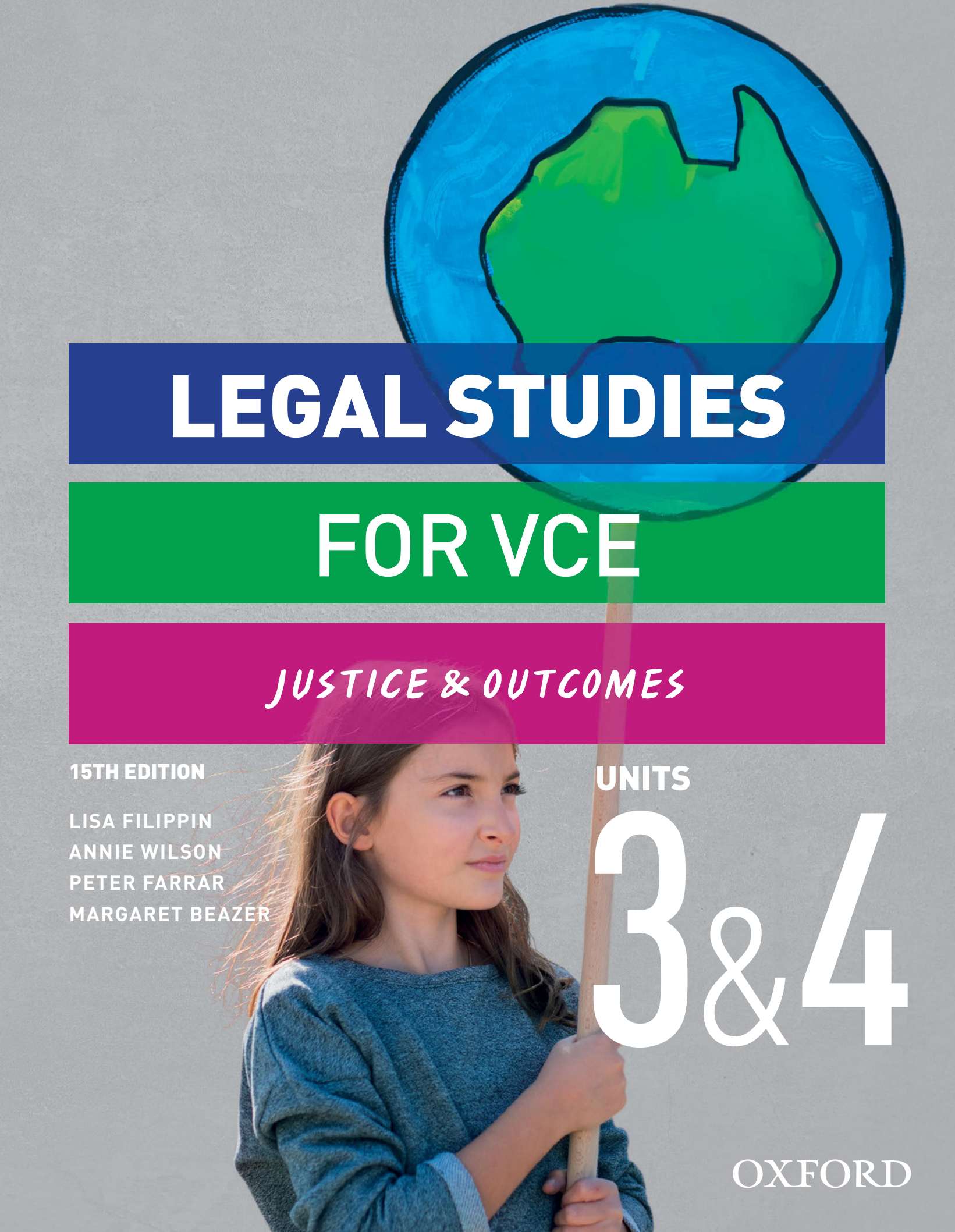


LEGAL STUDIES FOR VCE

JUSTICE & OUTCOMES

15TH EDITION

LISA FILIPPIN
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UNITS 3&4

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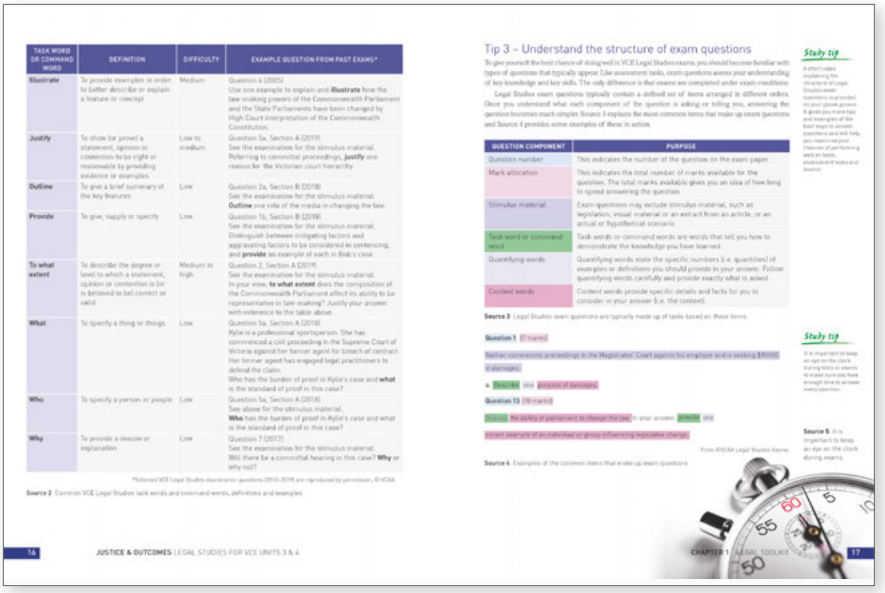
USING *LEGAL STUDIES FOR VCE UNITS 3 & 4*

Legal Studies for VCE Units 3 & 4 Justice & Outcomes (15th edition) offers complete support for teachers and students completing Units 3 & 4 of VCE Legal Studies.

Key features of the Student book

Legal toolkit

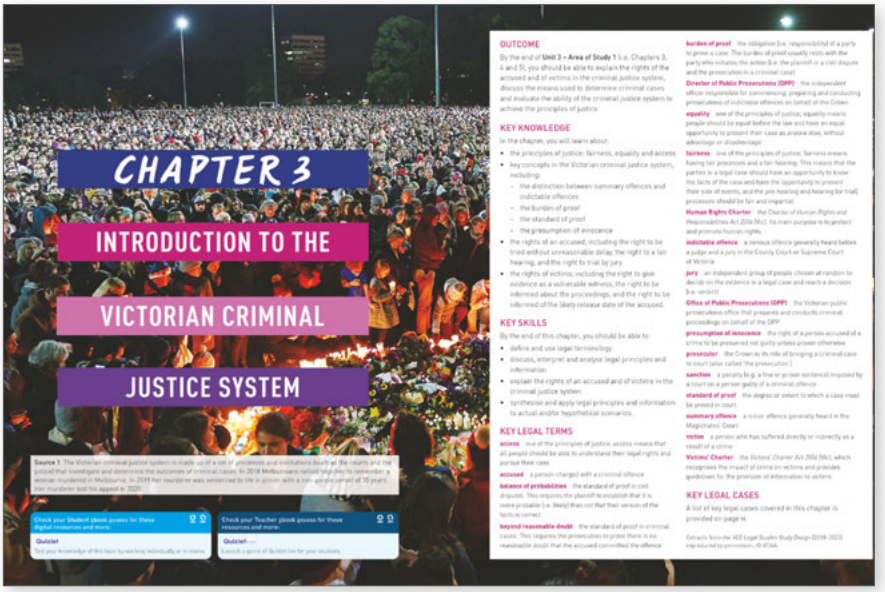
The legal toolkit at the front of the book is a stand-alone reference section for students that includes:



- an overview of the structure of the VCE Legal Studies course
- a range of helpful study tips
- tips for success on SACs and the end-of-year examination
- advice on mastering legal citation
- information about careers in the law.

Chapter openers

Each chapter begins with a chapter opener that includes:



- an engaging and relevant image that links to core content in the chapter
- links to expert authored content hosted on Quizlet, where it can be used anywhere, anytime
- a summary of outcomes, key knowledge and key skills dot points from the *VCE Legal Studies Study Design 2018–2023*
- a list of key legal terms that appear in the chapter (with supporting definitions)
- a list of key legal cases that appear in the chapter.

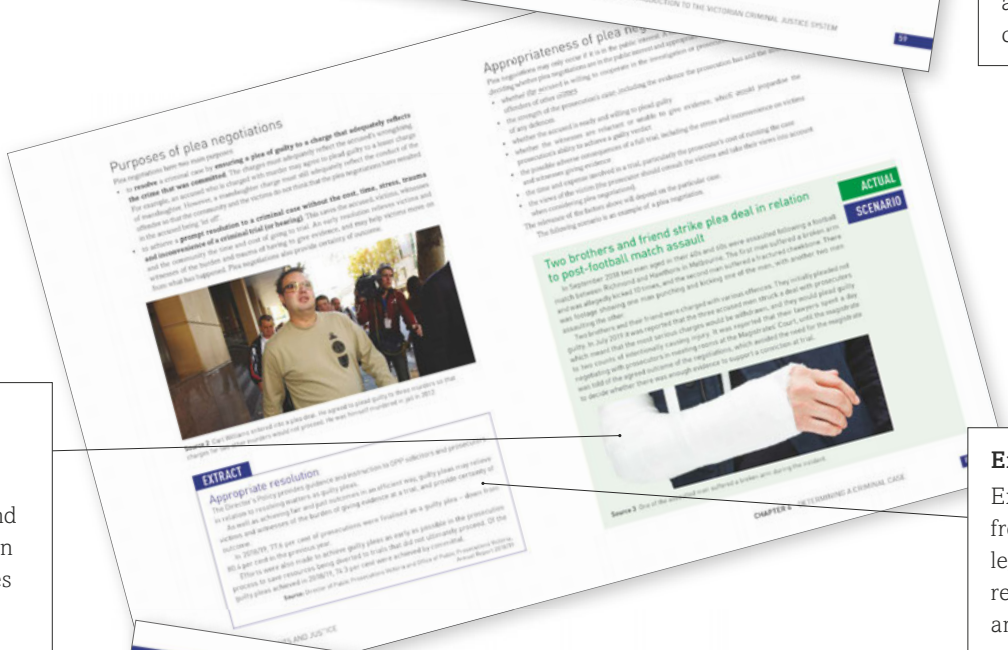
Clear topic-based approach

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

Key legal terms
Definitions are provided in the margin to support student understanding in each chapter. 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.



Actual scenario
Relevant legal cases and media articles with accompanying citation help students understand real world examples of the law in action and provide opportunities for students to practise responding to scenario-based questions.

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



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.

Hypothetical scenario
Hypothetical situations that raise legal points 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.

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 review

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



Chapter review

A chapter review appears at the end of every chapter and includes:

- three top tips from the chapter which provide succinct summaries of key points
- graded revision questions
- a practice assessment task.

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*.

Key features of digital support

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



Students receive:

- a complete digital version of the Student book with note-taking and bookmarking functionality
- 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 scenarios and examples for extension
- annotated on level, below level and above level responses
- auto-correcting quizzes for each chapter which assess their level of understanding, monitor progress and feed into the markbook
- direct access to Quizlet.

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
- access to markbook, where they can:
  - filter online test and quiz results by class or group
  - add custom results from self-administered assessments
  - view student progress reports in HTML or PDF
- direct access to Quizlet.

Quizlet

Each chapter of *Legal Studies for VCE Units 3 & 4* is supported by expert-authored content on Quizlet. Accessing Quizlet via web browser or app, students have access to different interactive learning tools, including:

- interactive flashcards to help students learn key legal terminology
- multiple choice questions to test students on their knowledge
- 'type what you hear' exercises to help students memorise key legal definitions.

Quizlet also provides students with fun revision games to support their learning, including:

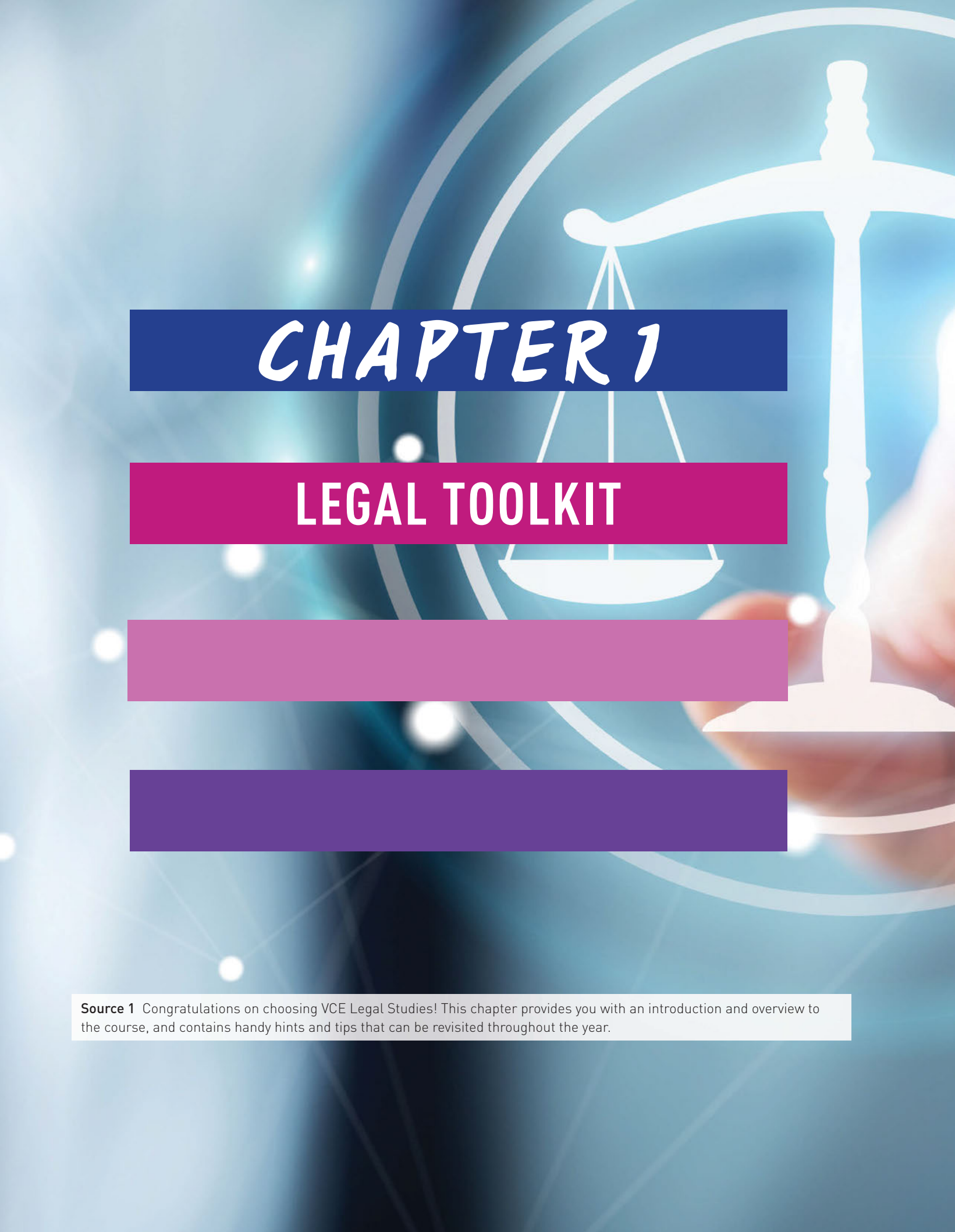
- Quizlet Live, where students battle in teams or individually against other members of their class
- 'match' card game where students must match the correct term to its definition
- 'gravity' timed test, where students test their knowledge against the clock.

Instructions for teachers launching a game of Quizlet Live

1 When prompted on in the Student book, log onto Oxford Digital and launch the Quizlet website.
2 Follow the prompts to how you would like to host the game for your students.
3 Your game is now set up with students ready to join. They can join by opening the Quizlet app or website and:
   – manually entering the six-digit code that has now appeared on the screen, or
   – scanning the QR code that has now appeared on the screen.
4 Once all students are ready, click the large 'Create game' button and a summary of the students playing will appear. Click 'start game'.
5 As the teacher, your screen will display a leader board which updates in live time as students answer questions.

CHAPTER 1

LEGAL TOOLKIT



Source 1 Congratulations on choosing VCE Legal Studies! This chapter provides you with an introduction and overview to the course, and contains handy hints and tips 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 explores the meaning of justice and helps you become active and informed citizens. It will provide you with opportunities to develop problem-solving skills as you navigate your way through criminal and civil cases and legal problems – both real and hypothetical.

This student book has been purpose-written to meet the requirements of the *VCE Legal Studies Study Design* (2018–2023) 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!

Extracts from the *VCE Legal Studies Study Design* (2018–2023) reproduced by permission, © VCAA.

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 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 the information you are expected to learn and provides important details about the way you will be assessed.

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 • You do not have to complete Units 1 & 2 to undertake Units 3 & 4.
Unit 4 – The people and the law	

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. **Sources 2 and 3** show 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* (2018–2023) reproduced by permission, © VCAA.

UNIT 4 – THE PEOPLE AND THE LAW

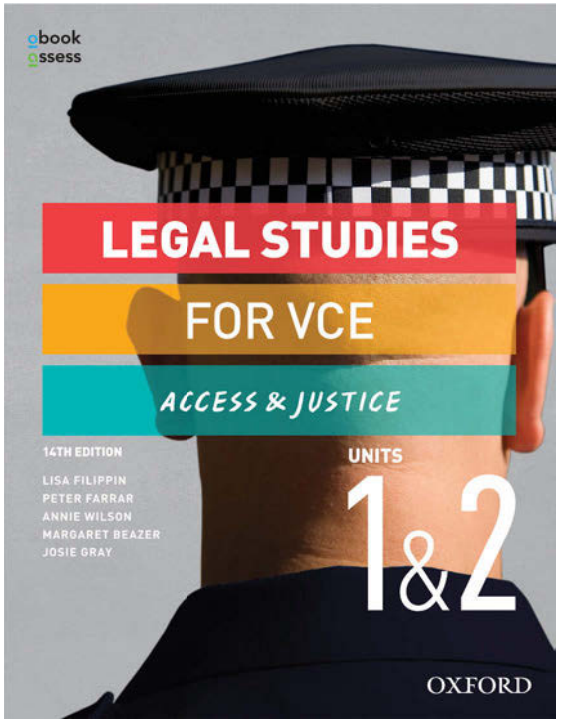
AREA OF STUDY	OUTCOME	MARKS ALLOCATED	CORRESPONDING CHAPTERS IN THIS BOOK
Area of Study 1 The people and the Australian Constitution	**Outcome 1** On completion of this unit the student should be able to discuss the significance of High Court cases involving the interpretation of the Australian Constitution and evaluate the ways in which the Australian Constitution acts as a check on parliament in law-making.	40	• **Chapter 10** The people, the parliament and the Constitution • **Chapter 11** Checks on parliament in law-making • **Chapter 12** 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 13** The parliament • **Chapter 14** The courts • **Chapter 15** Law reform
	Total marks	**100**	

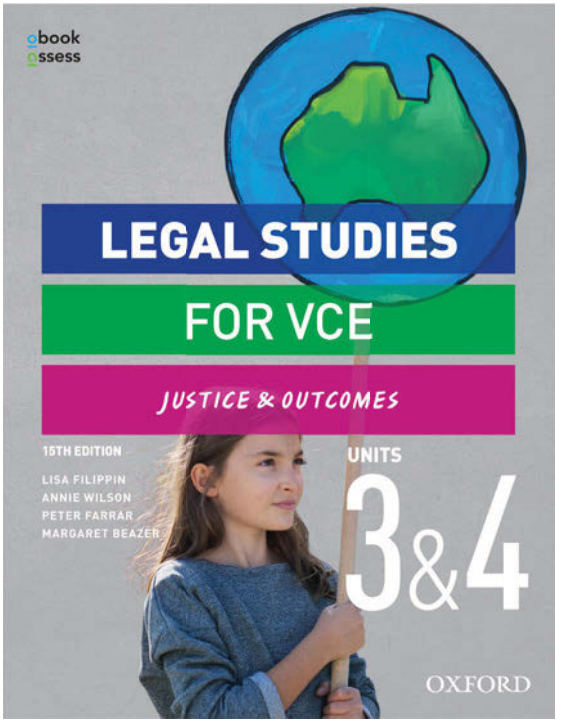
Source 3 An overview of the content, structure and marks allocated in Unit 4. Extracts from the *VCE Legal Studies Study Design* (2018–2023) reproduced by permission, © VCAA.

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 *Legal Studies for VCE Units 1 & 2 Access & Justice* (14th edition). Units 3 & 4 are covered in *Legal Studies for VCE Units 3 & 4 Justice & Outcomes* (15th 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 achievements 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 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 N in each unit is separate from the levels of achievement (i.e. mark) you receive on your SACs.

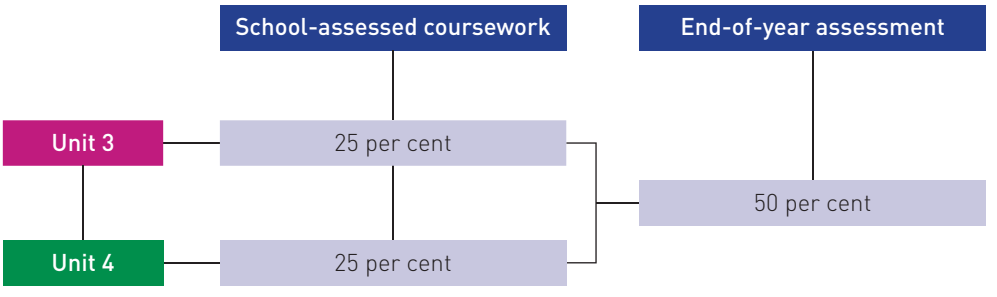
Assessment tasks

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

Several 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 and come to an understanding and appreciation of 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. 'Recent' means within four years in Legal Studies.

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. This means that 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 an equal 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 extended response
- **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 your other VCE subjects as well.

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 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 makes several other useful documents available at no charge on its website. These include past exam papers, examination reports and other support materials. The examination reports are particularly important to read.
- 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 (such as marking criteria or assessment rubrics). These are the documents that your teacher will use to assess your level of achievement, 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 (such as marking criteria or assessment rubrics).

Tip 2 – Study

Success in VCE Legal Studies does not just begin and end in the classroom. If you are going to perform at your best, you will need to make time for regular periods of study and revision outside school hours. This does not 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 is in your bedroom, at your local library or at your favourite cafe, 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 can 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. Do not 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 are exercising.



Source 2 Whether it is in your bedroom, at your local library or at your favourite cafe, 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 is not 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 is 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 THE BEST	BEST LEARNING STRATEGIES AND TOOLS
Visual learner	You learn best by seeing and looking.	You learn best by using pictures, images, diagrams, colour coding and mind maps.
Auditory learner	You learn best 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 consuming 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.



Source 5 Detailed revision notes are great, but you may also benefit from creating 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.

As part of staying healthy, it is important to maintain not only good physical health, but also good mental health and wellbeing. Reach out for support when you need it. Support comes in many forms, including face-to-face support (families, friends, carers, social workers and health professionals) as well as digital support. There are some excellent apps and websites dedicated to young people's mental health and wellbeing.

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 have learnt 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 is time well spent! • Taking the time to create your revision notes reinforces what you have learnt and means that they will be written in language that makes sense to you, not someone else.
Write dot-point summaries on index cards	• Detailed revision notes are great, but you may also benefit from creating 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.
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.

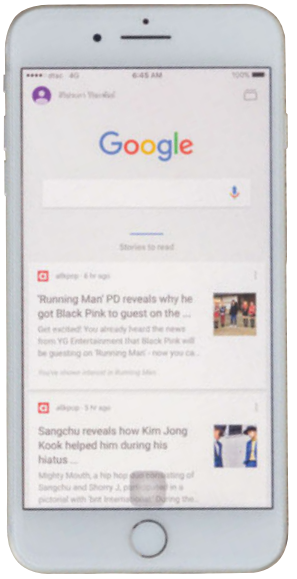
Source 6 Revision strategies

Tip 7 – Stay up to date with current events

This course focuses on our law-makers and our justice system, which is constantly evolving and reforming. So are our laws. It is 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.



Tip 8 – Make time for breaks

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.

Your break should have 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 are feeling tired, upset or frustrated you might need to take a break or take a night off from study. Just make sure you do not do this too often!

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 will receive regular updates on anything you are interested in – and it's free!

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

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 are 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 that can assist you.

If you are 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 do not understand. If your teacher is not available, talk to your friends and other students in your class to see if they can help.

Tip 10 – Keep a positive attitude

Keeping a positive attitude is important during your VCE. Tips to staying positive include:

- rewarding yourself for achieving your daily and weekly goals
- trying not to compare yourself with other students in your class; instead, set goals that are right for you and focus on achieving these personal goals
- decorating your study space with inspirational quotes or pictures of the people you care about; these things can help to remind you of your goals and the reasons why you are working so hard
- remembering that many concepts in the VCE Legal Studies course are complex, and you may not understand them the first time you come across them. These concepts require repetition, practice and resilience to master. Don't give up! Try some of the different tips and strategies listed above to understand them.



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.

Check your obook assess for these additional resources and more:

- **Study timetable** – Study timetable template
- **Weblink** – Google Alerts
- **Weblink** – VCAA
- **Weblink** – Headspace

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. To give yourself the best chance of success on these SACs – and the end-of-year examination – try 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.

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

- writing words and definitions on sticky 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.

Tip 2 – Understand task words and command words

In the assessment tasks you are asked to complete throughout the year, it is likely that questions and tasks will include a 'task word' or a 'command word'. In Legal Studies, task words and command 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.

Command words tend to start with a 'w' – **with**, **why**, **what** and **who** are the more common ones in Legal Studies examinations. Another command word is '**how**'. Like task words, they range in difficulty. For example, 'who' questions are generally simple and require you to identify a person or party. Others, such as 'how', can be more challenging.



Source 1 Learning key legal terms and using them correctly in your assessment tasks will show your teacher that you understand them.

Source 2 lists a range of common task and command words, their definitions, and an indication of their level of difficulty. The difficulty level can depend on the task or command word, and also the key knowledge being assessed – so an 'explain' question, for example, can range from medium to high in terms of difficulty.

The tables also provide example questions so you can see each task word and command word in context. Some 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 in the current Study Design. You should check with your teacher about this.

TASK WORD OR COMMAND WORD	DEFINITION	DIFFICULTY	EXAMPLE QUESTION FROM PAST EXAMS*
Advise	To offer suggestions about the best course of action or make recommendations	Medium to high	Question 1a, Section B (2018) See the examination for the stimulus material. **Advise** Ada on one enforcement issue she should consider before initiating this claim.
Analyse	To examine a complex feature, issue or concept by breaking it down into smaller parts and showing how they relate to one another	High	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)	Medium	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 do not)	Low to medium	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.
Define	To state the exact nature, features, or meaning of a term, feature or concept	Low	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	Low	Question 1b, Section A (2019) John has been charged with an indictable offence. He has pleaded not guilty. The victims are worried about giving evidence at the upcoming trial, which is expected to last for six weeks. John's lawyer has recommended that John should apply to the court for a sentence indication and consider pleading guilty. **Describe** one impact that a guilty plea may have on John's criminal case.

TASK WORD OR COMMAND WORD	DEFINITION	DIFFICULTY	EXAMPLE QUESTION FROM PAST EXAMS*
Discuss	To 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.	High	Question 6, Section A (2019) Section 116 of the Australian Constitution states: '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'. **Discuss** the extent to which the Australian people can prevent the Commonwealth Parliament from making any laws on religion.
Distinguish	To explain the differences and distinctive characteristics	Low	Question 1b, Section B (2018) See the examination for the stimulus material. **Distinguish** between mitigating factors and aggravating factors to be considered in sentencing, and provide an example of each in Bob's case.
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	High	Question 6 (2018) **Evaluate** two ways in which the Australian Constitution enables the Australian people to act as a check on parliament in law-making.
Examine	To consider in detail and establish the key facts and important issues related to a topic or issue.	Medium to high	Question 9 (2010) The doctrine of precedent allows for both consistency and flexibility. Critically **examine** these two strengths of the doctrine of precedent.
Explain	To clarify a point, feature or concept by describing it in more detail or revealing relevant facts about it	Medium to high	Question 2, Section A (2018) Kai is in a dispute with his landlord. The landlord refuses to repair the pipes in the bathroom and has declined Kai's requests to meet to resolve the matter. Kai has been advised that Consumer Affairs Victoria (CAV) is the most appropriate body to resolve this dispute. **Explain** one reason why CAV may not be the most appropriate body to resolve this dispute.
How	To specify a particular way, means or method	Medium	Question 2d, Section A (2018) See the examination for stimulus material. If the Commonwealth Parliament were to pass legislation allowing the commercial use of tanning units, **how** might section 109 of the Australian Constitution be relevant?
Identify	To state or recognise a feature or factor (and possibly provide some basic facts about it)	Low	Question 4a, Section A (2018) **Identify** two rights of victims in the Victorian criminal justice system.

TASK WORD OR COMMAND WORD	DEFINITION	DIFFICULTY	EXAMPLE QUESTION FROM PAST EXAMS*
Illustrate	To provide examples in order to better describe or explain a feature or concept	Medium	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	Low to medium	Question 5a, Section A (2019) See the examination for the stimulus material. Referring to committal proceedings, **justify** one reason for the Victorian court hierarchy.
Outline	To give a brief summary of the key features	Low	Question 2a, Section B (2018) See the examination for the stimulus material. **Outline** one role of the media in changing the law.
Provide	To give, supply or specify	Low	Question 1b, Section B (2018) See the examination for the stimulus material. Distinguish between mitigating factors and aggravating factors to be considered in sentencing, and **provide** an example of each in Bob's case.
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	Medium to high	Question 2, Section A (2019) See the examination for the stimulus material. In your view, **to what extent** does the composition of the Commonwealth Parliament affect its ability to be representative in law-making? Justify your answer with reference to the table above.
What	To specify a thing or things	Low	Question 5a, Section A (2018) Kylie is a professional sportsperson. She has commenced a civil proceeding in the Supreme Court of Victoria against her former agent for breach of contract. Her former agent has engaged legal practitioners to defend the claim. Who has the burden of proof in Kylie's case and **what** is the standard of proof in this case?
Who	To specify a person or people	Low	Question 5a, Section A (2018) See above for the stimulus material. **Who** has the burden of proof in Kylie's case and what is the standard of proof in this case?
Why	To provide a reason or explanation	Low	Question 7 (2017) See the examination for the stimulus material. Will there be a committal hearing in this case? **Why** or why not?

*Selected VCE Legal Studies examination questions (2010–2019) are reproduced by permission, © VCAA.

Source 2 Common VCE Legal Studies task words and command 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, you should 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 Source 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.
Stimulus material	Exam questions may include stimulus material, such as legislation, visual material or an extract from an article, or an actual or hypothetical scenario.
Task word or command word	Task words or command 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.

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.

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.

From ©VCAA Legal Studies Exams

Source 4 Examples of the common items that make up exam questions

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!

Study tip

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



Source 5 It is important to keep an eye on the clock during exams.

Tip 4 – Use the stimulus or scenario material

There are two sections to the VCE Legal Studies exam: Section A and Section B. The instructions on the Legal Studies exam for each section are important. In particular, the instructions state that for Section B questions, you must use stimulus material. You must do this even if the question does not specifically refer to the scenario or stimulus material. If you do not use the source material, you cannot get full marks for your responses in Section B.

For Section A questions, there may or may not be stimulus material or a scenario-based question. Some questions are stand-alone, which means that you answer them without reference to any stimulus material. For other questions that are attached to stimulus material, you must use that material. Sometimes the question specifically asks you to do so – for example, asking for an answer about 'this case' – but others are not as specific. To avoid any risk of losing marks, just remember the rule that if there is stimulus material, use the relevant bits in your answer.

Tip 5 – Practise questions with varying degrees of difficulty using the same key knowledge

Each of the key knowledge in VCE Legal Studies can be assessed in different ways, and sometimes to varying degrees of difficulties. For example, take one of the principles of justice. A question can be asked about fairness, but that question can be of low, medium or high difficulty.

The following three sample questions are examples of this in action.

QUESTION	LEVEL OF DIFFICULTY	HOW TO ANSWER
Q1: Describe the principle of fairness.	Low	• Provide a detailed account or summary of what the principle of fairness is and what it means • Likely to be worth about 3 marks
Q2: Explain how the principle of fairness could be achieved in this case.	Medium	• More detail needed than in the first question about the ways in which fairness could be achieved through a case • Answer must be more specific to the case, not just summarise what fairness means • Likely to be worth 4 to 5 marks
Q3: Discuss the extent to which the principle of fairness was achieved in this case.	High	• Consider both sides (arguments) as to whether fairness was achieved • Requires a detailed consideration of events • Likely to be worth at least 6 marks

Source 6 Sample questions and levels of difficulty

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)
- judgments from legal cases (also known as court decisions).

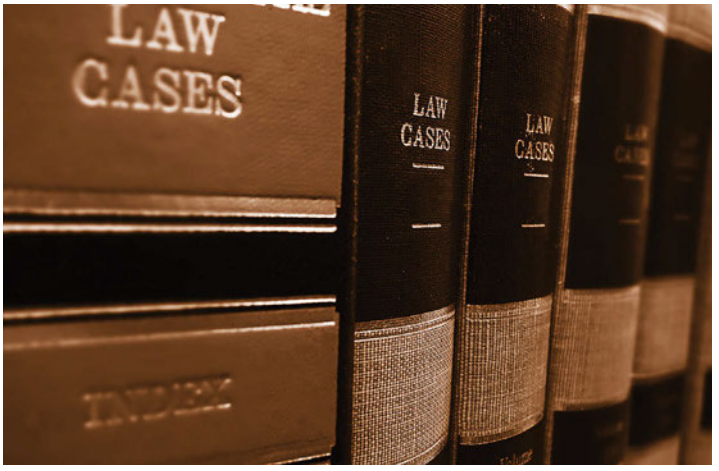
The following information will help you when reading and understanding legal citations. It will also help you cite legal documents correctly in your coursework and assessment tasks.

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** – the title that has been given to the statute; always written in *italics*
- **the year that it was made by parliament** – 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 (for example, Vic or Cth).



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

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

Amending Acts are a type of statute that amend (i.e. change or update) a statute that already exists. They are repealed (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 (change or update) those Acts. For example, the amendments might delete certain sections of the existing Acts, or change certain words or phrases, or add new sections.

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

This amending Act (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* stated that it would be repealed on 2 October 2018. That is because the changes it makes to various principal Acts took effect on 1 October 2018.

Study tip

If you are looking for an Act in a database (e.g. the Australasian Legal Information Institute (AustLII) database) and you can't find it in the list called 'Victorian current Acts', it might be an amending Act rather than a 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.

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!

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 (the Disability Amendment Bill) was presented in 2004 to 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** – 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 in which court a case was heard.

Examples of ways cases can be cited are as follows.

Example 5 – a civil case

Commonwealth v Tasmania **(1983) 158 CLR 1**

Parties | Year | Law report

- 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

DPP v Styles **[2017] VCC 96 (9 February 2017)**

Parties | Year | Court identifier | Date of judgment

- 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

Rules and regulations

The parliament can authorise other bodies to make regulations and rules. These are described as 'delegated legislation' or 'secondary legislation'. 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 is 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 look at what it 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 Becoming a lawyer is not the only career path available after studying law. Many other industries value a solid understanding and knowledge of the law.

What do lawyers do?

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

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 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.

Solicitors

Lawyers who see clients directly (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 practise 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 practise 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 to the bar and have a practising certificate. In Victoria a lawyer who wishes to practise 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.

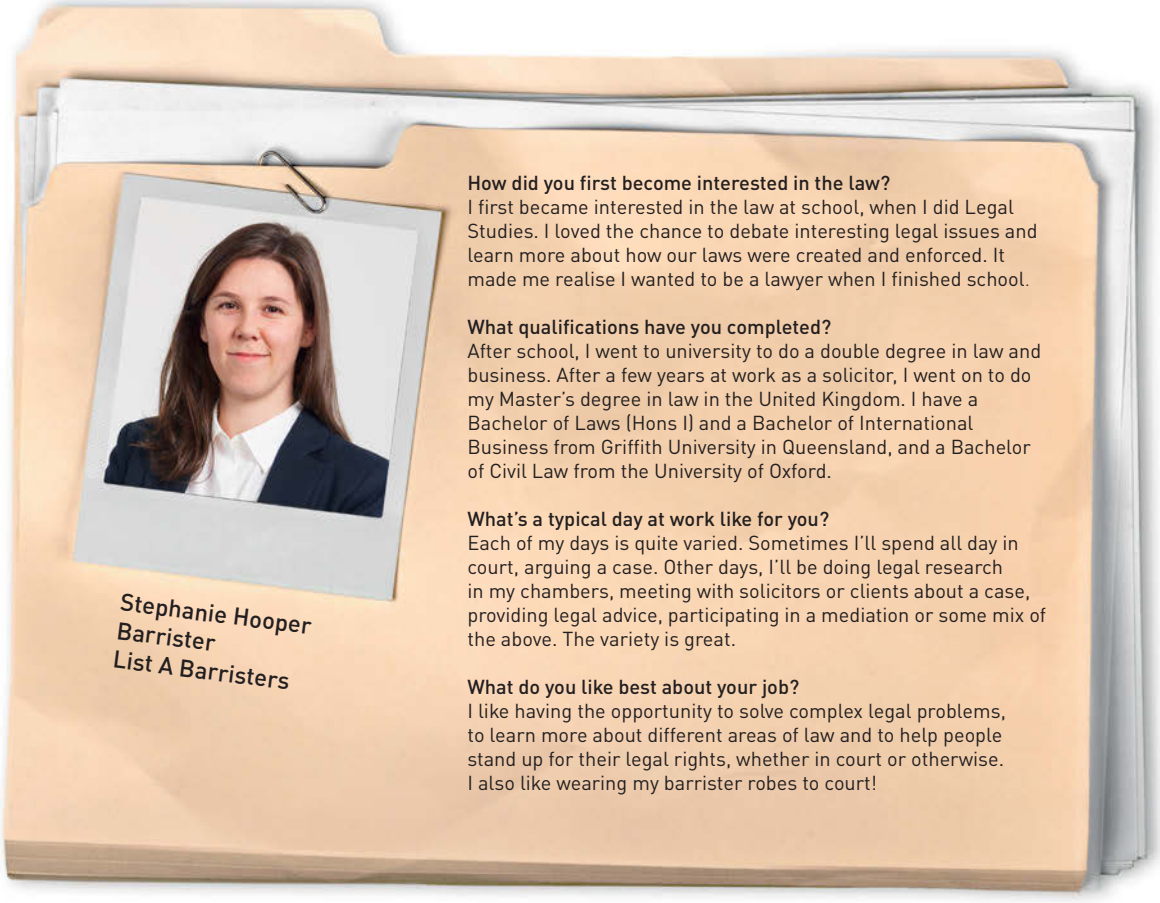
Unlike solicitors, all barristers practise as individuals, rather than as partners or employees of a law firm or company.

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) is not 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
- policy adviser
- legal analyst
- teacher
- politician
- court personnel
- paralegal
- document database specialist
- journalist
- legal editor
- conveyancer
- legal assistant
- legal recruiter
- mediator
- 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 one hand and a sword in the other, and has a blindfold over her eyes. Each of them is a symbol of justice. In Unit 3 of VCE Legal Studies, you will look at the meaning of justice in the Victorian criminal and civil justice systems, and how these systems aim to achieve justice.

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

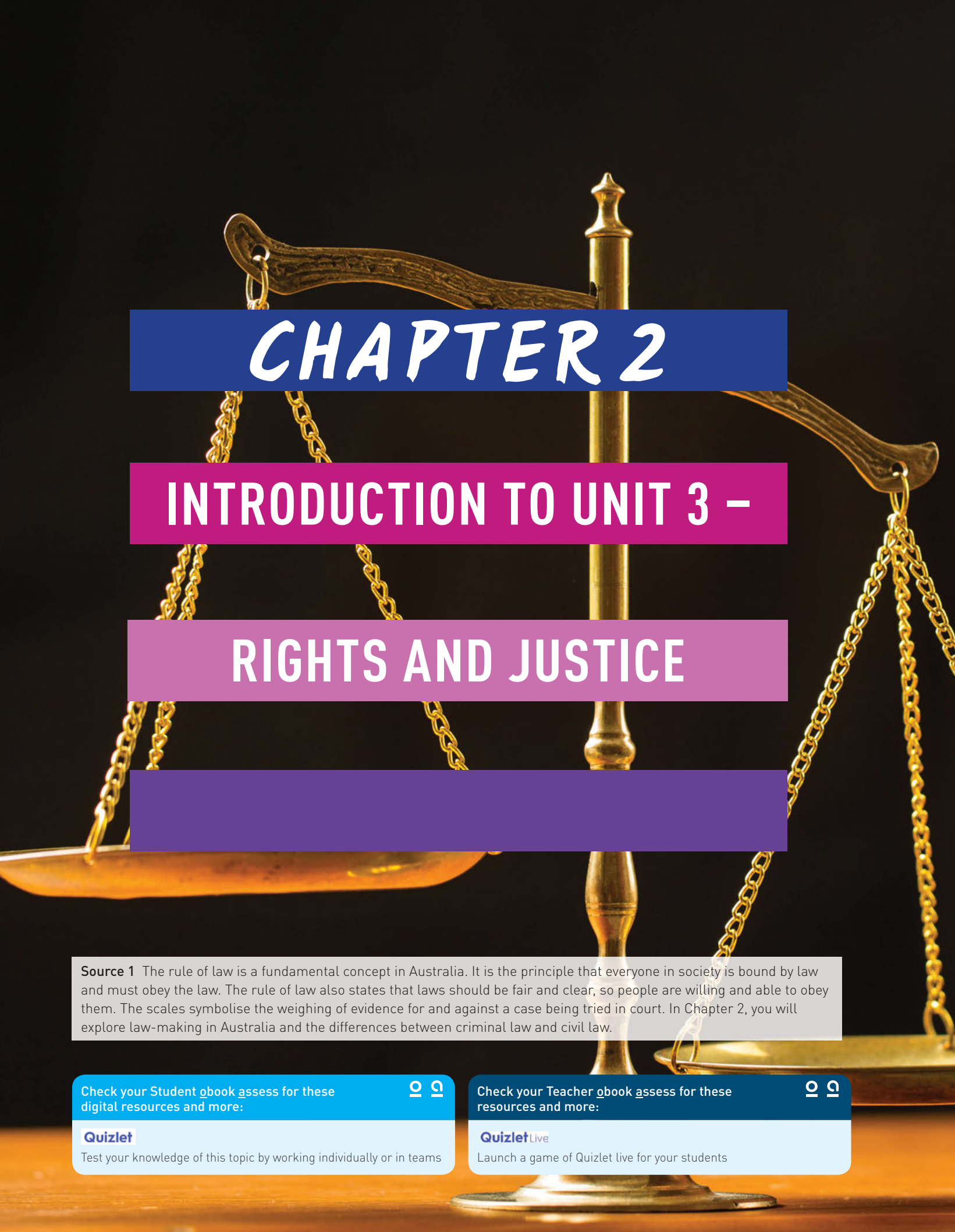
On completion of this unit you should be able to analyse the factors to consider when initiating a civil claim, discuss the institutions and methods used to resolve civil disputes and evaluate the ability of the civil justice system to achieve the principles of justice.

	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 law-making in Australia and the differences between criminal law and civil law.

Check your Student obook assess for these digital resources and more:

Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live

Launch a game of Quizlet live for your students



AIM

The aim of this chapter is to introduce students 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 legal system in Australia, including the Australian Constitution and law-makers
- 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 that has passed through parliament and has received royal assent (also known as a statute)

Australian Constitution a set of rules and principles that guide the way Australia is governed. 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

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

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 or parties (known as a coalition) 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

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 a 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) that are given the power to do so by the parliament. Also called 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 page vi.

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2.1 AN OVERVIEW OF THE AUSTRALIAN LEGAL SYSTEM

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

A 'legal system' is made up of a set of rules, procedures and bodies that make and enforce laws. **Laws** are legal rules made by a legal authority (such as **parliament** or the courts). Laws control the behaviour of people; the aim is to achieve **social cohesion** and help everyone to live together in a harmonious way by establishing boundaries of acceptable behaviour.

Although laws are established to achieve social cohesion, it is inevitable that disputes will arise and laws will be broken. Therefore, the legal system must also include procedures and bodies to decide an outcome when crimes are committed and disputes arise.

The Australian legal system consists of parliaments (which make laws), the courts (which make, interpret and enforce laws), and other bodies or authorities that ensure laws are followed (such as the police). The Australian legal system was formed in 1901 following the passing of the Australian Constitution.

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.

Australian Constitution
a set of rules and principles that guide the way Australia is governed. 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



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. It established the framework for our parliament and its law-making powers. In other words, the Constitution established our legal system.

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.

Source 1 Prior to colonisation in Australia and the creation of the Australian Constitution, Aboriginal and Torres Strait Islander peoples had their own complex system of laws and customs, which are still observed today.

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

Law-makers in Australia

The main types of law in Australia are statute law (made by parliament) and common law (developed gradually by courts, and 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. These houses are 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.

government
the ruling authority with power to govern, formed by the political party or parties (known as a coalition) that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

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

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

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

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

bill
a proposal to implement a new law or change an existing law

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 (also known as a statute)

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

Parliament also includes the Queen's representative: the Governor-General at the Commonwealth level and the governors 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.

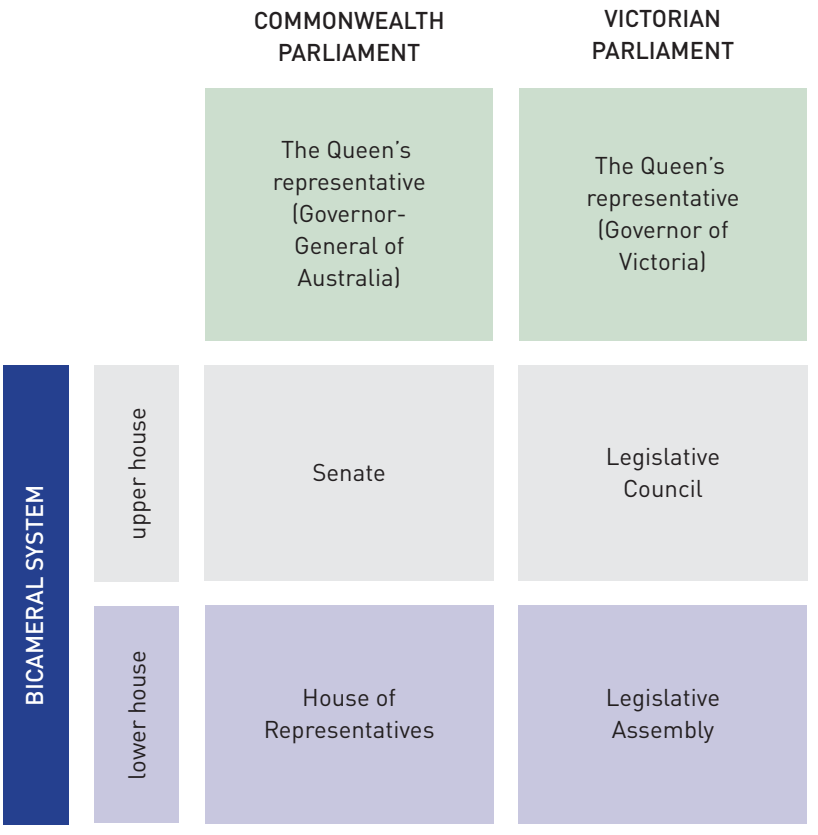
Statute law

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 to make regulations or rules; they are generally supervised by parliament. Examples include parking laws made by local councils and court rules made by the court.



Source 3 Both the Commonwealth Parliament and the Victorian Parliament are bicameral parliaments.

Courts

Courts are formal legal institutions that decide on criminal cases and civil disputes. When doing this, they interpret and apply the laws made by parliament. In Australia, the courts operate independently of parliament and the government, and are presided over by judges (and magistrates).

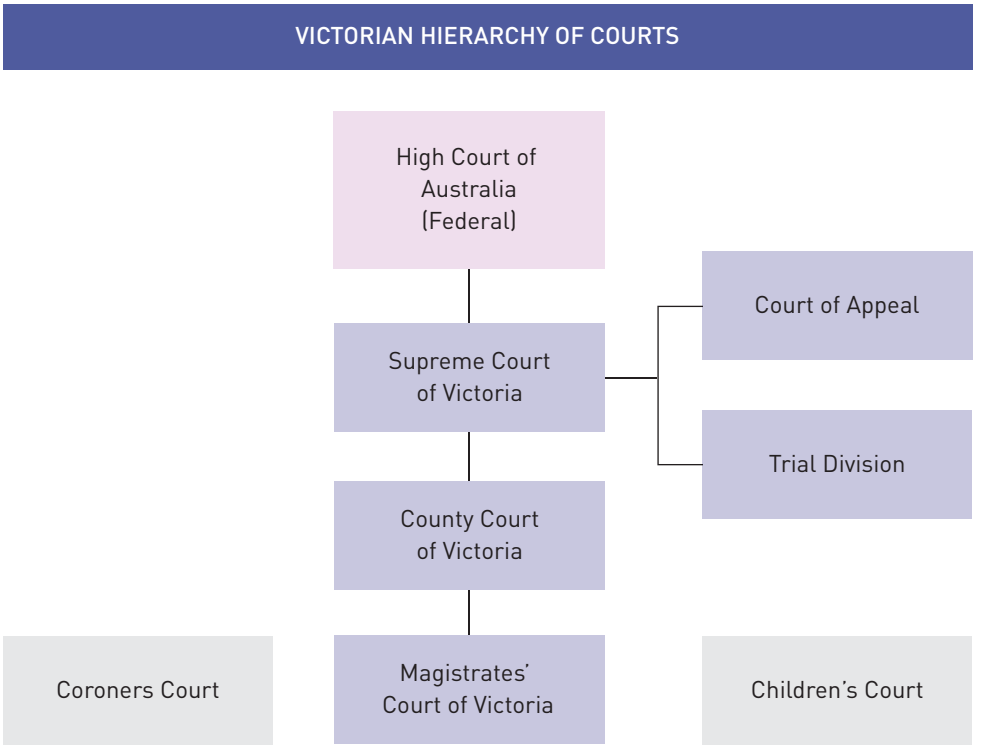
In Australia, some courts are Commonwealth (federal) courts and some are state courts. Generally, each court deals with issues that arise under its jurisdiction. The Commonwealth courts are the High Court of Australia, the Federal Court, the Federal Circuit Court and the Family Court. The Victorian courts 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.

Study tip

If you are not sure how to read Acts of Parliament, refresh your knowledge by reading Topic 1.4 in Chapter 1 (Legal Toolkit).

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



Source 4 The Victorian court hierarchy

Common law

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.

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**.

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

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)



Source 5 The High Court of Australia was established by the Australian Constitution. The High Court building in Canberra was opened by the Queen in 1980.

2.1 CHECK YOUR LEARNING

Define and explain

1. Define the terms 'government' and 'opposition'.
2. Distinguish between statute law and common law.
3. Did the High Court of Australia and the Commonwealth Parliament exist before the Australian Constitution? Explain your answer.
4. Why is Australia described as a democracy?
5. What do people mean when they say judges 'make law' when they interpret a statute?

Synthesise and apply

6. Decide whether 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** 2.1 Check your learning
- **Worksheet** The work of parliament
- **Weblink** The Australian Constitution
- **Weblink** Parliamentary Education Office fact sheets
- **Video** Why is Chapter 2 important?

