share of the proceeds. Litigation funders are often involved in representative proceedings

locus standi
(pronounced loh·kus STAN·dye)
a Latin term meaning 'standing in a case'; that is, the litigant must be directly affected by the issues or matters involved in the case for the court to be able to hear and determine the case

M

majority verdict
a jury verdict where all but one of the members of the jury agree with the decision

mandatory minimum sentence
the minimum sanction, prescribed by the parliament in legislation, that must be imposed by the court

material facts
the key facts or details in a legal case that were critical to the court's decision

means test
the test applied by Victoria Legal Aid (VLA) to determine whether an applicant qualifies for legal assistance or representation in court (beyond the services of the duty lawyer on the day). It takes into account the applicant's income, assets and expenses

mediation
a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

mediator
an independent third party who does not interfere or persuade but helps the parties in a mediation as they try reach a settlement of the matter

member
the person who presides over final hearings and compulsory conferences at VCAT. Members include the President, vice-presidents, deputy presidents and senior and ordinary members

micro party
a very small political party (e.g. one that is formed around a single-issue)

minister
a member of parliament who is a member of the party in government and is in charge of a government department

minor party
political parties that do not have elected representatives to win government but are able to place pressure on the government to address specific issues and introduce law reform

minority government
a government that does not hold a majority of seats in the lower house and relies on the support of minor parties and independents (i.e. the crossbench) to form government

mitigating factors
circumstances considered in sentencing that reduce the seriousness of the offence or the offender's culpability and lead to a less severe sentence

money bill
a bill that imposes taxes and collects revenue; also known as an appropriation bill

N

negotiation
informal discussions between two or more parties in dispute, aiming to come to an agreement about how to resolve that dispute

non-legal rules
laws made by private individuals or groups in society, such as parents and schools, which are not enforceable by the courts

O

obiter dictum
(pronounced OB· iter DIK· tum)
a Latin term meaning 'by the way'; comments made by the judge in a particular case that may be persuasive in future cases (even though they do not form a part of the reason for the decision and are not binding)

Office of Public Prosecutions (OPP)
the Victorian public prosecutions office which prepares and conducts criminal proceedings on behalf of the DPP

ombudsman
an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

opposition
the political party that holds the second largest number of seats (after the government) in the lower house. The opposition questions the government about policy matters and is responsible for holding them to account

original jurisdiction
the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

overruling a precedent
when a superior court changes a previous precedent, established by a lower court, in a different and later case thereby creating a new precedent which overrules the earlier precedent

P

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

parliamentary committee
a small group of members of parliament who consider and report on a single subject in one or both houses. Committee members can come from any party

parliamentary counsel
lawyers who are responsible for drafting bills in accordance with the policies and instructions of a member of parliament

parole
the supervised and conditional release of a prisoner after the minimum period of imprisonment has been served

party control
each party in a civil trial has control over the way the case will run

persuasive precedent
the legal reasoning behind a decision of a lower (or equal) court within the same jurisdiction, or a court in a different jurisdiction, that may be considered relevant (and therefore used as a source of influence) even though it is not binding (see binding precedent)

petition
a formal, written request to the government to take some action or implement law reform

plaintiff
(in civil disputes) the party who makes a legal claim against another person (i.e. the defendant) in court

plea negotiations
(in criminal cases) pre-trial discussions that take place between the prosecution and the accused, aimed at resolving the case by agreeing on an outcome to the criminal charges laid (also known as charge negotiations)

pleadings
a pre-trial procedure during which documents are filed and exchanged between the plaintiff and the defendant and which state the claims and the defences in the dispute

political party
an organisation that represents a group of people with shared values and ideas, and which aims to have its members elected to parliament

political pressures
influences on government or members of parliament to persuade them on a matter of law reform or to act in a certain way

practice note
a document issued by a court which guides the operation and management of cases

preamble
the introductory part of a statute that outlines its purpose and aims

precedent
principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

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

presumption of innocence
the right of a person accused of a crime to be presumed not guilty unless proven otherwise

private member
a member of parliament who is not a government minister

private member's bill
a bill introduced into parliament by a member of parliament who is not a government minister

pro bono
(pronounced proh BOH·noh)
a Latin term meaning 'for the public good'; a term used to describe legal services that are provided for free (or at a reduced rate)