2.2 CRIMINAL LAW AND CIVIL LAW

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

Criminal law

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

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

Criminal law is an area or body of law that protects the community by establishing and defining what crimes are. It also sets down **sanctions** (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 or plea 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 several 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

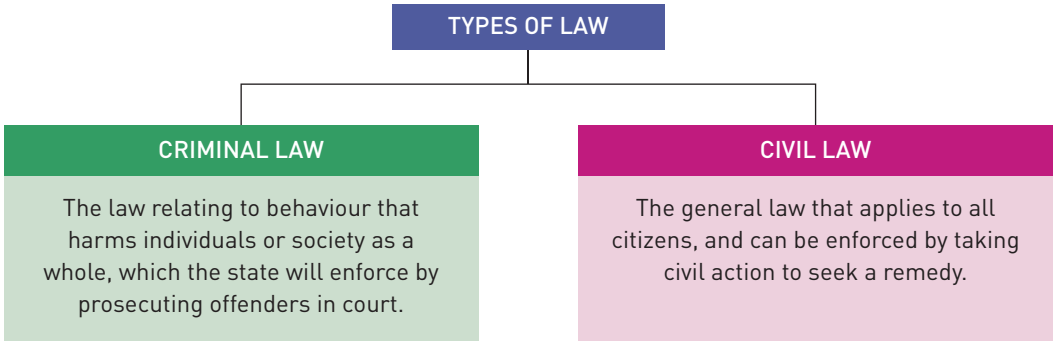
civil law
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes

civil dispute
a dispute (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

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 seek a remedy to return that person (known as the **plaintiff**) to the position they were in before their rights were infringed.



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, results in 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 results in both types of action, the two cases will be heard separately and may even 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 scenario involving Faruk Orman 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

ACTUAL SCENARIO

Civil action follows quashing of murder conviction

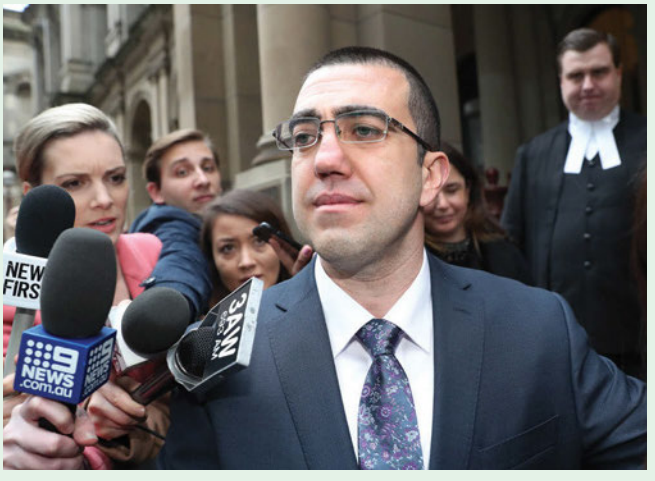
Orman v The Queen [2019] VSCA 163 (26 July 2019)

On 29 September 2009 Faruk Orman was found guilty by a jury in the Supreme Court of Victoria of the murder of Victor Peirce. He was sentenced to 20 years' imprisonment. Mr Orman's attempts to appeal to the Court of Appeal and the High Court were unsuccessful.

In July 2019 Mr Orman was released from prison after the Victorian Court of Appeal quashed his conviction. This decision followed the 2018 revelations that Melbourne barrister Nicola Gobbo had been acting as a police informant in obtaining criminal convictions against various people, while also acting as their barrister. A report found that Ms Gobbo had potentially undermined her clients' defences by providing information to the police and each of the convictions needed to be examined.

Study tip

If you choose to study the Lawyer X Royal Commission in Unit 4, come back to the case of Faruk Orman. It highlights the impact of Lawyer X's conduct on criminal convictions.



Source 2 Faruk Orman's case is a good example of how a criminal case and a civil case can arise out of the same set of facts.

In Mr Orman's case, Ms Gobbo improperly took active steps to ensure that a witness (Witness Q) who she acted for gave evidence against Mr Orman in the murder trial, while she was acting as Mr Orman's barrister in relation to other charges. The case against Mr Orman substantially depended on Witness Q's evidence. Mr Orman therefore suffered a miscarriage of justice, and his conviction was overturned.

In 2020 it was reported that Orman is suing Victoria Police for false imprisonment and is seeking an unspecified amount of damages for loss and harm suffered as a result.

Following the revelations about Ms Gobbo's conduct in acting as both a barrister for clients and a police informant, a royal commission was established in Victoria. Ms Gobbo was dubbed 'Lawyer X'. You can read more about this Royal Commission in Chapter 15.

2.2 CHECK YOUR LEARNING

Define and explain

1 Distinguish between a criminal case and a civil action.

2 What does criminal law aim to do?

3 Describe one way in which one set of facts may give rise to both a criminal case and a civil dispute.

Synthesise and apply

4 **a** Which parliament passed the *Crimes Act*?

b Access this statute from the Victorian Legislation website and describe three types of crimes. A link is provided on your obook assess.

5 Read the scenario *Orman v The Queen*.

a What crime was committed in this case?

b What sanction did the court impose?

c What were the circumstances which resulted in Mr Orman's conviction being overturned?

6 Conduct some research and find one case which involved both criminal law and civil law. Discuss your findings with your class.

Check your obook assess for these additional resources and more:

Student book questions
2.2 Check your learning

Worksheet
The differences between criminal law and civil law

Weblink
Orman v The Queen [2019] VSCA 163 (26 July 2019)

Source 3 Laws exist to ensure we live in a cohesive society.



2.3 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.

Study tip

The rule of law is referred to in page 5 of the Study Design. It underpins many of the legal principles you study in Units 3 and 4. You should try to refer to it in answers to questions where it is relevant.

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.

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.

ACTUAL SCENARIO

'Bring Jock Palfreeman home': Government pressures Bulgaria to allow Aussie to return

SBS News, 16 October 2019

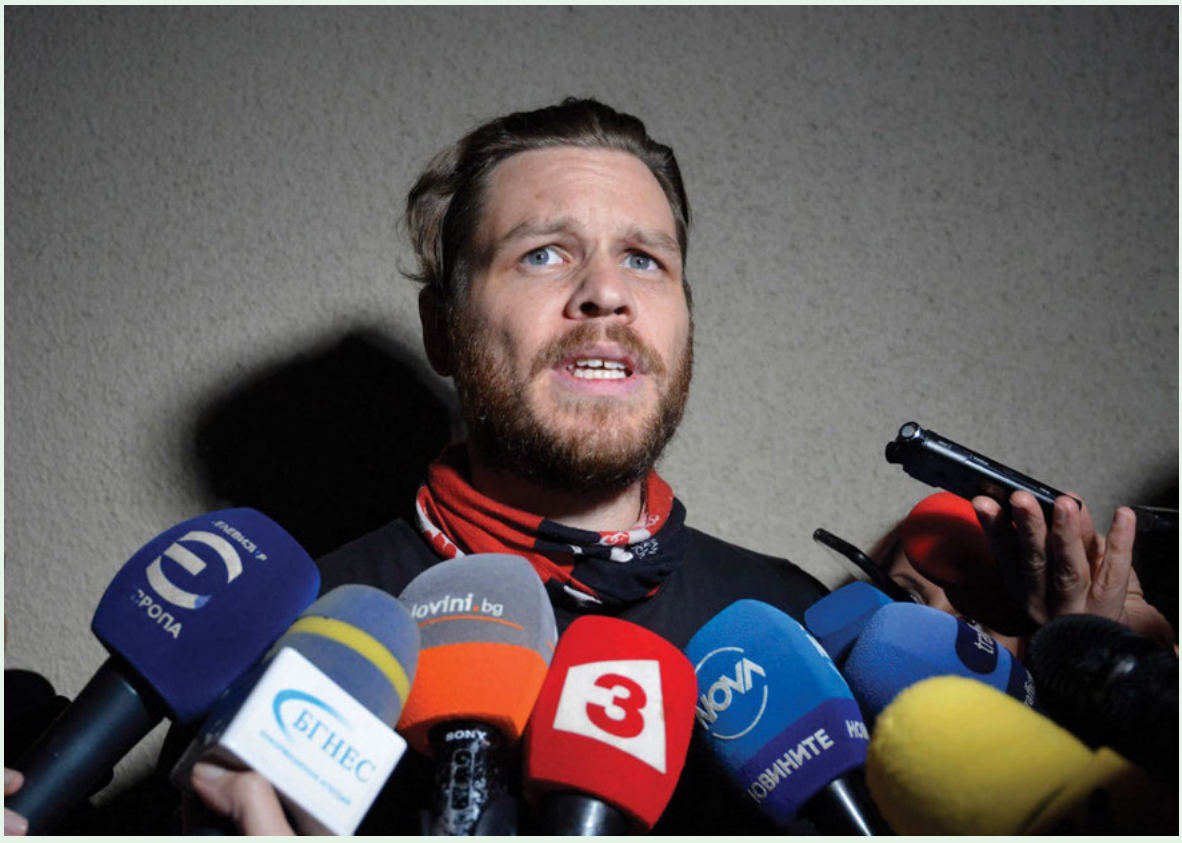
Foreign Minister Marise Payne has called on the Bulgarian government to allow Jock Palfreeman to return to Australia, expressing concern that the technicality keeping him in the country is outside its normal legal process.

The 32-year-old was sentenced to 20 years in jail for murder in 2009 and was granted parole in September, but was kept in immigration detention until 15 October and is barred from leaving Bulgaria.

Senator Payne said his release into the community is a positive step, but his family fears political interference could see him returned to prison ...

The minister also told the Senate she had raised Palfreeman's case with her Bulgarian counterpart twice, and also with a European Union representative.

'I stress that we respect the independence of the Bulgarian court and wish to see it make a decision according to the rule of law.'



Source 1 Jock Palfreeman has been held in detention in Bulgaria. The Australian Government has called on the Bulgarian Government to allow him to return home, referring to the rule of law.

2.3 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 scenario '"Bring Jock Palfreeman home": Government pressures Bulgaria to allow Aussie to return'.

a Explain what Senator Payne meant when she said she wished the Bulgarian court 'make a decision according to the rule of law'.

b Conduct some research and identify whether there have been any developments in this case.

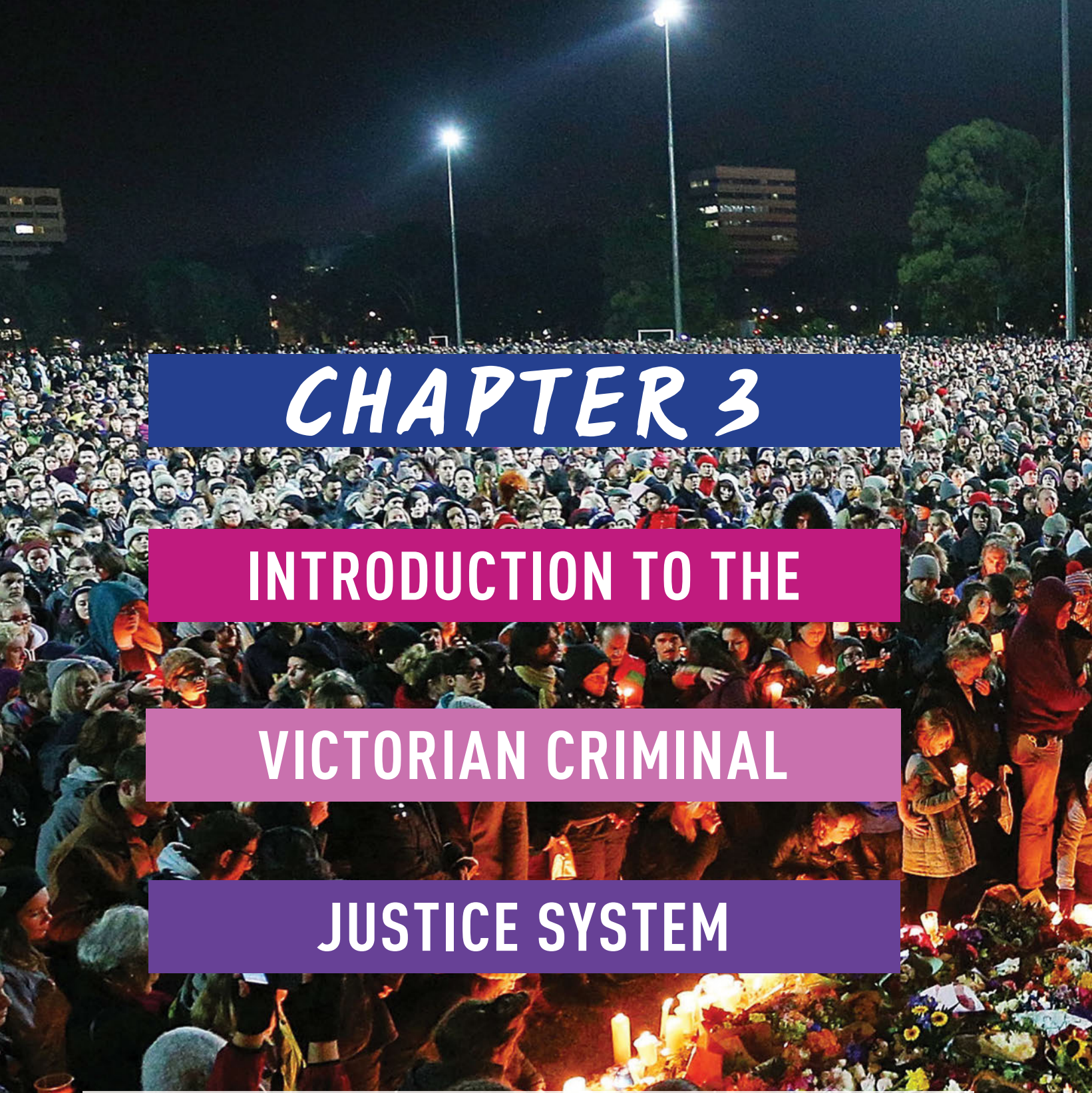
4 Conduct some research on the United States or the United Kingdom and identify some examples where the rule of law is discussed. Share as a class.

Check your obook assess for these additional resources and more:

Student book questions
2.3 Check your learning

Weblink
Rule of Law Institute of Australia

Video
How to incorporate the rule of law into your answer



CHAPTER 3

INTRODUCTION TO THE VICTORIAN CRIMINAL JUSTICE SYSTEM

Source 1 The Victorian criminal justice system is made up of a set of processes and institutions (such as the courts and the police) that investigate and determine the outcomes of criminal cases. In 2018 Melburnians rallied together to remember a woman murdered in Melbourne. In 2019 her murderer was sentenced to life in prison with a non-parole period of 35 years. Her murderer lost his appeal in 2020.

Check your Student obook assess for these digital resources and more:

Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive

Launch a game of Quizlet live for your students



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 their version of the facts is correct

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 an equal 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. This means that 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 that 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 the *Victims' Charter Act 2006* (Vic), which 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 page vi.

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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

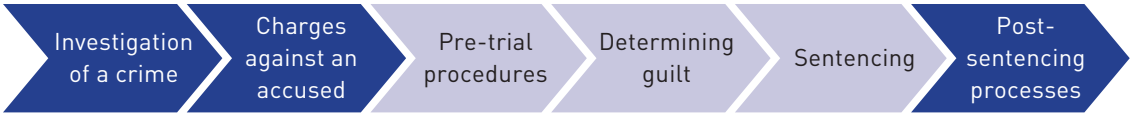
jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. verdict)

The **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 or pleaded guilty.

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

- investigating a crime (police investigations)
- charging the accused
- pre-trial procedures (for example, the parties attending pre-trial hearings before a magistrate or judge)
- determining guilt in a court hearing or trial (i.e. the **jury** or magistrate considering all the evidence and deciding whether the accused is guilty beyond reasonable doubt)
- sentencing (i.e. deciding the appropriate penalty)
- managing post-sentencing processes (such as overseeing 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 be learning about the three key stages shown in pale blue above.

Australia's criminal justice system

Australian Constitution
a set of rules and principles that guide the way Australia is governed. Its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

There is no single, unified criminal justice system in Australia. Each state has its own criminal justice system. This is because under the **Australian Constitution**, the Commonwealth Parliament does not have power to make laws about crime in general. That is left to the states, who have the power to maintain public order and protect citizens. Therefore, each state and territory in Australia has its own laws that establish:

- what is considered a crime
- the ways of determining criminal cases (i.e. the processes used to decide if someone is guilty)
- 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.

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 own constitutional powers in some way (such as avoiding customs duties, because customs is a Commonwealth power). These are known as **Commonwealth offences**. Commonwealth offences have expanded over time and there is now a great deal of overlap between Commonwealth and state crimes. Some crimes, such as drug dealing, could be prosecuted by either Commonwealth or state police.

Commonwealth offences
crimes that break a law passed by the Commonwealth Parliament

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:

- engaging in a terrorist act
- people smuggling
- espionage crimes (such as communicating information concerning national security to another foreign country).

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






Source 2 In Australia cyber crime, drug dealing and terrorism are all examples of Commonwealth crimes.

Criminal cases in Victoria

In Victoria the main 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 at the time of the offence) has been accused of committing a crime.

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 is a good idea to come back and review this chapter when you start Unit 4.

Parties to a criminal case

A criminal case involves two parties:

- the state (represented by a **prosecutor** (also called the 'prosecution') on behalf of the people, with the authority of the Crown)
- the accused (the person or organisation alleged to have committed a crime).

The victim is not a party to a criminal case and does not bring the court action.

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

The state

In Victoria the **Office of Public Prosecutions (OPP)** works with the **Director of Public Prosecutions (DPP)** and 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.

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

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

The accused

As you have learnt, 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 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 case on the following page is an example of a company charged with an offence relating to workplace health and safety.

ACTUAL SCENARIO

Company sentenced in relation to workplace safety

DPP v Bradken Resources Pty Ltd [2019] VCC 1053 (10 July 2019)

In July 2019 after a 13-day trial in Wangaratta before a jury, a company was found guilty in the County Court for failing to provide and maintain a safe plant or system of work.

The company operated a foundry in Wodonga. In July 2014 an incident occurred which led to the death of one of its employees. The employee was seated in the cabin of a loader which was used to move extremely hot castings. Evidence was given that a casting rested on the employee and he was charred by fire. The jury found there was a risk to the health and safety of employees who operated the loader during the 'knocking-out process', and those risks could have been reduced to ensure employees were not as close to the castings during that process. The company was fined $650 000 for failing to provide and maintain a safe plant.



Source 3 In 2019 a company was found guilty by a jury for failing to provide and maintain a safe plant. The company was fined $650 000.

3.1 CHECK YOUR LEARNING

Define and explain

1 Explain the meaning of the term 'criminal justice system'.

2 Is there one single unified criminal justice system in Australia? Explain.

3 Identify three persons or organisations that can prosecute a case in court.

Synthesise and apply

4 Read the scenario *DPP v Bradken Resources Pty Ltd*.
- **a** Who were the parties in this case?
- **b** Describe the nature of the offence said to have been committed.
- **c** Why was a jury required in this trial?
- **d** Identify the sanction imposed and describe two purposes of that sanction.

5 Visit the Australasian Legal Information Institute (AustLII) website (a link is 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

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').

Justice is a word you often hear when people talk about our legal system – 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 are common sayings such as 'justice delayed is justice denied', 'justice prevailed', and 'justice was (not) served today'.

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

Defining justice

Justice is difficult to define as it means different things to different people. Therefore, 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 case, it is helpful to consider the following three principles of justice:

- fairness
- equality
- access.

The three principles can be used to determine whether the criminal justice system as a whole is achieving its purpose. When looking at a case, legal principles or law, consider: are fairness, equality and access achieved?

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.



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.

Fairness

Fairness is the first principle of justice. One 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
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that 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

In the criminal justice system, fairness means having fair processes and a fair hearing, giving parties an adequate opportunity to be heard. This means that:

- people should have their case heard in an impartial and objective manner and without fear or favour
- people should have the opportunity to know the facts of the case and the case that is put against them
- the court or tribunal processes should allow all parties to present their case and to understand the other side's case
- the court or tribunal processes should be clear, structured and free from bias (for example, one party is not favoured over the other by being able to present their case and the other is not).

If laws are properly and fairly applied, and there is procedural fairness in each criminal case, then the **rule of law** will be upheld.

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

Consider the right to a fair trial from the perspective of both parties (the prosecution and the accused) in a criminal case:

- The prosecution should have an opportunity to know what evidence the accused will use in support of any defences they have (such as knowing in advance what witnesses the accused will call). They should also have the opportunity to present the case against the accused, and have the matter heard before a judge or magistrate who will not take sides.
- 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.

The right to a fair trial is not just limited to the trial itself. It extends to all the processes within the criminal justice system, as discussed in the High Court case of *Jago v District Court of NSW* below.

ACTUAL SCENARIO

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 – eight years after the last crimes were said to have been committed. The case went to the High Court on appeal because Jago argued that the charges should be stayed permanently due to the delay in the time it took for the case to go to trial.



Source 2 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 …

Fairness does not necessarily mean having the same type of hearing or sentence in a criminal case for every single crime of the same nature. Each case and circumstance is different, so fairness does not mean the same outcome for everyone. Fairness is not about the sentenced imposed; it is about the processes used to ensure a proper outcome. For example, as you will learn in Chapter 4 as part of sentencing, there are some factors specific to each case that may mean that a harsher, or less severe, sentence should be imposed.

In Chapters 4 and 5, you will consider whether the criminal justice system achieves fairness. Try to look for some of these features when determining whether something is fair:

- the time it takes for a criminal case to be heard and completed, and whether any delays have occurred (delays can lead to unfairness for all parties)
- the availability of legal representation for an accused and for victims (for example, if an accused does not have legal representation, this could lead to them presenting their case poorly)
- the opportunity for the accused to present their case and know the evidence that will be brought against them, and the opportunity to **appeal** (i.e. review) a decision made
- whether the accused and victims can understand legal processes and terminology, and have adequate assistance where necessary (if they do not, then they will not be able to fully participate in the hearings). In some cases this may require the judge to provide some assistance, such as to self-represented accused people who may not understand processes
- whether laws and court rules have been properly applied
- whether people have been treated impartially and without fear or favour (including victims). This means the judge must not become an advocate for a party and must remain neutral at all times.

Study tip

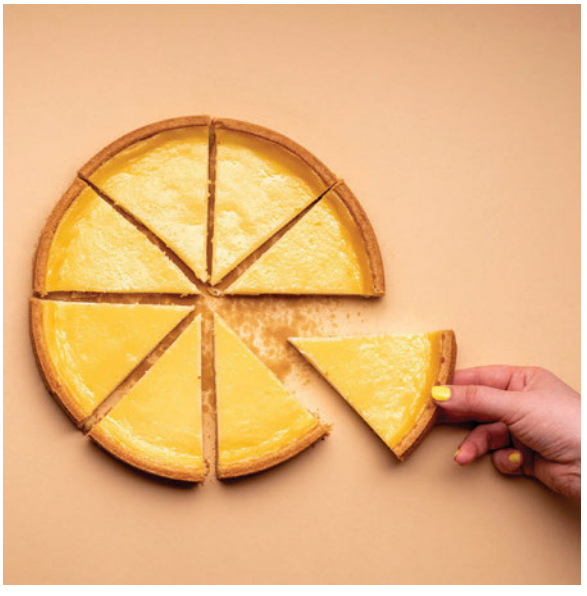
Try to use words other than 'fair', 'fairly' and 'fairness' when discussing 'fairness'. You can demonstrate how something is fair or unfair by explaining what happened and then using words or phrases such as 'unreasonable', 'bias', 'difficult to understand', 'opportunity to present their case', etc.

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

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 in general, 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 3 Does equality necessarily mean that everyone gets the same amount of pie?

In the criminal justice system, equality is about how a person is treated in a case. It requires all people to be treated equally before the law, with an equal opportunity to present their case. 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 **discrimination**, and the persons who make the decision should be impartial. Equal application of the law, and equality in processes, uphold the rule of law.

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.

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

bias
inclination or prejudice for or against one person or group, especially in a way considered to be unfair

discrimination
the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or gender identity). Discrimination can be direct or indirect

Study tip

In your notes, create a page for each principle of justice.

- 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.

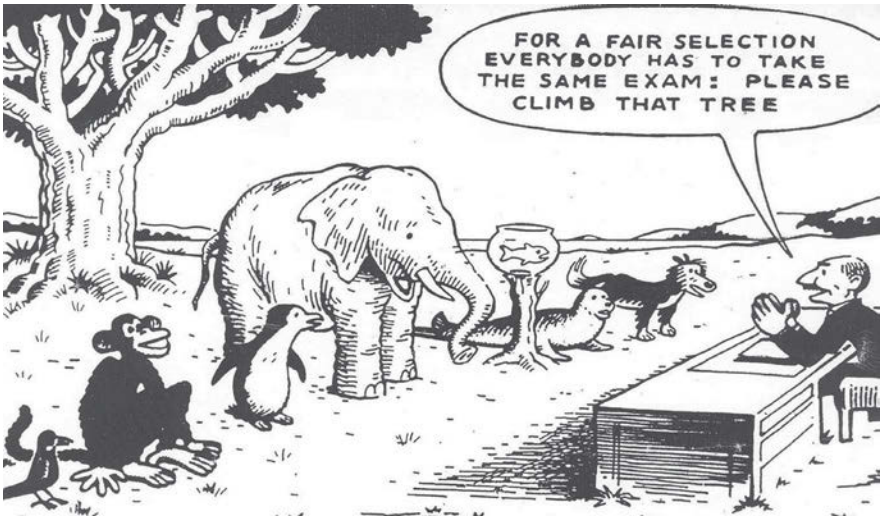
However, this does not mean that people are treated the same. Sometimes people need to be treated differently to achieve equality and fairness. If everyone were to be treated the same, this may lead to unfairness. For example, what would happen if the criminal justice system only supplied written documents to the accused, regardless of whether they had impaired vision – would that be fair?

Parties must have a reasonable opportunity to put their case forward in conditions that do not place them at a disadvantage compared to their opponent – this can often happen in cases where one party is represented and the other is not.

There is some overlap between fairness and equality, and you may sometimes encounter a legal scenario that is both fair and equal, or both unfair and unequal. For example, if an accused person does not have the ability to pay for legal representation it may be unfair because they may not be able to understand the court processes and procedures as well as experienced prosecutors. This could also be seen to be unequal because they do not have the same legal representation as the prosecution because of their socio-economic status.

In Chapters 4 and 5, you will learn more about the ways in which the criminal justice system tries to achieve equality. Try to look for some of these features when determining whether equality has been upheld:

- the use of a judge and jury when deciding criminal cases
- the way differences are treated and recognised (such as cultural, socio-economic and religious differences)
- whether the system disadvantages certain groups in society (such as vulnerable witnesses, people with mental health problems or people who are unable to understand English)
- the availability of legal representation to 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
- whether the judge undertook steps to ensure the playing field was level – for example, by explaining certain processes to the weaker party, or whether the judge went too far and advocated for one party or the other
- whether different processes were adopted to ensure certain groups are accommodated – for example, children
- the extent to which laws apply equally to everyone.



Source 4 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 will be fair?

Access

Access is the third principle of justice. In simple terms, access is the ability to use something, or gain access to something. It is generally accepted that members of society should be able to access education, health, food and shelter, and be able to freely access information or enter public areas.

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

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 use bodies and institutions that provide legal advice, education, information and assistance, and receive from them information about criminal cases, processes and outcomes. Therefore, access is not only about physical access (such as being able to attend court), but also about access to information such as information about rights, processes, legal cases, and people that can help them.

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 5 Access to the criminal justice system means all people should be able to use legal bodies and institutions for help.

Sally's inability to access the legal system

HYPOTHETICAL SCENARIO

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 get some protection from her ex-partner, but she is unable to afford their fees.

Sally's impairment, health and socio-economic status make 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. Try to look for some of these features when determining whether access has been achieved:

- the availability of a range of means used to finalise criminal cases, such as plea negotiations and sentence indications



Source 6 Access in the criminal justice system can relate to the costs associated with defending a criminal case or accessing information about legal rights.

- 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, including whether hearings are conducted as open hearings, and judgments and reasons for decisions are publicly available
- the information available to the accused, victims and the community about criminal processes, rights and the outcome of criminal cases
- the formalities associated with a hearing or trial.

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 Is access to information limited to access for the parties to a criminal case? Justify your answer.

Synthesise and apply

4 Identify three different people who have an interest in a criminal trial. How might each of them define a 'fair trial'?
5 Imagine you are a teacher in a classroom. Describe a situation where you might be seen to be treating students both unfairly and unequally.
6 Read the scenario '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 4. With a partner, consider 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?
- **Video** The principles of fairness, equality and access
- **Video worksheet** The principles of fairness, equality and access

3.3 KEY CONCEPTS IN THE VICTORIAN CRIMINAL JUSTICE SYSTEM

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.

In this topic you will learn about four key concepts in the Victorian criminal justice system. These are:

- 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 offences

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

Summary offences are minor criminal offences that are generally heard in the Magistrates' Court. The final hearing at which both parties will put their case before a magistrate is known as a hearing (as opposed to a trial in the County Court or Supreme Court). They are less serious types of crime, 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 2018–19 is set out in Source 1 below. As shown, most criminal cases heard each year in Victoria – more than 90 per cent – are heard in the Magistrates' Court, which hears summary offences.

COURT	NUMBER OF CRIMINAL CASES FINALISED IN 2018–19	PERCENTAGE OF ALL CRIMINAL CASES FINALISED IN 2018–19
Magistrates' Court	177 588	98.7
County Court	2273	1.2
Supreme Court (Trial Division)	120	0.07
Total	**179 981**	

Source: Annual Reports of the Magistrates' Court and County Court 2018–19, and Supreme Court, 2017–19.

Source 1 Number of criminal cases finalised in 2018–19 in the main Victorian courts

Indictable offences

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

Indictable offences are serious criminal offences heard by a judge (and 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 (such as murder or manslaughter), sexual offences, some theft crimes and drug trafficking.

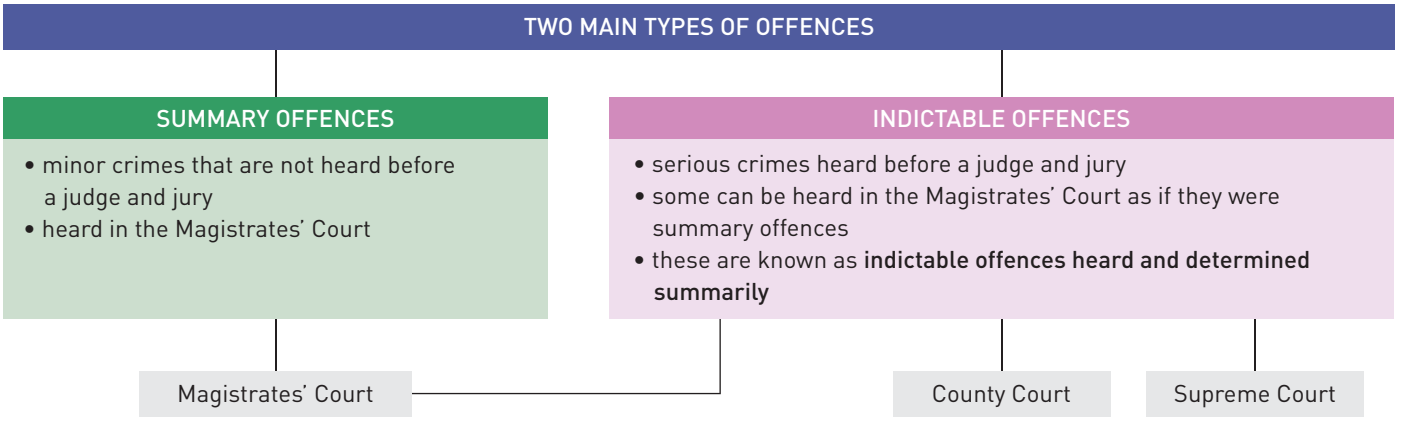
As a general rule, offences in the *Crimes Act 1958* (Vic) are indictable offences unless the offence is stated in the Act to be a summary offence.

Indictable offences heard and determined summarily

indictable offence heard and determined summarily
a serious offence that can be heard and determined as a summary offence if the court and the accused agree

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

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 less than if it were heard as an indictable offence. The court, however, must agree that the offence is appropriate to be heard summarily, and the accused must also agree.



Source 2 The two types of offences: summary offences and indictable offences

The main differences between summary and indictable offences are set out in Source 3 below. It is important to familiarise yourself with the differences.

	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
Entitlement to a 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 and indictable offences

The burden of proof

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 must 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 – for example, 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.

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 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**. 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.

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 their version of the facts is correct

The presumption of innocence

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 innocent (not guilty) until the charge has been proved beyond reasonable doubt.

The presumption of innocence is an 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 imposing the burden of proof on the prosecution. That is, the prosecution must 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.

The presumption of innocence was discussed widely in relation to the #MeToo movement; a global movement against sexual harassment and sexual assault that went viral from October 2017 onwards.

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

The hashtag #MeToo was used on social media to demonstrate the worldwide prevalence of women who had been subjected to sexual assault and/or harassment after actor Alyssa Milano shared a tweet encouraging women to talk about their experiences using the phrase 'Me too'. The movement gained momentum after sexual abuse allegations were made against powerful Hollywood movie producer Harvey Weinstein, and actors including Jennifer Lawrence, Gwyneth Paltrow and others responded to Milano's tweet. Harvey Weinstein was ultimately found guilty of sexual offences and jailed in 2020. Backlash about the movement from certain groups globally followed, with some suggesting that the movement jeopardised the presumption of innocence if an accusation of sexual assault or harassment was made. The scenario below discusses the movement and the backlash.

ACTUAL SCENARIO

Presumption of innocence and the #MeToo backlash

Jane Gilmore, *The Sydney Morning Herald,* 23 October 2018

Innocent until proven guilty!

It's the catchcry of the #MeToo backlash. If a woman (or three women, or 20 women) accuse a man of sexual assault or harassment, we should presume he is innocent (and therefore the women are lying) because everyone is entitled to the presumption of innocence.

Yes, they are entitled to that in a criminal trial. Because in a criminal trial all the resources of the state are lined up against you and the state can put you in jail. The presumption of innocence and a high standard of proof were built into our criminal justice system hundreds of years ago to make sure the state could not abuse the power it has over its citizens.

An accusation on Facebook can't put a man in jail. A tweet or a hashtag or an Instagram post can't deprive someone of their liberty for years on end. One woman, even a group of women, cannot impose fines and community service orders or demand that a man present himself to police and parole officers on a regular basis or face going back to prison. Only the criminal justice system can do that, which is exactly why the presumption of innocence only applies in the criminal justice system.



Source 4 A tweet from actor Alyssa Milano, a strong supporter of the #MeToo movement

It doesn't apply to social situations, job interviews or casting for TV shows. And it can't be co-opted by men to defend each other from the social consequences of their poor choices.

The presumption of innocence is the most basic principle underpinning our system of justice. In an imperfect world, it is our strongest weapon in redressing the power imbalance between the state and an individual it accuses of committing a crime. We also place the burden of proof on the state and require the state to prove its case beyond reasonable doubt. The standard we demand for a criminal trial, however, was never meant to be imposed on how we behave in social situations.

...

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 (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 (such as where the judge applied the wrong law).

3.3 CHECK YOUR LEARNING

Define and explain

1 Provide 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 Conduct some individual research on the #MeToo movement that spread worldwide from October 2017, the subsequent discussion about the presumption of innocence and whether the movement jeopardised that presumption. Weblinks have been provided on your obook assess to help with your research.

a Once you have completed your research, come together as a class. Form a line and position yourselves where you land in relation to the presumption of innocence in the #MeToo movement: students who strongly disagree the movement jeopardises the presumption will stand on one end of the line, and students who strongly agree the movement jeopardises the presumption will stand at the other end. If you fall somewhere in between, position yourself along the line to represent your point of view.

b As a class, conduct a respectful and informed debate. Support your point of view using information from your research where possible.

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

Weblink
Presumption of innocence and the #MeToo movement

Weblink
#MeToo exposes legal failures, but 'trial by Twitter' isn't one of them

Weblink
Whatever happened to the presumption of innocence?

3.4 THE RIGHTS OF AN ACCUSED

The protection and promotion of human rights is an important part of Australia's social and democratic systems, and an important part of our legal system. A number of human rights are available to all Australians. These include:

- the right to freedom of political expression
- the right to 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 other 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

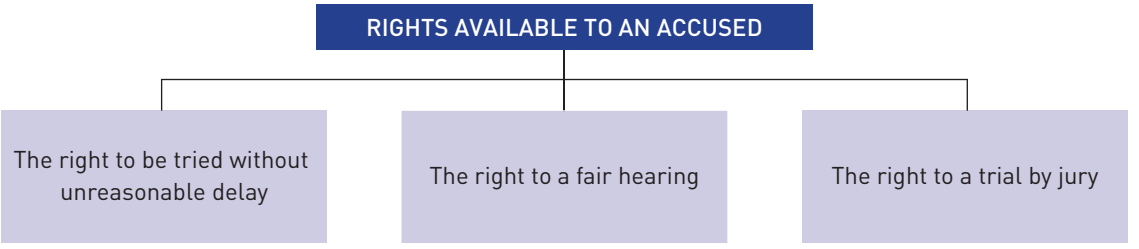
international treaty
a legally binding agreement between countries or intergovernmental organisations, in which they undertake to follow the obligations set out in the agreement and include them in their own local laws (also known as an international convention)

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*, published in 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, there are other rights contained in other statutes available to an accused. Three of the rights available to an accused are shown in Source 1, and are discussed in more detail in this topic.



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. You can learn other rights, but the three rights in Source 1 are the ones you **must** know.

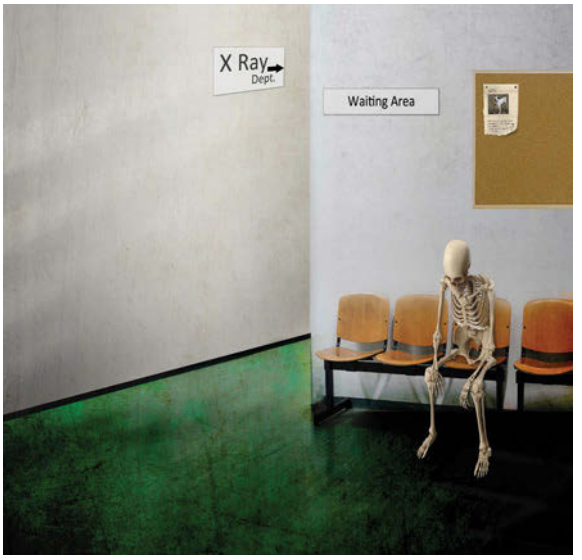
The right to be tried without unreasonable delay

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 convictions 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. For example, it would be reasonable for the prosecution to need more time to prepare for a case involving multiple crime scenes, multiple crimes and multiple accused people with few or no witnesses, as opposed to a case where there was a single incident with multiple witnesses.

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. Therefore, people should not be held for an unreasonable amount of time while they are awaiting trial.



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 reasonable.

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) – sections 21 and 25

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*, in which Kelly Gray was charged with a number of indictable offences arising out of an incident 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 the accused in this situation, where the Crown had failed to guarantee a timely trial, was to release him on bail.

Did you know?

So far, Victoria and Queensland are the only states in Australia to have adopted a formal charter of human rights. Victoria was the first to adopt one in 2006 and was followed by Queensland in 2019. The ACT also has a statute protecting many human rights.

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.

In 2020 many criminal trials were delayed or suspended as a result of the rapid spread of the novel coronavirus (COVID-19). This was seen to be a reasonable measure to take to ensure the health and wellbeing of all involved in criminal trials, but there were concerns held by many of the impact these delays would have on the parties and the courts (who would ultimately have a backlog of trials to determine).

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, 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 3 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) – section 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 of the most important cases discussing this right was the High Court case of *Dietrich v The Queen*.



Source 4 Olaf Dietrich successfully appealed his conviction on the grounds that he was not provided with legal representation and therefore did not receive a fair trial.

High Court orders retrial

ACTUAL SCENARIO

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. As a result, a court can now stay proceedings until the accused has an opportunity to get legal representation.

The right to trial by jury

A trial by jury is where a person's peers within the community decide the outcome of the case – i.e. in a criminal case, whether or not the accused is guilty. 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.

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.

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.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) – section 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 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'.

For Victorian indictable offences, the *Criminal Procedure Act 2009* (Vic) requires a jury to be empanelled where the accused pleads 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) sets out the requirements in relation to 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(5)(b) 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 5 A summary of three rights of an accused



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.

3.4 CHECK YOUR LEARNING

Define and explain

1 **a** Describe three rights available to an accused in a criminal proceeding.
   b Explain any exemptions or exceptions that apply to each right.
2 How does a right to a trial by jury for an indictable offence uphold equality?
3 What is meant by the term 'unreasonable delay', and what delays may be considered 'reasonable'?

Synthesise and apply

4 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.
5 In *Gray v DPP*, how did Justice Bongiorno attempt to remedy the fact that there may not be a timely trial?
6 Read the scenario *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. Ensure you record the source of the answer (for example, from the court judgment).
   e Share the results of your research with the other groups in your class.

Analyse and evaluate

7 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.
8 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.

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

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

3.5 THE RIGHTS OF VICTIMS

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

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

Victims' Charter
the *Victims' Charter Act 2006* (Vic), which recognises the impact of crime on victims and provides guidelines for the provision of information to victims

The rights of victims are recognised by several 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.

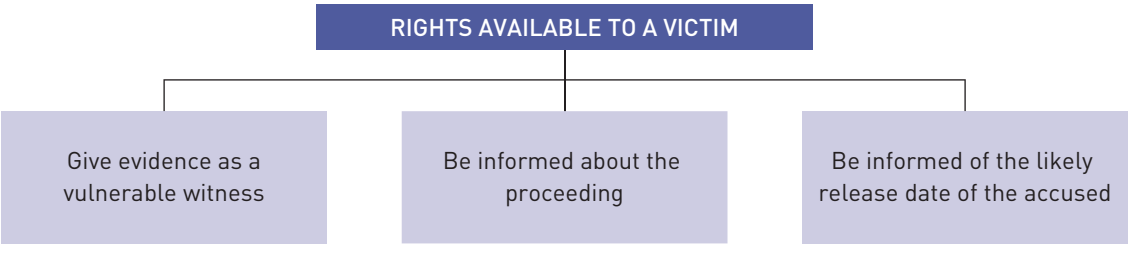
The Victims' Charter sets down principles such as respectful treatment of victims, respect for victims' privacy, and ensuring victims are given information about any criminal case brought to court. However, a breach of those principles (rights) does not entitle the victim to take civil action to enforce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

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 explain each of the rights. You can learn more than these three, but you **must** know the ones in Source 1.

In addition to the principles contained in the Victims' Charter, several 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.



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 at risk. This might be a child, a person who has a cognitive impairment, or the 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**. The term 'vulnerable witness' is not defined in the *Criminal Procedure Act* or in other statutes. However, children,

people who suffer from a cognitive impairment, and people who have been a victim of sexual offences and domestic violence generally fall within the category of vulnerable witnesses. These people are particularly at risk if they give evidence: because of their circumstances they may feel uncomfortable or distressed, embarrassed or intimidated (and, as a result, their evidence may be jeopardised), or they may suffer secondary trauma as a result of having to describe what happened. The laws therefore provide some protections to them for when they give evidence.

The main protection available under the *Criminal Procedure Act* for vulnerable witnesses is for alternative arrangements to be put in place when the witness gives evidence. These alternative arrangements are described below.

Did you know?

Victoria 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.

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:



Source 2 A witness may give evidence from a place other than the courtroom by means of closed-circuit television. This may occur if they were witness to obscene, indecent or threatening language or behaviour in public.

- 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.

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.

Other protections available

In addition to the alternative arrangements for giving evidence that are available above for witnesses in certain cases, there are two other main protections for vulnerable witnesses.

- A court can declare at any time that a witness is a protected witness in criminal proceedings for a sexual offence or 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. If a declaration is made, the protected witness must not be cross-examined by the accused (which involves questioning the witness about his or her story).

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 some people who cannot afford a lawyer

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

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.

- Special protections are 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, and 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.

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.

Source 3 A summary of protections available to vulnerable witnesses

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.

In the following scenario, four complainants have sought different types of alternative arrangements when giving evidence against an accused person.

HYPOTHETICAL SCENARIO

Barry's complainants wish to give evidence in the courtroom

Barry has been charged with a number of sexual offences, alleged to have been committed against four women between January 2015 and August 2016.

Barry is an artist in a local circus. The offences were alleged to have been committed while Barry was performing in the circus. The complainants are four women who also worked

within the circus. The women claim that Barry assaulted them after the circus shows while they were having after-show drinks.

Barry denies the allegations and has pleaded not guilty to the charges. The four complainants are expected to give evidence against Barry, as are other circus performers.

Because the criminal charges against Barry are charges for a sexual offence, the court may direct that alternative arrangements be made for the giving of evidence by a witness. Where the witness is the complainant, they will automatically give evidence by closed-circuit television unless they do not wish to do so and the prosecution consents to them giving evidence in the courtroom.

In Barry's case, the complainants have told the court that they want to sit in the witness box in the courtroom, and do not wish to give evidence via video link. One of the complainants, however, wants to sit behind the screen while giving evidence. The other three complainants have informed the court that they do not wish to sit behind the screen and are prepared to be in the direct line of vision of Barry while in the witness box. One of the complainants has requested that she have a support person available when giving evidence.

To protect the witnesses, the court has ordered that the hearings be closed to the public and the media while the complainants give evidence. The court has also ordered that the lawyers wear plain clothes and not stand while the witnesses are giving evidence. Each of the complainants will give evidence and be cross-examined by Barry's lawyer.

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 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.



Source 4 Victim services agencies include the police, the DPP and the Victims of Crime Commissioner.

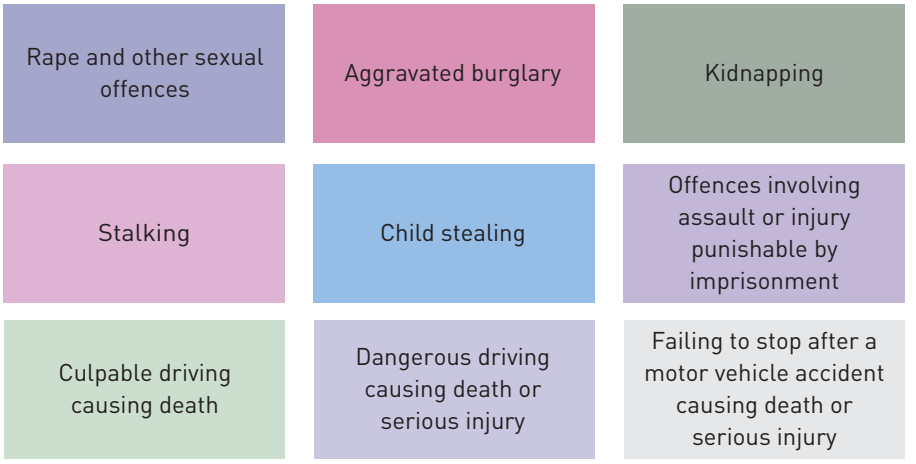
The victim must also be told that they are entitled to attend any court hearings.

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

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

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)

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.



Source 5 Criminal acts of violence

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

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 are also available to a victim on the Victims Register, including the right to know the length of the 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.

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*
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 6 A summary of three rights of victims

3.5 CHECK YOUR LEARNING

Define and explain

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

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

Synthesise and apply

3 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, or to persons with a vulnerability.

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

d 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.

5 Read the scenario 'Barry's complainants wish to give evidence in the courtroom'. Highlight or circle the parts in the article that refer to the types of protections that are available to vulnerable witnesses, and write above them which protection it is referring to. For example, the article refers to giving evidence via video link. Circle or highlight that statement, and write above it what protection that is referring to by reference to the terminology in this chapter.

Analyse and evaluate

6 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.

7 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.

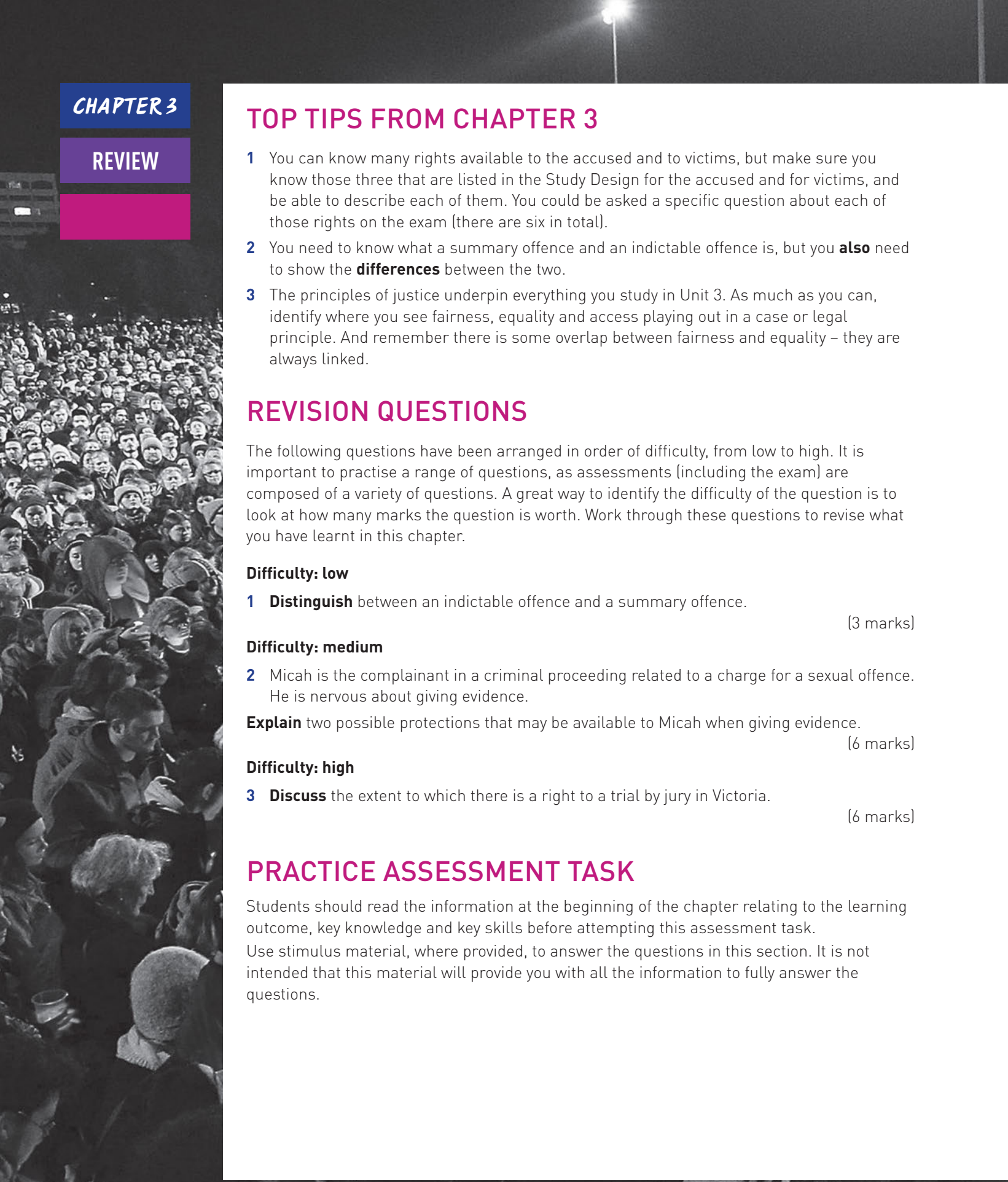
Check your obook assess for these additional resources and more:

Student book questions
3.5 Check your learning

Going further
Victims of Crime Assistance Tribunal

Weblink
Victims of Crime Commissioner

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz



CHAPTER 3

REVIEW

TOP TIPS FROM CHAPTER 3

1 You can know many rights available to the accused and to victims, but make sure you know those three that are listed in the Study Design for the accused and for victims, and be able to describe each of them. You could be asked a specific question about each of those rights on the exam (there are six in total).

2 You need to know what a summary offence and an indictable offence is, but you **also** need to show the **differences** between the two.

3 The principles of justice underpin everything you study in Unit 3. As much as you can, identify where you see fairness, equality and access playing out in a case or legal principle. And remember there is some overlap between fairness and equality – they are always linked.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Distinguish** between an indictable offence and a summary offence.

(3 marks)

Difficulty: medium

2 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.

(6 marks)

Difficulty: high

3 **Discuss** the extent to which there is a right to a trial by jury in Victoria.

(6 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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

Simon's trial

Judith, 23, is the victim of a sexual offence. Victoria Police has charged Simon, Judith's ex-boyfriend, with four counts of sexual assault. He has pleaded not guilty.

The DPP has three witnesses in its case against Simon: Judith, Judith's friend Andrew, who was at the premises at the time of the sexual assault, 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 by some of the legal terminology and she cannot afford legal representation to help her understand what is happening. However, all three witnesses have been provided with information about Simon's upcoming trial, including the date and time, and Judith has found staff members at the OPP to be helpful. Judith is nervous about giving evidence and is not sure about the way she can 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, but she is nervous about the formalities that come with a trial. Andrew wants his evidence recorded so that he does not have to attend.

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

Practice assessment task questions

1 Identify the complainant, the prosecution, the accused and the primary victim in the above scenario. (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 that is closed to the public. Explain whether he would 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 the principle of access has been achieved so far in this case. (6 marks)

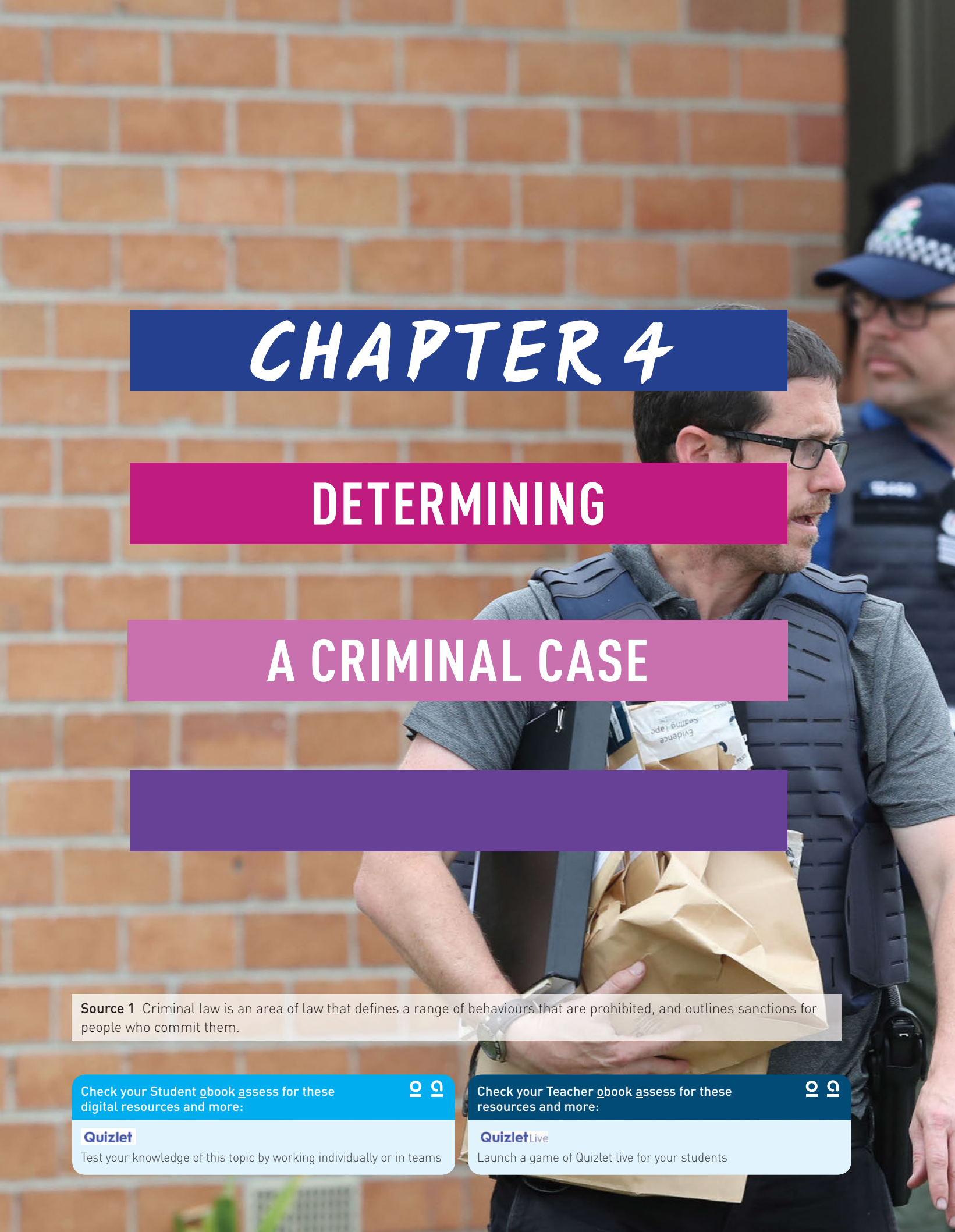
Total: 25 marks

Check your obook assess for these additional resources and more:

- **Student book questions** — Chapter 3 Review
- **Revision notes** — Chapter 3
- **assess quiz** — Chapter 3 Test your skills with an auto-correcting multiple-choice quiz
- **Video tutorial** — How to tackle scenario-based questions
- **Quizlet** — Revise key definitions from this topic

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.

Check your Student obook assess for these digital resources and more:

Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive

Launch a game of Quizlet live for your students



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 does not 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, designed to demonstrate the community's disapproval of the offender's actions

deterrence one purpose of a sanction, designed to 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 removing 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 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 all members of the community and low-cost or no-cost legal representation to some people who cannot 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 VICTORIA LEGAL AID IN ASSISTING 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 all members of the community and low-cost or no-cost legal representation to some people who cannot 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

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

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

The High Court has found 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 has no legal representation, cannot afford a lawyer and will not get a fair trial if they are not represented.

If an accused cannot afford legal representation, government-funded institutions such as **Victoria Legal Aid (VLA)** and Victorian **community legal centres (CLCs)** may be able to help them. In this topic, you will learn about VLA. In the next topic, you will learn about CLCs.

The role of 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 cannot afford to pay for a lawyer. VLA helps people with legal problems. It prioritises people who need it the most and cannot 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.

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
- ensure the coordination of the provision of legal aid and legal assistance information so that it responds to the legal and related needs of the community.

The most critical role VLA plays is to provide legal aid to accused people. In the 2018–19 financial year, VLA helped 100 061 unique clients (i.e. people who accessed one or more legal services). Of these, 54 520 clients were assisted in criminal cases.

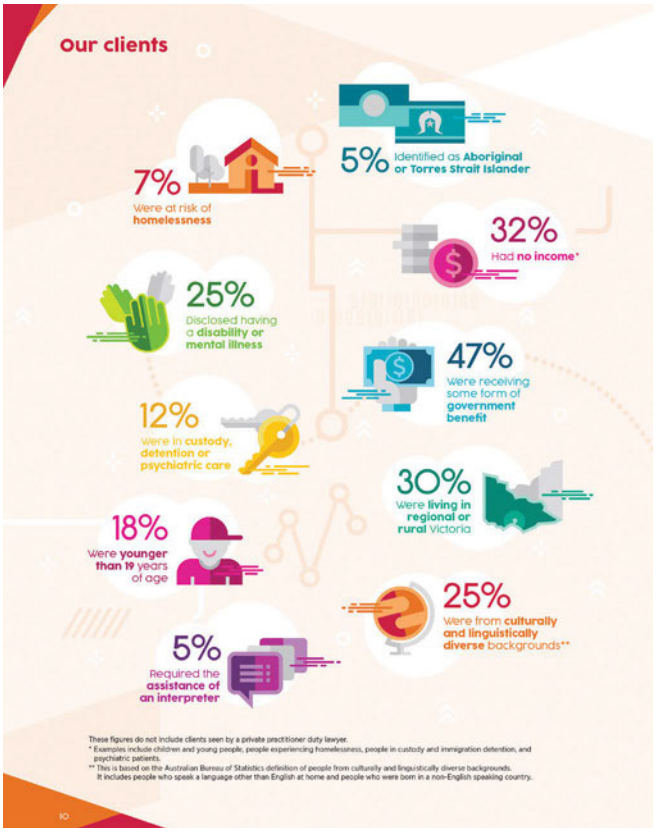
'Legal aid' can include much more than being legally represented in court. In fact, legal aid incorporates all of the following types of aid or assistance:

- the provision of legal education and information, which can be provided on VLA's website, in brochures, or over the telephone
- legal advice, which is normally advice and information about the law and how it applies to a particular case. If VLA provides legal advice, it does not necessarily mean the lawyer giving that advice formally represents the accused
- legal representation, which means that VLA will 'represent' the accused in the case (that is, VLA will be on record as the accused's lawyer).

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 often criticised for not being enough to meet the demand for legal services. A large part of the community is ineligible for legal aid and people are forced to defend themselves in criminal cases because of a lack of funding. VLA is also often criticised for representing 'notorious criminals' – something that was addressed in an open letter to the community in 2017. This is outlined in the scenario below.



Source 1 A snapshot of the clients that VLA sees every year

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

An open letter to the community on representing serious offenders

ACTUAL SCENARIO

Bevan Warner, Managing Director of Victoria Legal Aid, 28 August 2017

I am often asked why Victoria Legal Aid represents some of the state's most notorious criminals.

It seems incomprehensible to the community that someone would stand up in court and assist people accused of committing terrible crimes. Our decision to take on such cases is regularly questioned by the media, and sometimes even by the friends and family of our professional staff who undertake this work.

There are many reasons why Victoria Legal Aid (VLA) arranges representation for people accused of serious crimes. The first is a practical one. Without both sides of a case being put before the court, these cases could not and would not proceed. The brave victims who have come forward to the police would forever remain in limbo, without their day in court, because the court didn't get to hear both sides of the case. There is High Court authority to this effect and the Victorian Parliament has enabled the court to order VLA to arrange representation to avoid these exact circumstances from occurring.

Everyone who works in the criminal justice system knows this to be true.



Source 2 Legal aid can be made available to even the most notorious criminals.

As difficult as it may seem, not only is it our job to arrange representation, it is in the interests of justice, victims and the community that we do so. It is also ethically and legally the right thing to do. Although our work in serious crime is often uncomfortable, we do it willingly, because we know that the mark of a civil society is the way we treat the most reviled amongst us.

It can be easy to lose sight of the importance of how the legal system works when faced with an overwhelmingly emotional case. As much as the community may be united in their condemnation of our clients, we still have a job to do. In the court, our role is not to agree with the public or with the prosecution, but to represent the person accused. This is not the same thing as condoning their actions. This naturally puts us at odds with the public sentiment on many occasions. But in doing so, we ensure fair and robust decision-making processes that allow juries to return verdicts and judges to hand down appropriate sentences.

...

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.

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. There are four types of assistance, as described in Source 3 below.

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: • cannot afford a private lawyer • have a disability or are in psychiatric care • are homeless • are children • cannot speak, read or write English well • are Indigenous Australians • are at risk of family violence • are in custody.

ASSISTANCE	DESCRIPTION	AVAILABLE TO
Free duty lawyer services	A **duty lawyer** is a VLA lawyer who is at court (on duty) on a particular day and who can help people who are at court for a hearing on that day. Duty lawyers can give fact sheets about what happens in court, offer legal advice, or 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 do not 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 (such as stalking or threat to kill) or be one of the people that VLA prioritises (which includes those with a disability, brain injury or mental illness, homeless people, people who cannot speak, read or write English well, and Indigenous Australians). Duty lawyers prioritise those who are in custody and are being brought to court for the first time on that charge.
Grants of legal assistance (getting a lawyer to run the case)	VLA may be able to grant legal assistance to people who cannot 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 whether helping the accused can **benefit them and the public**, and whether the matter has **merit**.

Source 3 Legal assistance available from VLA

income test
income test
the test applied by Victoria Legal Aid (VLA) to determine whether 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

Duty lawyers – the income test

An accused meets the income test if they produce a current Centrelink benefit card (to show that they are receiving welfare benefits from the Commonwealth Government) or pensioner concession card to the duty lawyer. If they do not have one of these, they may still meet the income test if they sign a declaration which shows they have limited income (for example, their primary source of income is from welfare, or their weekly after-tax income is less than a certain amount).

Duty lawyers are not 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 considers the person's income and other assets (such as houses, cars or savings). For example, if the accused person receives more than $360 per week in income after living expenses are deducted, then they are not 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.

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.

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?

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 cannot afford the full cost of obtaining legal representation. The ability of the courts to stay a trial if they are satisfied the accused cannot pay for a lawyer upholds the principle of fairness by making sure that the accused can receive a fair trial by being legally represented.

EXTRACT

Criminal Procedure Act 2009 (Vic) – section 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 would not benefit the public.

ACTUAL SCENARIO

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 a Melbourne woman. 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.

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, noting 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 ultimately 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):

> 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.

4.1 CHECK YOUR LEARNING

Define and explain

1 Does legal aid always include legal representation? Explain.

2 Are you entitled to any assistance from VLA if you have enough money to pay for your own lawyer? Explain your answer.

Synthesise and apply

3 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 does not 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 cannot afford a lawyer, but has been told that he has a good chance of success. He wants to defend the charge.
- **d** Mary cannot speak, read or write English well, and is facing a summary offence in the Magistrates' Court in three weeks. She has a significant income.

4 Read the scenario *Bayley v Nixon and Victoria Legal Aid* and the scenario 'An open letter to the community on representing serious offenders'.

- **a** Do you agree with the decision of the Supreme Court in the 2015 case? Why?
- **b** What did Bayley do following that decision, and what was the final outcome?
- **c** What High Court case is the VLA referring to in its open letter?
- **d** Read the paragraphs extracted from the Court of Appeal's decision in 2016, and the VLA's open letter. Decide whether you agree or disagree with the statement of the Court. As a class:
  - separate into two groups: those who agree with the Court and VLA, and those who don't
  - debate the paragraphs. Make reference to the principles of justice in your debate.

Analyse and evaluate

5 Why is legal aid from VLA not available to everyone? Should it be? Give reasons for your answer.

Check your obook assess for these additional resources and more:

- **Student book questions** 4.1 Check your learning
- **Video tutorial** Introduction to Chapter 4
- **Weblink** Victoria Legal Aid
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

4.2 THE ROLE OF COMMUNITY LEGAL CENTRES IN ASSISTING AN ACCUSED

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)

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**, which provide broad legal services to people in a particular local geographical area (for example, Barwon Community Legal Service Inc. and Moonee Valley Legal Service are generalist CLCs that serve their respective local areas)
- **specialist CLCs**, which focus on a particular group of people or area of law (for example, YouthLaw provides free legal services for people under the age of 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.

Role of CLCs

Community legal centres provide people with information, legal advice and minor assistance, duty lawyer assistance and, in some cases, legal casework services, including representation and assistance.

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

Like VLA, CLCs prioritise 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 cannot afford a lawyer. CLCs also help **victims** of crime and their families. The types of assistance available are shown in Source 1.

ASSISTANCE	DESCRIPTION
Basic legal information	CLCs provide basic legal information on a day-to-day basis. Some 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 1 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
- whether other assistance is available (such as through VLA)
- whether the person has a good chance of success
- whether the accused can manage the case without help
- whether 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 (in other words, 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 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

Community legal centres receive their funding from a range of sources: state, Commonwealth and local governments and private donations. Some of its funding comes from VLA.

Funding to CLCs is an issue in Australia because of the significant demand for legal assistance. CLCs are continually seeking more funding to meet the increasing demand by people who cannot afford a lawyer.

Archie and Youthlaw

HYPOTHETICAL SCENARIO

Archie, 17, was at a house party with his friends, hosted by Veronica. At around 11.30 pm, a group of uninvited boys turned up outside the house, calling out drunkenly and hanging around. Veronica went out and insisted that they leave, but the boys refused.

Archie and his friends went outside to help, when a scuffle broke out. Archie tried to pull apart a pair of fighting boys. The police showed up and arrested Archie, his friends, and the uninvited guests. Archie has been charged with assault.

Archie and his family have little money to pay for a lawyer. They are unsure about the documents they have received, the charges, and attending court. Someone tells Archie about community legal centres. He accesses the Federation of Community Legal Centres Victoria website and identifies a legal centre called 'Youthlaw' that provides free and confidential legal advice for young people up to the age of 25, and runs a free drop-in legal clinic.

4.2 CHECK YOUR LEARNING

Define and explain

1 Explain the difference between generalist CLCs and specialist CLCs.

2 Provide two similarities and two differences between VLA and CLCs.

Synthesise and apply

3 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.

Analyse and evaluate

4 How does government funding to CLCs affect the ability of the criminal justice system to achieve the principles of justice? Give reasons for your answer.

5 Discuss 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** 4.2 Check your learning
- **Video tutorial** Introduction to Chapter 4
- **Worksheet** What assistance am I eligible for?
- **Weblink** Federation of Community Legal Centres Victoria

4.3 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. 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 before a full trial occurs to determine guilt. 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:

evidence information used to support the facts in a legal case

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

- to see whether a charge for an indictable offence is **appropriate to be heard and determined summarily**
- 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 ensure 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

The main and final stage of the committal proceeding is the **committal hearing**. At the committal hearing, the accused can question the prosecution's witnesses and make submissions about the charges. After the evidence and submissions, the magistrate will decide whether to commit the accused (i.e. send the accused to trial).

If the magistrate finds there is evidence (of 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 scenario 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 involving a construction company and allegations about safe working environments.

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.

Construction company Pipecon pleads not guilty to alleged health and safety breaches

ACTUAL SCENARIO

Sarah Jane Bell, *ABC News*, 4 December 2019

Construction company Pipecon Pty Ltd will stand trial next year for allegedly failing to provide a safe working environment and safe supervision for their employees.

It follows the deaths of 34-year-old Charlie Howkins and 21-year-old Jack Brownlee in a trench collapse in Ballarat last year.

Court documents show the men had been carrying out trenching and pipe laying works at a housing development in the suburb of Delacombe on March 21, 2018, when a trench collapsed, engulfing the men.

Mr Howkins died at the scene, while Mr Brownlee died in hospital the following day.

Magistrate Gregory Robinson heard evidence from eight witnesses over two days, including the Worksafe Victoria inspectors who attended the incident, prior to making his decision.

The Director of Pipecon, Andrew Mahar pleaded not guilty on the company's behalf to breaching several requirements of Section 21 of the *Occupational Health and Safety Act*.



Source 1 Pipecon Pty Ltd has allegedly failed to provide a safe working environment for their employees.

The following scenario is another example of a case involving a committal hearing.

Melbourne doctor and wife committed to trial on slavery-related charges

ACTUAL SCENARIO

In 2019 a Melbourne doctor and his wife were committed for trial over slavery-related charges after allegedly forcing an asylum seeker from Iran to work in their Box Hill bakery.

Dr Seyyed Farshchi was charged with one count of conducting a business using forced labour and one count of causing a man to 'enter into and remain in forced labour' between July 2015 and July 2017. His wife Naghmeh Mostafei was charged with aiding and abetting her husband.

The couple owned and ran two stores in Melbourne, where they employed asylum seekers from Iran like the complainant. The man, who cannot be identified due to a court suppression order, started working at the Box Hill bakery in early 2015.

The Court heard that the complainant worked for three months without pay because he was being trained. After that, he was paid $10 per hour, but did not receive a regular pay cheque.

The complainant alleged that he was blackmailed into working at the bakery, where he was not allowed to use his phone or take meal breaks. He was also allegedly forced to mow the lawn and clean the car at the home of Dr Farshchi and Ms Mostafei.

In a transcript of a police interview released by the court, the complainant told police that Dr Farshchi also told him: 'I have money, I have power, I have influence, I know people and connections in the Department of Immigration.'

Magistrate Luisa Bazzani described the complainant as a 'simple and humble' man who 'was vulnerable in his dealings with the defendants.'

The Court heard from 18 different witnesses during the two-week committal hearing, including former employees who told the Court that prescription drugs such as Tramadol were used to help them 'to be able to work.'

Magistrate Bazzani found there was sufficient evidence to commit Dr Farshchi and his wife for trial.

At the time of writing, the trial date had not yet been set.



Source 2 In 2019 Dr Farshchi was charged with one count of conducting a business using forced labour and one count of causing a man to 'enter into and remain in forced labour'.

After the committal proceeding

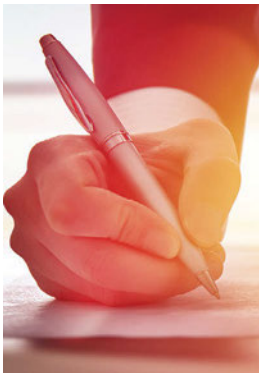
Director of Public Prosecutions (DPP)
the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

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)

When the accused person has been committed for trial, the documents are transferred to the **Director of Public Prosecutions (DPP)**. The DPP then 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.

From 2018 to 2020, the Victorian Law Reform Commission (a law reform body that investigates improvements to Victorian law, about which you will study in Unit 4) was investigating whether committal proceedings should be abolished, reformed or retained. It delivered its final report to the Victorian Government on 31 March 2020. The DPP has previously suggested that the role of assessing the strength of evidence should fall to the DPP. Other organisations do not agree.



Source 3 The DPP files an indictment in the Supreme Court or the County Court after an accused has been committed to stand trial.

Strengths and weaknesses of committal proceedings

Set out in Source 4 below are some strengths and weaknesses of committal proceedings.

STRENGTHS	WEAKNESSESS
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.	Committal proceedings are **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 unfair processes. It can also result in inequality between a very experienced prosecutor, and an inexperienced accused person.
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 help them to prepare their case without being ambushed by unexpected witnesses.	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 also increases the cost to the state of prosecuting a case.
The onus is on the prosecution to establish to the court that there is enough evidence (of sufficient weight) to support conviction at trial. If 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.	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.
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 by promoting an early resolution of cases.	Committal proceedings can contribute to the **stress and trauma** experienced by the accused, the victim and their families (for example, by some witnesses having to give evidence more than once). For some victims, this stress and trauma may see them not wanting to give evidence, which can reduce access to justice.
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.	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.

Source 4 Strengths and weaknesses of committal proceedings

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.

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

4.3 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 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

4 Read the scenario 'Construction company Pipecon pleads not guilty to alleged health and safety breaches'. Provide two strengths and two weaknesses of committal proceedings by reference to the case.

5 Read the scenario 'Melbourne doctor and wife committed to trial on slavery-related charges'.
- **a** What is the allegation in this case?
- **b** Who will go to trial?
- **c** Discuss the benefits and downsides of a committal proceeding from the perspective of the DPP, the accused persons and the complainant.

6 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.

7 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

8 As a class, access the submissions made by individuals and groups to the Victorian Law Reform Commission in relation to its review of the committal process.
- **a** Divide the submissions up as a class.
- **b** Analyse the submissions and summarise the arguments the submissions make in favour of or against the committal process. Write each down on a sticky note (noting who made the submission at the bottom). For example, 'Where there is a confession, just list the matter for hearing – Anonymous'.
- **c** Start putting the sticky notes up on the whiteboard or on a wall in class. Group the notes by topic or similarities – for example, group together those that say they uphold rights of the accused.
- **d** Come together as a class and analyse what you have discovered from the submissions. Are there any particularly compelling arguments in favour of or against committal proceedings?

9 Evaluate the ability of committal proceedings to achieve fairness.

Check your obook assess for these additional resources and more:

- **Student book questions** 4.3 Check your learning
- **Going further** Various stages of committal proceedings
- **Weblink** Victorian Law Reform Commission – committals review
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

4.4 PLEA NEGOTIATIONS

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

Criminal cases are heard and determined only in the courts (unlike some **civil disputes**, which can be resolved by bodies other than the courts). That is, 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 4.5. 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
(in criminal cases) pre-trial discussions 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)

Plea negotiations are negotiations that take place between the prosecutor and the accused about the charges against the accused, which can result in an agreement being reached between the two parties about the charges to which the accused will plead guilty. They can take place in relation to summary or indictable offences. Other terms for plea negotiations are 'plea bargaining' or 'charge negotiations' (although there are some groups that discourage the use of the term 'plea bargaining').

Plea negotiations usually begin when the accused (or their lawyer) indicates to the prosecution that they are willing to discuss the charges. Negotiations are ordinarily conducted on a 'without prejudice' basis. This means that any offers made by either party during the negotiations cannot be used against them if the negotiations are not successful. Therefore the accused may be 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 charge but an agreement is reached about the facts on which the plea is based
- 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 the lesser charge.



Source 1 Plea negotiations are heard in the Magistrates' Court.

Plea negotiations **do not** determine the sentence, because the prosecutor has no power to sentence an offender. Only the courts have that power. 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 saves the accused, victims, witnesses and the community 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 2 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

Appropriate resolution

The Director's Policy provides guidance and instruction to OPP solicitors and prosecutors in relation to resolving matters as guilty pleas.

As well as achieving fair and just outcomes in an efficient way, guilty pleas may relieve victims and witnesses of the burden of giving evidence at a trial, and provide certainty of outcome.

In 2018/19, 77.6 per cent of prosecutions were finalised as a guilty plea – down from 80.4 per cent in the previous year.

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. Of the guilty pleas achieved in 2018/19, 74 3 per cent were achieved by committal.

Source: Director of Public Prosecutions Victoria and Office of Public Prosecutions Victoria, Annual Report 2018/19

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 strength of any defences
- 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 relevance of the factors above will depend on the particular case.

The following scenario is an example of a plea negotiation.

ACTUAL SCENARIO

Two brothers and friend strike plea deal in relation to post-football match assault

In September 2018 two men aged in their 40s and 60s were assaulted following a football match between Richmond and Hawthorn in Melbourne. The first man suffered a broken arm and was allegedly kicked 10 times, and the second man suffered a fractured cheekbone. There was footage showing one man punching and kicking one of the men, with another two men assaulting the other.

Two brothers and their friend were charged with various offences. They initially pleaded not guilty. In July 2019 it was reported that the three accused men struck a deal with prosecutors which meant that the most serious charges would be withdrawn, and they would plead guilty to two counts of intentionally causing injury. It was reported that their lawyers spent a day negotiating with prosecutors in meeting rooms at the Magistrates' Court, until the magistrate was told of the agreed outcome of the negotiations, which avoided the need for the magistrate to decide whether there was enough evidence to support a conviction at trial.



Source 3 One of the assaulted men suffered a broken arm during the incident.

Strengths and weaknesses of plea negotiations

Source 4 below details some strengths and weaknesses of plea negotiations. The strengths and weaknesses of plea negotiations are not only relevant to evaluating them as a means of resolving a criminal case, but can also be considered in determining whether they are appropriate in a particular case.

STRENGTHS	WEAKNESSES
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 could not negotiate.	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.
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.	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).
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.	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).
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).	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.
Victims and the community may still be satisfied if the accused pleads 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**.	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.
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.	

Source 4 The strengths and weaknesses of plea negotiations

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

guilty plea
when an offender officially admits guilt which is then considered by the court when sentencing

4.4 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 scenario 'Two brothers and friend strike plea deal in relation to post-football match assault'.
   - **a** What was the agreement that was reached between the parties?
   - **b** Why did the magistrate no longer have to do anything in this case?
   - **c** Conduct some research to find out the names of the offenders. Were they ultimately sentenced? Discuss as a class the ultimate outcome of the case.

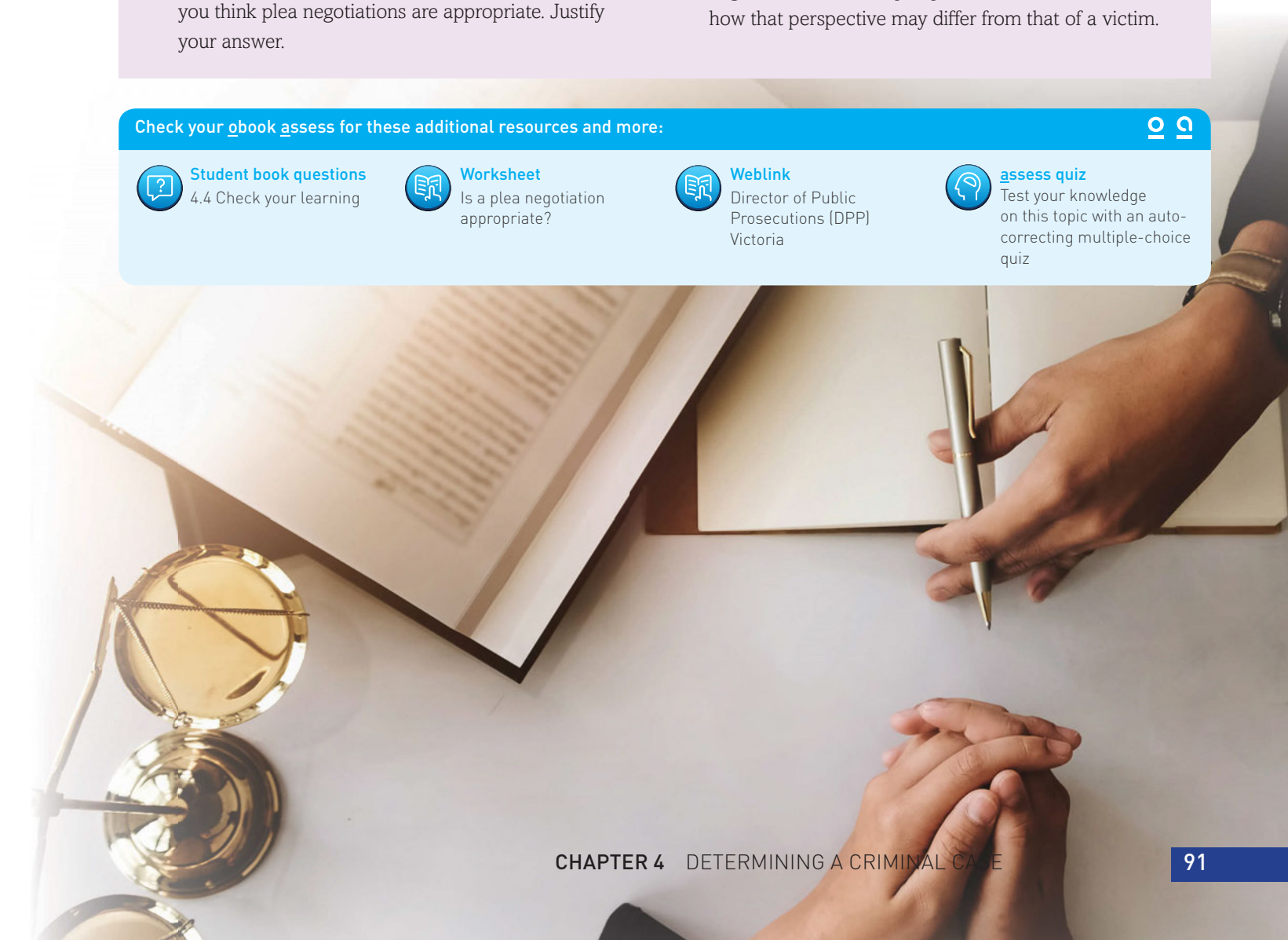
5 For each of the following scenarios, decide whether you think plea negotiations are appropriate. Justify your answer.
   - **a** The accused maintains her innocence of the charges laid against her.
   - **b** The DPP is expected to call more than 200 witnesses at trial. Many of those witnesses were 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 Discuss the strengths and weaknesses of plea negotiations from the perspective of an accused, and how that perspective may differ from that of a victim.

Check your obook assess for these additional resources and more:

- **Student book questions** 4.4 Check your learning
- **Worksheet** Is a plea negotiation appropriate?
- **Weblink** Director of Public Prosecutions (DPP) Victoria
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz



4.5 SENTENCE INDICATIONS

In 2008 the sentence indication regime was introduced in Victoria. It is another method (aside from 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 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 judge or magistrate 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 them as evidence that they are 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.



Source 1 For indictable offences, the judge will indicate whether they will likely impose an immediate term of imprisonment.

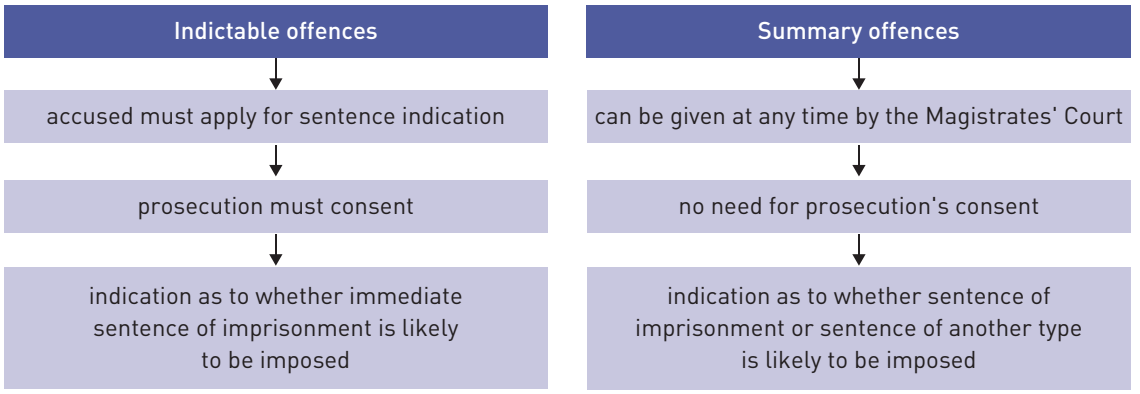
Sentence indications for summary offences

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.



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 they are 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 about the impact of the offence on the victim for the judge or magistrate to make an indication. 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 they have 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.

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

The following scenario is an example of an accused seeking a sentence indication before deciding on a plea. The accused was eventually sentenced to a community correction order.

ACTUAL SCENARIO

Stawell woman Lorraine Nicholson unlikely to go to jail over Navarre crash

The Courier, 19 February 2020

A Stawell woman charged over a crash which killed four grandmothers on their way home from a night of line dancing is unlikely to serve a jail sentence.

Judge Michael Bourke said he would impose a non-custodial sentence for Lorraine Nicholson, 66, if she pleaded guilty, during a sentence indication hearing at the County Court in Melbourne on Wednesday.

Nicholson is yet to formally plead guilty and the matter has been adjourned to a date to be fixed for a plea hearing.

Judge Bourke gave the indication after hearing victim impact statements and submissions about Nicholson's remorse during a hearing last week.

Nicholson was found not guilty of four counts of culpable driving causing death over the quadruple fatality at Navarre on May 5, 2018.

The Ballarat jury could not reach a majority verdict on four alternative charges of dangerous driving causing death in October. The jury was discharged.

The accused woman's Jeep T-boned a Kia driven by Hamilton's Elaine Middleton, 64, and carrying passengers Margaret Ely, 74, also of Hamilton, Heywood's Dianne Barr, 64, and Portland's Claudia Jackson, 72, at the intersection of Stawell-Avoca Road and Ararat-St Arnaud Road at 6pm on May 5, 2018.

The four women, who were returning home after attending a line-dancing competition in St Arnaud, died from their injuries at the scene.

A seven-day trial was held at the County Court at Ballarat before Judge Michael Bourke in October.

Author's note: Lorraine Nicholson ultimately pleaded guilty and was sentenced to a four-year community correction order in April 2020. You will learn about community correction orders later in this chapter.

Source 3 Lorraine Nicholson's jeep t-boned a car with four passengers returning from a line-dancing competition.



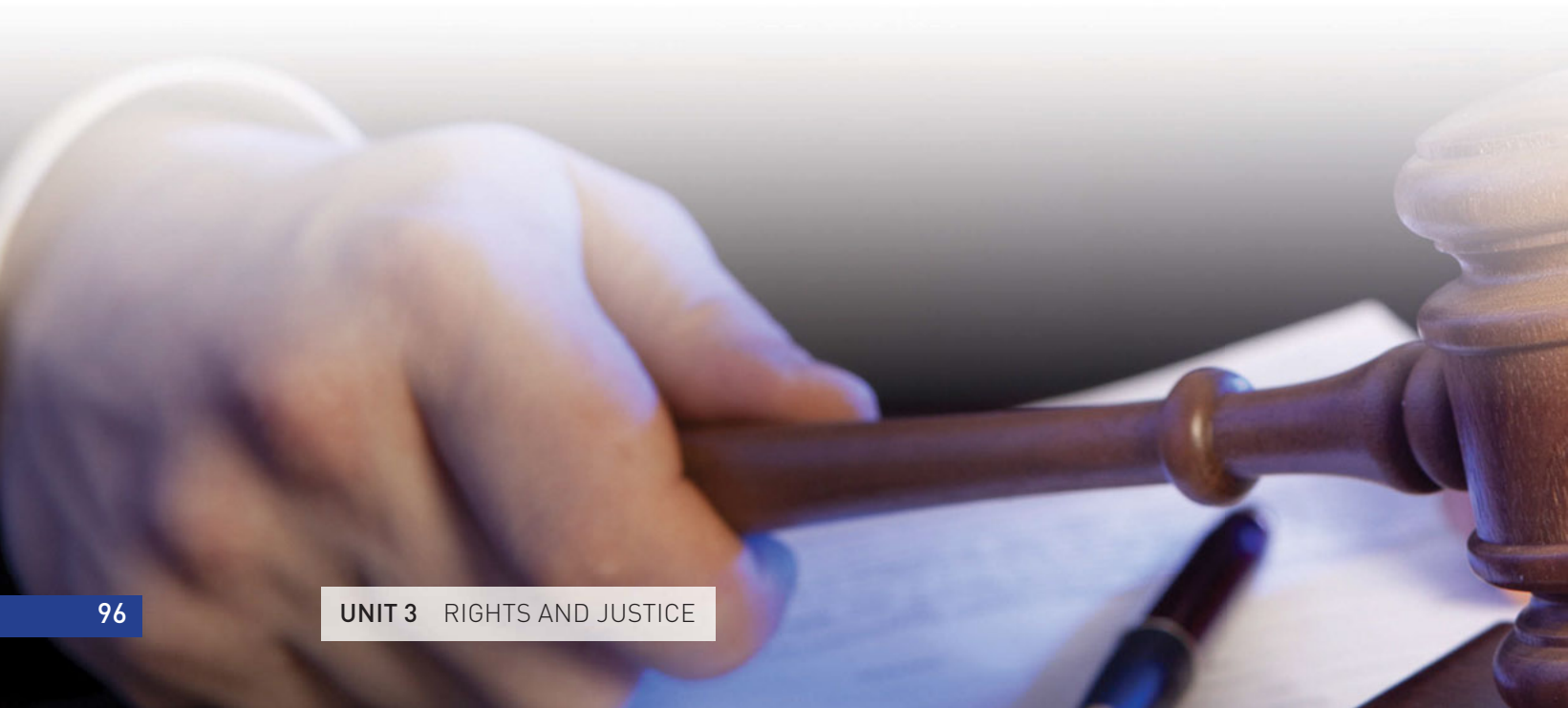
Strengths and weaknesses of sentence indications

Source 4 details some strengths and weaknesses of sentence indications. The strengths and weaknesses of sentencing indications are relevant not only to evaluating them as a means of resolving a criminal case, but can also be considered in determining whether they are appropriate in a particular case.

STRENGTHS	WEAKNESSES
It can result in the **early determination of the case**. This results in prompt justice rather than delayed justice. An early determination can benefit everyone involved, including victims, witnesses, the accused, families and the community.	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.
It can save **money and resources**. Not having to take the case to trial saves the prosecution and the community costs.	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.
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.	Legislation allows the court to **close a proceeding** to the public when a sentence indication is given. This means there may be a **lack of transparency** about what occurred.
The accused is **not bound to accept** the indication and plead guilty. This provides procedural fairness to the accused.	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 receive.
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 sentence indication **avoids the need for the charges to be proven beyond reasonable doubt** and might be seen by some as contrary to the principle that a person is innocent until proven otherwise.
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 may lessen the impact or need for **a victim impact statement** because the court will not 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, and victim impact statements can be tendered as part of the sentence indication process.

STRENGTHS	WEAKNESSES
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 evidence that may be stressful or traumatic for them.	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.
Any **victim impact statement can be considered** by a judge when giving an indication. This allows the victim a voice in the process.	Some may argue that a sentence indication may compel an **innocent person to plead guilty** to save them the possibility of receiving a higher sentence at trial – though this argument does not reflect the high standard of proof in criminal cases and the requirement for the prosecutor to prove guilt in any trial.
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.	

Source 4 The strengths and weaknesses of sentence indications



4.5 CHECK YOUR LEARNING

Define and explain

1 Who gives a sentence indication, when is it given, and who is it given to?

2 Explain two differences between sentence indications for summary offences and sentence indications for indictable offences.

3 Is the court bound by a sentence indication if the accused continues to trial and is found guilty? Justify your answer.

4 Describe the role of the prosecutor, if any, in the sentence indication process for both summary offences and indictable offences.

Synthesise and apply

5 Read the scenarios 'Man hides in green waste wheelie bin to escape police' (available on obook assess) and 'Woman, 65, charged over quadruple fatality to seek sentence indication'.

- **a** Imagine these are two scenarios in a school-assessed coursework. Prepare three to four questions that you think could be asked in relation to both scenarios and in relation to sentence indications. An example is provided in part b below.
- **b** Describe one difference between the sentence indication process in each of the scenarios.

6 'An offender who asks for a sentence indication has already entered a plea of not guilty by the time he or she asks for it'. Is this correct or not? Explain.

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 Moore & Dalrymple* [2019] VCC 1023 (5 July 2019). Read the decision and copy and complete 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	
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 about the following statement: 'There should be a law requiring victims to consent to the accused getting a sentence indication.'

Check your obook assess for these additional resources and more:

- **Student book questions** 4.5 Check your learning
- **Worksheet** Is a sentence indication appropriate?
- **Weblink** Australasian Legal Information Institute (AustLII)
- **Actual scenario** Man hides in green waste wheelie bin to escape police



4.6 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 (or 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)

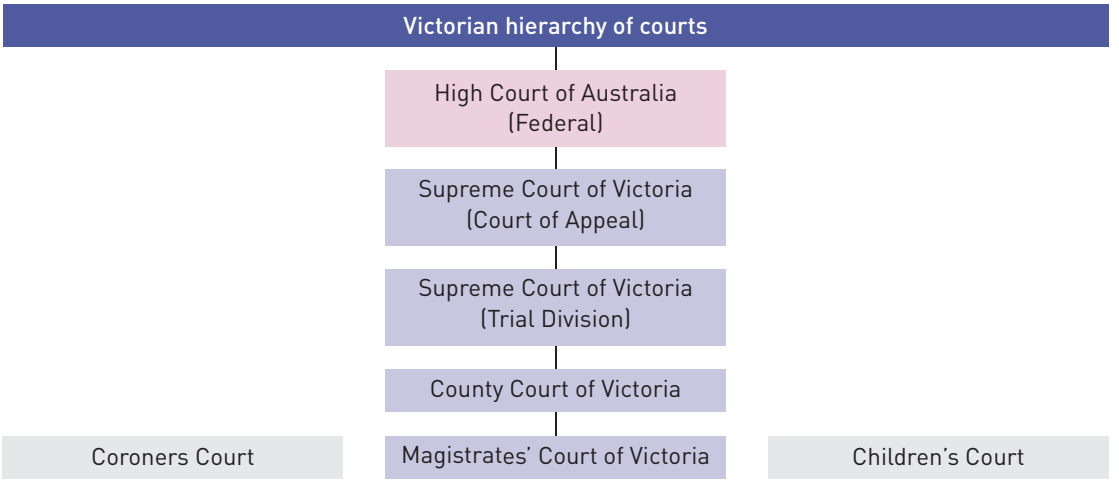
appellate jurisdiction the power of a court to hear a case on appeal

Jurisdiction can be broken down into two types:

- **original jurisdiction**, the power of a court to hear a case for the first time
- **appellate jurisdiction**, the power 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 (such as murder, manslaughter or 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 expertise in sentencing principles
- the **Supreme Court (Trial Division)** hears the most serious indictable offences (such as murder and manslaughter) and will have developed its own specialisation in those types of crime and the elements of each crime
- the **County Court** has developed expertise in hearing particular types of indictable offences (such as cases involving sexual offences and theft)

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 (such as drink-driving and traffic offences), as well as committal proceedings
- other specialist courts such as the **Children's Court** and **Coroners Court** deal with specialised cases. The Children's Court specialises in cases where young people have been charged with a crime, and the Coroners Court specialises in investigating deaths and fires involving suspicious circumstances or where the cause of death is unknown.

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; for example, if 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 sanction on the basis that it was 'manifestly excessive'.

In some circumstances, the appellant will need the leave (consent) of the court that will hear the appeal. 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 (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

Summary of the criminal jurisdiction of Victorian courts

Source 2 sets out the original and appellate criminal jurisdictions 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 Division)	• Most serious indictable offences, including murder, attempted murder, certain conspiracies and corporate offences	• From the Magistrates' Court on points of law • From the Magistrates' Court on conviction or sentence in limited circumstances
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

An example of an appeal on leniency is provided on the next page, where a man's sentence was increased.

Study tip

The *VCE Legal Studies Study Design* requires you to know about the Supreme Court, County Court and Magistrates' Court – make sure you can 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.

ACTUAL SCENARIO

Man who killed wife has sentence increased on appeal

DPP v Ristevski [2019] VSCA 287 (6 December 2019)

The murder of Karen Ristevski and the conviction of her husband, Borce, for manslaughter was one of the most talked about cases in Victoria between 2016 and 2019. In December 2019, Borce was resentenced in the Court of Appeal after an appeal by the prosecution, and his sentence was increased.

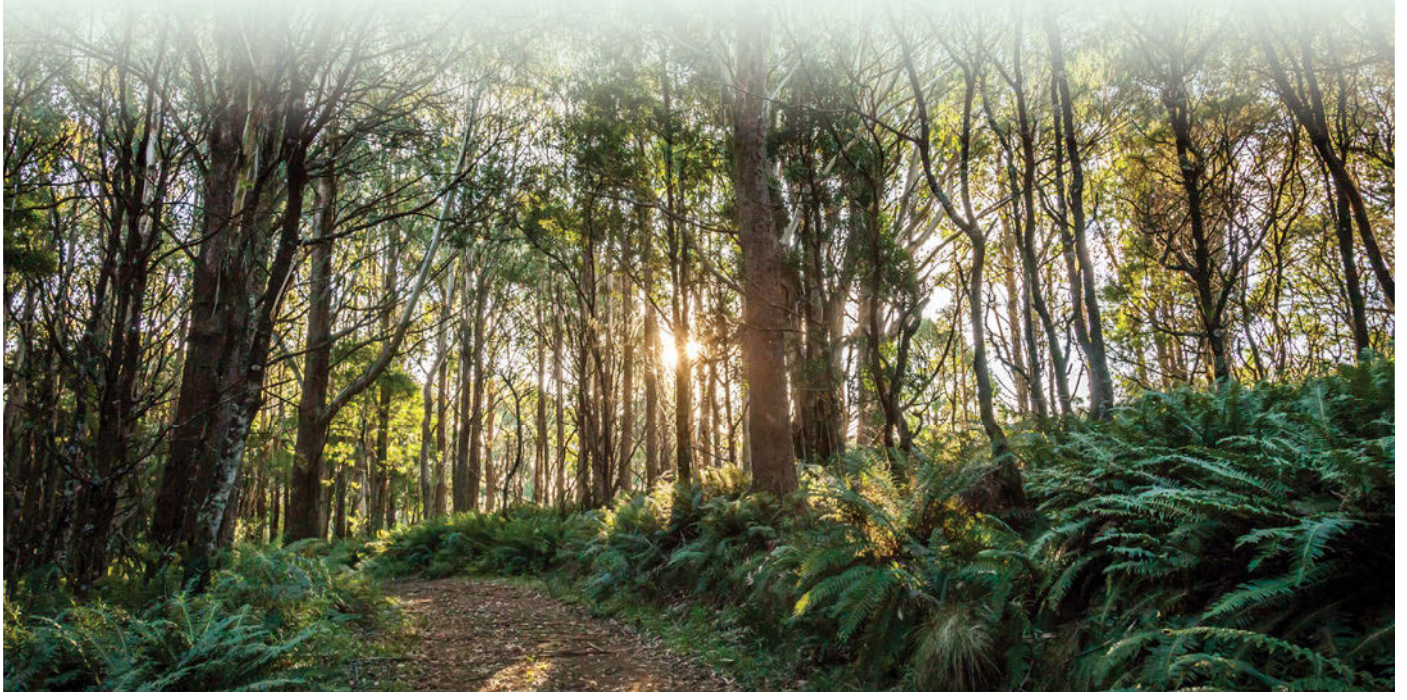
At some time on 29 June 2016, Borce Ristevski killed his wife of 27 years, Karen. Karen's body was found eight months later, dumped and concealed in isolated bushland. The circumstances of the killing are unknown and Borce has never disclosed how he took her life. Eighteen months after the killing, Borce was arrested and charged with murder.

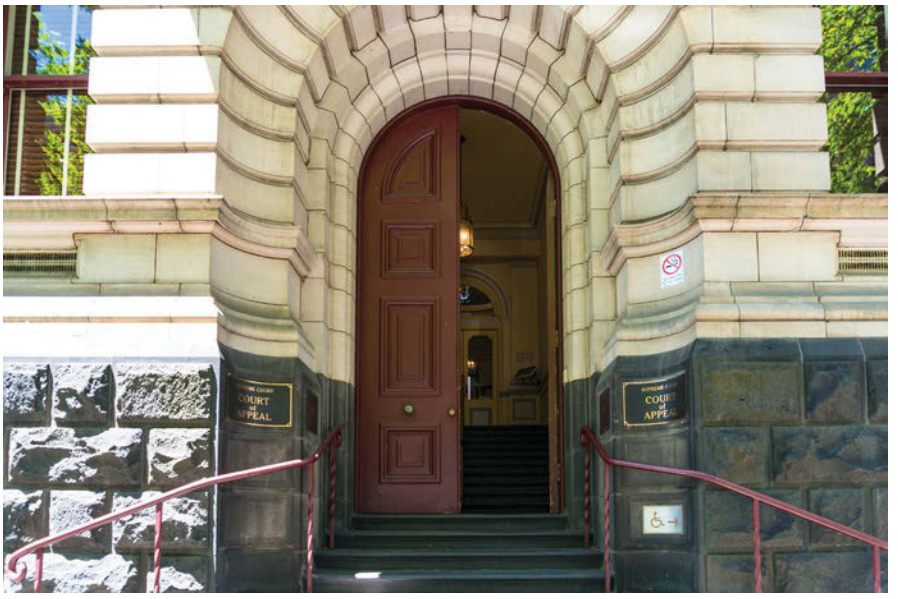
Borce's trial commenced in March 2019. Shortly after, Borce pleaded guilty to manslaughter once the prosecutor formally charged him with that crime. He was sentenced to nine years' imprisonment, with a non-parole period of six years.

The Director of Public Prosecutions appealed on the basis that the sentence imposed was inadequate. The appeal was allowed, and the sentenced was increased to 13 years' imprisonment, with a non-parole period of 10 years. The Court found that taking all sentencing factors into account (including mitigating and aggravating factors), it was more just to impose a higher sentence than was originally imposed.

In particular, the Court of Appeal considered the disposal of Karen's body as being a significant aggravating factor, and showed his complete lack of remorse. They also found that Borce's failure to reveal how he killed Karen demonstrated his lack of remorse. In his judgment, Justice Priest said 'in this case there is much more than a bare refusal to reveal how he killed his wife, since the respondent embarked on a cynical and protracted course of lies and deceit.' This was because Borce Ristevski was a pallbearer at his wife's funeral and comforted her relatives and friends after her disappearance – even though he killed her.

Source 3 Karen Ristevski's body was found eight months after she disappeared, concealed and buried in the Macedon Ranges where her remains were found by a bushwalker.





Source 4 The Supreme Court of Victoria (Court of Appeal) is the highest court in Victoria.

4.6 CHECK YOUR LEARNING

Define and explain

1 What is the highest Victorian state court, and what is the lowest Victorian state court?
2 Define the term 'jurisdiction'.
3 Referring to indictable offences, explain how the Victorian court hierarchy provides for specialisation.