Productivity Commission Review
an inquiry conducted by the Productivity Commission in 2014 in relation to access to justice in civil disputes in Australia

Productivity Commission
the Australian Government's independent research and advisory body, which researches and advises on a range of issues

prosecution
see prosecutor

prosecutor
the Crown in its role of bringing a criminal case to court (also called 'the prosecution')

protected witness
a person who is to give evidence in a sexual offence or family violence offence case and is either the complainant, a family member of the complainant or the accused, or any other witness the court declares to be a protected witness

protection
one purpose of a sanction; a strategy designed to safeguard the community from an offender in order to prevent them from committing further offence (e.g. by imprisoning them)

punishment
one purpose of a sanction; a strategy designed to penalise (i.e. punish) the offender and show society and the victim that criminal behaviour will not be tolerated

R

ratify (ratification)
confirmation by a nation's parliament of its approval of an international treaty signed by its government. The parliament expressly passes legislation that requires them by law to adopt the various rights and responsibilities set out in the treaty

ratio decidendi
(pronounced RAY·shee·oh des·ee·DEN·dee)
a Latin term meaning 'the reason'; the legal reasoning behind a judge's decision. *Ratio decidendi* forms the binding part of a precedent

recidivism
re-offending; returning to crime after already having been convicted and sentenced

re-examination
a second round of questioning by one party of its own witness, after the witness has been cross-examined by the other side

referendum
the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australia people in a public vote by a double majority

rehabilitation
one purpose of a sanction; a strategy designed to reform an offender in order to prevent them from committing offences in the future

remedy
a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

representative democracy
a system of government in which all eligible citizens vote to elect people who will represent them in parliament, make laws and govern on their behalf

representative government
a political system in which the people elect members of parliament to represent them in government

representative proceeding
a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person; also called a class action or a group proceeding

residual powers
powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain with the states (as opposed to concurrent powers and exclusive powers)

respondent
the party against whom an appeal is made

retrospective legislation
Acts of Parliament that are made to apply to conduct that existed before the passage of the law (backdating the operation of law)

reversing a precedent
when a superior court changes a previous precedent set by a lower court in the same case on appeal, thereby creating a new precedent which overrides the earlier precedent

review jurisdiction
the power of a body to consider a decision made by an agency or authority in order to either confirm, change or set aside (i.e. overturn) that decision

royal assent
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or the governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)

royal commission
the highest form of inquiry into matters of public concern and importance. Royal commissions are formed to support the work of a person (or persons) (being the commissioner(s)) given wide powers by the government to investigate and report on an important matter of public concern

rubber stamp
a term used to describe a situation in which the upper house of parliament automatically approves decisions made in the lower house of parliament because the government holds a majority of seats in both houses and its members vote along party lines

rule of law
the principle that everyone in society is bound by law and must obey the law and that laws should be fair and clear (so people are willing and able to obey them)

S

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

secondary legislation
rules and regulations made by secondary authorities (e.g. local councils, government departments and statutory authorities) which are given the power to do so by the parliament. Also referred to as delegated legislation

secretariat
parliamentary employees who provide administrative support to parliamentary committees and help run hearings

self-represented party
a person with a matter before a court or tribunal who has not engaged (and is not represented by) a lawyer or other professional

Senate
the upper house of the Commonwealth Parliament

sentence indication
a statement made by a judge to an accused about the sentence they could face if they plead guilty to an offence