Synthesise and apply

4 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
5 Read the scenario *DPP v Ristevski*.
   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 Access the AustLII website and find the full judgment of the case referred to in this scenario. Read paragraphs 15 and 81 of the judgment. Discuss as a class why there are two different decisions as to the sentence that should have been imposed, and why one and not the other was the final decision.

Analyse and evaluate

6 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.
7 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** 4.6 Check your learning
- **Going further** Specialist jurisdictions of the Magistrates' Court
- **Going further** Other reasons for a court hierarchy
- **Weblink** Court Services Victoria

4.7

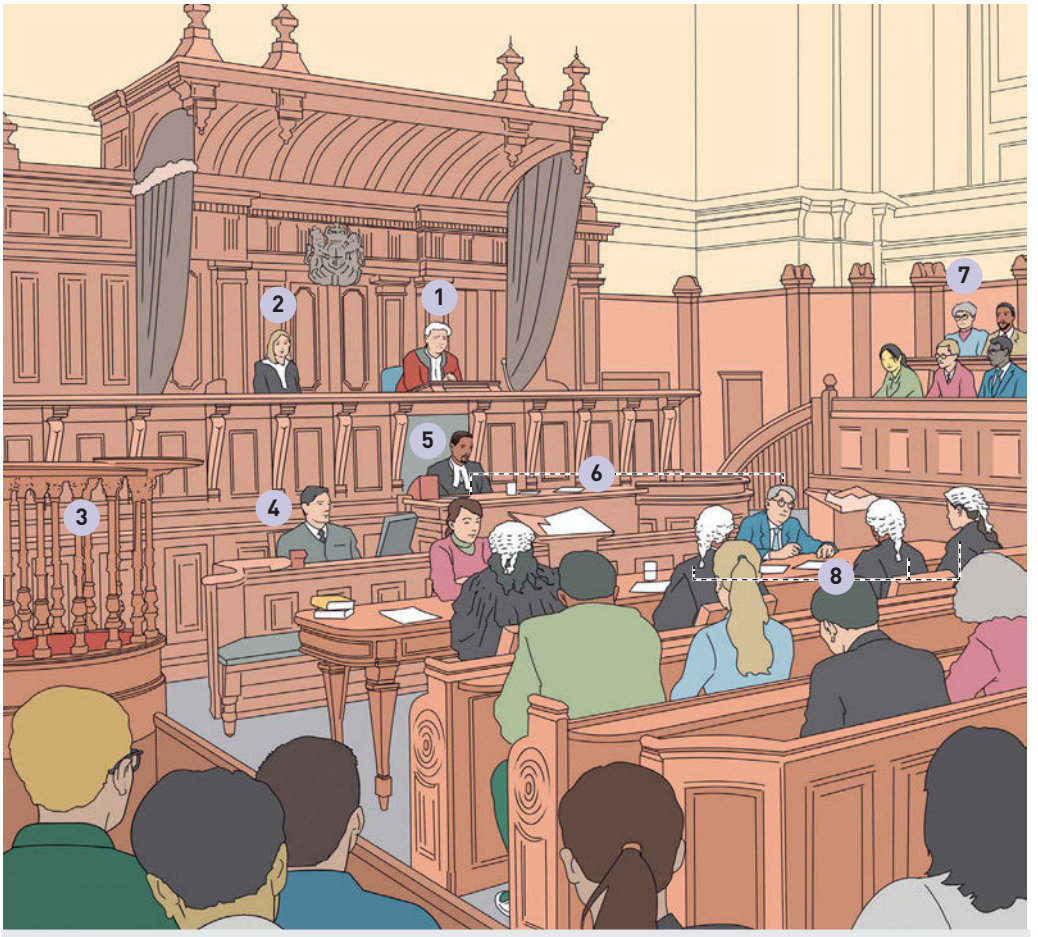
THE RESPONSIBILITIES OF THE JUDGE AND THE JURY IN A CRIMINAL TRIAL

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, jury, parties and their legal practitioners. You could be asked about any one of those four in an assessment task.

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 their legal practitioners.



1 Judge
2 Court reporter
3 Witness stand
4 Tipstaff
5 Associate
6 Solicitors
7 Jury
8 Barristers

Source 1 Key personnel in a criminal trial. You are required to know the responsibilities of the judge, jury, parties and legal practitioners.

Responsibilities of the judge

The judge is one of the central figures in a criminal trial. They act 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**.

In a criminal trial, the judge has the following responsibilities.

Manage the trial

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, controlling the order of events, and working with legal practitioners as to the conduct of the trial.

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 is an example of the Court of Appeal considering whether the judge in a criminal case appropriately managed the trial.

directions
instructions given by the court to the parties about time limits and the way a 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

ACTUAL SCENARIO

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 appellant 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 appellant 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 (the appellant). 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.



Source 2 A judge should not enter into the arena or insult a barrister during trial.

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.
- 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.

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 (for example, if 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 also have to discharge a juror if it appears that the juror is not impartial, is ill, cannot continue to act as a juror, or should not 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 did not 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. They may also have to explain certain legal definitions or principles to the jury so they understand what they mean. For example, the judge may have to give the jury an explanation of what is meant by 'beyond reasonable doubt'.

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 in the *Sentencing Act 1991* (Vic) and comply with legislation about the sentence that should be imposed.

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.

Other responsibilities

In addition to the above main responsibilities, the judge must also:

- **order that the VLA provide legal representation.** If a judge is satisfied that the court cannot 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.
- **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 in the following scenario.

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

Appeal allowed due to denial of procedural fairness

ACTUAL SCENARIO

Farah v The Queen [2019] VSCA 300 (12 December 2019)

In April 2019 Farah pleaded guilty to a single charge of conspiracy to commit common assault. He owned and operated a shop in Toorak Village, and sought to conspire with another person to commit an assault on a person who operated a business nearby. Before the assault occurred, the offender was arrested and his phones were seized. The offender spent some time in custody before he was bailed.

The offender was sentenced to a term of nine months' imprisonment, in combination with a three-year community correction order (CCO) (a sentence served in the community, which you will study later in this chapter).

The offender sought leave to appeal against his sentence. One of the grounds of the appeal was that the sentencing judge said he did not want to hear further submissions from the offender's legal representatives, and then imposed a term of imprisonment where it had previously been submitted on behalf of the offender that he should not go back to prison. The appeal was allowed for this and one other reason. The Court of Appeal found that the offender's legal representative never had the chance to make a submission that another sentence would have been more appropriate than returning someone to prison for a short and somewhat pointless additional period of imprisonment.

The offender was resentenced to six months' imprisonment only, with no CCO attached. Given that he had already served 189 days in prison, the Court declared that he should be immediately released from prison.



Source 3 Police seized the phones of the accused and another person while investigating this crime.

Responsibilities of 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 decides which facts it believes to be true. For example, was the accused at the scene of the crime, or at the cinema as she said? Did the witness see the accused or was the witness mistaken, and saw someone else?

A criminal jury comprises 12 jurors. They are chosen randomly from people who are eligible to vote and on the electoral roll.

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.

Some members of society are disqualified (such as some prisoners) or ineligible (such as lawyers and police officers) from being on a jury. Others can be excused if they have a valid reason (for example, if 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.

The jurors must take the job of being on a jury 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 following scenario is an example of an appeal of a case where the Court of Appeal found that the whole jury should have been discharged.

ACTUAL SCENARIO

New trial ordered after communication between a juror and the tipstaff

Carson (a Pseudonym) v The Queen [2019] VSCA 317 (20 December 2019)

In this case, the offender was a former principal of a regional boarding school in Victoria and was charged with 15 historical sexual offences. He pleaded not guilty and his trial commenced in July 2019.

During the offender's trial, one of the jurors approached a tipstaff outside the jury room and away from all other jurors. This juror expressed a belief that the offender's support person was present in the jury pool room when the jury panel was decided, and that the support person took photos of possible jurors. The tipstaff told the judge, and CCTV footage was examined. The footage showed that the offender's support person was in court with the offender, but there was no footage of them in the jury pool room. At the judge's discretion, the tipstaff informed the juror of this, however the parties' representatives were not informed.

On the weekend the tipstaff had a phone call with the juror, who was concerned about being protected. The juror believed he had seen the support person walking down his street. The tipstaff informed the judge, and there were further communications between the juror and the tipstaff.

One week later the judge raised the events in court with the legal practitioners. The juror was questioned by the judge in court. The offender then applied to have the entire jury panel discharged, however the application was refused and the trial proceeded. He was ultimately found guilty of 13 charges and sentenced to 14 years and 6 months in prison, with a non-parole period of 10 years.

The offender appealed against his sentence. One of the grounds of appeal was that the trial judge made an error by refusing the offender's application to discharge the jury, and this resulted in a substantial miscarriage of justice. This application had not been opposed by the prosecution at the time. The offender also appealed on the basis that the trial judge failed to inform the parties of communications that had occurred between the tipstaff and one of the jurors until one week after the communications took place. On these grounds the Court of Appeal allowed the appeal. It held that a trial judge must disclose significant communications from the jury to the parties. In this case the communication was of real significance as it may have indicated that the jury may have developed a bias against the offender, or may have become distracted in the trial.

The Court found that the moment the allegation made against the support person by the juror was kept from both parties, the trial was no longer fair. It found that the offender was denied the opportunity to make a timely application to discharge either the juror or the entire jury and there was a substantial miscarriage of justice. A new trial was ordered.



Source 5 In this case, the correspondance between the tipstaff and juror indicated that the jury may have developed a bias against the offender.

Listen to and remember the evidence

Evidence is sometimes complicated, particularly in cases involving fraud and drugs, 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 must not undertake its own investigations of what happened, conduct any research on the case, or make any enquiries about trial matters. They are not allowed to use 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 do not 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

unanimous verdict
a 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 decision where all but one of the members of the jury are in agreement. In a criminal trial, this means 11 of the 12 jurors are in agreement

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.

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 in the following scenario.

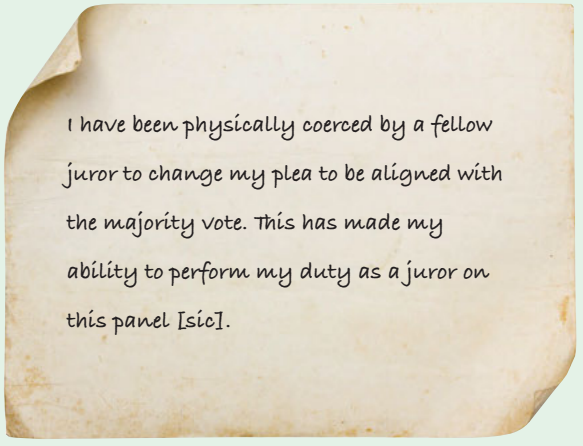
ACTUAL SCENARIO

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 (the head juror chosen to be spokesperson for the jury) was asked, in accordance with usual practice, whether 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.



Source 6 The exact text of the note left in the jury room after Smith's trial

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.

4.7 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 The judge does not have investigatory powers. Explain how this upholds the principle of equality.

3 Describe one way in which the responsibilities of the judge uphold the principle of access.

Synthesise and apply

4 Read the scenario *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?

5 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.

6 Read the scenario *Carson (a Pseudonym) v The Queen*.
- **a** Explain what it means to discharge a jury.
- **b** Why was it necessary for the parties to be informed of the communications that took place?
- **c** What principle of justice does this case most demonstrate? Justify your answer.

7 Read the scenario *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 is important?
- **e** Why did the High Court decide that the exclusionary rule did not apply in this case?
- **f** Consider this case and that of *Farah v The Queen*. Why does the exclusionary rule not apply to what happened in the *Farah* case?

Analyse and evaluate

8 Do you think jury deliberations should be secret? Give reasons for your opinion, referring to the principle of fairness.

9 Discuss the extent to which the responsibilities of the judge uphold the principle of equality.

Check your obook assess for these additional resources and more:

- **Student book questions** 4.7 Check your learning
- **Going further** Choosing a jury
- **Going further** Rules of evidence
- **Weblink** Roles in court

4.8 THE RESPONSIBILITIES OF THE PARTIES AND LEGAL PRACTITIONERS IN A CRIMINAL TRIAL

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.

In addition to the judge and the jury, the parties and the legal practitioners also have responsibilities in a criminal trial.

Responsibilities of 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, but must always 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.

In a criminal trial, the parties have certain 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.

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 can 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 witness, then the accused can request that the trial judge direct the jury on that fact.

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

The parties also have the following 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 following scenario 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.



Source 1 Kerri Judd SC was appointed Victoria's Director of Public Prosecutions in March 2018. She is the first woman to be appointed to the role.

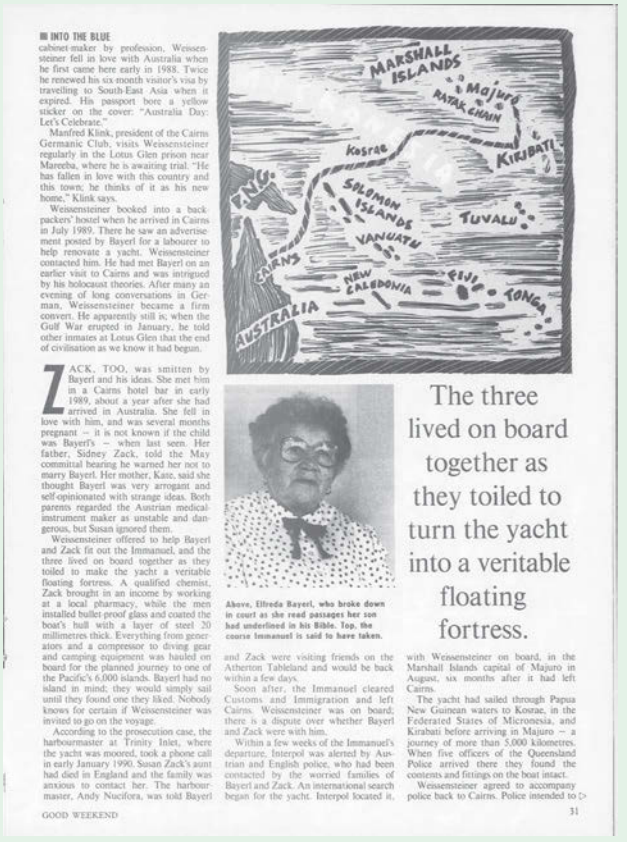
The Weissensteiner principle

ACTUAL SCENARIO

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.



INTO THE BLUE

cabinet-maker by profession, Weissensteiner fell in love with Australia when he first came here early in 1988. Twice he renewed his six-month visitor's visa by travelling to South-East Asia when it expired. His passport bore a yellow sticker on the cover: "Australia Day: Let's Celebrate."

Manfred Klink, president of the Cairns Germanic Club, visits Weissensteiner regularly in the Lotus Glen prison near Mareeba, where he is awaiting trial. "He has fallen in love with this country and this town; he thinks of it as his new home," Klink says.

Weissensteiner booked into a backpackers' hostel when he arrived in Cairns in July 1989. There he saw an advertisement posted by Bayerl for a labourer to help renovate a yacht. Weissensteiner contacted him. He had met Bayerl on an earlier visit to Cairns and was intrigued by his holocaust theories. After many an evening of long conversations in German, Weissensteiner became a firm convert. He apparently still is; when the Gulf War erupted in January, he told other inmates at Lotus Glen that the end of civilisation as we know it had begun.

ZACK, TOO, was smitten by Bayerl and his ideas. She met him in a Cairns hotel bar in early 1989, about a year after she had arrived in Australia. She fell in love with him, and was several months pregnant — it is not known if the child was Bayerl's — when last seen. Her father, Sidney Zack, told the May committal hearing he warned her not to marry Bayerl. Her mother, Kate, said she thought Bayerl was very arrogant and self-opinionated with strange ideas. Both parents regarded the Austrian medical-instrument maker as unstable and dangerous, but Susan ignored them.

Weissensteiner offered to help Bayerl and Zack fit out the Immanuel, and the three lived on board together as they toiled to make the yacht a veritable floating fortress. A qualified chemist, Zack brought in an income by working at a local pharmacy, while the men installed bullet-proof glass and coated the boat's hull with a layer of steel 20 millimetres thick. Everything from generators and a compressor to diving gear and camping equipment was hauled on board for the planned journey to one of the Pacific's 6,000 islands. Bayerl had no island in mind; they would simply sail until they found one they liked. Nobody knows for certain if Weissensteiner was invited to go on the voyage.

According to the prosecution case, the harbourmaster at Trinity Inlet, where the yacht was moored, took a phone call in early January 1990. Susan Zack's aunt had died in England and the family was anxious to contact her. The harbourmaster, Andy Nucifora, was told Bayerl

MARSHALL ISLANDS
Majuro
RATAK CHAIN
Kosrae
KIRIBATI
F.S.M.
SOLOMON ISLANDS
TUVALU
VANUATU
CAIRNS
NEW CALEDONIA
FIJI
TONGA
AUSTRALIA

Above, Elfreda Bayerl, who broke down in court as she read passages her son had underlined in his Bible. Top, the course Immanuel is said to have taken.

The three lived on board together as they toiled to turn the yacht into a veritable floating fortress.

and Zack were visiting friends on the Atherton Tableland and would be back within a few days.

Soon after, the Immanuel cleared Customs and Immigration and left Cairns. Weissensteiner was on board; there is a dispute over whether Bayerl and Zack were with him.

Within a few weeks of the Immanuel's departure, Interpol was alerted by Australian and English police, who had been contacted by the worried families of Bayerl and Zack. An international search began for the yacht. Interpol located it, with Weissensteiner on board, in the Marshall Islands capital of Majuro in August, six months after it had left Cairns.

The yacht had sailed through Papua New Guinean waters to Kosrae, in the Federated States of Micronesia, and Kirabati before arriving in Majuro — a journey of more than 5,000 kilometres. When five officers of the Queensland Police arrived there they found the contents and fittings on the boat intact.

Weissensteiner agreed to accompany police back to Cairns. Police intended to ▷

GOOD WEEKEND

31

Source 2 A page from the newspaper reporting the crime for which Weissensteiner served jail time

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 the Supreme Court of Victoria. Several DPPs have subsequently been appointed as judges.

Responsibilities of 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 cannot mislead or deceive the court, they cannot place incorrect facts before the court, and they must be honest about the law set out in previous cases (for example, they should not 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.

At trial, an accused is usually represented by two types of legal practitioner: 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.

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 should not 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.

Act in the best interests of their client

Legal practitioners have a responsibility to act in their client's best interests and present the case in a manner that has regard for those interests.

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. In doing so, they must ensure that they uphold their duty to the client, and not a duty to the broader society.

Other responsibilities

In addition to their main responsibilities, legal practitioners for the accused 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.



Source 3 Judges in Victoria have been wearing this new style of black robe, rather than the traditional red robes, since April 2017.

In the following scenario, Justices Weinberg, Priest and Mcleish criticised the prosecution for their delay in conceding a wrong verdict.

ACTUAL SCENARIO

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.



Source 4 In this case, two men were accused of selling three Brett Whiteley paintings.

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 5 below. Note that the *VCE Legal Studies Study Design* requires you to discuss these responsibilities. There are other points you can make beyond those in the table below to formulate a discussion.

KEY PERSONNEL	POINTS FOR DISCUSSION
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 and can make errors in the trial. • 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 does not 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 cannot make their own enquiries, thus ensuring a fair trial without bias, fear or favour. • Must remain objective, but may have unconscious biases. • Needs to 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 judge's directions, but these can be complex too. • Does 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 act in the best interests of their client. • 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 5 Some points of discussion in relation to the responsibilities of key personnel

4.8 CHECK YOUR LEARNING

Define and explain

1 Identify the 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? Justify with reference to the rule of law.

3 Explain what is meant by party control.

Synthesise and apply

4 Read the scenario *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?
- **e** Conduct some research on the case involving Borce and Karen Ristevski. Explain its relevance to the *Weissensteiner* case.

5 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 is not helpful in obtaining a guilty verdict.
- **b** The **accused** is not a fan of jury trials, and has asked one of her big, burly mates to attend trial each day to 'stare down' each of the jurors.
- **c** The **accused's barrister** believes the accused is guilty. Despite the accused maintaining innocence, in private conversations her story does not 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, does not 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** 4.8 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

4.9 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

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** (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 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.

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

	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 years 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.
LEAST SEVERE	**Adjournment** with or without conviction	Record a conviction and order the release of the offender with conditions attached; or without recording a conviction, order the release of the offender on the adjournment of the hearing, with conditions attached.
	Discharge with conviction	Record a conviction and order the discharge of the offender.
	Dismissal without conviction	Without recording a conviction, order the dismissal of the charge for the offence.

Source 1 The hierarchy of sanctions set out in the *Sentencing Act*

Did you know?

In 1788 sentencing options in the colony of New South Wales included execution, flogging with a cat-o'-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*.

Before looking at specific sanctions, it is useful to consider what the purposes or aims of sanctions are. The purposes of sanctions are set out in section 5(1) of the *Sentencing Act* and 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

rehabilitation
one purpose of a sanction, designed to reform an offender in order to prevent them from committing offences in the future

One purpose of sanctions is **rehabilitation**. Rehabilitation is designed to address the underlying reasons for the crime and **treat** the offender based on those reasons. For example, a person may have a drug and/or alcohol addiction which led to the commission of the offence. Rehabilitation will focus on treating that addiction. As another example, a person may have suffered severe trauma or difficulties in their life and as a result they committed a crime. Again, a sanction focused on rehabilitation would look at programs to treat that trauma.

community correction order (CCO)
a non-custodial sanction (one that does not involve a prison sentence) that the offender serves in the community, with conditions attached to the order

The sanction will therefore aim 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 Topic 4.11.

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. In December 2019 it was reported that an art project, known as the Torch program, for Indigenous prisoners had reduced rates of reoffending. The program helps Aboriginal and Torres Strait Islander prisoners and former prisoners reconnect with their culture through art and help provide a pathway towards rehabilitation.

However, generally, prison is not seen as an ideal place to rehabilitate somebody – rather, it has often been recognised by courts that it is not an ideal place to be treated, particularly for those with a mental illness or a significant addiction.



Source 2 The Torch program helps Aboriginal and Torres Strait Islander prisoners and former prisoners reconnect with their culture through art and provides a pathway towards rehabilitation.

An example of a case in which rehabilitation was not a primary consideration was *DPP v AK*; the judge decided that the accused had very little prospect of rehabilitation.

'Problematic' prospects of rehabilitation for murderer

ACTUAL SCENARIO

DPP v AK (Sentence) [2019] VSC 852 (20 December 2019)

On 20 December 2019 'AK' was sentenced for the murder of Laa Chol. Laa was 19 years old at the time of her death, and was undertaking a Diploma of Legal Studies at Victoria University. AK was 17 at the time of offending.

At a party in July 2018, to which the offender was not invited, a fight broke out before Laa was stabbed by the offender. He was arrested two days later. He was found guilty by a jury of murder.

AK was sentenced to 20 years' imprisonment, with a non-parole period of 15 years. As part of sentencing, the Court noted that the offender had several previous convictions and had previously spent time in a youth justice centre. It found that his previous convictions were relevant to an assessment of AK's prospects of rehabilitation, and that those prospects were 'quite problematic'. The Court found that AK had a real problem with controlling his feelings and that he was all too ready to resort to serious acts of violence to deal with situations in which he became involved.



Source 3 Laa Chol was 19 at the time of her death and was undertaking a Diploma of Legal Studies at Victoria University. She is pictured here playing soccer (in blue).

Punishment

Punishment is one of the purposes of sanctions. It provides the community with an opportunity to seek their **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 a manner that is just in all circumstances, so that the community can feel it has achieved retribution. Usually, the purpose of punishment is combined with another purpose such as deterrence.

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

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 proportionate to the offence committed. An overly harsh sanction should not be imposed; likewise, a sanction that is too lenient may not act as enough of a punishment.

The heavy punishment handed down in the following scenario was appropriate because of the nature of the offence.

ACTUAL SCENARIO

Uncle kills nephew and is sentenced to 26 years' imprisonment

The Queen v Pozzebon [2019] VSC 631 (18 December 2019)

On 18 December 2019 John Pozzebon was sentenced to 26 years' imprisonment with a non-parole period of 19 years for the murder of his nephew Jason Smith after he pleaded guilty to the crime. Following a fight between the uncle and nephew about money at a home, the offender grabbed a rifle and shot his nephew in the head. He was arrested soon after.

At his sentencing hearing, Justice Tinney of the Supreme Court said:

> To my mind, the important reasons for which sentence must be passed in your case are just punishment, denunciation, general deterrence, and protection of the community. You must be punished in a way which reflects the shocking seriousness of your crime and amounts to an appropriate response to it. The sentence of this Court must make it perfectly clear that the Court deplores violent crimes of this sort. The life of Jason Smith was precious. You took it away for no good reason, but in the clear knowledge of the severity of your actions. You were a mature adult of normal intelligence, suffering no mental impairment that clouded your reason or judgment.

Deterrence

deterrence
one purpose of a sanction, designed to discourage the offender and others in the community from committing similar offences

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 can also act as a **specific deterrence.** This is when they discourage that particular offender from committing the same offence again.

In *The Queen v Pozzebon* (the scenario above), the Supreme Court also found that general deterrence was important. Justice Tinney noted 'the sentence I pass must bring it clearly home to any person who might be minded to inflict extreme violence in response to feelings of anger and frustration that such conduct will be met with strong punishment'. Therefore, a message was sent to the broader community – if you act with extreme violence, then the sentence will be significant.

Denunciation

denunciation
one purpose of a sanction, designed to demonstrate the community's disapproval of the offender's actions

Denunciation refers to the **disapproval** of the court. A sanction may be given to show the community that the court disapproves of the offender's conduct. For example, the judge may give a harsh sentence for a particularly violent rape and make comment about how the court is showing disapproval of this type of behaviour. This was demonstrated in the scenario below.

ACTUAL SCENARIO

Denunciation given prominence in terrorist case

R v Ali [2020] VSC 316 (21 May 2020)

In this case, Ali Khalif Shire Ali pleaded guilty to intentionally doing an act in preparation for, or planning, a terrorist act. The offender planned to carry out a terrorist attack in Melbourne at the end of 2017. He intended to kill civilians in the attack, and considered various methods to carry out the act. The prosecution had evidence that the offender planned and prepared to carry out the attack, because the offender had conversations about doing so with undercover

police officers. At the time of the offences, the offender was 20 years old. He was 23 years old at the time of sentencing.

The defence counsel for the offender acknowledged that, in previous cases, the courts have made it clear that while youth is relevant in determining the weight to be given to general deterrence and denunciation, that weight of youth is diminished in cases where the youthful offender participates in or plans to carry out an act of extreme violence. That is, general deterrence and denunciation must be given primacy above the youth of the offender. However, the Supreme Court acknowledged various other factors – including that the offender appeared to be thoughtful, capable of reflection and was young, intelligent and well-educated.

After consideration of all the relevant factors and sentencing purposes, Ali was sentenced to a term of imprisonment of 10 years. A non-parole period of seven years and six months is to be served before Ali is eligible for parole.

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.

protection
one purpose of a sanction, designed to safeguard the community from an offender in order to prevent them from committing further offence (e.g. by imprisoning the offender)

A non-custodial sentence (when an offender is not 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. Conditions such as preventing the offender from going to certain places can also act as a protective mechanism. However, offenders sometimes abuse CCOs and offend while carrying out community work, or they sometimes breach the conditions imposed.

In some cases, the court can impose an indefinite sentence. An indefinite sentence is a term of imprisonment with no set end date, and is used for offenders who have committed serious crimes and are a serious danger to the community. In most cases, this has involved offenders who have committed serious violent or sexual offences. Only the court can decide whether to release a person on an indefinite sentence. An indefinite sentence was imposed on the murderer of Sarah Cafferkey in 2013. Sarah was tragically killed in November 2012 and her murderer, Hunter, was considered a serious violent offender who would remain a threat to the community, even in old age.

In other cases, parliament has intervened and has created specific legislation for a specific offender, preventing them from easily getting released from prison (see below).

Parliament steps in to protect the community

ACTUAL SCENARIO

Julian Knight and Craig Minogue

Julian Knight is one of Australia's most infamous mass murderers. In August 1987, he shot dead seven people and injured 19 during a shooting in and near Hoddle Street, Melbourne. He was sentenced to seven terms of life imprisonment with a non-parole period of 27 years, meaning he was eligible for parole in 2014.

Craig Minogue is also a convicted murderer, responsible for the tragic bombing in 1986 of the police headquarters in Russell Street, Melbourne. The bombings killed an Australian policewoman and injured many others. Minogue was sentence to life imprisonment and was required to serve a minimum term of 28 years before he was eligible for parole in 2016.

Both Knight and Minogue have applied for parole, but the Victorian Parliament has stepped in and passed legislation specifically in relation to these two offenders.



Source 4 Julian Knight shot dead seven people and injured a further 19 during a shooting on Hoddle Street, Melbourne in 1987.

Section 74AA of the *Corrections Act 1986* (Vic) was introduced into legislation in 2015 and is titled 'Conditions for making a parole order for Julian Knight'. It says that the Parole Board (which considers applications for parole) cannot approve a parole application unless it is satisfied that Knight is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person, and he has demonstrated that he does not pose a risk to the community. Similarly, section 74AB of the *Corrections Act* was introduced into legislation in 2018 and is titled 'Conditions for making a parole order for Craig Minogue'. It contains the same conditions imposed on Julian Knight.

Both men have tried to challenge the legislation in court, but those challenges have been unsuccessful.

4.9 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 Distinguish between general deterrence and specific deterrence.

Synthesise and apply

4 Read the scenario *DPP v AK*.
- **a** What was the crime?
- **b** Explain why the Court found there were problematic prospects of sentencing.

5 Read the scenario *R v Ali*.
- **a** Explain what the offender was charged with and the evidence against him.
- **b** Describe the sanction imposed by the Supreme Court.
- **c** Who could appeal the decision, and on what grounds?
- **d** Explain the relationship between the offender's youth, the circumstances of offending, and the purpose of denunciation in this case.
- **e** Access the Court's judgment in this case on the Australasian Legal Information Institute. Your teacher will assign paragraphs among the class members to summarise for the rest of the class. Once you have the full set of facts, discuss as a class the extent to which you agree with the sentence imposed.

Analyse and evaluate

6 '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, refer to at least two cases.

7 'Protection of the community should be the role of the courts, and not the role of parliament. Sections 74AA and 74AB of the *Corrections Act* usurp the role of the courts in sentencing.' Discuss this statement as a class. Before you do, conduct some research on both Julian Knight and Craig Minogue.

Check your obook assess for these additional resources and more:

- **Student book questions** 4.9 Check your learning
- **Worksheet** The purposes of sanctions
- **Weblink** You be the judge
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

4.10 TYPES OF SANCTIONS – FINES

The *VCE Legal Studies Study Design* requires you to know the following three sanctions: fines, community correction orders and imprisonment. You will study fines in this topic, and in the next two topics you will study community correction orders and imprisonment.

What is a fine?

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

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.

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. You could be asked a specific question about any of these sanctions in your assessment task or the end-of-year examination.

EXTRACT

Crimes Act 1958 (Vic) – section 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.

The *Sentencing Act* expresses fines in levels (2–12). Level 2 is the highest level, and level 12 is the lowest. 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 ('level 1' crimes are very serious offences such as murder and a fine would not be appropriate).

The use of 'penalty units' instead of fixed monetary amounts allows the government to increase all fines by increasing the value of a penalty unit each year without changing all statutes. Using the example of 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 scenario on the next page is an example of the court imposing a fine for illegally knocking down a historic pub in Melbourne.

ACTUAL SCENARIO

Developers who demolished Melbourne's Corkman Irish Pub have fines reduced on appeal

Bridget Rollason, *ABC News*, 7 September 2019

The developers who illegally knocked down a historic Melbourne pub have had their penalties almost halved, after a successful appeal in the Victorian County Court.

Raman Shaqiri and Stefce Kutlesovski pleaded guilty to breaching building and planning laws when they demolished the Corkman Irish Pub in Carlton without approval over a weekend in October 2016.

In February, the pair were fined more than $1.3 million plus costs, which amounted to a total of almost $2 million.

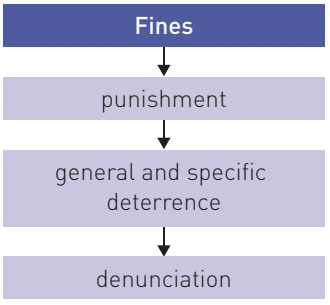
But County Court Judge Trevor Wraight reduced that penalty to just over $1 million, after he found the fines to be excessive.

During sentencing, Judge Wraight acknowledged the public anger the demolition had caused, but said it was up to Parliament to increase the penalties available.

'The community was outraged at the audacious manner in which the hotel was demolished by the owners without any consultation with the community,' Judge Wraight told the court.

Source 1 The historic Corkman Irish Pub was knocked down in 2016.





Source 2 The purposes of fines

Sentencing purposes of fines

Fines serve to **punish** offenders by requiring them to pay money to the state. Therefore the financial circumstances of each offender are important when a magistrate or judge is deciding on an appropriate sanction, 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 large 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

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. Similarly, if the offender does not have enough money, and cannot pay the fine, then it is unlikely to punish or deter them.
- 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 consider when determining whether a fine is able to achieve its purposes. Other factors may also be present when you consider a particular scenario.

4.10 CHECK YOUR LEARNING

Define and explain

1 Define the term 'fine' and identify to whom it is made.

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 scenario 'Developers who demolished Melbourne's Corkman Irish Pub have fines reduced on appeal'.
   - **a** Describe the key facts of the case.
   - **b** What sentence was originally imposed, and what was imposed on appeal?
   - **c** Would imprisonment have been an appropriate sanction? Justify your answer.

5 State whether you think that a fine would act as a specific deterrent for the following persons. Justify each response.
   - **a** Paulo 'Rodder' Tyler is a homeless person who lives in Flinders Street Station. He has been charged with begging.
   - **b** Vicky attends the University of Melbourne and has been fined for not having a valid tram ticket.
   - **c** Ursula, 75, was found urinating on a public street. She lives in public housing.

Analyse and evaluate

6 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** 4.10 Check your learning
- **Going further** Other types of sanctions
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

4.11 TYPES OF SANCTIONS – COMMUNITY CORRECTION ORDERS

Study tip

In 2019 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-based sanction is ordinarily available for people where a fine is not a severe enough sanction on its own, or is not appropriate, and imprisonment is also not appropriate. Community-based sanctions have therefore often been considered a useful form of sentence for those offenders whose sentence is best served in the community.

What is a CCO?

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 certain 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 offender**. If the offender does not 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. This is because some portions of the community and parliament formed the view that CCOs were being used too frequently, including for people who were best to serve a term of imprisonment. This was not a view shared by everyone, but as a result of the legislation:

- a CCO cannot be a sanction imposed for 'category 1 offences'. Category 1 offences include murder, various sexual offences, some assault offences and some drug offences.
- a CCO cannot be a sanction imposed for 'category 2 offences' unless in certain circumstances (for example, where the offender has a mental impairment). Category 2 offences include manslaughter, child homicide, kidnapping, arson causing death and some drug offences.



Source 1 One condition of a CCO is that the offender must not leave Victoria without permission.

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.



Source 2 Unpaid community work is one of the conditions that may be imposed as part of a community correction order.

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.

The court is also required to attach at least one special condition. The main ones are set out in Source 3 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 also 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 corrections 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 (for example, 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 (for example, staying at home between 9 pm and 6 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).

Source 3 One of the above special conditions must be attached to the CCO.

In 2018 the Victorian Government introduced a new form of community correction order, called a 'mandatory treatment and monitoring order'. The new order will be available where a person injures an emergency worker and imposes strict conditions on the offender, one of which is a judicial monitoring condition, and the other of which is either a treatment and rehabilitation condition, or a justice plan condition (which would apply if the offender has an intellectual disability, and requires the offender to comply with a plan to attend particular services).

In the following scenario, the judge imposed a CCO with three special conditions imposed.

ACTUAL SCENARIO

Wendouree gun incident returns to County Court

Erin Williams, *The Courier,* 15 December 2019

A Wendouree man who brought a slug gun to a neighbourhood dispute has avoided a 14-month jail sentence after winning an appeal on Friday.

Jason Baldwin, a 20-year-old father of two, appealed the severity of the sentence – which included a non-parole period of eight months – at the County Court at Ballarat in October.

County Court Judge Duncan Allen set aside the jail sentence imposed at the Ballarat Magistrates Court on June 5 and re-sentenced Baldwin to a two-year community correction order.

'It's in the community's best interest to re-sentence Mr Baldwin on two charges to a community correction order for two years with conditions he be under supervision and he submit to programs for mental health,' Judge Allen said.

He said he set aside the Magistrates Court sentence for the reasons set out by defence lawyer Scott Belcher, which included the sentence imposed by the lower court was inconsistent with current sentencing practices.

Judge Allen said another reason behind his decision was the details of a psychological report, which was prepared at the judge's request.

Baldwin was arrested and charged with possessing a firearm while a prohibited person and filing off the serial number after an incident on June 5.

During the incident about 2am, Baldwin's friend had called him as he was in an argument with a neighbour about parking, and needed 'muscle' after she got her friends to join her.

Baldwin arrived at Primrose Street, Wendouree holding the slug gun. The court had previously been told Baldwin did not 'brandish' the weapon, and no witnesses said he pointed it at anyone – instead, he had helped defuse the situation.

He pleaded guilty to the two charges at the Ballarat Magistrates Court on the same day as the incident.



Source 4 The offender in this case was charged with possessing a firearm.

Baldwin's community correction order includes judicial monitoring, supervision and programs for mental health and to reduce offending.

'Don't put a foot wrong this time. You only get a number of chances,' Judge Allen told Baldwin.

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 condition or a treatment and rehabilitation condition 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 (for example, 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 can 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.

4.11 CHECK YOUR LEARNING

Define and explain

1 Explain why a CCO is considered to be a 'tailor-made' type of sanction.

2 Identify two types of offences for which a CCO cannot be imposed.

Synthesise and apply

3 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-husband.
   - **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.

4 Read the scenario 'Wendouree gun incident returns to County Court'.
   - **a** Describe the role of the Magistrates' Court and the County Court in this case.
   - **b** Explain the purposes of each of the three conditions imposed on the offender.
   - **c** Provide one reason for and one reason against imposing a CCO on Baldwin.

Analyse and evaluate

5 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 in your answer.

Check your obook assess for these additional resources and more:

Student book questions
4.11 Check your learning

Weblink
'A quick guide to sentencing' – Sentencing Advisory Council

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

4.12 TYPES OF SANCTIONS – IMPRISONMENT

In some cases, imprisonment may be seen as the only appropriate sanction that can be imposed. Imprisonment is often called the sanction of last resort and is the most severe form of sentence that can be imposed in Victoria (and anywhere else in Australia), following the abolition of the death penalty in the twentieth century.

What is imprisonment?

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

People who have been convicted of a serious 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. As at 30 June 2019 there were 8101 prisoners in the Victorian prison system – 7527 of those were male prisoners.

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.

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

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. For some, this will mean that they will never be released from prison.

The Magistrates' Court is limited in the length of imprisonment it may impose. The maximum term of imprisonment it can impose 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.



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).

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.

If an offender has been held in custody (that is, on remand) before sentencing, any time spent in prison may be considered 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 Knowingly possessing child pornography
Level 6	5 years	Recklessly causing injury 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	Concealing the birth of a child

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 various offences, including the following:

- for certain serious offences (as defined, and which includes 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 can impose 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 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.



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.

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 involving children under 16.

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 more than 40 per cent. This means that at least four in every 10 prisoners in Victoria have been imprisoned before. The article on the next page considers the issues with the cost of imprisonment in Victoria. Interestingly, the Victorian Government is currently attempting to manage the ongoing growth of the prison population of Victoria by building a new maximum-security prison near Barwon Prison.

Many argue that this is not the solution to the growing problem of prisoner population and the cost to run prisons. In particular, in 2018–19 it cost $317.90 per day to keep a prisoner in jail. That amounts to just over $116 000 per prisoner per year.

Talking crooks straight

ACTUAL SCENARIO

John Silvester, *The Age*, 13 December 2019

Social worker-turned-naturopath Claire Seppings was a regular at the old Bendigo Prison, turning up once a fortnight to teach interested inmates about healthy lifestyles. Craig was an armed bandit who robbed to feed his drug addiction. He had been abandoned as a child, made a ward of the state at 11 and at 16 was jailed in the adult Pentridge Prison.

Seppings was from the right side of the tracks, married with a daughter. She lived on a hobby farm with animals – he lived in a prison with violent offenders. She was 34 and he was 28.

When he was released they moved in together and with her qualifications she was better equipped than most to help him stay out of jail. Yet he returned to crime.

After five years outside he was caught using a shotgun to commit four armed robberies in nine days. He was sentenced to six years. It was during a prison visit Craig told Seppings: 'I don't know how to be straight.'*

'It stopped me in my tracks,' she says. She realised that attempts to reform, re-educate and guide prisoners away from crime were failing and that there had to be a better way.

The terrible facts are that more than 43 per cent of released prisoners return to jail in Victoria within two years and considering our prison population is exploding, this means the problem will only get worse.

In Victoria prison numbers are at a record high of about 8000 and projected to reach 11,000 in 2023. The annual cost of running the state's prisons is now more than $1.6 billion, with each inmate costing nearly $300 a day. Every prison admission is an admission of failure by the criminal who commits the offence and the system that has failed to alter the destructive behaviour.

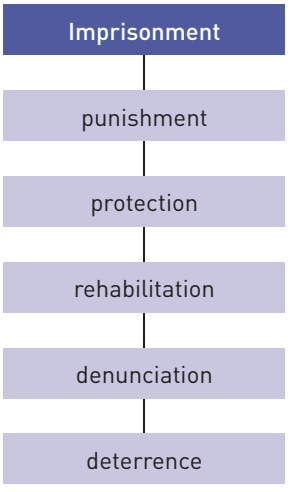
Purposes of imprisonment

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 can achieve its purposes include:

- the rate of recidivism and whether imprisonment is effective
- the availability of drugs in prisons (Corrections Victoria has acknowledged that greater than 11 per cent of prisoners targeted for a drug test in 2020 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 consider when determining whether imprisonment is able to achieve its purposes. Other factors may also be present when you consider a particular scenario.

4.12 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 for them to work out the type of sentence imposed.

Analyse and evaluate

6 Evaluate the ability of imprisonment to address the underlying causes of offending.

7 Conduct a debate or discussion in class on the following statement: 'The solution to the increasing number of prisoners in Victoria is to build more prisons.' In your debate or discussion, you should consider factors including the cost of prisons, the number of prisoners, recidivism and the purposes of sanctions.

Check your obook assess for these additional resources and more:

- **Student book questions** 4.12 Check your learning
- **Going further** Standard sentencing regime
- **Weblink** Corrections, Prison and Parole
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

4.13 SENTENCING FACTORS

When deciding the appropriate sanction to be imposed on an offender, the *Sentencing Act* requires a court to take several 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 scenario.

Aggravating factors

aggravating factors facts or circumstances about an offender or an offence that can lead to a more severe sentence

Aggravating factors are circumstances about the offender or the offence that can lead to an increase in the sentence that the offender will receive. Examples of aggravating factors include:

- the use of violence, explosives or a weapon when committing the offence
- the nature and gravity of the offence (for example, 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 (such as 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 (for example, 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.

The courts have long established that a lack of remorse is **not** an aggravating factor – but remorse can act as a mitigating factor.

Which aggravating factors will be relevant to sentencing depends on the circumstances of the offending.

mitigating factors facts or circumstances about the offender or the offence that can lead to a less severe sentence

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 showed remorse (this can often be demonstrated through the offender's conduct post-offence, such as cooperating with police, pleading guilty early, or general behaviour at court hearings)
- the offender has no record of previous convictions or is of good character
- the offender was acting under duress
- the offender has shown efforts towards rehabilitation while awaiting sentencing, or has prospects of rehabilitation
- the offender was under personal strain at the time or they have a unique background which means a lighter sentence should be imposed (for example, if they have had a difficult and violent childhood)

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.

- 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.

The Sentencing Advisory Council has described mitigating and aggravating factors as acting a bit like a 'tug of war' – mitigating factors pull towards a lighter sentence, whereas aggravating factors pull towards a heavier sentence.

As shown in the following scenario, a judge can consider a number of different factors when sentencing an accused.

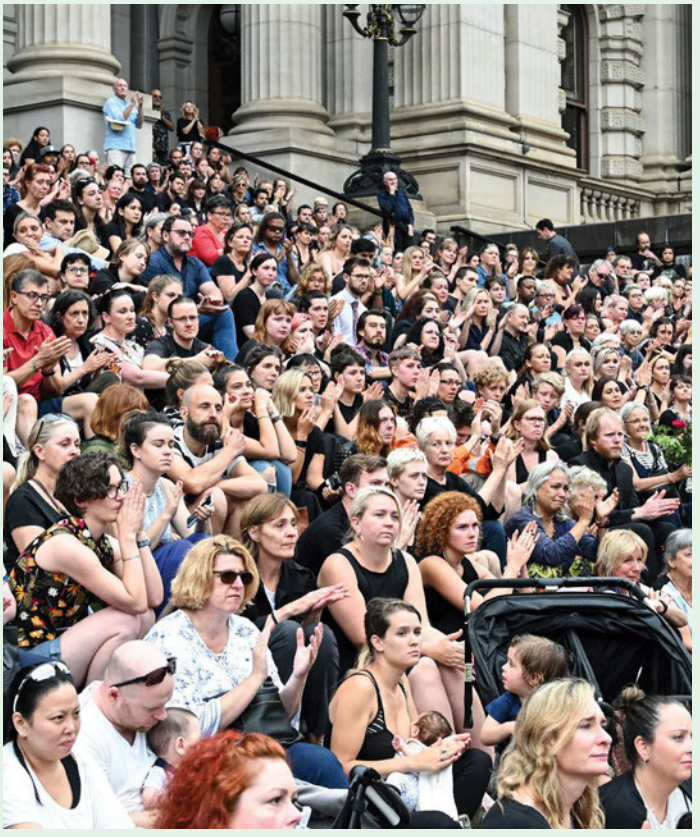
ACTUAL SCENARIO

Moral culpability to horrible crime reduced by personality disorder

DPP v Herrmann [2019] VSC 694 (29 October 2019)

In a horrific crime that shocked Melbourne, a young woman was brutally attacked in the early hours of 16 January 2019 on her way home from a comedy show in North Melbourne.

Codey Herrmann, aged 20 at the time, was walking on the footpath towards the victim. He confronted the victim on the footpath where he assaulted and murdered her before fleeing the scene. Herrmann was ultimately arrested and charged with rape and murder. He pleaded guilty to both charges at a committal mention on 7 June 2019, the earliest possible opportunity to plead guilty as part of the formal hearing processes.



Source 1 Melburnians gather on the steps of Parliament house to mourn the loss of the victim in the days after her death.

As part of the sentencing Justice Hollingworth set out Herrmann's background and the circumstances of the crime. She noted that the victim was doing nothing more than walking along a public street on her way home from a night out, and was physically small, unsuspecting and alone. As to Herrmann, the first three years of his life were a time of extreme physical and emotional deprivation. He was temporarily removed from his parents and was subject to numerous welfare notifications when he was very young. He was eventually placed into foster care until he was 18. He displayed behavioural problems at school, had anger and self-esteem issues, and poor concentration in class. He had suffered mental health issues from a young age, used drugs and had substance abuse issues. He had only sporadic employment and limited social contacts. He had previously attempted suicide.

The victim's family members and friends were deeply affected by the crime, and gave emotional and powerful victim impact statements both about the victim and the impact the crime had on them.

Some of the aggravating factors included the fact that Herrmann had tried to destroy evidence

in relation to the crime, and the circumstances of the offending, including the brutality of the crime.

Some of the mitigating factors included Herrmann's early guilty plea, which the Court noted as having spared the young woman's family and friends a very traumatic trial, his age (though the Court noted that the more serious the offending, the less weight is to be attached to youth), and the offender's fair prospects of rehabilitation.

An interesting focus of this case was that of Herrmann's personality disorders. Two psychologists provided expert reports and found that Herrmann had a 'severe personality disorder'. The Court had to consider what impact the personality disorder should have on the sentence. It considered the High Court case of *Bugmy v R* (2013) 249 CLR 571 and ultimately found that an offender's inability to control their violent response to frustration could decrease their moral culpability, but may increase the importance of protecting the community. In this case Justice Hollingworth found that Herrmann's personality disorder reduced, but did not remove, the need for general deterrence and that his sentence needed to reflect the Court's denunciation of, and need for just punishment for, these sorts of crimes.

Herrmann was ultimately sentenced to a total effective sentence of 36 years in prison. He is to serve 30 years in prison before he becomes eligible for parole.

Guilty pleas

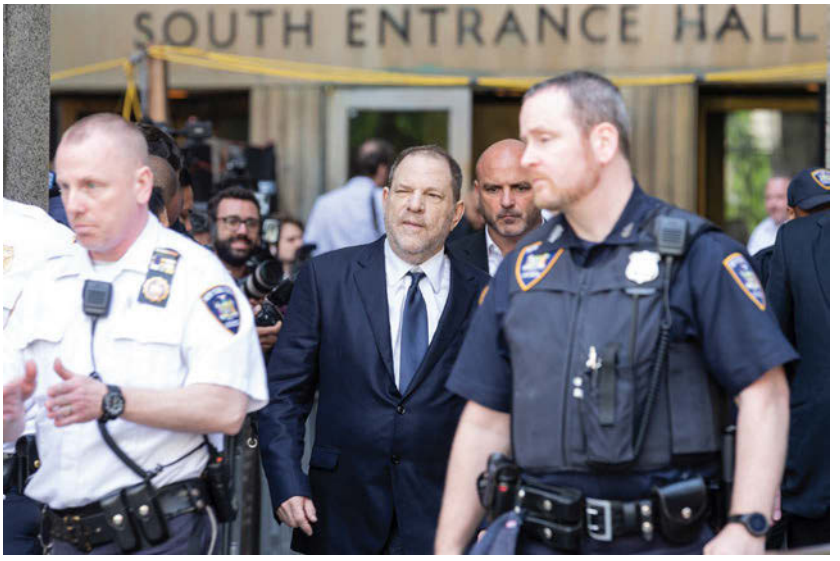
One of the factors a court must consider when sentencing an offender is whether the offender **pleaded guilty** to the offence and, if so, how far into the case. A guilty plea at an early stage before trial (or hearing) or at the start of the trial can result in a sentence of reduced severity, because it acts as a mitigating factor.

The *Sentencing Act* allows the court to consider a guilty plea when sentencing an offender for several 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, as well as 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.

An example of an early guilty plea being considered as part of sentencing is provided in the scenario on the next page.



Source 2 Hollywood film producer Harvey Weinstein (centre) pleaded 'not guilty' to five charges (relating to sexual assault and rape) brought against him in 2018. In 2020, he was sentenced to 23 years in prison after being found guilty of two of the five charges. Do you think the duration of his sentence would have been different if he had entered a guilty plea?

ACTUAL SCENARIO

Early guilty plea in drug case

DPP v Foo [2019] VCC 889 (14 June 2019)

Jeng Foo pleaded guilty to one charge of attempting to possess a commercial quantity of an unlawfully imported border-controlled drug. Foo was a 28-year-old Malaysian national who came to Australia in late 2017. He had no criminal history and is likely to be deported at the end of his sentence.

In 2019 four postal items were sent to Australia containing books. Some of those books contained methamphetamine. The total commercial quantity was 750 grams. The parcels did not get through customs, and the federal police established a link between Foo and the parcels. Foo's role in the importation of these drugs was to receive them and deliver them elsewhere. He was to be paid for his role. The County Court, as part of sentencing, said that Foo was not the 'kingpin' or the 'principal' but had a key or vital role in the drug trafficking.

As part of sentencing, Judge Tinney recognised that Foo had pleaded guilty and had done so at the earliest stage. He took the early guilty plea into account in sentencing, saying:



Source 3 Foo received packages containing books, which had narcotics hidden inside them.

> You have taken responsibility for your crime and the community has been spared the time, the cost and the effort of a trial in this court or a committal hearing in the Magistrates' Court. There is a utilitarian benefit. Witnesses have been spared the experience of giving evidence and the sentence I will impose is less than would have been imposed upon you had you been found guilty by a jury. You have facilitated the course of justice by pleading guilty and at the earliest stage. So too in your earlier co-operation and also in your consent to forfeiture. So, this is all deserving of a significant discount in sentence.

Foo was sentenced to 10-and-a-half years in prison and will serve a non-parole period of seven years' imprisonment.

Victim impact statements

When sentencing an offender, the court must consider the impact of the offence on any victim, and the personal circumstances of the victim. Often the court will learn about the impact and personal circumstances of the victim through victim impact statements.

victim impact statement a statement filed with the court by a victim that is 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

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 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 scenario on the following page.

This is not all about you: judge makes clear the impact on the victim

ACTUAL SCENARIO

DPP v Haberfield [2019] VCC 2082 (16 December 2019)

The case of James Haberfield was a serious case of violence inflicted against a female member of an ambulance crew who came to Haberfield's assistance. It is an example of how important victim impact statements can be in sentencing.

In January 2019 Haberfield attended a music festival and consumed a cocktail of drugs. In a drug affected and disturbed state, Haberfield knocked on the door of strangers at a house in Coburg. One of the occupants rang 000 and requested an ambulance.

The Court said that the victim, Monica, and her fellow worker, Sam Smith, had the 'misfortune to be allocated that job'. They attended to assist the offender. Monica ushered Haberfield into the ambulance and started to assess him. Without any warning he became aggressive and agitated and pushed Monica down. She tried to escape out of the ambulance in extreme fear and Haberfield responded by punching her in the face and then wrapping his arms around her and squeezing her. Monica was trapped and screamed for help. Sam took steps to help her and then tried to distract Haberfield. The intervention gave Monica the opportunity to escape the ambulance, and the police were called while civilians restrained Haberfield.

Haberfield eventually pleaded guilty to two charges, one of which was recklessly causing injury. The magistrate convicted him and admitted him to an 18-month mandatory treatment and monitoring order (an intensive type of community correction order). The DPP appealed against the sentence to the County Court.

In sentencing Haberfield, Judge Tinney of the County Court said the following:

> I turn now to the impact of your crimes. There is a large amount of victim impact material here including reports from an osteopath, a psychologist and a medical practitioner's progress notes in relation to Monica. She has also made two impact statements, the second quite recently. That is the one which she courageously read aloud in open court on the first day of the appeal. As I said last week, she should never have found herself sitting in a court in November 2019 reading such a document for she should never have been assaulted. No paramedic should be. She should have been out on the road doing the job that she has enjoyed doing for nine years, working as a serving paramedic and the reason that she was not is because of having the great misfortune of meeting with you. Her year has been a disaster because of you. It is that simple. There is less material as to the impact upon Mr Smith. He did not wish to prepare an impact statement which is his right but there is some material relating to the medical notes and an excerpt from his statement describing his anger at what had occurred. That is perfectly understandable. In each case there are some photographs.
>
> I take into account the impact of these crimes. I suppose I could say no more in that respect and move on to deal with the matters that have been raised on your behalf. But why should I do that? This is not all about you. This represents the only opportunity that your principal victim will ever have to provide information to the court about the impact of your crime. These sentencing remarks will be full of matters dealing with your own position, your age, your family, your character, your regret, your prospects,

your future. You, You, You. That is how a plea in mitigation usually proceeds because of course I am sentencing you. But what about her future? I am sentencing you for the serious crime that you have committed upon your principal victim. Upon her. She is the victim not you. I must never lose sight of that fact …

Your crime has impacted negatively on almost every domain of her life. She feels a bit powerless. What lies ahead for her? Work? This job? Who knows? She doesn't, and this is all because of you. Now I have to be very careful. I must not let the impact of the crime swamp my consideration of other matters. The impact of a crime is one of a large number of matters which I must consider and I am careful not to give it undue weight. It is however an important consideration. Hopefully in the time ahead she makes a full recovery physically and some of the mental scars either heal or at least fade. Hopefully she can return to work and enjoy that valuable work, as she used to. That is all up in the air. The fact is your crime has had a very deep and lasting impact upon her as that impact material makes so clear to me. It continues to this day. She will never forget this day in her life. I take the impact of your crimes into account as I am required to.

Source 5 James Haberfield eventually escaped jail for assaulting paramedics while under the influence of drugs.



4.13 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 factors listed below are examples of aggravating factors or mitigating factors:
- **a** Mary-Lou committed an offence while on bail.
- **b** Hugo's childhood was such that he was constantly surrounded by drugs, alcohol and violence.
- **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 confessed to the commission of the offence within hours of being charged.

Synthesise and apply

5 Read the scenario *DPP v Herrmann*.
- **a** Identify the aggravating factors and the mitigating factors in this case.
- **b** What sentence was imposed?
- **c** Explain the relevance of Herrmann's personality disorders on sentencing.

6 Read the scenario *DPP v Foo*.
- **a** What offence did Foo plead guilty to?
- **b** Break down Judge Tinney's remarks about the early guilty plea into three separate reasons as to why an early guilty plea should act as a mitigating factor in sentencing.

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 scenario *DPP v Haberfield*.
- **a** Other than through a victim impact statement, explain two ways in which the impact of a crime on a victim may be known to a judge when sentencing an offender.
- **b** Discuss as a class whether the impact of a crime on victims should be one of the most important matters to consider in sentencing.
- **c** Conduct some research to find out what sentence Haberfield received on appeal. Do you agree with the sentence? Give reasons for your answer.

Analyse and evaluate

9 Discuss the extent to which rewarding early guilty pleas achieves justice.

Check your obook assess for these additional resources and more:

- **Student book questions** 4.13 Check your learning
- **Sample** Victim impact statement
- **Weblink** Guilty pleas and sentencing
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

TOP TIPS FROM CHAPTER 4

1 The early guilty plea is a theme that appears through much of the key knowledge in this chapter: committal proceedings, plea negotiations, the responsibility of a judge in sentencing, and as a factor considered in sentencing. It can also be linked to Unit 4 in relation to the Victorian Law Reform Commission's inquiry into committal proceedings and early guilty pleas. It is worth trying, as a class, to write some questions about early guilty pleas which draw on various key knowledge points.

2 Many students confuse plea negotiations and sentence indications, and so it can be an area where students do not get full marks in assessment tasks. Remember that a judge is *not* involved in plea negotiations, but *is* in sentence indications. Also remember that plea negotiations take place *outside* of the courtroom, but sentence indications take place *in* the courtroom.

3 There are many key knowledge points in this chapter that use the word 'including', which means you could be tested on anything specific after the word 'including'. For example, you could be asked a specific question about deterrence, mitigating factors, appeals or fines. You could also be asked about them in the context of another key knowledge, such as the principles of justice; for example, how appeals achieve access.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Distinguish** between denunciation and punishment as purposes of criminal sanctions.
(3 marks)

Difficulty: medium

2 Maria has pleaded guilty at the earliest possible opportunity after negotiating with the prosecution to reduce her charge from culpable driving causing death to dangerous driving causing death. The victim's family is furious because they did not agree with Maria being able to negotiate her plea.
In your view, **should** a plea negotiation be allowed in this situation? **Justify** your answer.
(6 marks)

Difficulty: high

3 **Discuss** the extent to which sentence indications and plea negotiations enable greater access to the criminal justice system for an accused.
(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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

The excerpt on the following page is an extract of the Supreme Court sentencing decision in *The Queen v Lee* [2017] VSC 678 (10 November 2017).

The Queen v Lee sentencing

His Honour Justice Lasry:

Andrew William Lee, on 8 September 2017 … you pleaded guilty to one charge of manslaughter. That charge related to events which occurred on 16 April 2016 … at some time after 11:00pm that night … you threw a punch which struck Patrick Cronin to the right side of the head. That punch caused a fracture to him which in turn caused an unsurvivable brain injury and ultimately resulted in his death the following day, 17 April 2016 …

… As to your plea of guilty, it was made at a late stage in the legal process … However, late as it was, your plea of guilty has avoided the need for a trial and the trauma connected with it, particularly for the members of the Cronin family. In addition I am satisfied that you are genuinely remorseful for what you have done and, in part at least, your plea of guilty is a reflection of that and a willingness to accept responsibility for your actions …

… In the course of the proceedings on 3 October 2017, I received a total of 93 victim impact statements … The effect of Patrick Cronin's death on a very large number of people in the area in which he and his family lived, was educated and played football, is profound …

… On any view you acted violently and that violent act had a dreadful consequence. The nature and gravity of your offending was significant. However, it is not suggested that on that night you had entered the hotel with any intention of engaging in physical violence … As I understand it, there is no explanation for your spontaneous conduct which is connected with alcohol or drugs.

… you will be sentenced to be imprisoned for a period of eight years. I fix a period of five years to be served by you before you are eligible to apply for release on parole.

AUTHOR'S NOTE: Lee sought to appeal the sentence in the Court of Appeal but was refused leave. Patrick Cronin's family is reported to have said that Lee should not be allowed to keep trying to be let off.

Practice assessment task questions

1 Explain one reason for a court hierarchy.
(3 marks)

2 Describe two factors considered when sentencing Lee.
(4 marks)

3 Was a sentence indication used to determine the charges? Justify your answer.
(3 marks)

4 Explain one responsibility of the judge and one responsibility of the prosecution in this case.
(6 marks)

5 Identify two purposes of imprisonment and discuss the extent to which it may be able to achieve those purposes in this case.
(6 marks)

6 Discuss the extent to which the principles of fairness and access were achieved in this case.
(8 marks)

Total: 30 marks

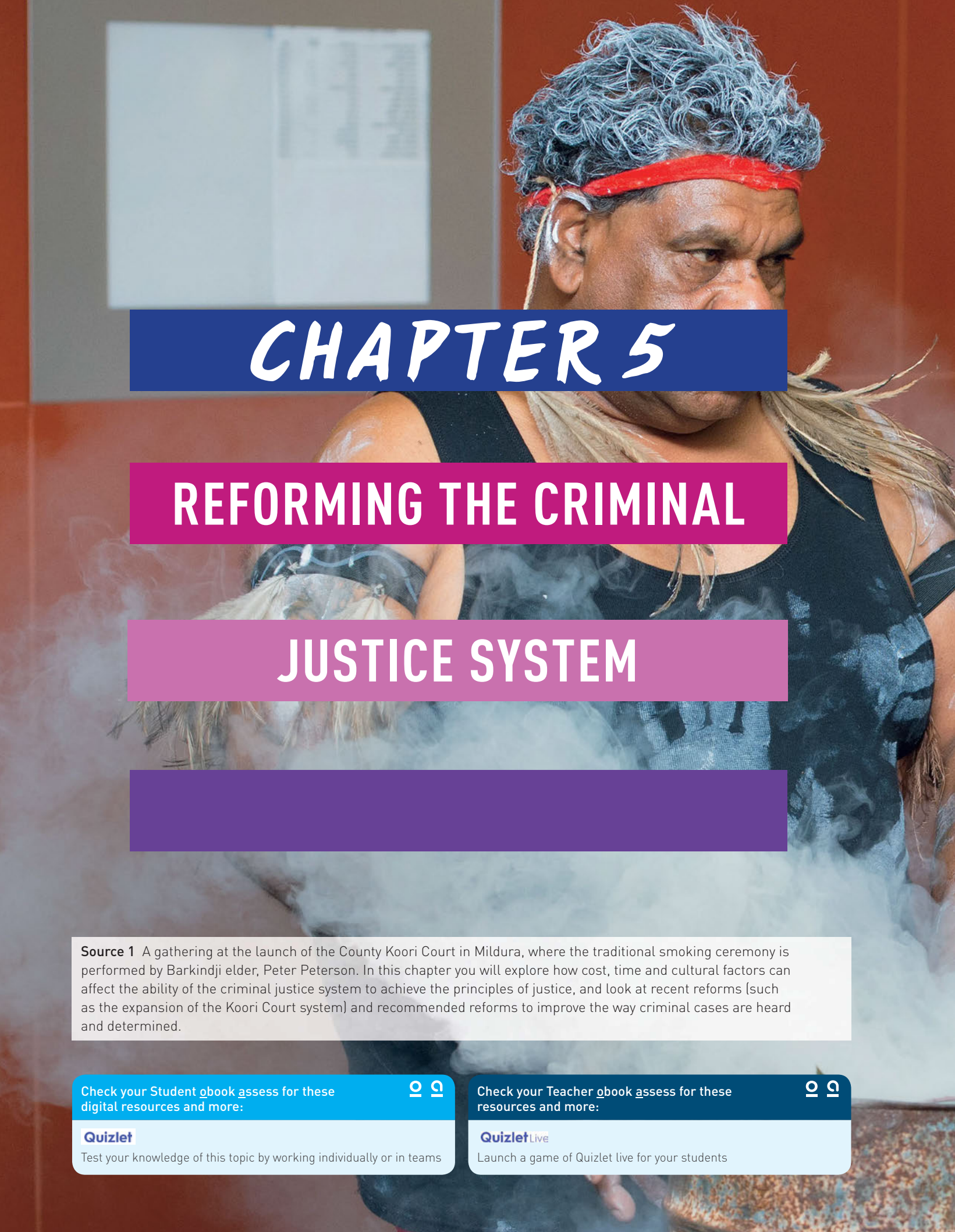
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CHAPTER 5

REFORMING THE CRIMINAL JUSTICE SYSTEM

Source 1 A gathering at the launch of the County Koori Court in Mildura, where the traditional smoking ceremony is performed by Barkindji elder, Peter Peterson. 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, and look at recent reforms (such as the expansion of the Koori Court system) and recommended reforms to improve the way criminal cases are heard and determined.

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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

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 Indigenous 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 three types of factors that can affect the ability of the **criminal justice system** to achieve the three principles of justice are considered in detail. These are:

- costs factors
- time factors
- cultural factors.

Recent reforms (and recommended reforms) to the criminal justice system designed to enhance its ability to achieve the principles of justice are also considered.

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 is in the table and what is contained in this chapter regarding costs?

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 two costs factors affect the criminal justice system:

- the costs of legal representation
- the availability of **legal aid**.

The first factor restricts the criminal justice system's ability to achieve justice, while the second factor can both restrict and enhance it.

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 affected, as they may require legal assistance to assert their rights, contact 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 disadvantageous 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 the 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.

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



Source 1 The Law Council of Australia represents lawyers through their associations, such as the Victorian Bar (pictured above). It is a national representative and advisory body on issues relating to the law and the justice system.

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

Source: Law Institute of Victoria

Source 2 The range of fees likely to be payable for criminal matters

These estimates are from 2008, so these numbers will have significantly increased. Even if the fees stayed 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 (discussed further below). This can place even more pressure on the courts and the parties.

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 the High Court in *Dietrich v The Queen*.

In particular the courts have held 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* recognised the right to a fair trial and that the lack of legal representation can inhibit a fair trial. The following scenario provides information on the case.

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 cannot 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

ACTUAL SCENARIO

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 burned 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 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, and will be great tools for revision. Remember, however, that your responses in assessment tasks and the exam must be structured as proper short answer or long answer responses (depending on the question). Annotated exemplar responses are available on your obook assess.

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.

PRINCIPLE	COST OF LEGAL REPRESENTATION
Fairness	• If an accused person can't properly participate in a hearing, it may lead to an unfair process. In particular, the following can lead to unfairness: – 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. • Not all legal representation is equal – that is, the use of an inexperienced, cheap lawyer may result in procedural unfairness such as making errors in law or advising an accused incorrectly.
Equality	• If parties cannot 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 procedures, formalities and language. This places an unrepresented accused at risk of not being able to perform at the same level as their opponent. • If a person is unrepresented, the judge or magistrate overseeing the hearing or trial will need to assist the unrepresented accused to understand court procedures and certain rights in relation to those procedures to ensure equality is achieved.
Access	• An accused who cannot pay for legal representation may have trouble accessing the courts and mechanisms used to determine the criminal charges. This may result in an accused person pleading guilty to a crime they may not have committed because they do not have the means or ability to defend the case. They may represent themselves poorly, or may not be able to make sophisticated submissions as part of sentencing. • The accused will also have less access to information and knowledge than a person who is well represented.

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. Previous estimates are that less than 1 per cent of people can access legal aid, but substantially more are in need of legal assistance. Demand is therefore constantly exceeding supply of legal aid.

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 was not entirely 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 cannot pay for a lawyer and will not receive legal aid. In 2015–16, CLCs in Australia turned away nearly 170 000 people because they did not have the resources to help them. This is likely to affect 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.

The lack of availability to legal aid and the inability to pay legal costs can result in people representing themselves. This means an increase in the number of self-represented parties in court.

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 estimated 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. It is often the case that trials and hearings take longer where there is a self-represented accused, because the judge or magistrate has to explain things along the way and allow the party more time to complete processes they are not familiar with.

As a result of the rise in self-represented parties, courts and judges must adapt by changing their processes. Court personnel, judges and magistrates can help self-represented accused persons in a criminal trial, which may enhance their ability to achieve justice.

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

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



Source 4 Justice Connect helps people who are ineligible for legal aid and cannot afford a lawyer to access free legal assistance.

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 an equal opportunity to present their case as anyone else, without advantage or disadvantage

evidence
information used to support the facts in a legal case

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* (in the following scenario) in finding that a judge has a duty to provide due assistance to self-represented parties.

ACTUAL SCENARIO

The duty of a judge

Tomasevic v Travaglini (2007) 17 VR 100

While this was a civil case, it is an important one 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 5 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

The availability of legal aid can affect the principles of justice. A summary is set out in Source 6.

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 hearing, as they are assisted with presenting the case before the judge, jury or magistrate. • Limits on access to free legal services can affect 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. This can result in unfairness (see the points raised previously in Source 3). • The ability and responsibility of court personnel, including judges and magistrates, to assist may decrease some problems associated with self-representation and therefore increase fairness. Although it may be limited to procedural matters, that 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	• 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. They are therefore most at risk of being at an unfair advantage when in the courtroom when up against skilled prosecutors. • 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	• VLA and CLCs aim to ensure there is access to justice. • A party who cannot 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. • 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 their 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 their way through complex and difficult procedures, understand aspects such as cross-examination, and make decisions about how to conduct the trial.

Source 6 The availability of legal aid and the principles of justice

5.1 CHECK YOUR LEARNING

Define and explain

1 Identify and describe two types of costs 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 assistance can be given by the courts to self-represented parties? What sort of assistance cannot be given by the courts?

Synthesise and apply

5 Explain why the assistance given to self-represented parties is characterised as a cost factor.

6 Prepare a mind map which shows the connection between the two different costs factors explored in this topic.

7 Read the scenario *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.

8 Imagine a County Court trial in which an accused person is unrepresented, and has inadequate knowledge of and experience with 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

9 '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.

10 'The right to a fair trial requires legal representation. It should be a rule that no accused person should ever 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



Source 7 The cost associated with the criminal justice system can be significant, especially for those who cannot afford legal representation.

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

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 two factors related to time:

- court delays
- the use of plea negotiations to reduce delays.

The first factor listed restricts the ability of the criminal justice system to achieve justice, while the second factor enhances the ability of the criminal justice system to achieve justice.

Court delays

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.

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

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

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

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 2018–19 annual report of the Director of Public Prosecutions (DPP) and the OPP stated that the average time taken to complete criminal matters was 18.9 months.

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.

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.



Source 1 Court delays can restrict the ability of the criminal justice system to achieve justice.

In addition to delays in getting a case ready for trial, parties must often wait for a hearing date in court. The court system is said to be stretched and unable to handle the increasing number of criminal cases that are before them. 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 legal community in particular is concerned about the long wait times for hearings in the Victorian court system, as demonstrated in the scenario below.

ACTUAL SCENARIO

Inside Victoria's courts as magistrates' 'oppressive' caseloads pile up

Emma Younger, ABC News, 7 November 2018

'I know you're sorry ... I know you're a good person and you want to do the right thing, but you did the wrong thing here,' Magistrate Pauline Spencer tells a man staring back at her through a TV screen.

The middle-aged offender was caught with a stolen violin and empty iPhone boxes down his pants.

He's been apologising profusely and pleading for mercy, but Magistrate Spencer has decided to send him to prison.

This is one of the many lives she'll change today as she deals with about 80 cases in the Melbourne suburb of Dandenong ...

In the last six years, the caseload in the Victorian Magistrates' Court has increased dramatically, while the number of magistrates has barely risen.

Magistrate Spencer told the ABC that magistrates are working as hard as possible to avoid lengthy delays, but the daily caseload has become too large, and time pressure makes it challenging to deliver justice fairly.

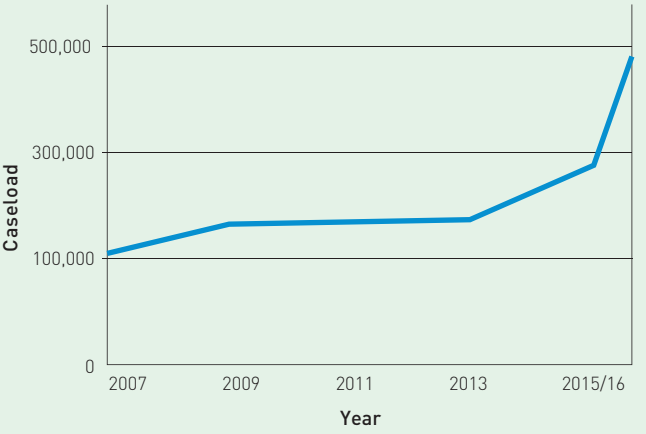
'You've got to try to be just and fair, you've got to listen, you've got to hear everyone's point of view. If you are under time pressure, it makes it harder to do that and you worry that you're not doing your job as well as you could be.'

Stress and well-being were largely unspoken issues until the suicides of two magistrates within six months in the last year.

Magistrate Spencer said she now realises she was like a frog in boiling water – not noticing how much the caseload was creeping up on her and her colleagues.

'I think [magistrates] often talk about feeling exhausted, leaving court at the end of the day with nothing left,' she said.

'[About] needing to have rest and recovery, and to be fit enough to go back in. And there's a real risk of burnout ...'



Source 2 The growing caseload in the Magistrates' Court of Victoria has not been met by an increase in magistrate numbers.

The principles of justice

Delays in preparing a case for trial can affect the principles of justice. A summary is set out in Source 3.

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. • 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. • Long delays can also affect 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 affect 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 3 Delays in preparing a case for trial and the principles of justice

The use of plea negotiations

The use of **plea negotiations** has significantly helped to address 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 saves the time (as well as costs, stress and inconvenience) of having to take a case all the way to trial. This can often take months, even years, and so there is a recognition by our system that early guilty pleas allow for early resolution of disputes.

Plea negotiations not only save the time involved in the case in which the negotiations take place, but also save time in other ways. The resolution of cases before they go to trial ensures that the courts are freed up to hear and determine those cases that the prosecution is unwilling to negotiate on, or where it is in the best interests of the public that they be heard by a judge and jury.

In their 2018/19 annual report, the DPP and OPP stated that guilty pleas were achieved in 77.6 per cent of matters (see the following extract). The early guilty pleas avoid matters having to go to trial, and the delays that occur as a result.

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)

guilty plea when an offender officially admits guilt which is then considered by the court when sentencing

EXTRACT

Appropriate resolution

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 proven beyond reasonable doubt, and that allows for a sentence that adequately reflects the criminality.

The Director's Policy provides guidance and instruction to OPP solicitors and prosecutors in relation to resolving matters as guilty pleas.

As well as achieving fair and just outcomes in an efficient way, guilty pleas may relieve victims and witnesses of the burden of giving evidence at a trial, and provide certainty of outcome.

In 2018/19, 77.6 per cent of prosecutions were finalised as a guilty plea – down from 80.4 per cent in the previous year.

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. Of the guilty pleas achieved in 2018/19, 74.3 per cent were achieved by committal.

Source: Office of Public Prosecutions, 'Annual Report 18/19 Director of Public Prosecutions, Office of Public Prosecutions', (Annual Report, 30 August 2019)

The principles of justice

The use of plea negotiations can affect the principles of justice. A summary is set out in Source 4.

PRINCIPLE	PLEA NEGOTIATIONS
Fairness	• An accused person is given the opportunity to negotiate a plea with the prosecution. The accused does not have to accept any proposed resolution. 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. • Plea negotiations avoid the burden of trial for victims and witnesses. • Victims and members of society may see plea negotiations as unfair in that the accused is seen as being 'let off'. • To ensure fairness, the DPP has a policy about when it will enter into plea negotiations. For example, it is unlikely to negotiate directly with a self-represented accused. • The ability for plea negotiations to achieve fairness depends on the information that is available to both parties to be able to make an informed decision about the outcome.
Equality	• Plea negotiations 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). • Plea negotiations generally ought not be undertaken with an unrepresented accused as there is a risk of inequality here, where an unskilled person is up against highly experienced prosecutors.
Access	• Guilty pleas avoid the trauma, stress and inconvenience of trial, which enables better access by 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 4 The use of plea negotiations and the principles of justice

5.2 CHECK YOUR LEARNING

Define and explain

1 How do delays in a criminal case affect 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 If you had a trial that was expected to take 30 days, what length of time would you expect to wait until trial? How does this affect:
   - **a** the victims
   - **b** the accused
   - **c** society?

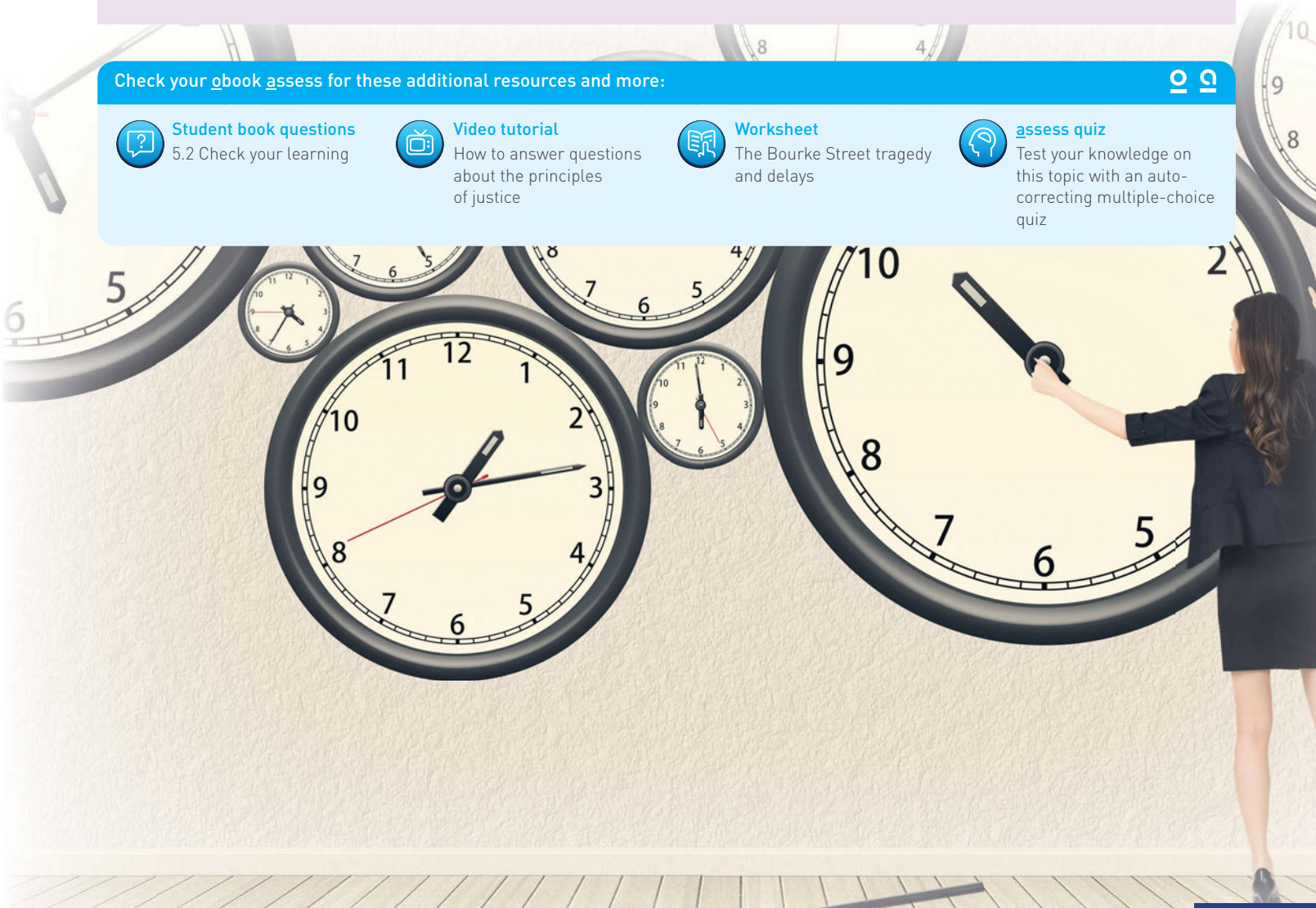
5 Imagine you are a lawyer representing a victim of a domestic violence case. The accused person is on remand, and your client is nervous about the possibility of him getting bail at any point in time, and continues to relive the trauma of the violence. You have just been told that trial will not occur 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

6 '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
- **assess quiz** — Test your knowledge on this topic with an auto-correcting multiple-choice quiz



5.3 CULTURAL FACTORS

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.

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.

Cultural difficulties include lack of knowledge of the legal system, lack of understanding of the English language, legal system failures to account for differences, and cultural misunderstandings.

In this topic you will explore the following two factors relating to cultural differences:

- difficulties faced by Aboriginal and Torres Strait Islander peoples in questioning and giving evidence
- language barriers.

Both factors can restrict the ability of the criminal justice system to achieve justice.

Difficulties faced by Aboriginal and Torres Strait Islander peoples

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 ending their life; '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 Indigenous 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.
- **cultural taboos** – within some Indigenous cultures it is considered taboo 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 following scenario.

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

ACTUAL SCENARIO

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 that Indigenous people face when 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 for Aboriginal and Torres Strait Islander people can affect the principles of justice. A summary is set out in Source 2.

PRINCIPLE	DIFFICULTIES FACED BY ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES
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 affect 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 affect a person's ability to equally present their case.
Access	• Inability to understand legal processes and terminology, legal rights and the court system can affect a person's ability to access the system without some adaptation of processes or assistance. • There may be a reluctance by Aboriginal and Torres Strait Islander peoples to seek information about their rights and about court processes if they are unfamiliar with or uncertain about the legal system.

Source 2 Difficulties faced by Aboriginal and Torres Strait Islander peoples and the principles of justice

Language barriers

Many members of our community were born overseas and have a language other than English as their first language. This can affect whether an accused is able to understand court documents, court processes and the language used in criminal cases.

This can also affect victims of crime and witnesses who are in contact with the criminal justice system. Victims and witnesses who do not have English as their first language may not necessarily understand their legal rights, the different types of agencies that exist, and the legal processes that happen in a courtroom – all of which can be difficult to understand, even for those who do use English as their first language. Without knowing how the legal system works and what the processes are about, an accused person, victim or witness can be at a significant disadvantage to those who do have the skills and knowledge to understand these things.

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 ensure a fair outcome. However, access to an interpreter can vary greatly from court to court. Ensuring enough interpreters are available is an area for possible reform, as demonstrated in the scenario on the next page.

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

ACTUAL SCENARIO

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.

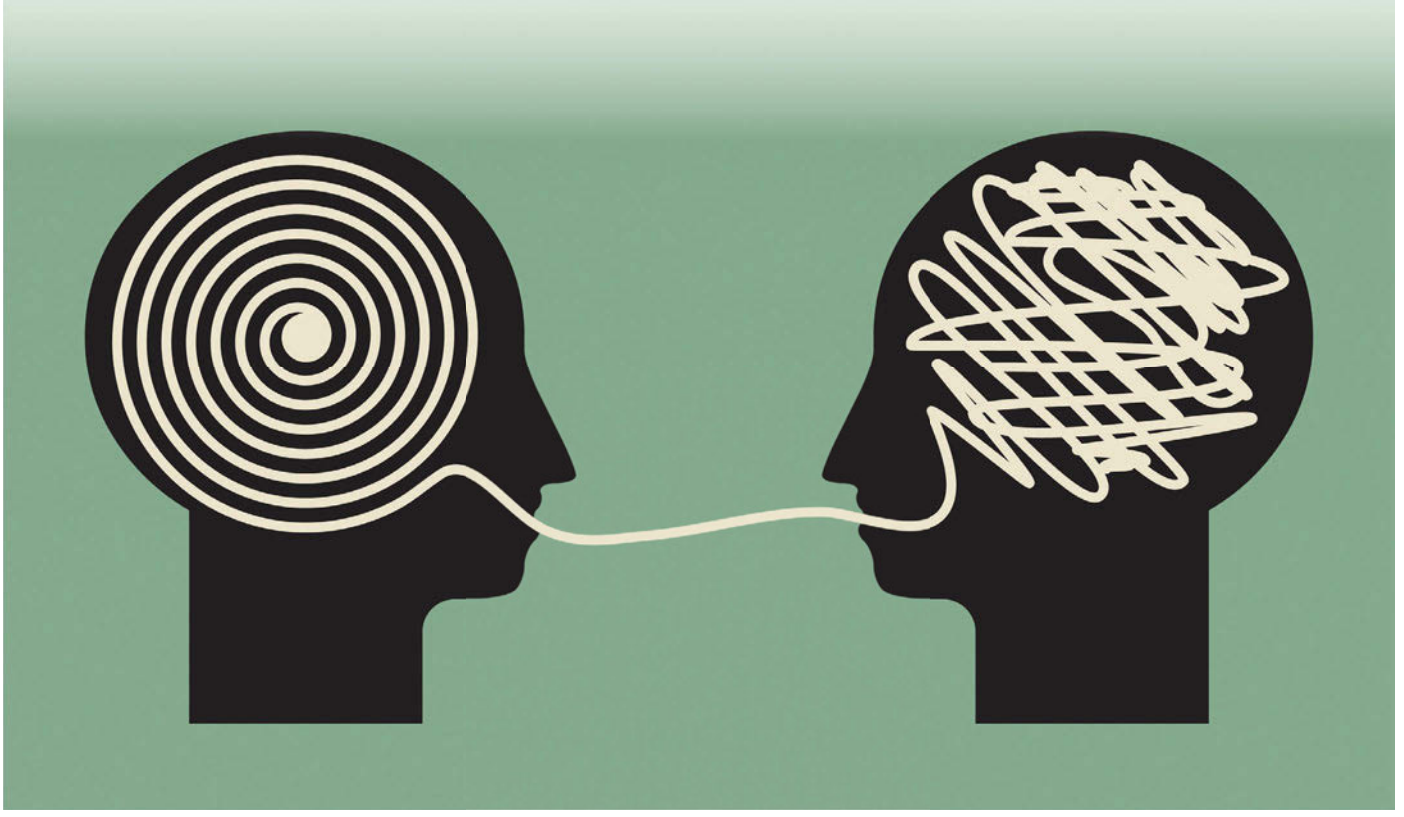
About 17 Vietnamese court interpreters stopped accepting bookings from the Melbourne Magistrates' Court for about eight months from March, after the court made changes to their hiring practices that effectively lowered the amount of money it paid them.

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.

Source 3 Language barriers can affect whether an accused is able to understand the court process.



The principles of justice

Language barriers can affect the principles of justice. A summary is set out in Source 4.

PRINCIPLE	LANGUAGE BARRIERS
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. However, sometimes interpreters are not widely available.
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 their 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 are 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 4 Language barriers and the principles of justice

5.3 CHECK YOUR LEARNING

Define and explain

1 In what ways do court processes create problems for Aboriginal and Torres Strait Islander peoples?

2 How is a victim who does not speak English affected 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 scenario *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?

Analyse and evaluate

5 To what extent should traditional Indigenous customs be recognised in the administration of Australian law? Discuss.

6 Discuss the extent to which a national regime which provides interpreters to all accused people who cannot understand English will achieve the principle of equality.

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
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

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, and make sure you know at least two of them – the Study Design specifies **recent reforms**. Three are provided in this chapter so that you can choose.

Koori Court
a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Indigenous people

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

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.

Three recent reforms are discussed below.

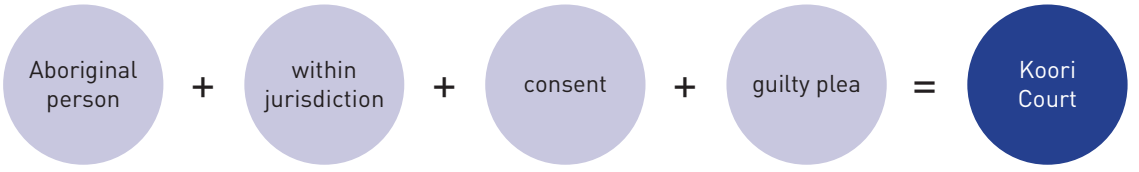
Reform 1: Expansion of the Koori Court (2020)

One recent reform is the expansion of the **Koori Court** into other areas of Victoria such as Shepparton, Mildura, Dandenong and Warrnambool.

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 Indigenous person
- the offence must be within the **jurisdiction** of the relevant court
- 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).



Source 1 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. It is also not used for certain offences such as sexual offences.

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 Community Safety) can advise the Court on 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. There are now 12 adult Koori Courts and 12 children's Koori Courts in Victoria.

Recently there have been four new Koori Courts open in regional Victoria: the Shepparton County Koori Court (opened in July 2018), the Dandenong Koori Court (started sitting in 2019 and officially opened in early 2020), the Mildura County Koori Court in 2020, and the Warrnambool County Koori



Source 2 A sitting of the Koori Court in the Children's Court. The informality and equality shown in the design reflect the strengths of Indigenous ways of communicating and the importance of the role of elders.

Court (opened in October 2019). Opening a County Koori Court for the Mildura, Shepparton and Warrnambool regions in particular allows for greater participation of Indigenous peoples in the Koori Court which has seen greater success in allowing them to participate in the sentencing process, and to combat some of the cultural issues discussed in Topic 5.3.

Ability of the expansion of the Koori Court to achieve justice

When considering whether the expansion of the Koori Court achieves justice, you should consider whether it achieves any or all of the principles of justice: fairness, equality and access.

Some of the points to consider are explored in Source 3.

PRINCIPLE	EXPANSION OF THE KOORI COURT
Fairness	• The expansion emphasises the importance of the Koori Court as a way to ensure fairness and equality (see the following scenario). In particular, it allows the accused to participate in the hearing process as the process is conducted informally and in a manner that feels comfortable for an accused. • Koori elders or respected persons participate in the sentencing process – but the sentence is still handed down by the judge or magistrate, therefore ensuring that the appropriate sentence is given to match the crime. • The Koori Court only operates as a sentencing court – it is not available for contested criminal hearings, so it does not completely resolve many of the issues suffered by Aboriginal and Torres Strait Islander peoples in a full hearing (such as giving evidence and understanding procedures). • The Koori Court still does not exist in many parts of Victoria.
Equality	• The expansion emphasises the importance of the Koori Court as a way to ensure fairness and equality (see the following scenario). In particular, the Supreme Court has recognised that the Koori Court can address the disadvantages suffered by Aboriginal people in the criminal justice system by including measures to avoid them suffering inequality or discrimination. • The Koori Court is not a complete solution to the problems faced by Aboriginal and Torres Strait Islander peoples. It is a sentencing court only, which means that it is not accessible to those who plead not guilty. • In addition, a party still may suffer other characteristics or vulnerabilities which may put them at risk of inequality – such as mental impairments.
Access	• The expansion enables greater access to the Koori Court for the Indigenous Australian population, who may not have previously been able to have access to it. • The County Koori Courts have opened in areas where there is likely to be a greater Indigenous Australian population. • The expansion of the Koori Court does not address other access issues such as access to information and knowledge about rights and court processes.

Source 3 The ability of the expansion of the Koori Court to achieve the principles of justice

In a significant decision in September 2018, the Victorian Supreme Court confirmed that the cultural rights of Indigenous people must be considered when making decisions about an accused's request that their matter be heard in the Koori Court. This is explained further in the scenario on the next page.

Cemino v Cannan [2018] VSC 535 (17 September 2018)

ACTUAL SCENARIO

The facts

The accused was a 22-year-old Indigenous Yorta Yorta man who lived in Echuca. There is no Koori Court in Echuca, but there is one in Shepparton, which is part of Yorta Yorta land. The accused, who had an intellectual disability, was charged with 25 offences alleged to have been committed in 2016 in or around Echuca. The accused was also alleged to have breached a **community correction order (CCO)**. The case was prosecuted in the Echuca Magistrates' Court.

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

The accused applied to have his case transferred to the Koori Court Division of the Magistrates' Court in Shepparton. The Magistrates' Court refused the application. A key factor in this decision was that the Magistrates' Court found that it was important the case be heard in the proper venue, which in this case was the Echuca Magistrates' Court (noting that was where the accused lived, and where the offences were alleged to have taken place). The Magistrate also noted that because of the cultural training that non-Koori Court magistrates had undertaken, the accused's Aboriginal cultural identity would be adequately accommodated in the Magistrates' Court and the Koori Court did not need to sentence him to adequately factor in cultural issues.

The accused asked the Victorian Supreme Court to review the decision to refuse his request that the case be transferred.

As part of the review, the accused relied on two grounds, one of which was that the Court had made an error in law by refusing his request to transfer the matter to the Koori Court, because it had failed to give proper consideration to the accused's rights to equality before the law, and enjoy their identity and culture. The accused gave evidence in the Supreme Court as part of his appeal. He said he preferred the Koori Court because of the presence of elders and the layout of the court. He said he felt understood by elders, as he believed that they could relate to his feelings and the issues he faced, and that the layout allowed him to better understand proceedings because he could tell his story. In contrast, he said he felt uncomfortable and misunderstood in the Magistrates' Court, and could not speak about his deceased mother in that courtroom.

The decision

The Victorian Supreme Court found in favour of the accused, and ordered that the transfer request be re-heard in the Magistrates' Court by a different magistrate.

The judgment sets out a very useful summary of a person's right under the Human Rights Charter to equality before the law. It found that the courts must uphold those rights and that every person is equal before the law, is entitled to equal protection of the law without discrimination, and has the right to equal and effective protection against discrimination (as set out in section 8 of the Charter). It also said



Source 4 The Yorta Yorta are the traditional custodians of the area surrounding the junction of the Goulburn and Murray rivers.

that the Koori Court is an opportunity for Aboriginal people to enjoy their identity and culture, and can ensure that equality is upheld.

Justice Ginnane said:

> The Koori Court was established for purposes that included addressing systemic disadvantage faced by Aboriginal people who have been over-represented in the criminal justice system, in imprisonment and in deaths in custody. The Koori Court seeks to reduce that systemic disadvantage by providing special measures and accommodations so that the procedure is less disadvantageous for Aboriginal offenders; it protects against indirect discrimination on the basis of race. It is a means through which systemic disadvantage in the justice system is mitigated in pursuance of the s 8(3) right.

Reform 2: Victim Support Dog Program (2019)

In late 2017 the Office of Public Prosecutions commenced a pilot program to provide witness support dogs to sit in with sexual offences case witnesses whilst they gave evidence at a remote witness facility. The OPP took on Coop, a three-year-old black Labrador, to make it easier for **vulnerable witnesses** to give evidence and to improve court processes.

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

Attorney-General Martin Pakula announced in January 2018 that the program would be extended to two full days a week, and that a puppy in training, Champ, would also be trained to support vulnerable witnesses. In January 2019, the program was extended so that the dogs were allowed into the courtroom.

Court Dogs Victoria now runs the OPP Victim Support Dog Program. Trained support dogs are now used to provide comfort to vulnerable witnesses when waiting for court or when giving evidence. Studies have showed that the use of a dog can significantly reduce the stress that is suffered by vulnerable witnesses in these experiences. The dogs are used to help witnesses and their families, and accompany them into witness rooms at the OPP's office and in the Magistrates' Court and County Court. Permission is sought from the magistrate or judge, and the legal representatives for the accused are notified. It is the role of the judge to balance the needs of the witness against the presence of the dog to ensure there is no prejudice suffered and that the accused remains entitled to a right to a fair trial. For example, the jury does not see the dog as the dog lies on a mat beside the witness out of view of the camera when the witness is giving evidence in the remote witness facility. Feedback has shown that the use of the dogs helps facilitate the court process, that victims feel less stress, and that victims are calmer when they are giving the evidence. They have also found that the length of court proceedings is reduced because witnesses need fewer breaks and are more able to give evidence.

The program has been so successful that Court Dogs Victoria now has six dogs. There are similar programs running in America and Canada, and other states such as NSW have programs that provide therapy dogs to support court users in that state.



Source 5 Six support dogs have been trained to comfort vulnerable witnesses when giving evidence.

Ability of the Victim Support Dog Program to achieve justice

In relation to achieving fairness, equality and access, some of the points to consider are explored in Source 6.

PRINCIPLE	VICTIM SUPPORT DOG PROGRAM
Fairness	• The presence of a dog is intended to help witnesses and victims deliver their evidence in a calm and less stressed manner, which can shorten the length of court proceedings and help ensure credible and reliable evidence is given. • To reduce any unfairness, permission is sought from the magistrate or judge so that the person presiding over the hearing can decide whether it is in the best interests of a fair trial to allow the dog. • To minimise any risk of an unfair trial, the jurors do not see the dog and so they do not get overly influenced by their presence. • Witnesses may be more willing to give evidence, which allows for a fairer process – it ensures that critical evidence about the crime is able to be heard as part of the process of determining whether the accused is guilty.
Equality	• The program seeks to provide assistance to vulnerable witnesses who are more at risk of suffering secondary trauma by having to give evidence. • There are measures in place to ensure that there is no inequality suffered by the accused. For example, the dog sits on the mat beside the witness and is not seen by the jury so as not to be seen to influence or prejudice a jury. • The judge or magistrate can decide whether it is appropriate for the dog to be present having regard to any fairness or equality issues that may arise. There have been a couple of instances where the request to use a support dog has been refused.
Access	• The changes enable greater access to vulnerable witnesses and their families in giving evidence – it helps them feel more relaxed and helps them give their evidence in a way which is calmer. • Witnesses may be more prepared to give evidence with a support dog present than they may not have otherwise been. Witnesses have in the past changed their mind about whether they would give evidence because of having some support from a dog while they were doing so.

Source 6 The Victim Support Dog Program and its ability to achieve the principles of justice

Reform 3: Changes to committal proceedings for some sexual offence matters (2018 and 2020)

In September 2018 the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) was passed by the Victorian Parliament. One of the reforms made as part of this Act was that a committal hearing is not to be held in a committal proceeding for sexual offence matters if the complainant is a child or a person with a **cognitive impairment**. In addition, the accused is not entitled to cross-examine any witness in these types of matters. The accused will still be entitled to make submissions during the committal process, but any cross-examination of any witnesses will take place at the trial instead. Further legislative changes were made in 2020 which clarified the changes to ensure that no committal hearing may be held in a case in which a complainant for a sexual offence charge is a child or a person with a cognitive impairment, regardless of whether the case also involves an adult complainant without a cognitive impairment.

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

The changes are intended to avoid delays and make more efficient use of resources by having witnesses examined only at the trial, rather than at both the committal hearing and the trial. It will also avoid witnesses having to give evidence twice, particularly in sensitive cases where there has been a sexual offence against a child or somebody with a cognitive impairment.

Ability of changes to committal proceedings to achieve justice

In relation to achieving fairness, equality and access, some of the points to consider are explored in Source 7.

PRINCIPLE	CHANGES TO COMMITTAL PROCEEDINGS
Fairness	• The changes are likely to lead to fewer delays in the criminal justice system and allow for more efficient use of resources. It will also avoid the unfair result of particularly vulnerable witnesses having to give evidence twice. • The accused may see this change as unfair and that he or she should be entitled to test the evidence of witnesses in these matters. However, the changes do not completely disentitle the accused from doing so – he or she will have the witness's evidence available by way of a written statement, and he or she will be entitled to cross-examine the witnesses at the trial.
Equality	• The changes try to allow for equality by recognising the rights of witnesses and in particular some of the difficulties they suffer in giving evidence twice. This can be traumatic for them, and may not necessarily lead to the best outcome. • Some may argue that these changes unfairly disadvantage an accused by removing the opportunity to cross-examine witnesses at an early stage, therefore putting them on a lesser footing than the prosecution.
Access	• The changes enable greater access for vulnerable witnesses who may be more prepared to give evidence if they know they only have to do so once, being at trial. • There is less access from the accused's perspective in being able to test the evidence of the witness at an early stage.

Source 7 The ability of changes to committal proceedings to achieve the principles of justice



5.4 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by the term 'recent reform'.

2 Identify one recent reform that responds to each of the following factors:
   - **a** the difficulties experienced by Aboriginal and Torres Strait Islander peoples in giving evidence
   - **b** delays in court
   - **c** trauma suffered by victims in giving evidence.

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 affect the person's experience with the criminal justice system. Explain which principles of justice are addressed in each scenario because of the reform.
   - **a** Jon Pert is an Aboriginal man who lives near Shepparton. He has been charged with a serious theft charge, and is concerned about having to interact with the criminal justice system.
   - **b** Manuel has been charged with a sexual offence involving a child. He is about to face the committal process in the Magistrates' Court, and wants his lawyer to cross-examine all of the witnesses.

Analyse and evaluate

5 Divide 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. 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.

Check your obook assess for these additional resources and more:

- **Student book questions** 5.4 Check your learning
- **Weblink** Koori Court
- **Weblink** Victorian Law Reform Commission (VLRC)
- **Weblink** Court dogs helping victims and witnesses

5.5 RECOMMENDED REFORMS

A number of reforms have been recommended by various bodies, institutions and individuals but have not yet been made. Three 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.

Recommended reform 1: Continued expansion of the Koori Court

You have learnt in the previous topic the nature and operation of the Koori Court. The Koori Court operates as a sentencing court in various parts of Victoria. However, it is not in all parts of Victoria, and so some people do not have access to it.

There continues to be calls for the Koori Court to be expanded into other areas of Victoria. The Koori Court system is seen as an important way to reduce the over-incarceration of Indigenous people in Victoria and to allow the court to have a crucial cultural perspective of the person as part of sentencing. Indigenous people can feel excluded and not heard when they are being dealt with by the mainstream courts.

There is continuing support for the funding of Koori Courts across Victoria. It is expected that, following the decision in *Cemino v Cannan* (see page 165), Indigenous people will have greater access to Koori courts, because magistrates will need to consider their distinct cultural rights when they request to be heard in the Koori Court.

An area of possible expansion of the Koori Court is to introduce County Koori Courts in all areas where the Magistrates' Koori Courts operate. As part of the Victorian Aboriginal Justice Agreement, an agreement between the Victorian Government and Aboriginal Community, there is an intention to continue to expand the Koori Court to additional locations.

The following article demonstrates the widespread welcome of the new County Koori Court for Warrnambool.

ACTUAL SCENARIO

New County Koori Court for Warrnambool

Jessica Howard, *The Standard*, 25 September 2019

Indigenous elders will continue to play a major role in Warrnambool's justice system, when Victoria's newest Koori Court is launched in the city next month.

The County Koori Court will expand to Warrnambool in October, and will sit at times aligned with the region's county court criminal circuits.

Koori courts were first established as a division of the Magistrates' Court in 2002, in a bid to reduce the over-representation of Indigenous Victorians in the criminal justice system.

The successful initiative resulted in Koori Courts being expanded to the County and Children's Court jurisdictions. Judge Irene Lawson said the court provided an informal setting for the plea hearings of Indigenous defendants who choose to go through it ...

Judge Lawson said since Koori Court was established in 2008, there was much better participation among the Indigenous community.

'You don't have people not coming to court,' she said.

'If they're listed for Koori Court, they'll be here and they'll be here with family and other supporters, they'll participate and generally speaking, they'll adhere to their orders.

'Koori Court is re-establishing the importance of cultural norms and the expectations from community is that 'this is for us, this is for our community and we've worked hard to get this'.

'So if you elect to come before the Koori Court you must respect the Koori Court because by doing that, you're respecting our elders and respected persons. It's a whole community activity.'



Source 1 A new Koori Court opened in Warrnambool, Victoria in 2019.

Ability of the expansion of the Koori Court to achieve justice

In relation to achieving fairness, equality and access, some of the points to consider are explored in Source 2.