Sentencing Advisory Council
an independent statutory body that provides statistics on sentencing in Victoria, conducts research, seeks public opinion and advises the Victorian Government on sentencing matters

separation of powers
a principle established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate. This principle provides a set of checks and balances to ensure that no single body has the power to make, implement, apply and interpret the law

short mediation and hearing (SMAH)
a dispute resolution process used for small claims about goods and services in the Civil Claims List at the Victorian Civil and Administrative Tribunal (VCAT). Both the mediation and the hearing will be conducted on the same day (if the dispute is not settled at mediation)

social cohesion
a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

social media
a range of digital tools, applications and websites used to share information in real time between large groups of people (e.g. Facebook, Twitter, Instagram and Snapchat)

solicitor
a qualified legal practitioner who will give advice about the law and a person's rights under the law

specialist CLC
a community legal centre that focuses on a particular group of people or area of law (e.g. young people, asylum seekers, domestic violence and animal protection)

specific prohibitions
areas in which the state and Commonwealth Parliaments are constitutionally banned from making law

standard of proof
the degree or extent to which a case must be proved in court

stare decisis
(pronounced STAR·ray di·SYE·zis)
a Latin term meaning 'let the decision stand'; the basic principle underlying the doctrine of precedent

statement of claim
a document filed by the plaintiff in a civil case to notify the defendant of the nature of the claim, the cause of the claim and the remedy sought

statute law
law made by parliament; also known as legislation or Acts of Parliament (as opposed to common law)

statute
see Act of Parliament

statutory interpretation
the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. statute) so it can be applied to resolve the case before them

subordinate bodies
delegated bodies or secondary authorities (e.g. local councils, government departments and statutory authorities such as Australia Post and the Australian Broadcasting Corporation Board) which are given power by parliament to make rules and regulations on its behalf

sue
to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

summary offence
a minor offence generally heard in the Magistrates' Court

T

terms of reference
instructions given to a formal body (e.g. a law reform body or royal commission) to investigate an important matter. Terms of reference set out the precise scope and purpose of the inquiry and the date by which the final report must be completed

terms of settlement
a document that sets out the terms on which the parties agree to resolve their dispute

terra nullius
(pronounced ter·ra NULL·ee·us)
a Latin term meaning 'empty land'; a false common law principle that Australia belonged to no one when the British first arrived in Australia to establish a colony in 1788

tied grant
funding (i.e. money) given to a state government by the Commonwealth on the condition that it spends the money in the manner specified by the Commonwealth

traditional media
conventional ways of communicating information to the public, being newspapers and magazines, television and radio, that were relied on before the internet

treason
the crime of betraying one's country, especially by attempting to overthrow the government

tribunal
a dispute resolution body that resolves civil disputes and is intended to be less costly, more informal and a faster way to resolve disputes than courts

U

ultra vires
(pronounced ul·tra VYE·reez)
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

unanimous verdict
a verdict or decision where all the jury members are in agreement and decide the same way (e.g. they all agree the accused is guilty)

V

vicarious liability
the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

victim impact statement
a statement filed with the court by a victim, and considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

victim
a person who has suffered directly or indirectly as a result of a crime

Victims Register
a register (i.e. database) maintained by the state of Victoria set up to provide the victims of violent crimes with relevant information about adult prisoners while they are in prison (e.g. the prisoner's earliest possible release date)

Victims' Charter
a charter (i.e. the *Victims' Charter Act 2006* (Vic)) that recognises the impact of crime on victims and provides guidelines for the provision of information to victims

Victoria Legal Aid (VLA)
a government agency that provides free legal advice to the community and low-cost or no-cost legal representation to people who can't afford a lawyer

Victorian Access to Justice Review
an inquiry conducted by the Victorian Government's Department of Justice and Regulation about access to justice. The final report was released in October 2016

Victorian Civil and Administrative Tribunal (VCAT)
a tribunal that deals with disputes relating to a range of civil issues heard by various lists (sections), such as the Human Rights List, the Civil Claims List and the Residential Tenancies List

Victorian Law Reform Commission (VLRC)
Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

voting on party lines
when members of parliament vote in accordance with their party's policy or agenda

vulnerable witness
a person who is required to give evidence in a criminal case and is considered to be impressionable or at risk. This might be a child, a person who has a cognitive impairment, or the alleged victim of a sexual offence

W

Westminster system, the
a parliamentary system of government that developed in Britain and upon which Australia's parliamentary system is modelled

writ
(in relations to elections) the legal document that establishes the official timetable and process for the election to begin

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