PRINCIPLE	EXPANSION OF THE KOORI COURT
Fairness	• The expansion emphasises the importance of Koori Courts as a way to ensure fairness and equality, particularly by allowing Indigenous people to participate in and understand the sentencing processes, and by adjusting the processes to allow them to be recognised and heard, and to understand the processes involved. • Some may feel that it is a negative because it requires the accused person to plead guilty to be able to get access to it. Some may argue that all sentencing of Indigenous people should be heard in a Koori Court-style matter – not just those who plead guilty. However, that does not necessarily fit with the model of the Koori Court which requires a person to admit their guilt before participating in the process.
Equality	• The Supreme Court has recognised that the Koori Court allows for Aboriginal people to participate in the processes and to address any disadvantage they would suffer by being sentenced in a mainstream court. • However, the changes are not a complete solution to equality issues. For example, Aboriginal and Torres Strait Islander peoples are still at a disadvantage in contested hearings.
Access	• The expansion may enable greater access to the Koori Court for the Indigenous Australian population who may not have previously been able to have access to it. • The Koori Court is not a complete solution to the problems faced by Aboriginal and Torres Strait Islander peoples. It is a sentencing court only, which means that it is not accessible to those who plead not guilty.

Source 2 The ability of the expansion of the Koori Court to achieve the principles of justice

Recommended reform 2: Judge-alone trials

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.

In Victoria, it is a requirement that any contested criminal trials are to be tried by a jury. That is, a jury is the decider of facts, and it will determine whether the prosecution has proven beyond reasonable doubt that an accused is guilty.

This is not the same for all states in Australia. For example, in NSW trials by judge alone are allowed for state offences where the prosecution consents. If the prosecution does not consent, the accused can apply to the court for the trial to be conducted by judge alone. The judge will consider various factors, such as whether the trial will involve facts that requires the application of objective community standards such as reasonableness, indecency and dangerousness, in deciding whether the matter should proceed by judge alone. Similarly, in Western Australia, an accused person may be entitled to a trial by judge alone if they can persuade the court that it is in the interests of justice to proceed that way.

In other states, cases where there is an overwhelming amount of media attention and coverage have resulted in a judge-alone trial. This is because there may be legitimate concerns about whether 12 individuals who remain unbiased can make a decision based on facts alone. That is – can they simply apply their mind to the facts, ignore everything they have read, and remain neutral in their decision-making?

Currently, Victoria does not allow for there to be a criminal trial by judge alone. However, there remain increasing calls for amendments to be made to allow either party to apply to the court for an order that the trial of a charge to be by judge alone. In Victoria in 2020, the calls increased as a result of the acquittal of Cardinal George Pell by the High Court. Cardinal Pell was convicted by a jury of 12 in the County Court for sexual offence charges, refused appeal in the Court of Appeal, and was ultimately acquitted. Many early on suggested that this was such a high-profile matter that it was best that a judge alone make the decision.

The calls also increased as a result of the coronavirus pandemic, which saw many jury trials aborted or postponed because of the inability to allow for social distancing in the courtroom. In April 2020, the Victorian Parliament passed legislation which amended the *Criminal Procedure Act 2009* (Vic), allowing for judge-alone trials for a period of six months to deal with the inability to conduct jury trials due to the pandemic. During this time, judge-alone trials were allowed where the accused consented, the prosecution was consulted (but the prosecution did not have to consent), and the court considered it in the interests of justice that the trial be conducted by a judge alone. Interestingly, the court's judgment on whether the accused is guilty needed to include the principles of law applied and the facts on which the judge relied (in contrast to a jury decision – a jury does not have to give reasons for the decision).

The following scenario describes some of the sentiments around allowing judge-alone trials as a permanent measure.

ACTUAL SCENARIO

Pell verdict is not the death of juries, but he should have been tried by a judge alone

Greg Barnes, *The Sydney Morning Herald*, 10 April 2020

The High Court's decision in the case of George Pell has evoked a deeply emotional response in the community. The subject matter of institutional historical sexual abuse does that. And there has also been some commentary predicting the death of the jury system.

Some have complained the High Court is making the jury's job redundant and that the court has 'mistreated' the jury that heard the charges against Pell in Victoria's County Court. Why should we bother to serve if the High Court will not trust our decisions? That has been a theme on social media. It is wrong.

All the High Court did was to restate the law. As the Law Council of Australia observed, 'although the testimony of [Pell's accuser] was capable of being considered truthful and reliable when taken by itself, there was other contradictory evidence before the court that was unchallenged by the Crown and which therefore also had to be considered truthful and reliable. When considered together, a reasonable doubt must have arisen as to which account was correct.' This has always been the law. It doesn't say to potential jurors their job is superfluous.

But that does not mean we shouldn't reflect on what the 21st century means for juries and where they fit into our legal system.



Source 3 Cardinal Pell was acquitted in 2020 of charges made against him.

The jury system is regarded as a bedrock institution in the Australian legal system, as it is in others that have adopted the English common law framework. And the right to be judged by your peers is something which the legal system and legislatures have been very reluctant to interfere with because of this central importance. But we live in the age of Twitter and Facebook. Long gone is the reticence that the community, including the media, once had in discussing individuals facing criminal proceedings. The potential for jurors to have knowledge about a case they are selected to decide upon is self-evident.

It raises an important question. Should Pell, given the hostility of the media, had the option a trial by judge alone? This was not available to him in Victoria but would have been in NSW, South Australia, the ACT, Queensland and Western Australia. Not because of Pell's position but because such a right should be available to every person in Australia, irrespective of where they happened to be charged by police.

Pell became for media the personification of the arrogance of the Catholic Church in its dealing with chronic institutional sexual abuse. He had given evidence to the Royal Commission into Institutional Responses to Child Sexual Abuse. It is fair to say there would be few in the community who had not read, heard, watched or even discussed Pell and his role in the church's responses.

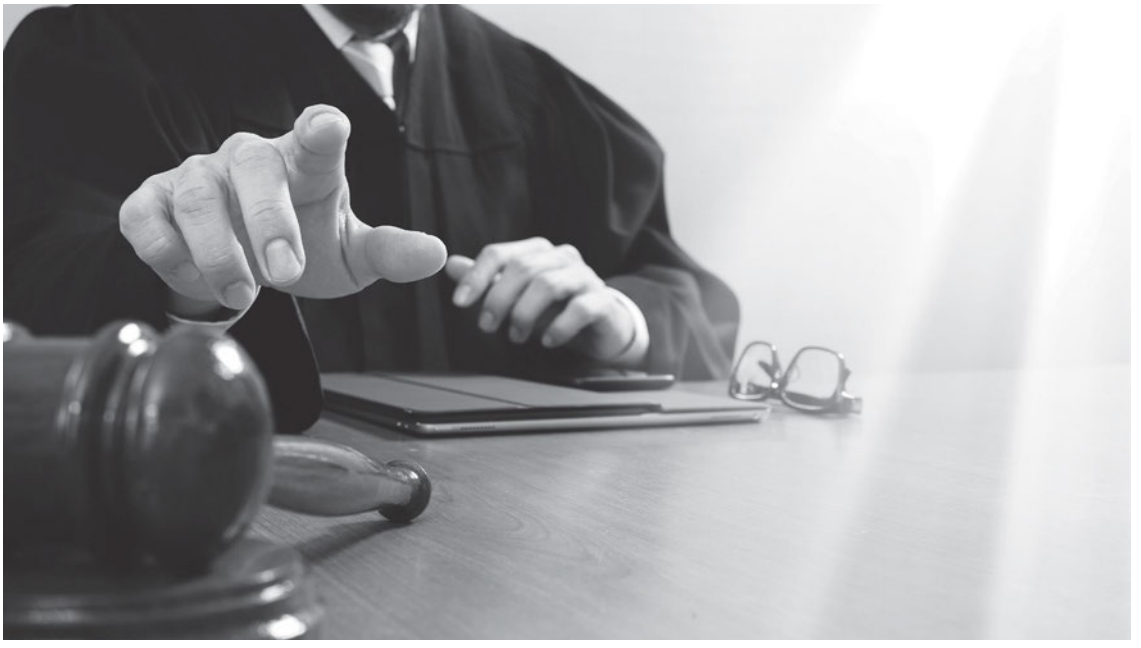
One will never know whether the jurors in the Pell case were influenced by the negative media. This does not mean they did not undertake their task to the best of their ability and with good conscience. But is it good enough to work on the hunch that a person's liberty and reputation should be in the hands of 12 individuals about whom nothing is known, and in circumstances where no reasons have to be provided as to why they find a person guilty or not guilty? This is a point made often by Malcolm McCusker QC, a leading West Australian barrister and Kim Beazley's predecessor as governor of that state ...

Ability of a judge-alone trial to achieve justice

In relation to achieving fairness, equality and access, some of the points to consider are explored in Source 4.

PRINCIPLE	JUDGE-ALONE TRIALS
Fairness	• Judge-alone trials are used in other states, and in NSW for some time. Procedural fairness can still be achieved, and there remains an appeal system to ensure that any errors made are corrected by a higher court. • Many people see this as addressing issues with receiving a fair trial before a jury in particularly high-profile cases. • Some people may see the use of a jury to be important to the operation of a fair trial, as it allows for objective community standards to be applied when deciding the facts (for example, what is reasonable, or what is offensive behaviour). • The court delays experienced as a result of the COVID-19 pandemic were able to be averted by introducing judge-alone trials rather than people waiting for justice.
Equality	• A high profile accused person may be at a significant disadvantage simply because of the media coverage and attention afforded in the case. There can be enormous prejudice suffered by people who have received so much media attention as a result of being charged with a crime. • However, this may be seen as giving high profile people an advantage over people without a high profile – but it may also be seen as a measure where they are treated differently to be treated equally.
Access	• Access to justice could be achieved by allowing the most experienced person in the courtroom – the judge – to be the decider of facts. • The changes may deny an accused person an opportunity to be tried by 12 people from their community – though a judge will only order a judge-alone trial if it is in the interests of justice to do so.

Source 4 The ability of judge-alone trials to achieve the principles of justice



Source 5 Introducing judge-alone trials during the COVID-19 pandemic averted some of the court delays.

Recommended reform 3: Increased funding for legal aid, legal centres and other services

From early 2017 the Law Council of Australia conducted a comprehensive review into the state of access to justice in Australia for people who experience disadvantage. This includes people from 13 priority groups, including people with disability, people experiencing economic disadvantage, LGBTIA+ people, prisoners, Aboriginal and Torres Strait Islander peoples, children and young people, rural, regional and remote Australians, and asylum seekers, among others.

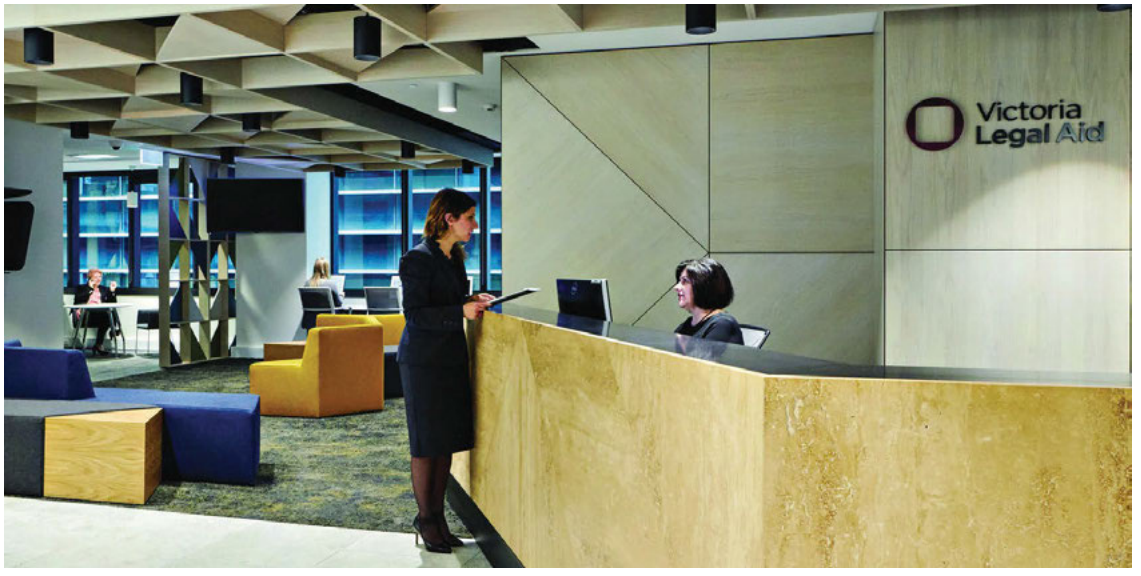
The Law Council of Australia saw it as one of the most comprehensive reviews into access to justice undertaken, and one of its most important pieces of work. It was overseen by an expert steering group led by former Chief Justice of the High Court, Robert French AC. The final report was released in August 2018 and contained 59 recommendations.

One of the recommendations made was that Commonwealth, state and territory governments should invest significant additional resources in legal aid commissions, community legal centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services (all centres or institutions that provide legal services) to address both critical civil and criminal legal assistance service gaps. It recommended that, at a minimum, the additional resources should be $390 million per annum.

In its report, the Law Council of Australia recognised that legal services must be affordable, but that many people face economic disadvantage. It found that there was an unmet need, and that services were experiencing extremely high levels of unmet demand. This often resulted in services prioritising certain matters, turning away many people, and resulting in possible injustice as a result (for example, because of a lack of a fair hearing because a person is unrepresented).

The Law Council found that governments must bear the responsibility for ensuring an appropriate service safety net – i.e. to ensure that everyone has access to some level of services, to ensure the principle of equality and to uphold the rule of law. It recognised the public benefit of spending money in this area – for example, not providing adequate funding in this area may mean that the government will have to spend in other areas such as child protection or prisons.

In June 2020, the Commonwealth Government announced an extra $248 million for legal services, including restoring $151 million in funding that was set to be cut. The funds will be provided to various legal aid commissions as well as community legal centres. It appears, however, that there remains a shortfall between the funding provided and the funding required to service demand for legal services.



Source 6 The Law Council of Australia has recommended that Commonwealth, state and territory governments invest significantly in legal aid.

Study tip

You can find a practice assessment task for Unit 3 – Area of Study 1 at the end of Unit 3 on page 298.

Ability of increased funding to legal services to achieve justice

In relation to achieving fairness, equality and access, some of the points to consider are explored in Source 7.

PRINCIPLE	INCREASED FUNDING TO LEGAL SERVICES
Fairness	• The courts have recognised that for indictable offences, a fair trial requires representation for an accused. This allows the accused to understand court processes and be informed of their rights and responsibilities. Many accused people do not qualify for legal aid but cannot afford their own lawyer, and so are at risk of not receiving a fair trial. • The court can stay a trial while the accused is providing with legal representation, but there is no guarantee as to the quality of that legal representation. In addition, prioritising matters such as these means that other people are at risk of not receiving legal aid. • Many accused people are self-represented in summary hearings. This risks the right to a fair trial and places a burden on the magistrate to explain matters to the accused. This can result in delays to the criminal justice system.
Equality	• The funding is targeted to ensuring people who are the most marginalised in our society, or people who are over-represented in our criminal justice system, are provided with legal services. These include people of a low-socio economic background, disabled people, people with mental impairments and Aboriginal and Torres Strait Islander people. It is aiming to provide them with an opportunity to be on an equal footing to the prosecution. • The lack of funding results in a 'missing middle' – people who fall through the gaps and who cannot afford a lawyer, and cannot get access to legal aid or free legal services. The people in the 'missing middle' will ultimately be at a significant disadvantage when trying to understand court processes and understand their legal rights.
Access	• The increase in funding would seek to ensure access to justice through the assistance of a legal adviser or representative. Costs is often one of the greatest barriers to accessing legal services – the reality is that many people cannot afford those services. Being unable to access legal services creates a worse outcome for some people. • The Law Council has recognised that government has a role to play in ensuring access and has found that an increased funding would bridge many of the gaps in current legal service delivery. • Despite an increase in funding in June 2020, it is possible that further funding will not be forthcoming, and so demand may not be fully met.

Source 7 The ability of increased funding to legal services to achieve the principles of justice

5.5 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by a recommended reform.

2 Describe one recommended reform which aims to lessen costs, and one recommended reform aimed at overcoming cultural issues.

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 addresses 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 only need tweaking? 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 evaluating the ability of the system 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 the aspects or features of the criminal justice system that help achieve those principles (for example, '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 (for example, '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
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

TOP TIPS FROM CHAPTER 5

1. The *VCE Legal Studies Study Design* is clear when it states that a reform is only recent if it has been introduced in the last four years. Make sure you check the date on which a recent reform was introduced before using it.
2. Many students get confused between recent reforms and recommended reforms, and this can result in students not getting full marks in their assessments. Try to remember recent reforms from when they were introduced, and try to remember recommended reforms based on who recommended them (and they have no date).
3. The best way to work through the factors and reforms is by linking them to what you studied in Chapters 3 and 4 and by working through the following questions.
   - **a** What part of the criminal justice system am I looking at (for example, committal proceedings)?
   - **b** What are the strengths and weaknesses of this part of the criminal justice system?
   - **c** What factor (costs, time, cultural differences) might arise with this part of the criminal justice system (such as delays in hearing committal proceedings)?
   - **d** What recent or recommended reform might address this factor (for example, abolition of committal proceedings)?
   - **e** Will this reform really address the weaknesses and the relevant factors? (This will bring out your discussion about the reform.)

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Describe** the nature of the Koori Court system, and how it aims to achieve equality.

(5 marks)

Difficulty: medium

2 **Explain** how delays in the hearing of criminal cases can have an impact on the accused and on victims. **How** do both committal hearings and plea negotiations affect the time in which a criminal case is heard? **Discuss**.

(8 marks)

Difficulty: high

3 **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)

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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

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 three 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 Shepparton which will enable June to be sentenced there. Another friend told her that she is sure that June will have to give evidence via closed-circuit television because she is a victim. Another friend has told her that she has heard that June can access legal aid and it is 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 A description of who the main parties in the trial are, including who June will be known as.
(3 marks)

2 Whether each of June's friends is right in their suggestions, and the reason for your answer.
(6 marks)

3 Two difficulties that June will most likely face during her trial, the reason why you say these are most likely, and how they will affect the achievement of justice.
(8 marks)

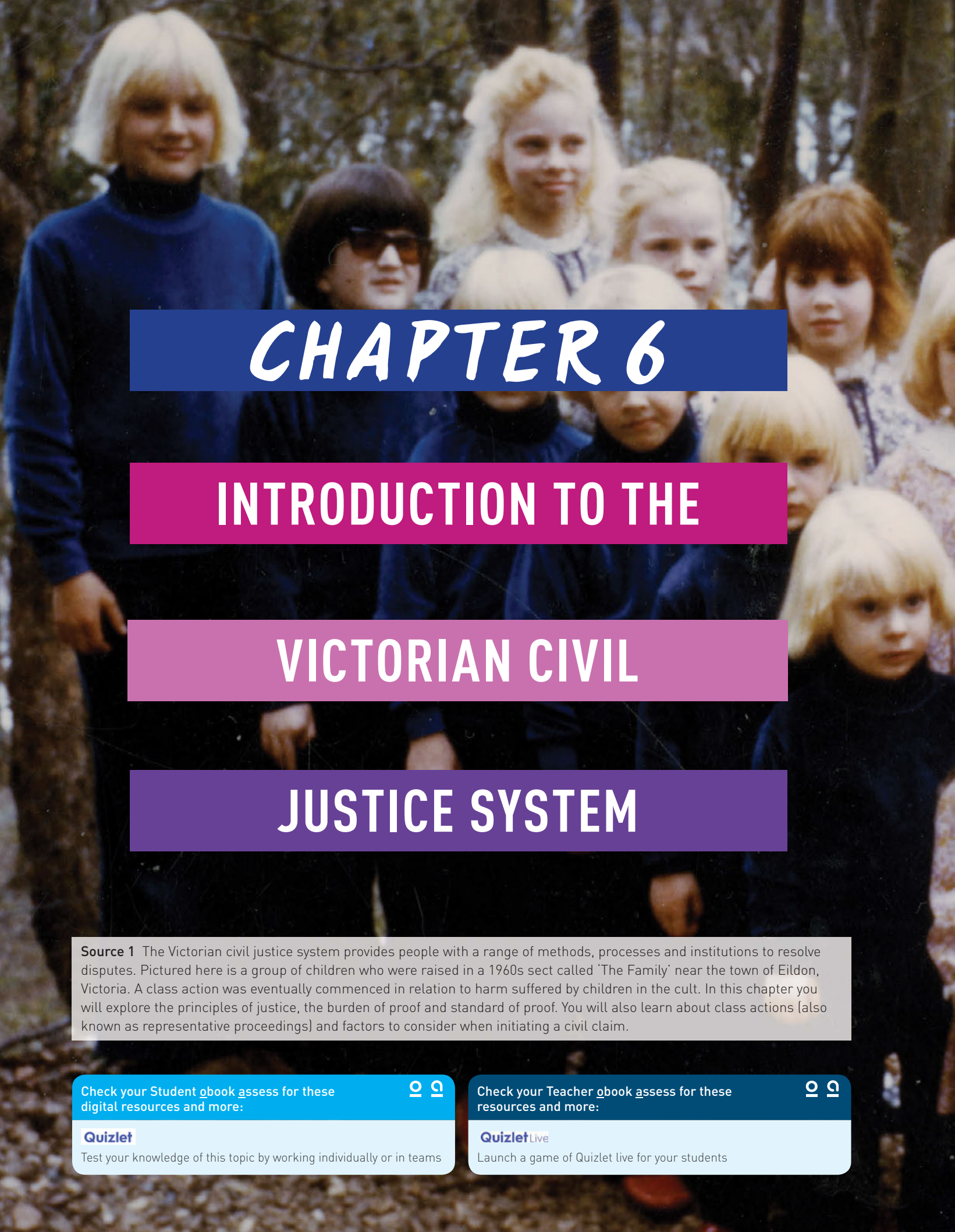
4 Two aspects of the criminal justice system that may address those two difficulties, and the reasons why you say that is so.
(4 marks)

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

Check your obook assess for these additional resources and more:

- **Student book questions** Chapter 5 Review
- **Revision notes** Chapter 5
- **assess quiz** Chapter 5 Test your skills with an auto-correcting multiple-choice quiz
- **Video tutorial** How do I evaluate?
- **Quizlet** Revise key definitions from this topic



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. Pictured here is a group of children who were raised in a 1960s sect called 'The Family' near the town of Eildon, Victoria. A class action was eventually commenced in relation to harm suffered by children in the cult. In this chapter you will explore the principles of justice, the burden of proof and standard of proof. You will also learn about class actions (also known as representative proceedings) and factors to consider when initiating a civil claim.

Check your Student obook assess for these digital resources and more:

Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive

Launch a game of Quizlet live for your students



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 (e.g. 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 their side of the story is right

burden of proof the obligation (or 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

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

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 that uses an independent third party (i.e. a 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 party (i.e. the defendant) in court

remedy 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 (disagreement) between two or more individuals (or groups) in which one of the individuals (or groups) makes a legal claim against the other

remedy
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

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 before trial which are relevant to the dispute)
- dispute resolution methods (such as mediation and arbitration)
- 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 several key stages. However, because there are different ways to resolve a civil dispute, the stages can be different from case to case, and not all cases go through the entire process. An example of the stages that a typical 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 blue above.

civil law
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes

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)

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 or 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 (such as tribunals).

Parties to a civil dispute

Every civil dispute involves two parties:

- the **plaintiff** – the party who commences a civil action and who has had their rights infringed (the plaintiff is also known as the aggrieved party)
- the **defendant** – the party who is alleged to have infringed the rights of the plaintiff 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 (for example, 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 cannot be reversed (for example, 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**.

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

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 (such as WorkSafe Victoria, a local council or a body such as the Australian Competition and Consumer Commission).

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'.

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)

You will learn more about vicarious liability in Topic 6.4 of this chapter.

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.

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.

liability
legal responsibility for one's acts or omissions



Source 2 A child under the age of 18 can sue another person or group through a litigation guardian.

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.

Types of civil disputes

There are various types of 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 3.

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 to land 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.
Wills and inheritance claims involve disputes over a will. For example, a frail old man might be pressured into making a will that leaves all his money to a scam artist. The family could go to court to claim that the will was not valid.	

Source 3 Various types of behaviour can give rise to disputes.

The following scenario is an example of a plaintiff awarded damages in her civil dispute.

ACTUAL SCENARIO

$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.

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.'



Source 4 In 2015 Kate Mathews was awarded damages in a Supreme Court case against her former employer.

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 every day'.

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 that you will learn about in Unit 3 are as follows:

- complaint bodies, such as Consumer Affairs Victoria
- 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 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 these dispute resolution bodies in Chapter 7 as part of Unit 3 – Area of Study 2.

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

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 the types of disputes that they hear.

3 Who are the parties to a civil dispute?

Synthesise and apply

4 Look at the different types of civil disputes in Source 3. 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.

5 Read the scenario '$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 suffered by the plaintiff.

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

6 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? Discuss in the context of one of the principles of justice.

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

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that 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

In the civil justice system, **fairness** means fair processes and a fair hearing (or trial), and giving parties an adequate opportunity to be heard. This means that:

- both parties should know the case against them and be given a fair opportunity to present their case
- both parties should be given the right to participate in the trial and pre-trial processes, such as being entitled to examine or **cross-examine** a witness and make submissions to the judge about legal or factual matters
- 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.

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

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. As another example, fairness means that a party should be entitled to a trial date during which that party is able to attend. A trial date that is set for a time when the party is overseas would result in an unfair outcome, as it would mean the party could not participate in the trial.

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 with the criminal cases, fairness is not about the outcome of the case – it is about the processes used to ensure a proper 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. It is therefore possible that the remedy awarded for the violinist will be greater than that given to the postal worker. Fairness is not concerned with the outcome – it is concerned with the processes involved.

mediation
a method of dispute resolution using an independent third party (the mediator) to help the disputing parties reach a resolution

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 based on 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 it achieves fairness in civil disputes. Try to look for some of these features when determining whether something is fair:

- the time it takes for a civil dispute to be resolved, and whether any delays have occurred (delays can lead to unfair outcomes, such as witnesses forgetting what happened, or the plaintiff being so old that they are denied the ability to enjoy any remedy awarded to them)

- 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 can understand legal processes and terminology, and have the appropriate assistance where necessary. In some cases, this may require the judge to provide assistance to a party – particularly to self-represented parties who cannot understand processes.
- whether procedural rules and laws have been properly applied. For example, both parties are given opportunities to make applications, cross-examine witnesses, or attend hearings.
- whether the accused and victims have been treated impartially and without any bias towards them. In particular, the judge must not 'enter the arena' and become an advocate for a party.



Source 1 Is justice fair for everybody?

Equality

The *Charter of Human Rights and Responsibilities Act 2006* (Vic), a Victorian law which aims to protect human rights, 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 the civil justice system, this means that parties should be treated equally, have an equal opportunity to present their case, and not be discriminated against because of a certain attribute or characteristic.

In particular, the civil justice system 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.

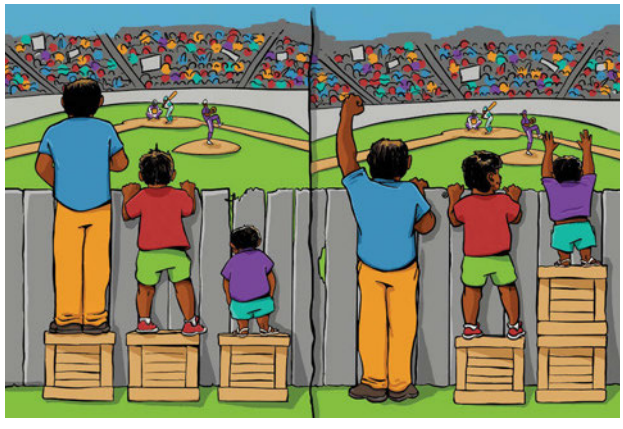
Equality is about how the parties are treated in the proceeding, but it does not necessarily mean that people should be treated the same. Sometimes it is actually unequal to treat two parties the same way because it does not account for the ways in which they are different. For example, if one party is represented by legal counsel but the other party is not, then the judge may have to level the playing field by assisting the **self-represented party**. As another example, what would happen if a defendant who had a mental impairment and could not understand legal processes was in a civil dispute against a well-represented bank? Should there be processes in place to ensure the defendant was assisted in some way?

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

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 make some assessments about whether it achieves equality for parties in civil disputes. Try to look for some of these features when determining whether equality has been upheld:

- 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 groups or people with disabilities)
- the extent to which the availability and skill of legal representation affects people being treated equally before the law
- the ability of people to be equally represented and able to present their case
- the extent to which variations were made to the pre-trial and trial procedures to assist someone who was at a disadvantage
- the extent to which the judge or magistrate overseeing the case assists a self-represented party or a vulnerable party so that they are on a level playing field.



Source 2 Are fairness or equality relevant in this picture?

Access

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

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

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 do not 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 cannot afford to pay legal fees.

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. Try to look for some of these features when determining whether access has been achieved:

- 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.

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.

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>

Source 3 The principles of justice are relevant to both criminal and civil cases.

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?

Synthesise and apply

4 Identify two individuals or groups in Australia that may need to be treated differently in order to be treated equally. Describe how a judge may be able to achieve equality in these cases.

5 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 trial may still have been fair.

6 Look at the pictures 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 ensure equality.
- **c** Come together as a class and share your views and your diagrams, pictures or scenarios.

Analyse and evaluate

7 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 internet to find out whether there are any local lawyers in that town who specialise in resolving civil disputes. Write their names 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.

8 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.

9 Conduct some research and find out the top three reasons why the Victorian civil justice system is sometimes 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
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz



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 must prove the case
- the standard of proof – the level of certainty the judge, magistrate or jury must have in deciding the dispute
- representative proceedings – a proceeding in the name of one person, on behalf of a group.

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 response to the plaintiff's claim (and heard at the same time by the court)

standard of proof
the degree or extent to which a case must be proved in 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 their version of the facts is correct

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

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)

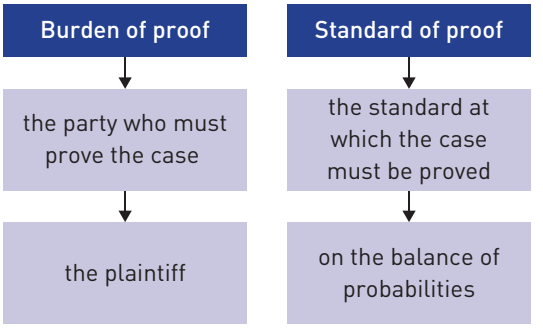
The burden of proof

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 must show that the defendant was in the wrong. This follows the principle that the party who brings the case must 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 defence (for example, 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 **representative proceeding** (or 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 (such as 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. That person, known as the **lead plaintiff**, will represent the group in the proceeding. The persons who are part of the group are known as **group members**.

The lead plaintiff is named as the plaintiff on behalf of the group (see as an example 'The Family' scenario below). 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 in a representative proceeding (i.e. class action) and who represents the group members

group member
a member of a group of people who are part of a representative proceeding (i.e. a class action)

1960s cult 'The Family' class action in the Supreme Court

ACTUAL SCENARIO

Leeanne Joy Creese has brought a claim on behalf of persons who allegedly suffered personal injury in relation to a sect known as 'The Family' during the period 1968 to 1987.

The sect allegedly operated between 1968 and 1987. Anne Hamilton-Byrne was the head and administrator of a group of adults and children who were part of the sect. It is alleged that the children were subjected to cruel and inhumane treatment at her direction. Ms Hamilton-Byrne allegedly considered herself a reincarnation of Jesus Christ and founded the sect in the 1960s, and acquired children through adoption, imprisoning them at a house near Lake Eildon. The children were home-schooled, wore identical clothes, and their hair was often dyed blonde. It is alleged that psychological abuse took place.



Source 2 Ms Hamilton-Byrne died in 2019 aged 97. The claim is being made against her estate.

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.

Australia's first successful class action occurred in 1995 when a firm of solicitors, Slater and 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;

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.

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 several benefits:

- the group members can share the cost (though see the 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, therefore giving 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 threatened class action was as a result of the spread of a novel coronavirus (causing COVID-19) in 2020.

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.

litigation funder
a third party who pays for some or all the costs and expenses associated with initiating a claim in return for a share of the amount recovered. Litigation funders are often involved in representative proceedings

ACTUAL SCENARIO

A virus outbreak, a cruise ship and a class action

The emergence of a novel coronavirus (a newly identified virus causing the disease COVID-19) first caused an outbreak in China, and then quickly spread to the rest of the world. In Australia significant social and economic restrictions were put in place to prevent the spread of the virus, for which there was no treatment or vaccination in 2020.

On 8 March 2020 the *Ruby Princess* cruise ship left Sydney, returning to dock on Thursday 19 March 2020. All 2700 passengers were allowed to disembark. Over 600 people who were on the cruise ship were subsequently diagnosed with COVID-19.

In April 2020 Shine Lawyers stated that it was investigating legal action on behalf of all passengers affected by the outbreak on board the cruise ship, and said it was considering whether legal avenues existed to file a class action against the *Ruby Princess* owners and operators for failing to protect its passengers.

Source 3 The *Ruby Princess*, which may be the subject of a potential class action



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 to third-party funders before the group members receive any funds. This is explored more in Chapter 8.



Source 4 Class actions can allow people to pursue civil actions as a group that they may not have been able to afford as an individual, but the costs can still be significant.

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 scenario '1960s cult "The Family" class action in the Supreme Court'.
  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 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 defendant(s)
  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 scenario 'A virus outbreak, a cruise ship and a class action'.
  a Describe the facts of this issue.
  b Who would be the class members in this case, and who would be the defendants?
  c Conduct some research. What is the status of this threatened claim?

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? When 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

Worksheet
Representative proceedings and litigation funding

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

6.4 RELEVANT FACTORS WHEN INITIATING A CIVIL CLAIM

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.

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, 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 to 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.

One or more of these factors may affect whether a party decides to sue and, if so, who they sue.

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 to 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.

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 to **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
informal discussions between two or more parties in dispute, aiming to come to an agreement about how to resolve that dispute

Negotiation normally involves the parties interacting directly with each other to try to 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'.
- 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).

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

When negotiation may not be an option

There are several reasons why negotiation may not be an option. Though this depends on the case and the parties involved, some of those reasons include:

- 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 to stop that from happening)
- there is a significant power imbalance between the parties, so the parties are not on an equal footing to be able to negotiate (for example, a young employee with a claim against their employer who has significant legal representation).



Source 1 Negotiation may not be the best option if there is a significant power imbalance.

These reasons will need to be considered when determining whether a party should try to negotiate before initiating a claim.

Some of these reasons why negotiation may not be an option are demonstrated in the following scenario about Susan's dispute with her neighbour.

Persistent abusive messages

HYPOTHETICAL SCENARIO

Susan's neighbour, Carl, has set up a music studio in his backyard shed. Between midnight and 3 am every morning, Carl plays loudly on the drums and other musical instruments. Susan has been unable to sleep at night, and her work is suffering as a result.

On at least five occasions, Susan has approached Carl and asked that he stop. Carl laughs every time and asks Susan 'who does she think she is' and insists that he has a right to play music on his own property. On the last occasion, Susan told her neighbour she would go and see a lawyer.

Since that time, Susan has received abusive messages from Carl. Her lawyer has advised her not to approach him again, and that she is not to try to negotiate any resolution.

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.

Costs

A party involved in a civil dispute may incur costs in resolving a civil dispute. The costs include fees for legal representation, disbursements (such as court fees, mediation fees and expert witness fees), and possible costs to be paid to the other party if the plaintiff is not successful.

Fees for legal representation

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

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 and the time it will take to resolve
- 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 expertise of the legal practitioners; lawyers and barristers with greater seniority or expertise usually charge higher fees.



Source 2 Engaging a solicitor or barrister can be very costly.

Did you know?

Solicitors generally charge clients on a time basis. Hourly rates vary from solicitor to solicitor, but partners in law firms typically charge more than $600 per hour.

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?

Disbursements

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

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.

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. There may also be jury costs, if a party chooses to have a jury.

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 to 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.

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. The expert will charge a fee for their work.



Source 3 A party involved in a civil dispute may incur costs in resolving the dispute.

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**.

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. Therefore, it is a risk that the plaintiff needs to consider before initiating a civil claim.

adverse costs order
a court order (i.e. legal requirement) that a party pay the other party's costs

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. (For example, will they have to sell their assets to pay those costs?)

Limitation of actions

Plaintiffs must 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.

limitation of actions
the restriction on bringing a civil claim after the allowed time

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

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, to promote social cohesion.

In Victoria the main **statute** that imposes limitations on actions is the *Limitation of Actions Act 1958* (Vic). Depending on the type of claim, there are different limitation periods. For example, a plaintiff has one year to bring a defamation claim, but has six years to bring a claim for breach of contract.

The effect of the expiry of any limitation period means that the plaintiff will be barred from obtaining any remedy. In some situations, the limitation period can be extended, as in the scenario on the next page.

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.

ACTUAL SCENARIO

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.



Source 4 This case was heard in the Supreme Court of Victoria.

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.

In 2015 Victoria became the first state to remove limitation periods for persons who suffered physical or sexual abuse as a minor, or psychological injury 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.

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.

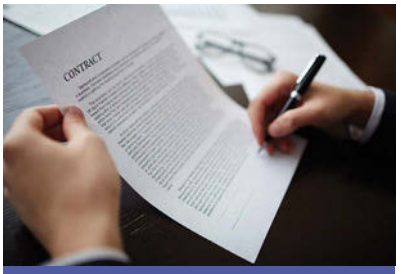
Sometimes there may be two or more persons who have infringed the plaintiff's rights or caused harm to the plaintiff, and both may become liable for loss or damage suffered by the plaintiff.

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).



EMPLOYERS



INSURERS



PERSONS INVOLVED IN WRONGDOING

Source 5 If a person slipped on spilt milk in a supermarket the plaintiff could recover money from 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.

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. 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 hypothetical scenario on the following page, Joey could sue Rachel's husband Ross because 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 (e.g. encouraging another person to cause the harm)

HYPOTHETICAL SCENARIO

Joey's bakery's not so scrumptious

Joey recently purchased a bakery business from Rachel. During his research on the business, he was told by Rachel that the bakery made $200 000 profit a year. Joey attended the bakery several times over the course of three months. Every time he attended, Ross, Rachel's husband, was working at the bakery and would often rave about how much money they were making. Ross at some stage showed Joey some statements which indicated that the profit was about $200 000 a year.

After a few months of business, Joey is struggling to make money. He later finds out that Ross's statements were not true, and that Ross's handwritten statements contained false profit numbers. Joey believes he has been misled about the true value of the bakery.



Source 6 Joey recently purchased a bakery business.

The extent of the defendant's liability

One of the other issues that may arise for a plaintiff, and which they 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 their 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*, the defendant attempted to claim contributory negligence to reduce their liability but was unsuccessful.

ACTUAL SCENARIO

Workplace injury results in an award for damages

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.

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?

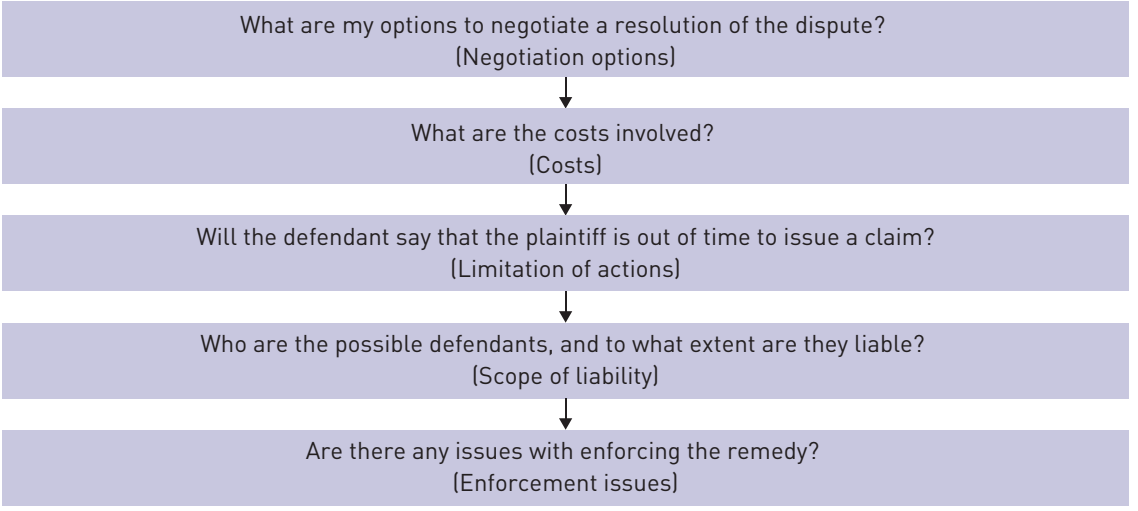
The plaintiff will need to consider whether the defendant **is able to** pay, and if so, whether the defendant **will** pay. Some of the issues that the plaintiff will need to consider are:

- the defendant may be bankrupt, which means that they will not have any assets or money to pay anything to the plaintiff
- even if the defendant is not bankrupt, they 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 can 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.

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 7.



Source 7 The factors to consider when commencing a civil action

In the scenario below, Aria believes she has a claim for negligence.

HYPOTHETICAL

SCENARIO

The hole in the footpath

At 8 am on 14 August 2020, Aria 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, Aria 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. Ezra, 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 Aria's accident. Barriers R Us were at the site the next morning, but had not 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. Aria feels like a laughing stock, and now suffers from anxiety. She does not want to go out anymore, she has missed a lot of school, and she no longer see her friends.

Two years after the incident, Aria goes to see a lawyer. She wants to sue Ezra 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.

Source 8 Barriers put up to protect pedestrians had been removed by local boys, contributing to Aria's accident.



6.4 CHECK YOUR LEARNING

Define and explain

1 Describe the dispute resolution method of negotiation, and provide two types of cases in which negotiation may not be appropriate.

2 What is meant by limitation of actions? Why is it relevant to a civil dispute?

3 Is the wrongdoer the only possible defendant in a civil dispute? Give reasons for your answer.

Synthesise and apply

4 For each of the following scenarios, identify as many costs issues 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 does not have any cash but owns her own home. She is prepared to borrow against her home to pay for legal fees.

5 Your neighbour was involved in a motor vehicle accident caused by the negligence of a driver who was transporting goods for the company he works for.

- **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 delivering flowers to his girlfriend. Does this change any advice you would give to your neighbour about who should be sued?

6 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

7 Read the scenario 'The hole in the footpath'.

- **a** What is the nature of Aria's claim?
- **b** Describe the loss that Aria has suffered as a result of her accident.
- **c** Who are the possible defendants in Aria's claim? Why do you think they might be liable?
- **d** Identify and describe all of the factors that are relevant to Aria before she initiates her civil claim. After considering each of these factors, do you think that Aria 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
6.4 Check your learning

Worksheet
Factors to consider

Worksheet
Negotiation options

Weblink
Limitation of Actions Act 1958 (Vic)

Weblink
Dispute Settlement Centre of Victoria

TOP TIPS FROM CHAPTER 6

1 Each of the five factors to consider before initiating a civil claim can be specifically assessed, so be familiar with each of them. You should be able to spot which factors should be considered by the parties in a particular scenario. Do this by highlighting the parts in the scenario that are relevant to each factor. Have a go with the scenario 'The hole in the footpath' on page 202 of this chapter.

2 You do not need to know minor details such as the limitation period for different types of claim, or the amount of costs that will be charged for filing a claim or a hearing day. Exam assessors will not expect you to know that information, and you will not be asked a specific question about it.

3 Enforcement issues is not about how you enforce, but issues you will face if you want to enforce. They are two different things. Focus on the latter, not the former.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Distinguish** between the standard of proof in a criminal case and the standard of proof in a civil dispute.

(3 marks)

Difficulty: medium

2 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)

Difficulty: high

3 '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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

Penny's wedding night

In 2020 Penny married Javier in Bendigo in a lovely ceremony in the gardens. They then had a cocktail evening at the local restaurant, Insightful Nights. Insightful Nights had arranged catering from Gastro Specialty Pty Ltd. One of the signature dishes of the night was a warm chocolate mousse served in a chocolate nest, created by its chef, Andrea McChock.

The next day Penny vomited frequently, was hospitalised and diagnosed with gastroenteritis. She spent five days in hospital. She later discovered that five other guests who had also eaten the mousse suffered the same thing, and with the same severity. One of the ill guests is a pregnant woman who has since suffered issues with her pregnancy, and another is an elderly male who now suffers from anxiety when eating food. Penny is unsure whether there is anyone else who got sick from her wedding, as she has not yet contacted everyone.

Penny has since suffered ongoing health problems and lost her job due to time off work. Penny's lawyer says she has a good case and is happy to issue a claim in court at a fee of $350 per hour. He estimates Penny will need to pay $45 000 in legal fees, for him and a barrister, for Penny to take the matter to trial. Penny does not have that money. She is also concerned because she has recently heard that the local restaurant has gone out of business, and nobody knows where the owner is. However, she has heard that Gastro Specialty Pty Ltd's business is thriving. She has also heard that Andrea does not have any assets in Australia and spends most of her time in the United States. Penny feels that there is no choice but to abandon her claim.

Practice assessment task questions

1 If limitation of actions is an issue in this case, who will raise it? 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 her money and 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

Check your obook assess for these additional resources and more:

Student book questions
Chapter 6 Review

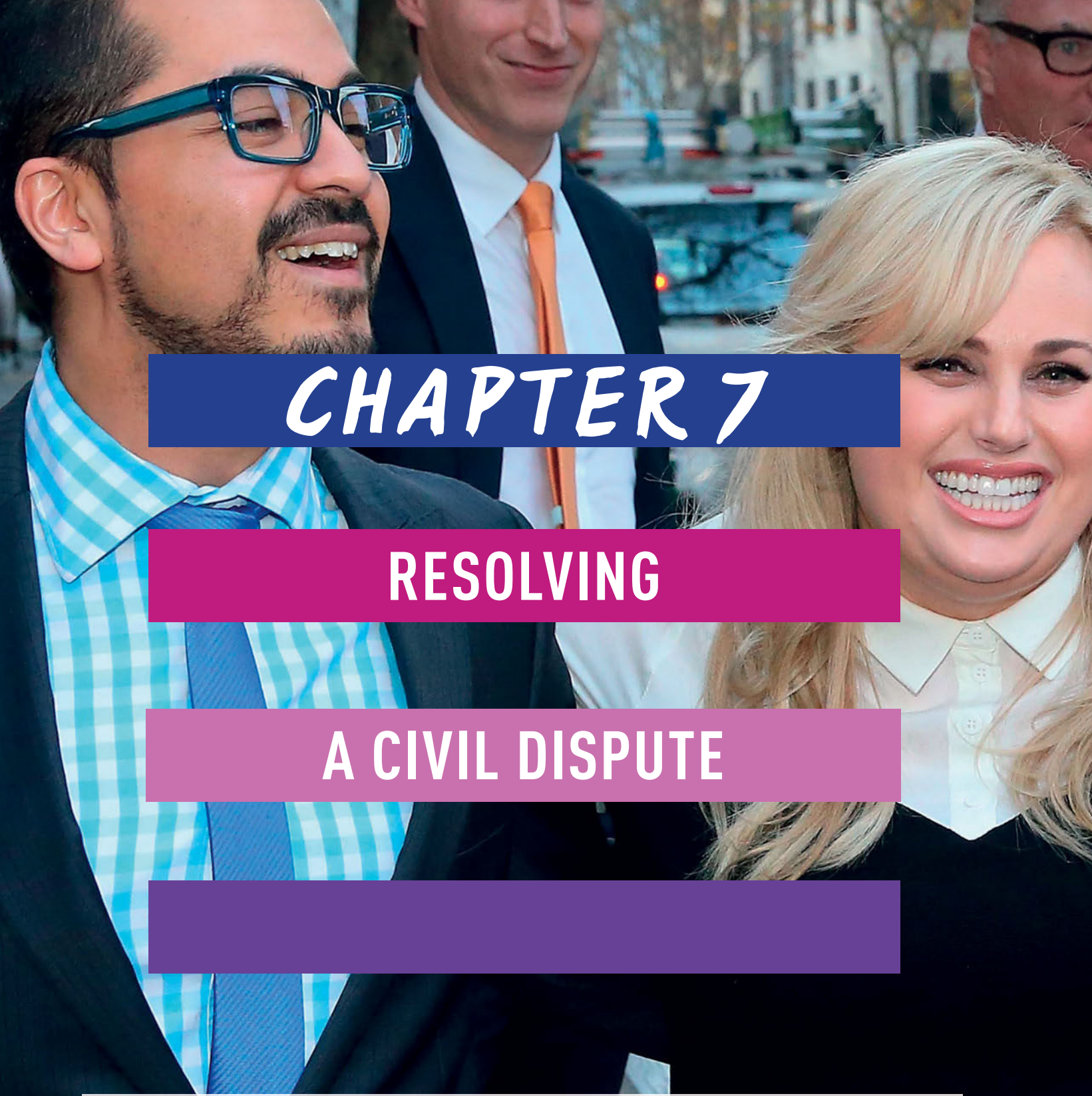
Revision notes
Chapter 6

assess quiz
Chapter 6 Test your skills with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

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, which was reduced to $600 000 on appeal. In this chapter you will explore ways in which civil disputes like these may be resolved.

Check your Student obook assess for these digital resources and more:

Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive

Launch a game of Quizlet live for your students



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 methods

arbitration a method of dispute resolution in which an independent person (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 (e.g. an order that the parties attend mediation)

conciliation a method of dispute resolution that uses an independent third party (i.e. a 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 evidence (testimony) given by an independent expert about an area within their 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 (testimony) 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 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.

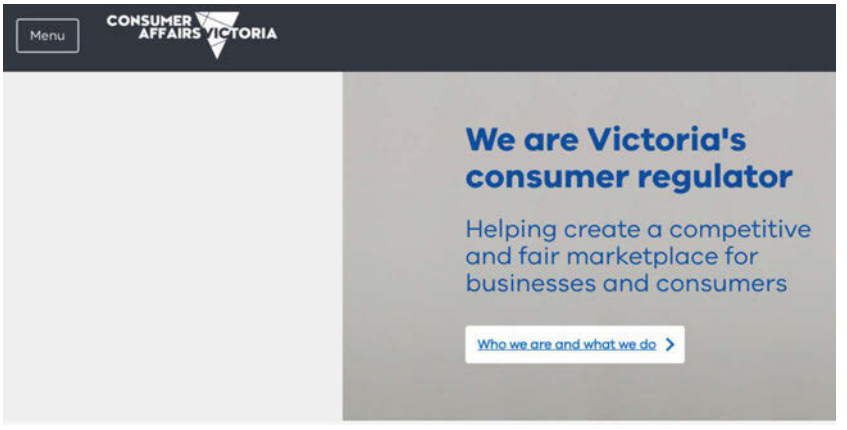
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7.1 CONSUMER AFFAIRS VICTORIA

Many organisations in Victoria provide dispute resolution services. Some of these organisations are **complaints bodies**, which offer free dispute resolution services to people who make a complaint about another party. Consumer Affairs Victoria (CAV), part of the Victorian Government's Department of Justice and Community Safety (DJCS), is one of these. In this topic you will explore the purpose of CAV and consider when CAV may be an appropriate body to resolve a **civil dispute**.

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 (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 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

Consumer Affairs Victoria is Victoria's consumer affairs regulator. It advises the Victorian Government on consumer legislation (**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 those rights may have been infringed.

CAV will help **people settle their disputes efficiently and constructively**, without any cost, and assist them with resolving their 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 to seek compensation for any loss they have suffered.

CAV only accepts complaints from consumers and tenants, not from businesses and landlords.

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

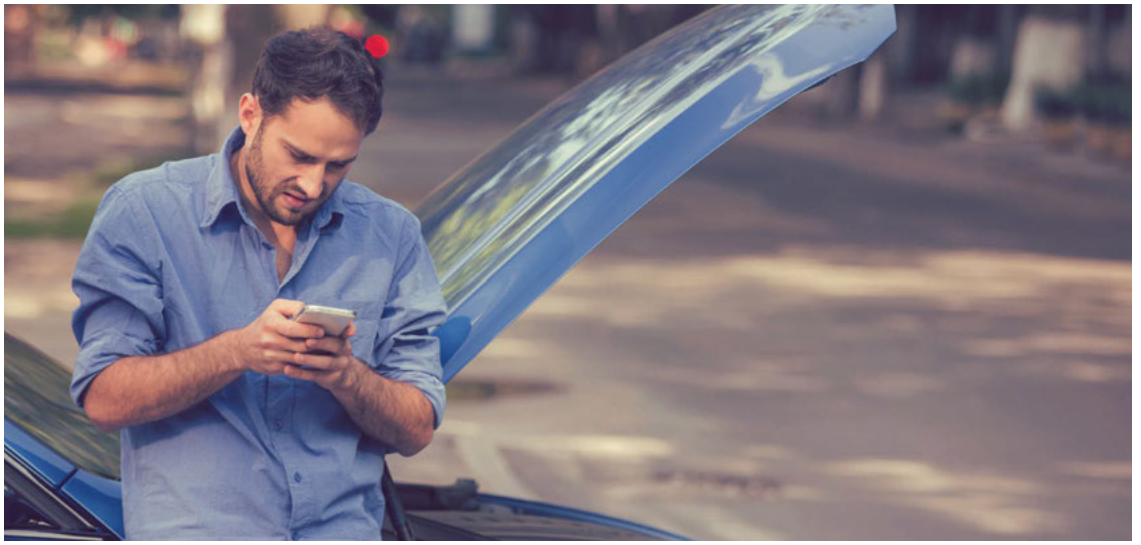
conciliation
a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution

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 themselves

Dispute resolution methods used

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 explores possible solutions with the parties to help them come to their own decision. The conciliator is usually someone with specialist knowledge of the nature of the dispute. CAV has teams devoted to the types of disputes they can help with.



Source 2 Consumer Affairs Victoria can offer dispute resolution services to motor vehicle drivers who have been sold dodgy cars.

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.

terms of settlement a document that sets out the terms on which the parties agree to resolve their dispute

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.

Appropriateness of Consumer Affairs Victoria

Not all civil disputes can be resolved by CAV. When deciding whether to offer a dispute service, CAV considers a range of factors, which includes the following (other factors can be considered):

1. whether the dispute is within CAV's **jurisdiction**
2. whether the dispute is likely to be resolved
3. whether there are other or better ways to resolve the dispute (that is, there is another alternative).

In addition to the above factors, CAV will consider the following:

- whether the issue has already been dealt with by the courts, CAV or the **Victorian Civil and Administrative Tribunal (VCAT)**. If the matter has already been ruled on by the courts or VCAT, or there is a case pending, CAV will not intervene.
- whether the consumer has tried to resolve the dispute themselves first
- whether the complaint warrants CAV's involvement (for example, it is not a trivial complaint)
- if the consumer is vulnerable or disadvantaged (if they are, this may require CAV's involvement to protect the consumer).

jurisdiction the lawful authority (i.e. 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' (i.e. sections) of the tribunal. These lists include 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 these types of disputes 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.	*Australian Consumer Law and Fair Trading Act 2012* (Vic) and the Australian Consumer Law (Victoria), *Goods Act 1958* (Vic), *Motor Car Traders Act 1986* (Vic)
Disputes between a tenant and landlord about issues such as: • a complaint by a tenant about the repair of rented premises • a 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 resolve using conciliation

If CAV does not have jurisdiction to hear a matter, then it is not an appropriate dispute resolution body for that matter. 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 following hypothetical scenario.

HYPOTHETICAL SCENARIO

Faulty blender fails after four weeks

Morgan Smoothie has just bought a high-quality blender from a local appliance store. The blender cost more than $2000. Morgan wanted to buy it to make his morning protein smoothies.

After four weeks Morgan's blender stopped working. The blades seem to whizz around but nothing blends. When he tries it again, the plug starts to fizzle out. Morgan goes into the appliance store, who disagrees that it is their fault. They say that Morgan has been using the blender too much and has not been washing it properly, so it is not a faulty product. Morgan disagrees. The instructions for the blender clearly state that it can be used on a daily basis, and he has been following the instructions for cleaning. He wants his money back, but the appliance store has refused. Morgan has now approached CAV to assist him to get his money back.



Source 4 A faulty blender can result in a small civil claims dispute between a purchaser and a supplier.

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

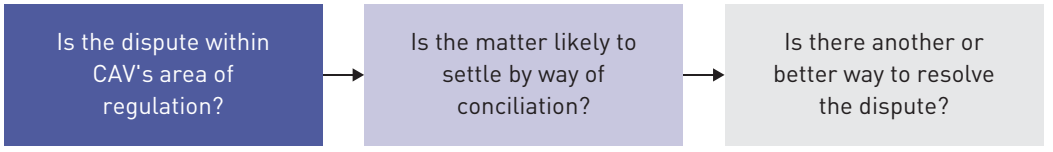
- the person complaining has not contributed to the dispute through inappropriate behaviour
- the dispute is not overly subjective (for example, where the consumer has complained about services which are personal in nature, such as hairdressing, because this would call for opinions about whether something as personal as a haircut was 'good' or not)
- the trader has not 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.

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 (for example, 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 (such as an order to stop a trader selling a car to someone else).



Source 5 Questions that can be asked to decide whether CAV is an appropriate dispute resolution body

Study tip

When you are answering a question about CAV conciliation services, remember that these government agencies are not courts or tribunals. They have no power to hear cases, only help people reach a settlement. Avoid using language in your answers which suggests that CAV has the power to make a binding decision on the parties.

negotiation informal discussions between two or more parties in dispute, aiming to come to an agreement about how to resolve that dispute

Study tip

If you are asked to evaluate CAV, link each of the strengths and weaknesses to one or more of the principles of justice. Then 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 of CAV best achieves or does not achieve?

Strengths and weaknesses of Consumer Affairs Victoria

When considering the appropriateness of CAV for a dispute, as well as evaluating it as a dispute resolution body, you should consider its strengths and weaknesses.

STRENGTHS	WEAKNESSES
CAV's conciliation service is **free**, meaning that it remains accessible to all Victorians, regardless of their ability to pay.	CAV's **role is limited** mainly to consumer and landlord disputes, meaning that it has no power to assist with 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.
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 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 willing.

STRENGTHS	WEAKNESSES
CAV ensures **procedure fairness** by allowing both sides the opportunity to present their case and rebut the other side's case.	CAV 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.
CAV assesses disputes individually, **case by case**, reducing waste of time and resources on disputes that are clearly unlikely to be resolved through conciliation.	**Not all cases are accepted** by CAV. This is because of CAV's criteria and its prioritisation of cases.
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 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**.
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.	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 6 Summary of CAV's strengths and weaknesses

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 has jurisdiction to resolve.
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 Conduct some research and find a recent article which discusses CAV assisting to resolve a dispute (hint: look for cases where CAV was helping a consumer, and not where CAV took action against somebody). Prepare a set of questions for another person in your class about CAV based on the article. Discuss the answers with your pair.
7 Read the scenario 'Faulty blender fails after four weeks'.
   a In your view, is CAV an appropriate dispute resolution body for this dispute? Justify your answer.
   b What would you advise Morgan do in this situation?

Analyse and evaluate

8 Evaluate the ability of CAV to resolve small disputes between consumers and traders.
9 '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

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

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 the Victorian Civil and Administrative Tribunal (VCAT). Members include the VCAT President, vice-presidents, deputy presidents and senior and ordinary members

The governing body of VCAT consists of the President, 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 five divisions. Each contains one or more lists, which hears certain types of disputes. The divisions and lists as of 2020 are shown in Source 1.

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 • 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
Planning and Environment	Deals with reviews of decisions made by councils or other authorities (e.g. decision to grant a permit).	• Planning and Environment
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 2020

Purpose of the Victorian Civil and Administrative Tribunal

Did you know?

A number of tribunals operated in Victoria prior to the establishment of VCAT in 1998. This proved to be inefficient and expensive. Fifteen boards and tribunals were therefore combined to form VCAT as a one-stop shop dealing with a range of civil disputes.

VCAT's purpose is to provide Victorians with a **low-cost, accessible, efficient and independent** tribunal delivering high-quality dispute resolution processes. How VCAT achieves this purpose is set out in Source 2.

VCAT'S PURPOSE	HOW VCAT ACHIEVES THIS
Low cost	• Generally the parties need only pay a small amount for filing their claim, although costs vary from list to list. As at 1 July 2020, the standard fee was $65.30 for smaller claims. • VCAT has three tiers or levels of fees: corporate, standard and health care card holders. The aim is to make corporate applicants pay higher fees, and 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 (for example, a claim of $15 000 or less); 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. • Parties can represent themselves, rather than paying lawyers. More than 80 per cent of people represent themselves at VCAT.
Accessible	• VCAT conducts hearings in various locations in Victoria. Its main centre is in Melbourne but it has several venues across the state. • VCAT offers telephone and video conferences in place of attending the tribunal, allows people to make applications online and conducts online hearings. • VCAT hearings are less formal than court hearings, which makes people feel more comfortable in using its services.
Efficient	• 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.
Independent	• 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**.

Source 2 How VCAT achieves its purpose

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 or parties (known as a coalition) that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

Dispute resolution methods used at the Victorian Civil and Administrative Tribunal

VCAT uses three main types of dispute resolution methods:

- mediation, including a fast track mediation and hearing 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 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. If the matter settles at mediation, then there is no need for a hearing.

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



Source 3 A mediator allows the parties to have control of their dispute and ensures that both parties are heard.

Fast track mediation and hearing

Disputes about goods and services in the Civil Claims List valued between $500 and $10 000 may be listed for a **fast track mediation and hearing**. A qualified mediator from VCAT or the Disputes Settlement Centre of Victoria 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 VCAT member.

fast track mediation and hearing (FMAH)
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, at 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.

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. VCAT also has an obligation under section 97 of the *Victorian Civil and Administrative Tribunal Act* to act fairly when resolving disputes.

evidence
information used to support the facts in a legal case

Orders

The types of orders that VCAT can make in a hearing vary from list to list. In general, VCAT can:

- require a party to pay money (for example, where a person has purchased goods or services and has not paid for them)
- require a party to do something, such as perform work, carry out repairs or vacate premises (for example, where a landlord refuses to repair a kitchen of the house they rent)
- require a party to refrain from doing something (for example, to stop a demolition)
- declare that a debt is or is not owing (for example, where there is a dispute about money owing under a contract)
- review, vary or cancel a contract
- dismiss a claim (where the applicant has been unsuccessful in providing their 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. a 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 case of *Hoskin v Greater Bendigo City Council* an appeal of a VCAT decision was dismissed by the Court of Appeal because it was not made on a question of law.

ACTUAL SCENARIO

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)



Source 4 These protestors marched to support building the mosque, demonstrating against what they felt was racist opposition to its construction.

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 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 would change. Justice Greg Garde AO RFD, the then 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.

Appropriateness of the Victorian Civil and Administrative Tribunal

To determine 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

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.

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

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.

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.

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

Disputes that VCAT cannot hear

There are some disputes that VCAT cannot hear, so it is not an appropriate body to resolve these types of disputes. Examples include:

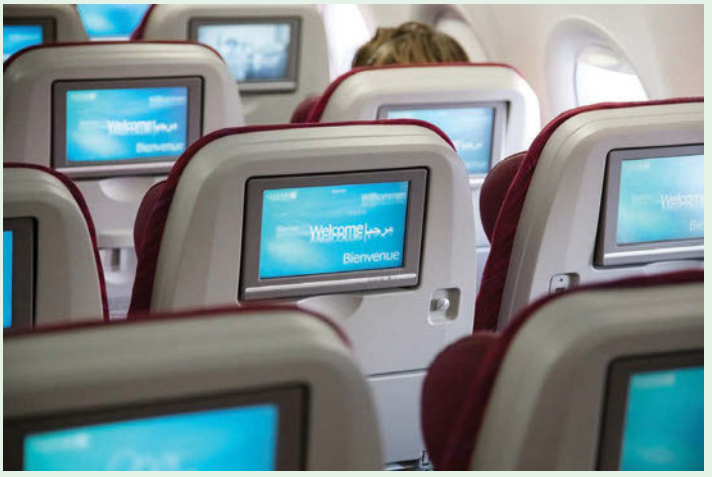
- representative proceedings (class actions)
- disputes between employers and employees
- disputes between neighbours (unless it is also a dispute about an owners' corporation)
- disputes between drivers in car accidents
- disputes involving federal or state law where VCAT has not been given any power to hear the matter.

The scenario below is an example of a dispute that was subject to international law and could not be heard by VCAT.

ACTUAL SCENARIO

Where's the entertainment?

Ivanovic v Qantas Airways Limited (Civil Claims) [2016] VCAT 2202 (23 December 2016)



Source 5 What happens when your inflight entertainment system does not work and you have paid money to use it?

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.

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 can 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 the 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.

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. Some of these are set out in Source 6.

STRENGTHS	WEAKNESSES
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.	Due to increased use of legal representation, the **costs** of taking a matter to VCAT can sometimes 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.
VCAT 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 three weeks.	VCAT has suffered **long delays** in some of its lists, particularly the Planning and Environment List (which hears and determines matters such as when Council objects or grants a planning permit). Some argue this hurts the economy, as many construction projects are unable to go ahead without the appropriate permits.
An **informal** atmosphere at VCAT ensures that parties can put their case forward in their own way, which can make people feel more comfortable with the process.	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.
The **flexibility** of VCAT's hearing processes ensures **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.	VCAT is not a court, and it cannot create **precedents**: it can only apply law made by parliament or the courts. Its own decisions are not binding on anyone.
Each VCAT list operates in its own **specialised** jurisdiction, resulting in tribunal personnel developing expertise in resolving disputes in that area of law.	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.
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.	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).
Smaller claims benefit from a more **streamlined** process (court cases have more steps, which can often be complex, time-consuming and expensive).	Some VCAT members are not judicial officers, meaning they may be casual, sessional members **without as much experience** in hearing matters as judges.
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).	VCAT orders will **still need to be enforced through the courts**, which takes a little longer, rather than VCAT being able to assist in enforcement.

Source 6 The strengths and weaknesses of VCAT

Study tip

For each of the strengths and weaknesses of VCAT you should identify the principle(s) of justice that it most aligns to.

The extract below is from a case where the applicant had no legal representation. In their final judgment, the VCAT member referred to VCAT's role in ensuring that both fairness and equality are upheld when a party is not represented.

EXTRACT

Udugampala v Essential Services Commission (Human Rights) [2016] VCAT 2130 (30 December 2016)

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.

7.2 CHECK YOUR LEARNING

Define and explain

1 Define the term 'tribunal', and describe two ways in which a tribunal is different to a court and to CAV.

2 Describe three dispute resolution methods used by VCAT.

Synthesise and apply

3 Read the scenario *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 further appeal options do the objectors have?

4 Read the scenario *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.

5 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.

Analyse and evaluate

6 Should the fast track mediation and hearing process be used in larger claims at VCAT? Give reasons.

7 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** 7.2 Check your learning
- **Sample** VCAT order
- **Going further** Court Services Victoria
- **Video tutorial** How to answer questions about 'appropriateness'
- **Worksheet** Evaluation of VCAT

7.3 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:

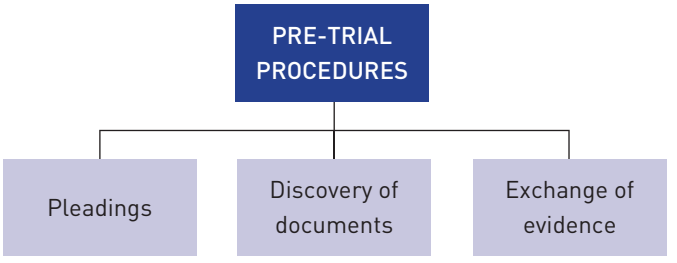
- Supreme Court civil pre-trial procedures are specified in the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).
- County Court civil pre-trial procedures are set out in the *County Court Civil Procedure Rules 2008* (Vic).

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.

Types of pre-trial procedures

Source 1 shows three types of pre-trial procedures: pleadings, discovery of documents, and exchange of evidence.



Source 1 Three types of pre-trial procedures

Pleadings

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

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:

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

- 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 state what the contract was, how the defendant breached it, and what loss the plaintiff suffered because of the breach. An example of a statement of claim is provided in your obook assess.

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

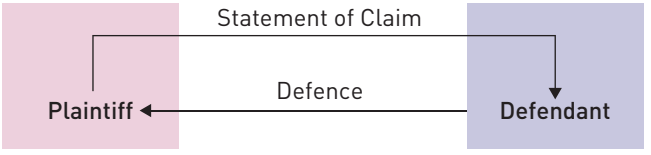
- a **defence**, which is filed by the defendant. It sets out the defendant's response to each of the plaintiff's claims. In the above example, the defendant may (in the defence) admit that there was a contract, but may deny that he or she has breached that contract. An example of a defence is provided in your obook assess.

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
- 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.



Source 2 The two main documents exchanged during the pleadings stage

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:

EXTRACT

Banque Commerciale SA, En liquidation v Akhil Holdings Pty Ltd (1991) 69 CLR 279

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
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

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 (usually this happens by way of an electronic exchange rather than physical inspection). For example:

- if the plaintiff claims that there is a written contract, the plaintiff is likely to have a copy of that contract, or at least documents which point to the existence of the contract
- if the plaintiff claims to have suffered physical injuries, there are likely to be medical records which show the nature and extent of the injuries
- if the defendant defends a contract claim on the basis that the plaintiff sent emails varying the contract, then the defendant is likely to have copies of those emails
- 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 to 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

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, films or other recordings.

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.

Purposes of discovery

The purposes of the discovery stage are 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. Usually the parties are required to not only produce documents that support their case, but also documents that may support the other party's case, or are adverse to their own case.
- 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.

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.

Predictive coding: A first for Australia

ACTUAL SCENARIO

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 1.4 million 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. This case remains one of the leading cases in Australia which authorises the use of technology to conduct discovery.



Source 3 When it comes to discovery, is it possible that technology could replace much of the role of lawyers in the future?

Exchange of evidence

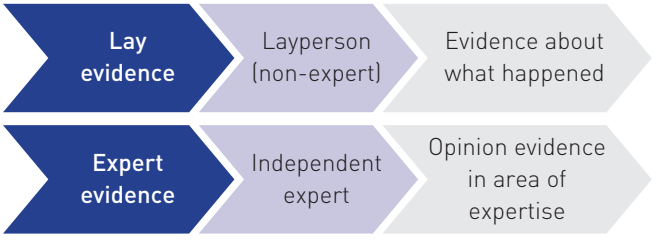
To prove their case, the plaintiff and defendant will generally need to rely on evidence. This is particularly the case where the documents are unable to speak for themselves, or where someone has to prove something that is contained within the emails.

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.

There are generally two types of evidence: **lay evidence** and **expert evidence**.

lay evidence
evidence (testimony) given by a layperson (an ordinary person) about the facts in dispute

expert evidence
evidence (testimony) given by an independent expert about an area within their expertise



Source 4 Types of evidence

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:

- **in writing, by filing a witness outline or statement** – 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. A witness statement is the written form of evidence that the witness would have given orally, and so is much more developed than a written outline. The witness will still need to attend trial to be cross-examined.
- **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.

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

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

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.

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 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).

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.

An example of expert evidence being called in a civil claim is provided in the scenario below.

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

ACTUAL SCENARIO

Powercor 'knew about rotten pole and failed to act' before bushfire

Andrew Thomson, *The Age*, 17 November 2019

Electricity giant Powercor knew about a rotten power pole in 2005, 13 years before it snapped and caused a bushfire in the state's south-west, according to lawyers acting for its victims.

The claim that the company knew and didn't act will be key in a Supreme Court civil trial starting on Monday in Melbourne.

It's part of the official written outline of opening submitted to the court by Hall & Wilcox, lawyers for bushfire victims and their insurers.

The opening contains the evidence victims of the Sisters/Garvoc bushfire, east of Warrnambool, rely on in their almost $20 million case against the electricity company and an inspection contractor.

The series of fires in the Terang district on St Patrick's Day last year led to the loss of 18 homes, 45 sheds and thousands of head of stock.

Experts will tell the court that Powercor was on notice from 2005 that the pole had a substantial internal cavity caused by rot, but failed to take any additional precautions in the subsequent 13 years leading up to its failure.

A drill test in 2005 returned a reading of just 70mm of sound wood ...

Pole No.4 on the Sparrow Spur line near Terang snapped in high wind, causing a bushfire. It was one of four main bushfires caused that day in the south-west by electrical infrastructure.

According to the claim, the collapse was due to wood rot and termites producing a conical or vase-shaped void about two metres high inside the pole.

At the time of the fire, the mountain grey gum pole had been in service 53 years in the high-bushfire-danger area.

It was double staked in 1994, shifting the load point from ground level to above the stakes.

But expert evidence suggests these works reduced the strength of the pole by 25 to 30 per cent and allowed increased moisture to enter the pole through large bolt holes, producing a more conducive environment for timber rot and decay.

'In other words, a measure designed to strengthen the pole and prolong its service life ultimately had the opposite effect,' Hall & Wilcox claim.

Expert evidence will be heard that data collected on inspections was not actioned, leaving enormous gaps in Powercor's knowledge of its ageing 580 000 power poles.



Source 5 The series of fires in the Terang district on St Patrick's Day in 2019 led to the loss of 18 homes, 45 sheds and thousands of head of stock.

Inspectors were kept in the dark about the fact the pole had been affected by rot for more than a decade.

Inspections were also under pressure to meet targets during an impending tender/contract renewal process, with some checks completed in under four minutes.

Experts will say even visual inspections should have set off alarm bells in 2005 about pole No.4 and defects would have been visible at all four subsequent inspections.

Drilling tests identified 'well-established decay' as early as 2005.

The plaintiffs will claim that had inspections been properly performed, the pole would have been identified and removed from service years before the fire.

Summary of the purpose of pre-trial procedures

A summary of the purposes of pre-trial procedures is set out in Source 6, 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 7.6 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

7.3 CHECK YOUR LEARNING

Define and explain

1 Describe three types of pre-trial procedures.
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 explain how it aims to achieve this.

Synthesise and apply

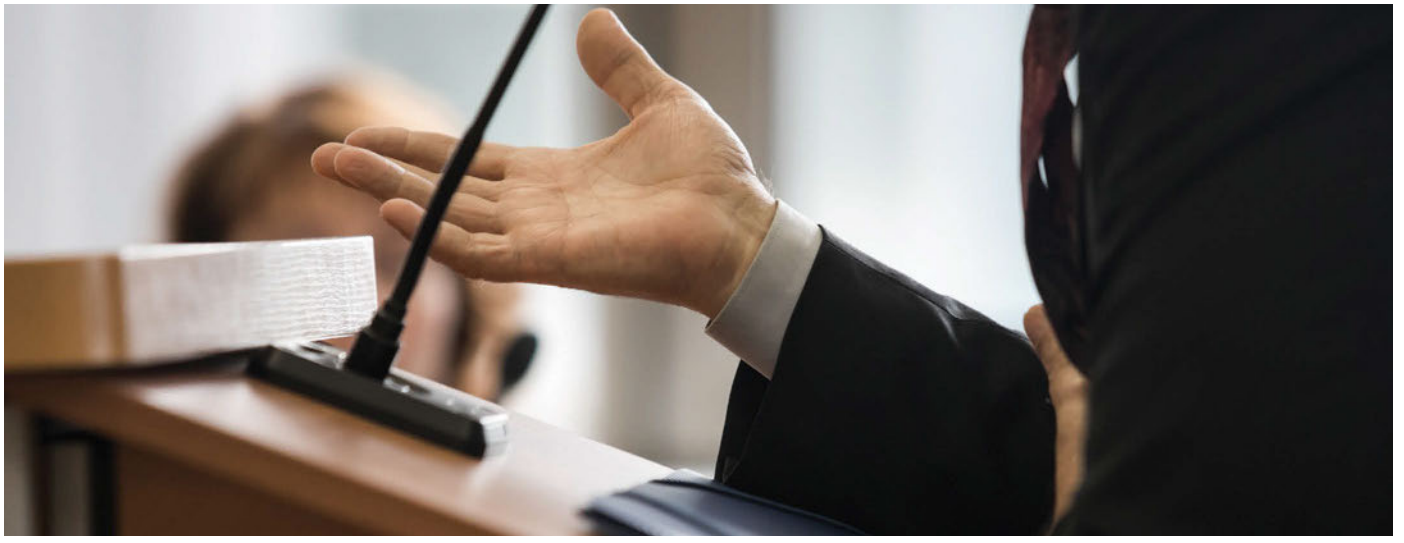
4 Access the Supreme Court of Victoria's website. A link is provided on your obook assess. Does it contain any assistance for unrepresented parties in a civil proceeding about pre-trial procedures? If so, what sort of information is provided?
5 Read the scenario 'Powercor "knew about rotten pole and failed to act" before bushfire'.
   a Who are the parties in this case?
   b What are the plaintiffs claiming in this case?
   c Identify one pleading that the plaintiffs and the defendant each would have filed and describe the purpose of those documents.
   d Why is expert evidence required in this case, and why can't lay evidence be used in its place?
   e Conduct some research about the outcome of this case. How was it resolved?
   f 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 hinder or enhance the achievement of the principles of justice? Give reasons.

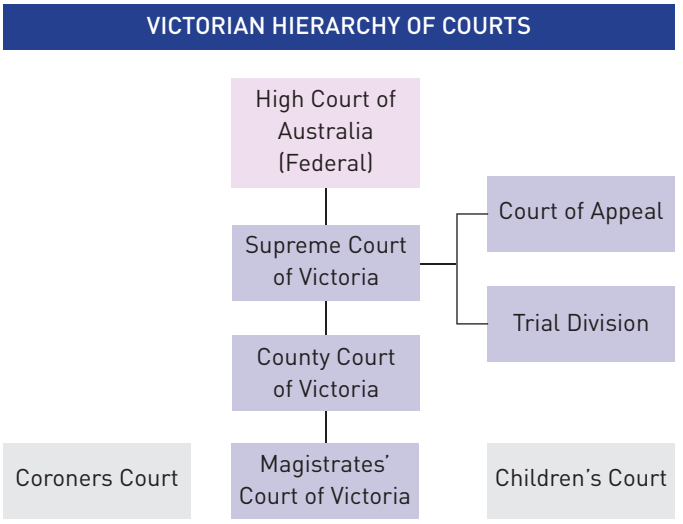
Check your obook assess for these additional resources and more:

- **Student book questions** — 7.3 Check your learning
- **Sample** — Statement of claim
- **Going further** — Other pre-trial procedures
- **Weblink** — Supreme Court of Victoria



Source 7 One pre-trial procedure is the exchange of evidence, which includes the submission of lay or expert evidence.

7.4 THE REASONS FOR A VICTORIAN COURT HIERARCHY



Source 1 The Victorian court hierarchy. The High Court is a federal court, but it hears appeals from the Court of Appeal.

As discussed in Chapter 4, 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 (permission) to appeal.

There are two main reasons for a court hierarchy to resolve civil disputes: to ensure administrative convenience, and to allow for appeals to be made.

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 $100 000 or less) 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 both have an unlimited jurisdiction. Technically, a plaintiff with a large claim could choose to file it in either the County Court or the Supreme Court, but will generally opt for the Supreme Court where the matter is significantly large or complex, or is of a particular type of dispute that is better suited to Victoria's highest court (for example, a complicated construction dispute).

Class actions (representative proceedings) are only heard in the Supreme Court. They take longer to hear and require judges who are experts in managing class actions. 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.

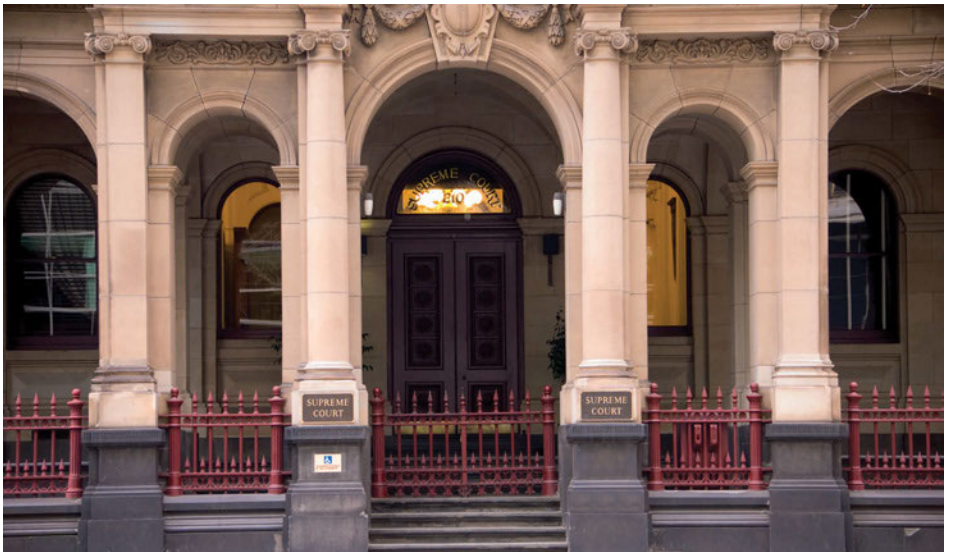
Grounds for appeal in a civil case can include:

- a point of law (also known as a question of law) – where the law has not been correctly applied; for example, the court heard inadmissible evidence, or applied the wrong legal test in the case
- 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 the lower 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. That is, it is accepted that sometimes, our courts get it wrong.

Most civil disputes now require leave to appeal. 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 real prospect 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, costs and stress involved in a formal hearing.



Source 2 The Supreme Court of Victoria is the highest Victorian court.

Summary of the civil jurisdiction of the Victorian courts

The jurisdiction of the Victorian courts is set out in Source 3 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 3 The civil jurisdiction of the Victorian courts

The importance of having a court hierarchy so that a decision can be reviewed by a superior court is seen in the case of *Bauer Media Pty Ltd v Wilson (No 2)*, involving celebrity Rebel Wilson.

ACTUAL SCENARIO

Rebel Wilson awarded damages for defamation

Bauer Media Pty Ltd v Wilson (No 2) [2018] VSCA 154 (14 June 2018)

In 2016 Australian actor and comedian, Rebel Wilson, best known for her work in Hollywood films such as *Cats* and *Pitch Perfect*, brought an action for defamation in the Supreme Court of Victoria. The claim was in relation to a series of articles published in 2015 by Bauer Media, which publishes magazines such as *Woman's Day*. Rebel claimed that the publication of articles portrayed her as a liar who had invented stories about herself to become successful, that her reputation was ruined as a result, and that she had lost the opportunity to earn income by acting in feature films. She sought over $7 million in damages.



Source 4 Rebel Wilson's dispute was ultimately considered by three courts.

The dispute was heard by a jury of six in the Supreme Court of Victoria in 2017. The jury found in favour of Wilson, finding that the articles were defamatory and that Wilson had suffered damages as a result. The judge awarded her $650 000 in general damages, and special damages of nearly $4 million. This was the highest damages awarded in a defamation claim in Australia as at that time.

The defendants appealed the decision to the Court of Appeal. They did not dispute the findings in relation to their defamatory conduct, but they did dispute the assessment of damages, including the finding that the plaintiff had established the loss of an opportunity to earn US$15 million to be cast in three feature films as a result of the publication of the articles. The Court of Appeal reassessed damages and reduced the amount to $600 000. In particular, it concluded that the special damages amount should not be awarded at all, because Wilson had not lost an opportunity to earn money from being cast in lead or co-lead roles.

Rebel Wilson appealed the Court of Appeal's decision to the High Court, but the High Court did not find that there were sufficient grounds for it to hear an appeal.

7.4 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 Why is VCAT not included in the court hierarchy?

5 Which court in Victoria would be called the 'intermediate court'? Which would be called the 'superior court'? Why?

Analyse and evaluate

6 Discuss two problems that could arise from having one court that heard all types of cases.

7 'The Rebel Wilson scenario demonstrates that there are flaws in our civil justice system, not strengths.' Discuss the extent to which you agree with this statement.

Check your obook assess for these additional resources and more:

Student book questions
7.4 Check your learning

Going further
Other reasons for a court hierarchy

Weblink
Victorian Courts and Tribunals

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

7.5 THE RESPONSIBILITIES OF THE JUDGE AND THE JURY IN A CIVIL TRIAL

Did you know?

Civil juries are far less common than criminal juries. In 2018–19 there were 62 civil jury trials in the County and Supreme Courts, compared with 462 criminal jury trials in the same period.

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 Anne Ferguson of the Supreme Court of Victoria. Judges are central figures in a civil trial.

The responsibilities of the judge

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.

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

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 – in particular, judges are independent of government and the parties, one of the ways in which the rule of law is upheld.

Some of the main responsibilities of a judge in a civil trial are outlined below.

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. You will learn about powers of case management in the next topic.

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 (e.g. an order that the parties attend mediation).

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 witness can give **hearsay evidence**. The judge may make a ruling in the middle of trial about whether this is allowed.

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

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.

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 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.

Determine liability and the remedy

liability
legal responsibility for one's acts or omissions

judgment
a statement by the judge at the end of case that outlines the decision and the legal reasoning behind the decision

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.

The scenario below is an example of a judge deciding whether to order compensation to a family.

ACTUAL SCENARIO

Supreme Court orders $170k compensation for victim's family from one-punch killer

In 2016, 19-year-old Patrick Cronin was fatally punched outside The Windy Mile Hotel in Diamond Creek after celebrating his first senior football match alongside his older brother. He was trying to help a friend who was involved in a brawl when he was hit in the head by Andrew William Lee.

Lee is currently serving an eight-year jail term for the manslaughter of Patrick Cronin.

Under the *Sentencing Act 1991*(Vic), the Cronin family exercised their rights to seek financial compensation from their son's killer.

The Supreme Court heard evidence that each of the Cronin family, including Patrick's father Matthew, his mother Robyn and his two siblings Emma and Lucas, suffer varying degrees of psychiatric injury, including depression, post-traumatic stress disorder and chronic adjustment disorder.

In 2019, Victoria's Supreme Court ordered Mr Lee to pay the Cronin family more than $170 000 in compensation. Judge Lesley Taylor awarded Matthew $61 562, Robyn $59 410 and Emma and Lucas $25 000 each.

Speaking outside court, Mr Cronin told the media that the monetary amount of the compensation was irrelevant: 'It's always been about Pat for us, you know, he should still be here, he should be playing footy for the Lower Plenty footy club with his brother and us watching him.'

Mr Cronin said he had been forced to restructure his business and spend a large amount in order for the family to be awarded compensation.

The Cronin family will now continue focusing on the work of the foundation set up in Patrick's honour to educate young people and conduct research into coward punch attacks.



Source 2 Patrick Cronin died tragically after he was hit in the head in 2016.

Decide 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 hypothetical scenario on the following page is an example of costs in a dispute being decided at a later date.

Contractual dispute between a builder and a subcontractor

HYPOTHETICAL SCENARIO

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 took the case all the way 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.

The responsibilities of the jury

Unlike a criminal case, a civil trial does not usually have a jury. Juries may be used in two situations:

- 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 decides 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) cannot decide on the amount of damages. This is only a role for the judge in those types of disputes.

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. 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 deliberating on the verdict, only six jurors will be able to deliberate.

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 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 complex. For example, a case about a business valuation may include complicated and detailed evidence about how to value a business and what method should be used to get to a value. This can often be difficult to understand for ordinary laypeople.

Did you know?

In a case in England in 1840, the verdict was decided by the jury picking options out of a hat. The court ordered a new trial because the jurors had not decided based on the facts of the case.



Source 3 A civil jury will only have six jurors.

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 their 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**. They must also decide whether the defendant has established any defence. A civil jury must try and reach a unanimous verdict (six out of six jurors), but the court may accept a majority verdict in all cases (five out of six jurors).

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.

7.5 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 scenario 'Supreme Court orders $170k compensation for victim's family from one-punch killer'.
   - **a** Did this case go to trial or did it settle beforehand? Justify your answer.
   - **b** What was the nature of the claim?
   - **c** Was a jury used in this case? Explain.
   - **d** Conduct some research about the rights under the *Sentencing Act 1991* (Vic) to seek financial compensation from Mr Lee. Summarise your findings.
   - **e** Describe one enforcement issue that the plaintiffs may face in this case.

Analyse and evaluate

6. '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.
7. 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** 7.5 Check your learning
- **Going further** Who can't be on a jury?
- **Weblink** Jury service
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

7.6 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 responsibilities of the parties

lead plaintiff the person named as the plaintiff in a representative proceeding (i.e. class action) and who represents the 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)

counterclaim a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

party control a term used to describe the power that each party in a legal case has to decide how they will run their case

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 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 prove that the defence gives a good answer to the claim. A defendant who has filed a **counterclaim** will also have to prove their claim. The facts will need to be established on the balance of probabilities.

The parties have various responsibilities in a civil trial. The main responsibilities are set out below.

Make decisions about the conduct of the case

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 in which an external investigator seeks out the truth to determine liability. Therefore, the parties make their own decisions about what claims they will make, what defences they will raise, and which witnesses they will call. For example, if a plaintiff is out of time to file their claim (i.e. outside the limitation period), it is up to the defendant to decide whether they will raise this as part of their defence.

Discover relevant documents

As explained in Topic 7.3, one of the key pre-trial procedures is to discover relevant documents in the proceeding. This is considered one of the most important steps in a civil proceeding, and it is the responsibility of the parties to ensure they hand over key relevant documents.

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.

Comply with overarching obligations

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 10 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, 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.



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.

The responsibilities of the 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.



Source 3 Wendy Harris, QC is a 'silk' – a senior barrister.

The main responsibilities of legal practitioners in a civil trial are set out below.

Comply with their duty to the court

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.

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 barrister will also make submissions about matters that come up during trial.

Legal practitioners have a responsibility to present 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.

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. Note that the *VCE Legal Studies Study Design* requires you to discuss these responsibilities. There are other points you can make beyond those in the table below to formulate a discussion.

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.
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, valid claims or defences may not be raised. • Unrepresented party can cause delays (though this can be reduced if a judge assists where possible). • Highly complex procedures can be difficult to understand without legal representation. • Parties may feel stressed or inconvenienced because of party control and the way trials are conducted. • Parties are required to comply with overarching obligations, but it may be difficult to prove they are not.
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 and their duty to the court. • 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



Source 5 Legal practitioners have responsibilities to put a client's case forward in its best light.

7.6 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?

Synthesise and apply

3 Consider the responsibilities of the parties in a civil trial. What problems would a party face in undertaking these responsibilities without legal representation? Refer to one or more of the principles of justice in your answer.

4 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.

5 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.

6 For each of the following scenarios, identify one document that the party is likely to have to disclose, and how each document may affect the outcome of the case.

a Josiah is the lead plaintiff in a class action in which it is alleged that the class suffered physical injuries as a result of faulty personal protective equipment. Josiah has recently received medical advice that he has not suffered any injuries as a result of using that equipment.

b Luca's company is the defendant in a defamation claim in which it is alleged the company allowed comments to be posted on their Facebook page about Paige. Luca's company has a policy in place which requires staff members to regularly vet public comments on their social media pages.

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 or could 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** 7.6 Check your learning
- **Going further** Who else?
- **Weblink** Overarching obligations
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

7.7 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 overseeing hearings and cases, 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) – section 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 some 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 chance 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

Judges also have power to give directions to the parties. 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.

The power to give directions is contained in the *Civil Procedure Act* and 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.

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. They can therefore actively manage civil proceedings by giving directions either before or during the trial. Penalties can be imposed on a party who fails to comply with a direction of the court.

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 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.

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

In the following hypothetical scenario a Supreme Court justice ordered the plaintiff to file and serve an expert report at a directions hearing.

HYPOTHETICAL SCENARIO

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 attend mediation by a certain date.

Directions during trial

The judge also has the power to make directions during a trial about the conduct of the trial. The types of directions that a court can give directions about include the following:

- 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.

7.7 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 five 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

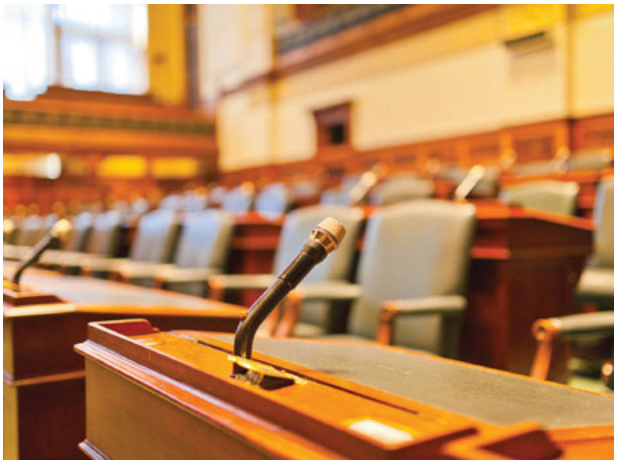
6 Do you think that judges should have more or fewer powers of case management? Give reasons for your answer.

7 What are the risks of a judge limiting the number of witnesses that a party may call?

Check your obook assess for these additional resources and more:

- **Student book questions** 7.7 Check your learning
- **Sample** Court orders
- **Going further** Other judicial powers
- **Weblink** *Civil Procedure Act 2010* (Vic)

7.8 COURTS AS DISPUTE RESOLUTION BODIES



Source 1 Are courts always the best option to resolve a dispute?

In Topics 7.3 to 7.7, 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 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.

Appropriateness of courts as dispute resolution bodies

In determining whether a court is an appropriate dispute resolution body for a civil 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 means that 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. Alternatively, 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 can 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 can 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

adverse costs order a court order (i.e. legal requirement) that a party pay the other party's costs

- 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
- 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.

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

arbitration
a method of dispute resolution in which an independent person (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 several strengths and weaknesses. The main ones are discussed below, drawing on the information contained in Topics 7.3 to 7.7. The strengths and weaknesses are also relevant to determining whether courts are an appropriate dispute resolution body for a particular type of case.

Strengths

Some of the most important strengths are set out in Source 2.

STRENGTH	EXAMPLES
The court hierarchy allows for administrative convenience and specialisation.	• 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.

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 them 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 makes 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 2 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 in Source 3, 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 must 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 must 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 3 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	Generally, 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

	CAV	VCAT	COURTS
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
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 4 Ways in which CAV, VCAT and the courts are similar to and different from each other when resolving disputes

7.8 CHECK YOUR LEARNING

Define and explain

1 What does 'unlimited jurisdiction' mean?

2 Can the Supreme Court of Victoria hear a claim for $5000? 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, refer 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** 7.8 Check your learning
- **Video tutorial** How to answer a compare question
- **Going further** Other dispute resolution bodies
- **Worksheet** Evaluating courts

7.9 METHODS USED TO RESOLVE CIVIL DISPUTES

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

Parties and dispute resolution bodies can use a range of methods to resolve civil disputes. These include mediation, conciliation and arbitration.

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.

Study tip

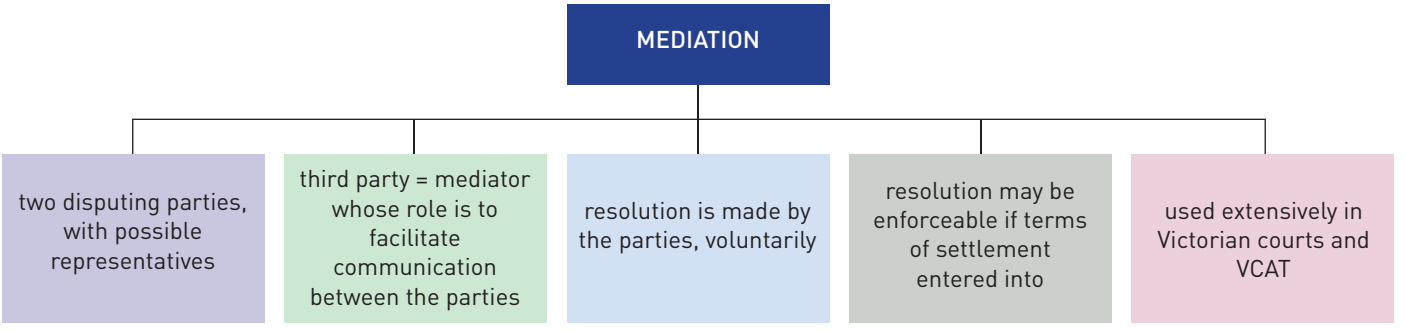
You should be able to distinguish between dispute resolution bodies (CAV, VCAT and the courts) and dispute resolution methods (mediation, conciliation and arbitration). The bodies are institutions and the others are methods used by those institutions and parties to resolve disputes. Students often get the two (bodies and methods) confused – can you think of a way to remember the difference between them?

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.

In 2018–19 the Supreme Court of Victoria estimated that 1206 hearing days were saved through the use of judicial 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 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 2 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 fast track mediation and hearing process, in which parties attend a brief mediation conducted by a 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 and not mediation.
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 (for example, through the Resolution Institute).

Source 2 How mediation is used by courts, VCAT, CAV and privately

In the following scenario, both of the Black Saturday class actions were referred to mediation by the Supreme Court of Victoria.

Settlement of bushfires class actions

ACTUAL SCENARIO

Matthews v AusNet Electricity Services Pty Ltd & Ors [2014] VSC 663 (23 December 2014)

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.

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 action was 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'.

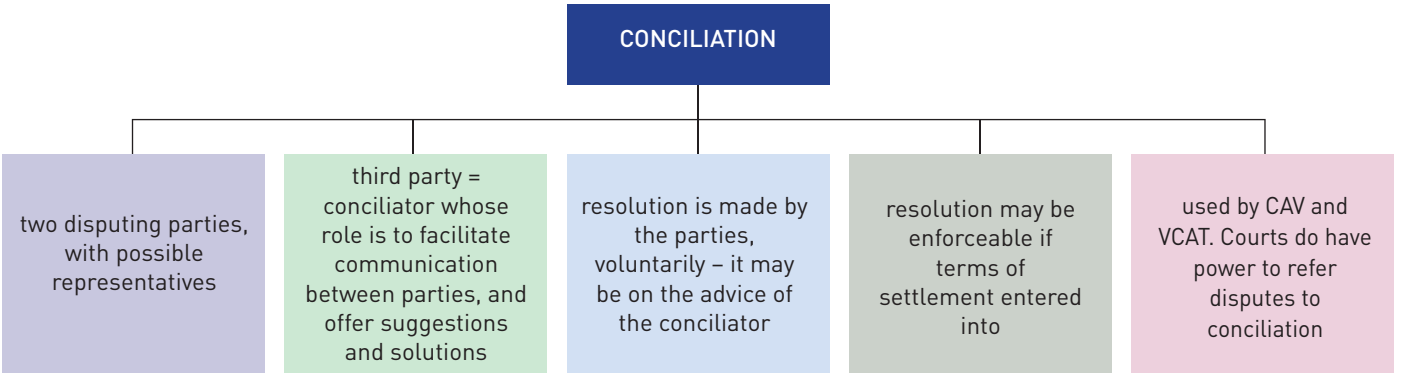


Source 3 The Kilmore East-Kinglake bushfire class action was heard in a special courtroom in the William Cooper Justice Centre.

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 reach 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 4 The elements of conciliation

Use of conciliation in resolving disputes

Source 5 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 5 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 (for example, 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 (such as domestic violence)
- disputes in which one or both of the parties is/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 (such as failure to pay the balance of a car)
- where the matter is urgent.



Source 6 Arbitration is often conducted in private and can be less formal than attending a court hearing or trial.

Strengths and weaknesses of mediation and conciliation

The strengths and weaknesses of mediation and conciliation are set out in Source 6.

STRENGTHS	WEAKNESSES
They are much less formal than a final hearing – 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 and conciliation 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 civil justice system.	There is no ability to appeal the agreement or go back on what was agreed, particularly if terms of settlement have been signed.

Source 7 Strengths and weaknesses of mediation and conciliation

Arbitration

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 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. The final order is known as an **arbitral award**, and it is enforceable.

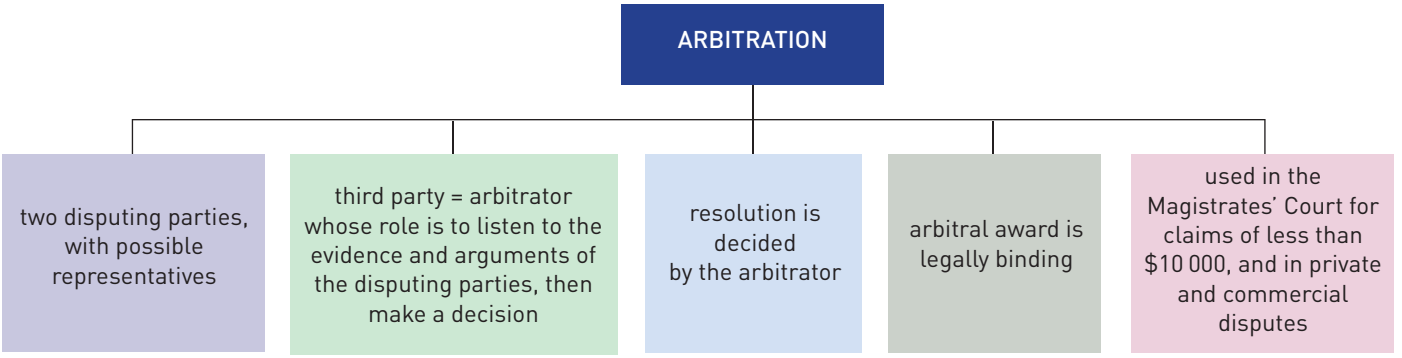
Arbitration is often conducted in private, and it can be less formal and more cost-effective than attending a court hearing or trial. Parties have much more control over the process and are free to agree on the procedure. They may be able to agree on how evidence is to be submitted, or the time by which 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 to present 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 8 The key features of arbitration

Use of arbitration in resolving disputes

Source 9 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 – they are hearings. 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. The 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 9 How arbitration is used by courts, VCAT, CAV and privately

Appropriateness of arbitration

Whether arbitration is most appropriate for a 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.

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.

Strengths and weaknesses of arbitration

The strengths and weaknesses of arbitration are set out in Source 10.

STRENGTHS	WEAKNESSES
The decision is binding and 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.

Source 10 Summary of the strengths and weaknesses of arbitration

Comparison of the three methods of dispute resolution

A comparison of the three methods of dispute resolution is set out in Source 12.

	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 11 A comparison of the three methods of dispute resolution

7.9 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 two differences between the role of the mediator and the role of the conciliator.

3 Distinguish 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 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.

6 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.

7 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.

8 In the following scenarios, choose which dispute resolution method 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 does not 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

9 Read the scenario *Matthews v AusNet Electricity Services Pty Ltd & Ors*. Discuss the benefits and downsides to both class actions being settled through mediation.

10 Discuss the extent to which dispute resolution methods help parties and the courts save costs and time in resolving disputes.

Check your obook assess for these additional resources and more:

- Student book questions: 7.9 Check your learning
- Video: Mediation
- Video worksheet: Mediation
- Sample: Arbitration contract clause
- Going further: Collaborative law

7.10 REMEDIES

remed
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

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 resolve 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 scenario below two people lodged a claim with the Supreme Court seeking damages against the state of Victoria.

ACTUAL SCENARIO

Seven-figure payout for Inflation nightclub patrons shot by police

In July 2017, Dale Ewins and then-girlfriend Zita Sukys attended a Saints and Sinners erotic ball at Inflation nightclub in Melbourne. Dressed respectively as punk icon Sid Vicious and a schoolgirl, Mr Ewins and Ms Sukys were engaged in a sex act when police entered.

Officers with a ballistic shield, batons, a semi-automatic gun, tasers and a shotgun firing non-lethal bullets stormed the venue after another patron reported that Mr Ewins was carrying a gun in his pants. The gun was a plastic toy.

Mr Ewins was shot in the back twice, tasered three times, beaten and stomped on, while Ms Sukys was shot in the leg.

Mr Ewins' lawyer told the press that as a result of this, his client was left with catastrophic injuries, including a shattered shoulder and post-traumatic stress disorder.

The former couple sued the state of Victoria for negligence and excessive force, claiming that their lives had been significantly affected by the shooting.

The case went to trial in the Supreme Court on Monday 11 November 2019. Two days later, the proceedings were dismissed after an earlier mediation session. No details of the settlement have been revealed, but it was reported the pair will receive $1 million each.



Source 1 Zita Sukys and Dale Ewins settled their case against the state of Victoria.

Justice John Dixon said that this resolution was 'not necessarily an easy thing to do' but had saved the court considerable resources. He noted, ' thank the parties in particular for negotiations on their positions and accepting some compromise.'

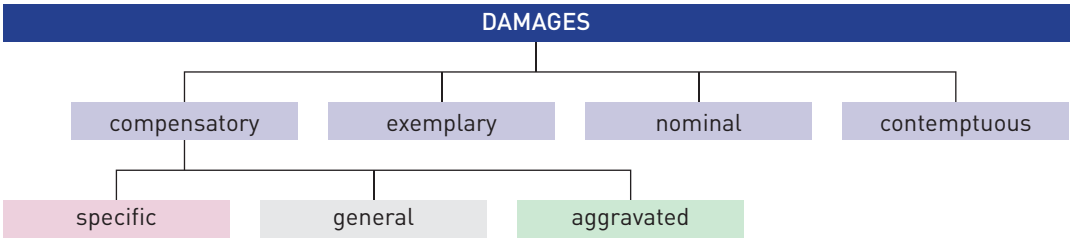
Ms Sukys was also offered a formal apology to reflect that she was an 'innocent bystander who was injured through no fault of her own in the circumstances of the case'.

Mr Ewins has not been offered an apology, as officers from the police's critical response team claim that he pointed the gun at them. Victoria Police is investigating the actions of its officers, although the CCTV footage is inconclusive and Mr Ewins denies having pointed the toy at police during the confrontation.

Study tip

For the exam you should know the general purpose of remedies, as well as the specific purposes of damages and injunctions, and how they can achieve those purposes.

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.

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 untrue statements about the plaintiff have been published, but little damage has been done to the plaintiff's reputation.

In the below case, nominal damages were sought by fans of Michael Jackson in relation to a controversial and highly sensitive documentary which aired in 2019. Although this is not a Victorian or Australian case, it does demonstrate how nominal damages can be used to demonstrate the infringement of a person's rights.

Michael Jackson fans sue alleged abuse victims for nominal damages

ACTUAL SCENARIO

In 2019 HBO aired a documentary called *Leaving Neverland*, which focuses on two men who were alleged to have been sexually abused as children by Michael Jackson, a famous singer, songwriter and dancer who passed away in 2009. Jackson was accused of sexually abusing children while he was alive, but was never convicted of any charges.

The airing of the documentary led to a renewed backlash against Jackson. Subsequently, certain Michael Jackson fan groups were reported to be seeking damages from the two alleged abuse victims for damaging Jackson's image. The action was taken in France, because French laws allow someone to be sued for defamation even if the person who has been defamed has died. The fan groups were said to be seeking symbolic damages (nominal damages) of $1.60 each.



Source 4 Nominal damages were sought in relation to a documentary aired about Michael Jackson.

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 does 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. This is shown in the scenario on the next page.

ACTUAL SCENARIO

Assault leads to contemptuous damages

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.



Source 5 Her Honour ordered the defendant to pay the plaintiff the sum of five cents as contemptuous damages.

After considering all of the evidence, Her Honour found that the proceeding was maliciously brought, and should never have been made. 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.

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 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 scenario of *Cruse v State of Victoria*, the Supreme Court awarded exemplary damages on top of compensatory damages to punish the defendant.

ACTUAL SCENARIO

Exemplary damages in case against the state of Victoria

Cruse v State of Victoria [2019] VSC 574 (27 August 2019)

In 2015 the police carried out raids across six locations in Melbourne. The raids were prompted by intelligence obtained about a plan to kill a police office and members of the public during Anzac Day commemorations the following week.

Mr Cruse, the plaintiff, was a person of interest and his home was raided by police. During the raid, he sustained injuries to his head and upper body and was left bloodied, bruised and concussed. At one stage, after Mr Cruse had been struck and was lying on the floor, an officer held him by the hair and allegedly said, 'There's more to come' or 'There's more where that came from'. Mr Cruse was later diagnosed with post-traumatic stress disorder and major depression. He has never been charged with a terrorism offence.

Mr Cruse sued the state of Victoria in the Supreme Court of Victoria, claiming that the injuries were a result of vicious battery and assault by one or more police officers. The state of Victoria defended the claim, stating that the force was reasonable and necessary.

The Supreme Court accepted Mr Cruse's account of the force used by police against him and found that the arrest was not lawful as there were no reasonable grounds to suspect that Mr Cruse had committed or was committing a terrorism offence. The Court also found that the force was not necessary and reasonable to arrest Mr Cruse.

The Court awarded damages of $200 000 for pain and suffering and loss of enjoyment in life, $20 000 for the cost of future medical treatment, aggravated damages of $80 000, and exemplary damages of $100 000. The Court found that while an award of exemplary damages is an exceptional remedy, in this case it was justified. It said that the award would mark the Court's disapproval of the treatment of Mr Cruse by individual officers, which was a significant departure from the standards that are set for police officers and the standards to which the community expects them to adhere. It also said that the decision to arrest Mr Cruse involved a misuse of considerable powers given to police to combat terrorist activity.

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), and claims for non-economic loss, being pain and suffering and loss of quality of life, are limited year by year to an amount fixed by parliament.

In defamation claims, damages for non-economic loss (generally, pain and suffering) 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 stopping someone from pulling down a building, or preventing 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 following scenario.

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

ACTUAL SCENARIO

Family seeks injunction to prevent deportation

In 2019 the plight of a Tamil family attracted the media and the Australian community's attention, and involved the use of interlocutory injunctions to prevent the family from being deported from Australia.

Priya and Nades came to Australia separately by boat in 2012 and 2013 respectively, following Sri Lanka's civil war. They met in 2014, married and settled in Biloela, near Gladstone. Their daughters, Kopika, 4, and Tharunicaa, 2, were born in Australia. The family was detained in Melbourne in March 2018 when Priya's bridging visa ran out. After several cases, the couple and their children were refused the right to stay in Australia and they were due to be deported in August 2019. The family was due to fly out of Australia when a last-minute injunction by a Federal Court was granted just as the plane flew out of Melbourne. The plane landed in Darwin.



Source 6 Priya and Nades' family have widespread support from the Biloela community.

The ultimate court case focused on whether Tharunicaa is owed protection, and in particular whether the Commonwealth Government properly considered whether she had a right to apply for a visa. The family remain detained on Christmas Island and have widespread support from the Biloela community.

At the final trial or hearing, the interlocutory injunction can become a final (permanent) injunction, or it can be dismissed (overturned).

In the scenario involving a failed recycling group, an injunction was ordered that the recycler clean up a giant glass mountain at its Coolaroo site.

ACTUAL SCENARIO

'Deal with it now': SKM's glass mountain a tragedy waiting to happen

Clay Lucas, *The Age*, 22 August 2019

Failed recycler SKM has been ordered to clean up a giant glass mountain at its Coolaroo sorting centre because of fears of a 'catastrophic' fire.

Hume Council took SKM's Glass Recovery Services to the Broadmeadows Magistrate's Court on Thursday to warn of the fire risk.

Magistrate Martin Grinberg granted the council an urgent injunction ordering clean-up of the Coolaroo site.

The court ruling came as, separately, Melbourne City Council said it was interested in buying SKM's recycling processing centres.

On Thursday, after SKM failed to attend the court hearing in Broadmeadows, Mr Grinberg found there was 'sufficient urgency' to order a clean-up of the site.

'If something is not done urgently there exists a real danger,' the magistrate said of the site where 30 Victorian councils have for years sent household glass waste.

The urgent order came after SKM's finances deteriorated so badly that power was cut off at the glass sorting plant.

Source 7 The glass stockpile at Coolaroo



A summary of the purposes of remedies is set out below in Source 8.

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 8 Purposes of remedies

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 (such as 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).



Source 9 A company can seek an injunction restricting someone from trespassing on their land.

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 to where it was 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 10 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 (such as non-economic loss for a personal injury claim under the *Wrongs Act* or for a defamation claim)? • Is there any other reason why 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 10 Questions to ask when determining whether remedies achieve their purposes

7.10 CHECK YOUR LEARNING

Define and explain

1 Define the term 'remedy' and describe 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

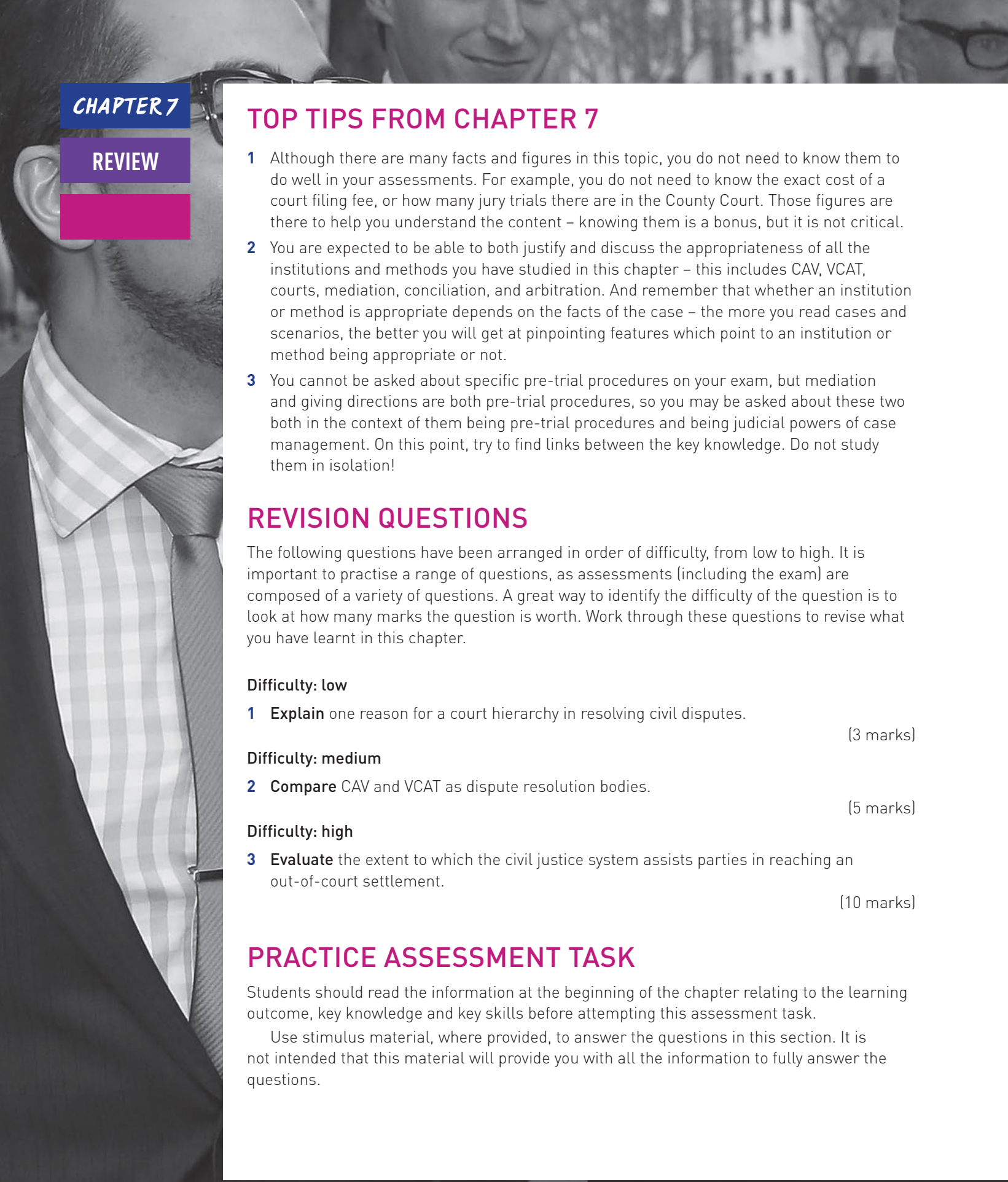
6 Read the scenario 'Seven-figure payout for Inflation nightclub patrons shot by police'
   a Explain the central facts of this case.
   b Explain how a resolution was reached, and why the exact details of the resolution are not known.
   c Would an injunction have been an appropriate remedy in this case? Justify your answer.
7 Read the scenario 'Michael Jackson fans sue alleged abuse victims for nominal damages'.
   a Who is seeking damages in this case?
   b Why were damages being sought in France?
   c 'A plaintiff should **not** be able to commence court proceedings only to seek nominal damages.' Discuss this with your classmates.
8 Read the scenario *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 scenario *Cruse v State of Victoria*.
   a Describe the central facts of this case.
   b Identify the exemplary or punitive damages awarded.
   c 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 scenario 'Family seeks injunction to prevent deportation'.
   a Who is the primary plaintiff in this case, and why?
   b Why was an urgent injunction necessary in this case?
   c Conduct some research on the family. What was the ultimate outcome of the Federal Court case, and the family's fate?

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** 7.10 Check your learning
- **Video tutorial** How to distinguish in a response
- **Going further** Other types of remedies
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz



CHAPTER 7

REVIEW

TOP TIPS FROM CHAPTER 7

1 Although there are many facts and figures in this topic, you do not need to know them to do well in your assessments. For example, you do not need to know the exact cost of a court filing fee, or how many jury trials there are in the County Court. Those figures are there to help you understand the content – knowing them is a bonus, but it is not critical.

2 You are expected to be able to both justify and discuss the appropriateness of all the institutions and methods you have studied in this chapter – this includes CAV, VCAT, courts, mediation, conciliation, and arbitration. And remember that whether an institution or method is appropriate depends on the facts of the case – the more you read cases and scenarios, the better you will get at pinpointing features which point to an institution or method being appropriate or not.

3 You cannot be asked about specific pre-trial procedures on your exam, but mediation and giving directions are both pre-trial procedures, so you may be asked about these two both in the context of them being pre-trial procedures and being judicial powers of case management. On this point, try to find links between the key knowledge. Do not study them in isolation!

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Explain** one reason for a court hierarchy in resolving civil disputes.

(3 marks)

Difficulty: medium

2 **Compare** CAV and VCAT as dispute resolution bodies.

(5 marks)

Difficulty: high

3 **Evaluate** the extent to which the civil justice system assists parties in reaching an out-of-court settlement.

(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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

Chloe and her laptop

Chloe is a Year 12 student. She purchased a laptop from Jenner Laptops in September 2021. After two weeks, the laptop cord started to spark and caused the laptop to burn and break down. Chloe has not been able to turn on the laptop since. She took it to a repair store who, after two days, confirmed that the laptop was unworkable and that Chloe had lost all of her data and documents on the laptop, including her photos, school assignments, exam revision notes and practice examinations.

Chloe has contacted the owner of Jenner Laptops, Courtney. Courtney Jenner looked at the terms and conditions of Chloe's contract and pointed out that it states that any repairs are to be undertaken by Jenner Laptops. Courtney told Chloe that because Chloe used a third party to repair the laptop, that this had voided any guarantees and that Chloe was not entitled to a refund or any compensation.

Since that visit, Chloe has sent several emails to Courtney. Courtney has politely declined to meet with Chloe and has said that her attention is on promoting Jenner Laptops through social media and at a large international expo for boutique IT stores.

Chloe has been told she should abandon her claim, but she is upset. She has not slept since it happened, and she has suffered sleepless nights as a result of her VCE exams that are coming up. She has tried to piece together as much as she could of her exam notes and school assignments.

Chloe goes to see a friend of hers who is studying law. Her friend tells her that she should issue a claim in the Magistrates' Court as it is a small claim, and the Magistrates' Court can make a binding decision without much cost to Chloe.

Practice assessment task questions

1 Which remedy would Chloe seek in this case? Justify your answer.
(2 marks)

2 Referring to the Magistrates' Court and its civil jurisdiction, explain one reason for a court hierarchy.
(3 marks)

3 If Chloe issued a claim in the Magistrates' Court, other than mediation, describe one pre-trial procedure that would be most beneficial to Chloe. Justify your response.
(5 marks)

4 Describe one dispute resolution method that the following institutions may use to resolve Chloe's dispute. You must choose a different dispute resolution method for each.

- **a** Magistrates' Court
- **b** Consumer Affairs Victoria
- **c** Victorian Civil and Administrative Tribunal

(9 marks)

5 Chloe decides to issue the claim in the Magistrates' Court with the help of a lawyer. Discuss the role of Chloe's lawyer in achieving fairness in this case.
(6 marks)

6 Discuss the extent to which each of Consumer Affairs Victoria, the Victorian Civil and Administrative Tribunal and the Magistrates' Court could assist in achieving fairness in resolving Chloe's dispute.
(10 marks)

Total: 35 marks

Check your obook assess for these additional resources and more:

- **Student book questions** — Chapter 7 Review
- **Revision notes** — Chapter 7
- **assess quiz** — Chapter 7 Test your skills with an auto-correcting multiple-choice quiz
- **Quizlet** — Revise key definitions from this topic

CHAPTER 8

REFORMING THE CIVIL JUSTICE SYSTEM

Source 1 Our civil justice system has seen a substantial increase in the use of technology and media to make our system more accessible. In 2018 VCAT launched a pilot online dispute resolution service – one of many technological reforms that our civil justice system has seen recently. In this chapter you will explore reforms that seek to improve the operation of the civil justice system.

Check your Student obook assess for these digital resources and more:

Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive

Launch a game of Quizlet live for your students

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 (e.g. an order that the parties attend mediation)

contingency fee agreements a contract or arrangement between a lawyer and their client which allows the lawyer to charge a fee for legal services which is calculated as a share of the amount recovered if the litigation is successful

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

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), and recent and recommended reforms to the civil justice system. The three factors are:

- costs factors
- time factors
- accessibility factors.

Introduction to costs factors

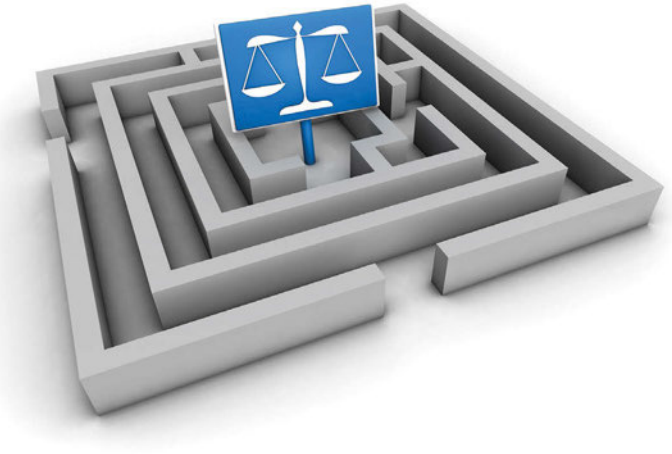
As you have learnt, some aspects of the civil justice system – such as alternative dispute resolution methods like mediation and conciliation – have been designed to help reduce legal costs for parties. However, even though some parts of our civil justice system aim to reduce costs, many people involved in civil disputes 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 two costs factors that affect the ability of the civil justice system to achieve the principles of justice. These are:

- legal 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 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.

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. Issuing a claim through the Victorian Civil and Administrative Tribunal (VCAT) can be inexpensive – but that depends on the type of claim, and who is making it.

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).

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 to 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 most of the 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 able 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 case of *Loftus v Australia and New Zealand Banking Group Ltd*, outlined in the scenario below.

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)

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

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

ACTUAL SCENARIO

Appeal granted to ensure fair trial for self-represented party

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 appellant, 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.



Source 2 The Court of Appeal held that a judge has an overriding duty to ensure a fair trial, which includes ensuring that a self-represented litigant understands their rights.

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.

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).

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>

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 affect 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

Increased use of dispute resolution methods

The use of **alternative dispute resolution methods** such as **mediation** and **conciliation** are 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 such as 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.
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.

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
a method of dispute resolution using an independent third party (the mediator) to help the disputing parties reach a resolution

conciliation
a method of dispute resolution which uses an independent third party (i.e. a conciliator) to help the disputing parties reach a resolution

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 4 (on the next page) 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, such as a judge or jury member who may have biases, 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 (for example, 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 4 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 scenario *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 agreed 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 affected the ability to achieve a fair trial.
- **e** Explain how this legal case shows how 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 a 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 to put them in the order that you think the party is likely to confront them. Think of as many costs as you can.

Analyse and evaluate

5 '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.

6 Evaluate the ability of the civil justice system to achieve equality by helping a self-represented party in a civil dispute.

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
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

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 two time factors that affect the ability of the civil justice system to achieve the principles of justice. These are:

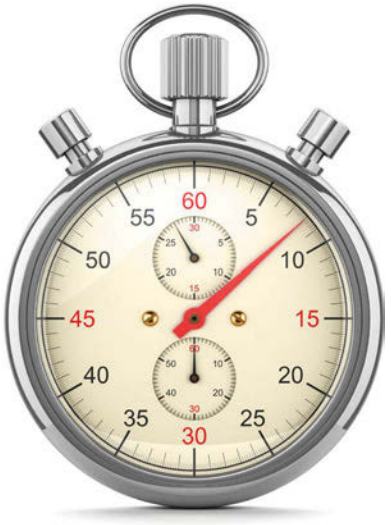
- court and VCAT delays
- the use of case management powers.

The first factor can often reduce or restrict the ability of the civil justice system to achieve justice, while the second factor can enhance the achievement of justice.

Court and VCAT delays

The time it takes for courts and VCAT to resolve disputes can vary greatly depending on the complexity of the case, the type of claim, the number of parties involved, and where 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. At VCAT in the 2018–19 financial year, the time it took to resolve disputes ranged on average from three weeks (for residential tenancies disputes) to 26 weeks (for planning and environment matters).



Source 1 Quick and efficient hearings are often the fairest.

Court and VCAT delays have several causes. These include:

- **backlogs** – while delays in having cases listed for hearing or trial (that is, obtaining a hearing date) have improved in recent years, it largely depends on the court or the VCAT list
- **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 hearing (including gathering evidence and preparing for the hearing).

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.

The principles of justice

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 AND VCAT DELAYS
Fairness	• The delay can affect the reliability of evidence, jeopardising a fair outcome. Previous cases have found that extraordinary or significant delays can impact on procedural fairness. • Delays deny the parties fair and due process. For example, swift justice is seen to produce a fairer process because of less impact and stress on the parties and the ability to conduct things as efficiently as possible.

PRINCIPLE	COURT AND VCAT DELAYS
Equality	• Delays can have a serious impact on more vulnerable parties (for example, an injured person, or somebody with little to no money). • Delays can also affect 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 and VCAT delays and the principles of justice

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 (e.g. an order that the parties attend mediation)

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 powers 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.

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

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.

practice note
a document issued by a court which guides the operation and management of cases

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, reissued December 2017

The principles of justice

Source 3 provides a summary of the way case management powers can affect the ability of the civil justice system to achieve the principles of justice.

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. • Certain case management powers are focussed on reducing the time it takes for a matter to be resolved. This can limit the impact that extraordinary delays can have on procedural fairness.
Equality	• Courts and tribunals can ensure there is flexibility without any favour or discrimination. • Orders or directions can apply equally to both parties. • Some case management powers can be directed not only to addressing delays but also addressing the impact that some delays will have on vulnerable parties – for example, an order may be made to limit discovery so that one party is not expected to review millions of documents.
Access	• Case management enables greater access to the courts and tribunals, as there can be flexibility in formalities, in what 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 3 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 VCAT delays affect 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) to access current waiting times for each of the VCAT lists. Has there been an increase or decrease in the waiting times? Provide a summary of your analysis.
5 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, and explain how each of these examples aims to achieve one of the principles of justice.

Analyse and evaluate

6 Do you think that delays have more of an impact on certain groups or individuals in society, or do they affect all parties equally? Give reasons for your answer.
7 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
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

8.3 ACCESSIBILITY FACTORS



Source 1 Access is one of the principles of justice.

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 to have 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 (such as 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.



Source 2 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 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.

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 3 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 3 Barriers to communication 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 be no 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 4 The Bendigo law courts is 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'.

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'.

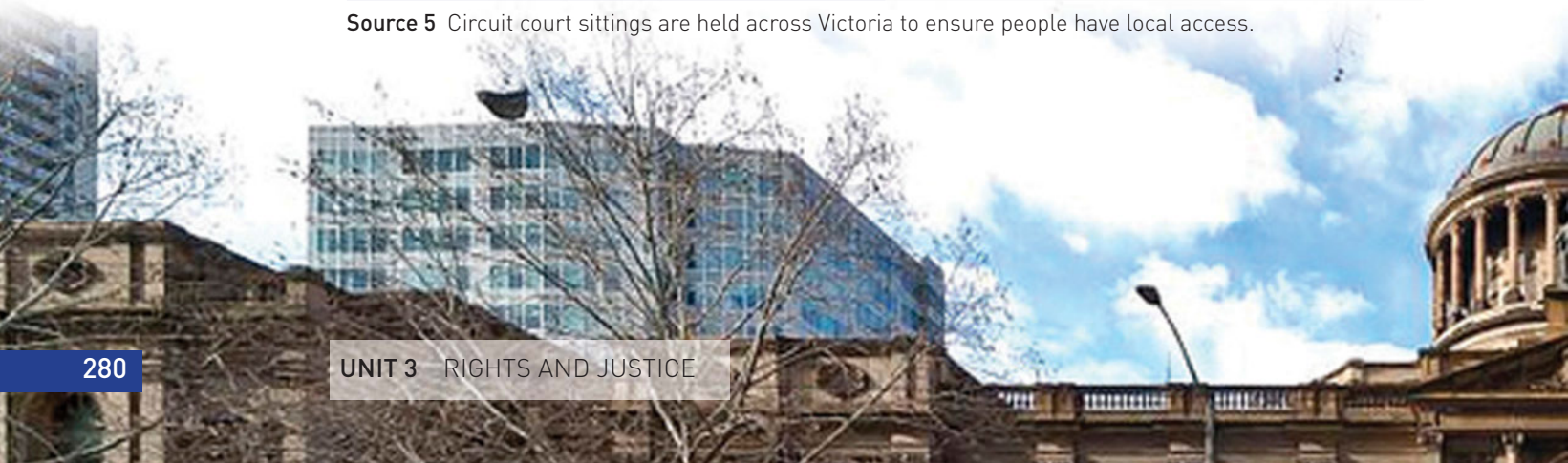
Source: Government of Victoria, *Access to Justice Review: Report and recommendations (Volume 2)*, (August 2016) Engage Victoria

The courts and VCAT have tried to ensure that they sit in locations that are accessible to most Victorians. 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 2020) are set out in Source 5. 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 5 Circuit court sittings are held across Victoria to ensure people have local access.



The principles of justice

Source 6 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 affects 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 affect the ability of a person to pursue their legal rights and seek compensation for any wrong that they have suffered.

Source 6 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.

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 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)

lead plaintiff
the person named as the plaintiff in a representative proceeding (i.e. class action) and who represents the group members



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 amount recovered. Litigation funders are often involved in representative proceedings

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 7 A class action on behalf of persons who were taxi or hire-car drivers, operators or licence holders during periods within 2014 to 2017, has commenced in the Supreme Court of Victoria. The class action is brought against a group of Australian and international Uber entities and alleges that they engaged in conspiracy by unlawful means.

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

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. The final report was published in March 2018 and made several recommendations to ensure that access to justice could be achieved by class actions. An extract from the report is set out below.

EXTRACT

Access to Justice – Litigation Funding and Group Proceedings

VLRC final report

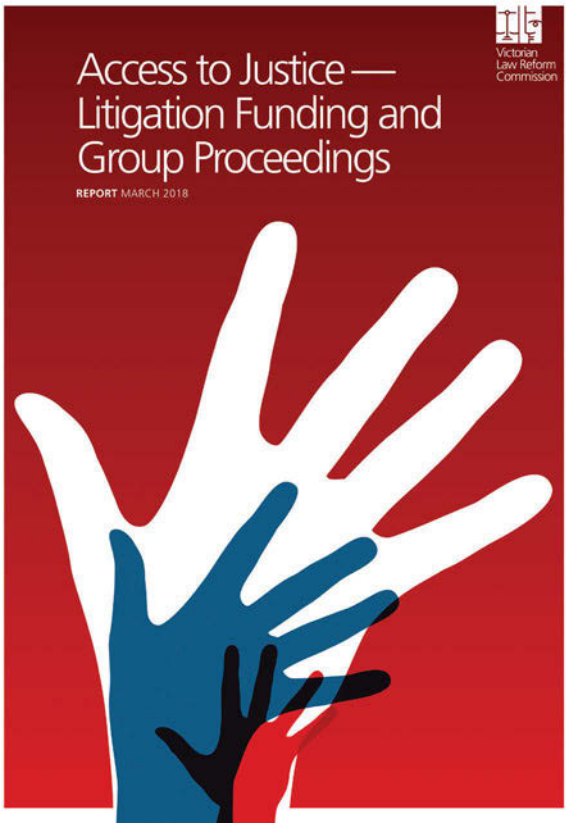
1 On 16 December 2016, the Attorney-General, the Hon. Martin Pakula MP, asked the Victorian Law Reform Commission to report on ways to ensure that litigants who use the services of litigation funders or participate in group proceedings (class actions) are not exposed to unfair risks or disproportionate cost burdens.

2 In accordance with the full title of the terms of reference, Access to Justice—Litigation Funding and Group Proceedings, the overarching theme of this report is access to justice. Litigation funding and class actions help plaintiffs overcome two impediments to accessing justice: the cost of bringing proceedings; and the risk that, if the litigation is unsuccessful, the plaintiff will be required to pay the other side's costs (adverse costs).

3 The potential for litigants to be exposed to unfair risks and disproportionate cost burdens arises from the conditions under which litigation funding is provided, the manner in which class actions operate, and how these two factors affect each other.

...

6 Class actions create economies of scale that make it cost-effective for individual claimants to take legal action against a well-resourced defendant to recover a small loss. By grouping individual claims from the same, similar or related circumstances, the cost of bringing proceedings can be spread across many claimants. If unsuccessful, the representative plaintiff is liable for both the cost of bringing the proceedings and adverse costs. If successful, the cost of bringing the proceedings, as well as the settlement or judgement amount, is shared among the class members.



Source 8 The *Litigation Funding and Group Proceedings* report was published in March 2018.

The principles of justice

Source 9 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	• The way in which class actions are conducted removes a party from court processes and from 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. • Judges manage class actions so that they are conducted efficiently and fairly – for example, by ensuring adequate disclosure of information to parties about matters related to the class action.
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. • 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. In particular, this can help those who have little to no money but have a valid claim.
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 9 Use of representative proceedings and the principles of justice



Source 10 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. Pictured here is Wodonga, a city located on the Victorian side of the border with NSW and 300 kilometres from Melbourne.

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 from Vietnam, 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 might have in understanding and pursuing your claim, and explain how these difficulties can affect your ability to achieve justice.

6 Find out more about the VLRC's enquiry into class actions and litigation funding.

- **a** What was the VLRC required to investigate?
- **b** Search the final report (a link is provided in your obook assess) and find examples of cases that the VLRC used in its report. Summarise those cases.
- **c** 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 Access to Justice – final report
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

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 2022 do not use reforms from before 2018.

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.

Three recent reforms are discussed below.

Reform 1: Group class orders in class actions (2020)

contingency fee agreements a contract or arrangement between a lawyer and their client which allows the lawyer to charge a fee for legal services which is calculated as a share of the amount recovered if the litigation is unsuccessful

In Victoria (and all of Australia), **contingency fee agreements** are prohibited. Contingency fee agreements are contracts or agreements between lawyers and their clients which enable the lawyers to charge for legal services that are calculated as a share of the amount recovered if the litigation is successful. No fee is charged if the litigation is unsuccessful. Further details about contingency fees are in the next topic.

Although contingency fee agreements are prohibited in Australia, in June 2020 the Victorian Parliament passed the *Justice Legislation Miscellaneous Amendments Act 2019* (Vic). This Act allows plaintiff law firms in class actions only (not all types of litigation) to receive a percentage of the damages awarded to all class members. The Act does not remove the prohibition of contingency agreements, but rather allows a court in a class action to make a group cost order, which could allow the plaintiff's solicitor to calculate their fees as a percentage of the amount recovered if the court is 'satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding'.

Victoria is the first jurisdiction to introduce these types of orders in class actions, and as such some now see it as the possible preferred place to commence class actions, as it will enable plaintiff law firms to commence class actions that are not funded by a third party litigation funder, and possibly see the commencement of smaller class actions which may not be attractive to third party litigation funders.



Source 1 Victoria may become a preferred place to commence class actions, after the Victorian Parliament passed the *Justice Legislation Miscellaneous Amendments Act 2019* (Vic) in June 2020.



Source 2 To what extent do group class orders achieve the principles of justice?

The introduction of these types of group orders has been criticised by some, which see it as possibly compromising lawyers' ethical obligations to ensure the best outcome for the client rather than for themselves. It has also been criticised that Victoria now has a different regime to fees for class actions than other states, thus creating an inconsistency.

Ability of group class orders to achieve justice

When considering whether group class orders in class actions achieve justice, you should consider whether they achieve any or all of the principles of justice: fairness, equality and access.

Some of the points to consider are explored in Source 3.

PRINCIPLE	GROUP CLASS ORDERS
Fairness	• The changes do not address any procedural fairness issues directly, therefore the reform is not a complete solution to many of the fairness issues that are confronted by people. For example, it would not address the procedural fairness issues that arise where a party is self-represented in a class action. • However, one could argue that the legislation ensures that the court needs to consider appropriate issues such as whether it is in the best interests of justice to make an order before it does so. This would allow submissions to be made and matters to be considered by the court before it allowed a plaintiff law firm to receive a percentage of any amount recovered by the group members. • Some have argued that the changes cause a conflict of interest for plaintiff law firms who may act in their own best interests rather than their clients which may create unfairness issues for group members. Measures will need to be put in place to ensure this is avoided.
Equality	• The changes try to allow for equality by changing the ways in which group members may be charged by their lawyers. The court may consider various matters such as how much the class will recover, how much of that amount the plaintiff law firm should receive, and whether the amount is appropriate. This may see the court treating the class members differently so that they are able to not only prosecute their claim, but also receive a reasonable amount of the damages received.
Access	• The changes enable greater access to groups of people that may not have otherwise been available to afford legal costs. • The ability of the court to make these orders may see a greater number of class members access to class actions where a third party litigation funder is not prepared to fund the claim. • The changes are limited to class actions and not to other types of litigation, because contingency fee agreements remain prohibited.

Source 3 The ability of group class orders to achieve the principles of justice

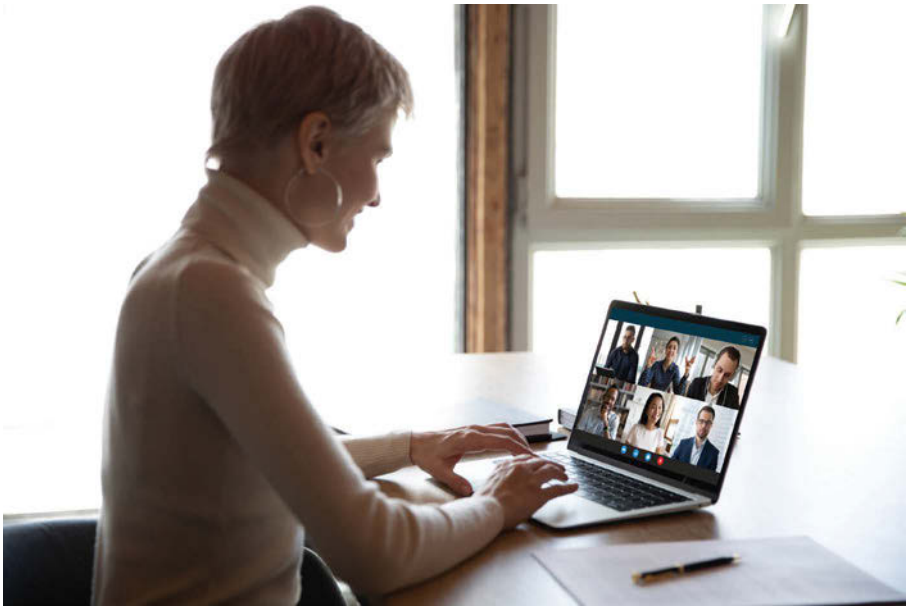
Reform 2: Technological improvements in the legal system (2019)

The civil justice system has increasingly seen the use of technology to enable access to justice and resolve disputes. Some of this technology has been driven by the courts themselves (such as web streaming trials and hearings), and others have been driven by private parties seeking to use technology as a method of resolving disputes (such as Immediation – see your obook assess for more information).

Some of the most recent technological reforms and improvements are outlined below.

- In 2018–19 VCAT established an online dispute resolution (ODR) process by conducting a pilot that involved 65 online hearings of small civil claims. VCAT identified the potential for ODR to be used to resolve small civil claims and improve access to justice. A survey conducted by VCAT indicated that more than 70 per cent of people said they would be interested in utilising services provided in this way. By way of example, the ODR process could see a mediation take place with a VCAT member and the two parties. If the parties agree on a resolution, they both get sent the agreement to digitally sign. If the matter does not settle, they attend an online hearing.
- VCAT and the Supreme Court have both developed and improved their application and filing processes. In the Supreme Court (including the Court of Appeal), almost all court documents are now filed electronically via RedCrest. VCAT has also launched a new application process to make it easier to apply to VCAT.
- As discussed in Chapter 7, the use of Technology Assisted Review to conduct some discovery tasks has substantially reduced the manual time associated with a lawyer reviewing documents, because a computer can be 'trained' to review those documents.
- In response to the COVID-19 pandemic in 2020, which saw the introduction of social distancing and the inability of the courts to conduct hearings and mediation in the usual way, the courts had to quickly adapt to allow for online hearings and trials. For example, many of the courts adopted video conferencing and video platforms such as Microsoft Teams and Zoom to ensure the continuation of hearings and mediations. The courts also allowed for flexibility in relation to electronic filing.

The changes to technology across the court and tribunal system have been in response to demand for the technological systems to be overhauled and improved, and an expectation that digital technologies should be used to improve people's access to dispute resolution.



Source 4 In response to the COVID-19 pandemic, many courts adopted video conferencing.

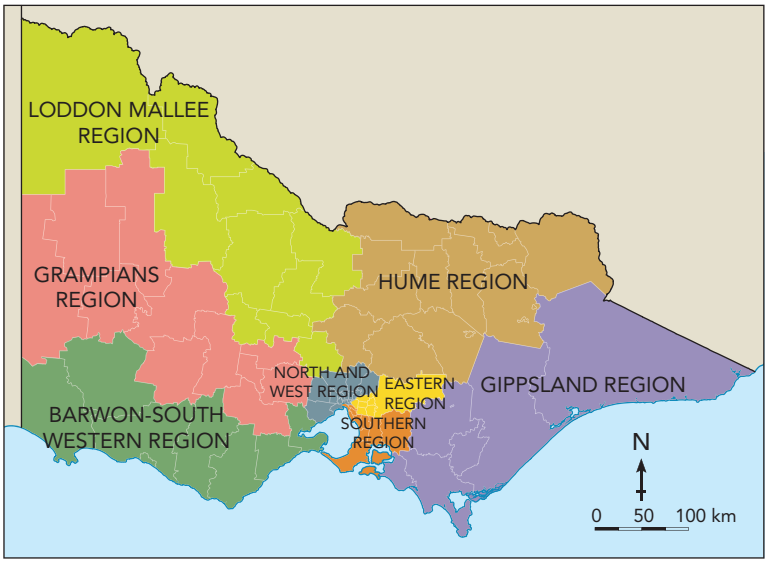
Ability of technological improvements to achieve justice

In relation to achieving fairness, equality and access, some of the points to consider are explored in Source 5.

PRINCIPLE	TECHNOLOGICAL IMPROVEMENTS
Fairness	• The courts and VCAT can make directions or orders to ensure that technology allows for procedural fairness rather than prohibits it. For example, the courts are not likely to order a party to discover documents electronically if they do not have access to Technology Assisted Review. • The technology, if used, will be available to all parties and the courts are likely to ensure that all parties are able to use it. For example, the courts will not proceed with a virtual hearing if they are aware that one or more parties cannot access the platform they are using.
Equality	• The changes try to allow for equality by giving more people access to courts and tribunals. That is, some people may have been disadvantaged because of where they lived, or because of their inability to travel. Those disadvantages could potentially be removed. • However, the changes are not a complete solution to equality issues. For example, technology may not necessarily help vulnerable people who do not have access to technology, and there are some people, such as the elderly or those with mental impairments or disabilities, who may struggle to use the technology. It is therefore questionable whether technology achieves equality for all.
Access	• The changes enable greater access for people who may not otherwise have been able to access the court or tribunal system. This is particularly so for people in rural or remote areas, or those who are not able to travel to courtrooms or tribunals. • While the technological improvements are exciting and welcomed, they are not widespread, and so more needs to be done to allow for greater access.

Source 5 The ability of technological improvements to achieve justice

Reform 3: Expansion of VCAT's fast track mediation and hearing processes (2019)



Source 6 The VCAT fast track mediation and hearing process has expanded so that everyone in Victoria can get access to it.

As discussed in Chapter 7, VCAT uses a fast track mediation and hearing process for civil claims where the amount claimed is up to $10 000. In 2019 the fast track mediation and hearing process expanded in two ways.

- Previously, the threshold limit was $3000 (i.e. the civil claims that could be heard could only be for claims up to $3000). It is now $10 000, meaning that far more civil claims can be resolved using this process.
- The process was originally only used for claims dealt with at the Melbourne venue at VCAT. In 2019 it was expanded to be a state-wide service (though the threshold limit is $5000 for non-Melbourne based claims).

The following extract from VCAT's 2018–19 annual report demonstrates the success of the fast track mediation and hearing process in resolving disputes.

EXTRACT

Fast Track Mediation and Hearing

This year we expanded the reach of the Fast Track Mediation and Hearing service (FTMH). The service was established in late 2017 following an Access to Justice Review recommendation to expand our alternative dispute resolution services for small civil claims.

If the amount in dispute is between $500 and $10 000, parties may be invited to attend a mediation – an opportunity to resolve the dispute by talking through the issues with the other people involved, assisted by an accredited mediator from the Dispute Settlement Centre of Victoria (DSCV) or VCAT. If the dispute is not resolved at mediation, it goes to a VCAT hearing within a few hours. At the hearing, a VCAT member makes a decision about the case. There are no hearing fees for this same-day service.

This year we assessed 3147 cases as being suitable for FTMH, a vast increase from last year's figure of 926. The settlement rate also improved this year. Some 55 per cent of cases were settled at mediation. The implementation of FTMH is overseen by a dedicated steering committee and working group, which includes representatives from VCAT and DSCV. The Victorian Government is supporting this program with $6.26 million over four years to DSCV.

ASSESSMENTS	TOTAL
Number of cases assessed as suitable, including cases that may be scheduled for mediation and hearing in 2019–20	3147
MEDIATIONS CONDUCTED AND SETTLED	**TOTAL**
Mediations conducted	1166
Mediations settled	640
Mediation settlement rate %	55%
SETTLED BEFORE MEDIATION	**TOTAL**
Total matters settled before mediation, including DSCV – assisted settlement	578
Settled before scheduled mediation %	18%
Settled with assistance from DSCV after making initial contact with parties	87
DSCV assisted settlement %	3%

Source 7 The above table demonstrates the success of the fast track mediation and hearing process helping to resolve disputes.

VCAT Annual Report 2018-2019, p. 37



Source 8 The fast track mediation hearing and hearing process can be used in claims where the amount claimed does not exceed $10 000.

Ability of fast track mediation and hearing to achieve justice

In relation to achieving fairness, equality and access, some of the points to consider are explored in Source 9.

PRINCIPLE	FAST TRACK MEDIATION AND HEARING
Fairness	• The VCAT hearing is heard by a different member, which allows for fairness, and is conducted with as little formality as possible, while also assisting the parties to make out their case. • Mediation can avoid many of the procedural fairness issues that can arise in a VCAT hearing (for example, if a party does not understand the process of giving evidence). • It is not a complete solution to many unfairness issues that may arise in a VCAT hearing.
Equality	• The fast track mediation and hearing process seeks to ensure that all people are treated equally in the process by using an unbiased and impartial mediator, which also allows for fairness. • However, the changes are not a complete solution to equality issues. For example, people who suffer particular vulnerabilities may still face inequality issues even through this process.
Access	• The expansion enables greater to access to a wider range of people, particularly those with claims in Melbourne worth up to $10 000 (because of the increased threshold) and those in rural and remote areas. • The changes give access to a highly successful form of dispute resolution – mediation – and access to highly experienced mediators who have been proven to assist a significant amount of parties resolve the dispute without having to go to hearing. • The threshold of $5000 for regions other than Melbourne means it is not as accessible as it could be, and the process is also limited to the Civil Claims List and not other lists such as the Residential Tenancies List.

Source 9 The ability of the fast track mediation and hearing process to achieve justice

8.4 CHECK YOUR LEARNING

Define and explain

1 Explain how technological advances can address the principle of access in the civil justice system.

2 How does the fast track mediation and hearing process assist both VCAT and 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 have 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 do not 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
- **Worksheet** Technology: Immediation
- **Weblink** VLA online tool

8.5 RECOMMENDED REFORMS

Many reforms to the civil justice system 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.

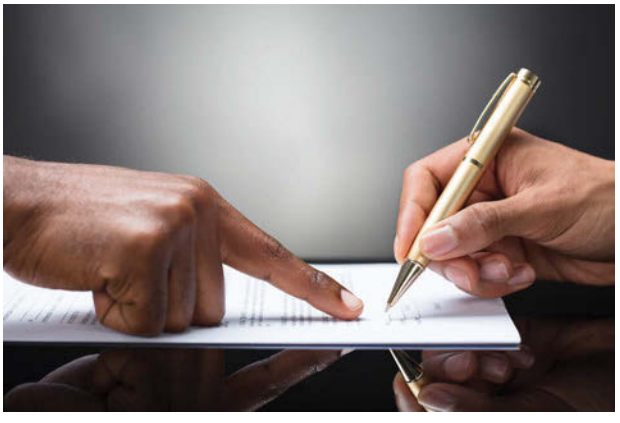
Recommended reform 1: Allowing contingency fee agreements

As mentioned in Chapters 6 and 7, litigation funders are often used in representative proceedings. Litigation funders are third parties that agree to fund the costs of a proceeding in return for a share of any amount recovered in the proceeding. The litigation funder is not a party to the proceeding – it almost acts as an 'investor' to the proceeding and bears the risk of paying the legal costs, and the proceeding being unsuccessful. Litigation funders are used in all civil proceedings, but are most often discussed in the context of class actions.

In return for bearing the risk, the litigation funder ordinarily enters into an arrangement with the class members or plaintiff who will agree on what the funder will be entitled to if the proceeding is successful (for example, an out-of-court settlement is reached, or there is a final judgment in favour of the plaintiff). As part of this agreement, is not unusual for the litigation funder to receive a substantial portion of any damages recovered – sometimes, between 20 and 45 per cent of the total amount.

One of the reasons that litigation funders have been able to fund so many class actions in Australia (it is estimated that they fund about 70 per cent of class actions) is because lawyers in Australia are not able to enter into contingency fee agreements with their clients, which were discussed in the previous topic. Contingency fee agreements are agreements whereby the lawyer will agree to provide legal services in return for a share of the amount recovered if the proceeding is successful. It would act like a litigation funding agreement, but instead of a third party, independent investor receiving a cut of the damages, it would be the lawyers who would also be providing the legal services. Contingency fee agreements are prohibited in Australia.

As part of its report into class actions and representative proceedings, one of the recommendations the VLRC made was to allow lawyers to be able to charge contingency fees. It believed that this provides another avenue of funding for clients who may be otherwise unable to pursue proceedings due to cost. The VLRC found that by allowing lawyers to enter into contingency fee agreements, it may improve access to justice by providing a means by which legal claims that may not attract the interest of litigation funders could be pursued by lawyers who are willing to invest in the proceeding. In other words, smaller claims may be able to be pursued because lawyers may be prepared to fund them for a smaller percentage.



Source 1 The introduction of contingency fee agreements could allow more people to pursue their claims.

The VLRC has recognised that there are some risks that need to be worked through when making this recommendation. For example, it recognised that there is a need to avoid any conflict of interest issues that arise if a lawyer is both providing legal services, and has a vested interest in winning (because they get to share some of the amount received). The VLRC felt that these risks could be

managed, for example by imposing limits on the types of litigation for which contingency fees may be charged.

As mentioned in the previous topic, in June 2020 the Victorian Parliament passed legislation which allows the Supreme Court to make orders in class action proceedings that allow plaintiff law firms to receive a percentage of the damages awarded to all class members. The new legislation, however, does not allow for contingency fee agreements more broadly (for example, in proceedings other than class actions), and only allows the court to make an order (and not for the plaintiff law firm to freely enter into an agreement with its client).

Ability of contingency fee agreements to achieve justice

In relation to achieving fairness, equality and access, some of the points to consider are outlined in Source 2.

PRINCIPLE	CONTINGENCY FEE AGREEMENTS
Fairness	• The use of contingency fee agreements may allow for greater procedural fairness, as lawyers will have a vested interest in ensuring the success of a proceeding. • This may, on the other hand, cause issues if a lawyer acts in their own interests rather than in the interests of their clients (though this is unlikely, given lawyers are subject to strict duties and rules). • The VLRC has proposed additional recommendations such as full disclosure of funding or contingency fee agreements so that there is transparency for plaintiffs and class members about what they would be entitled to if the proceeding is successful.
Equality	• The use of contingency fee agreements seeks to put parties on an equal footing in terms of allowing a greater number of claims to be made by potential plaintiffs. • However, the recommended reform does not necessarily address all equality issues faced by class members and plaintiffs – and many of the equality issues in proceedings may depend on the skill and expertise of the legal representatives.
Access	• The recommended reform most addresses the principle of access. The VLRC has seen the change as allowing greater access to justice because smaller claims which may not attract the attention of litigation funders may still be funded by lawyers willing to take the risk. • There is also the potential that lawyers may be prepared to take a smaller cut of any damages than litigation funders and thus enable greater access to the amount available to the plaintiff and, in relation to class actions, available to the group members.

Source 2 The ability of contingency fee agreements to achieve the principles of justice

Recommended reform 2: Increased use of case management

As you learnt in Chapter 7, the use of case management in the courts has seen an improvement in efficiencies and the way that cases are managed in the courts. The active role of the judge has narrowed the issues in dispute that have to be decided at any trial, and more disputes are resolved before they reach trial.

The Supreme Court has recognised that active case management can improve the flow of cases, and saves the costs for the parties and the time and resources spent on trials. The Supreme Court also uses a 'triage' system such that some case management work is undertaken by registry staff, associate judges and judicial registrars (all staff of the Court), leaving the judges to work on more complex cases and trials.

There have been widespread recommendations for active case management to form an ordinary part of managing cases in the court system. By way of example, the Commercial Court of the Supreme Court has already started planning for the extension of its 'early triaging of cases' (assessing cases and how they are best handled at an early stage) to reduce unnecessary delays and shorten times to resolution.

The Victorian Law Reform Commission (VLRC) also made a series of recommendations (in its 2018 recommendations in relation to representative proceedings) to provide for greater powers to the Supreme Court to have a greater role in case management of class actions. For example, the VLRC recommended that the Court be given powers to order that a proceeding no longer continue as a class action.

Ability of increased use of case management to achieve justice

In relation to achieving fairness, equality and access, some of the points to consider are outlined in Source 3.

PRINCIPLE	INCREASED USE OF CASE MANAGEMENT
Fairness	• The use of case management powers allows for fairness because it involves a greater use of the judge in managing the dispute, and allows the judge more oversight into the progress of the case. For example, there may be directions hearings along the way, which provides the judge an opportunity to explain matters to a self-represented party, or to make appropriate orders when one party is not complying with pre-trial procedures, thus disadvantaging the other side.
Equality	• The changes try to allow for equality by treating people equally in the process, and by ensuring they are subjected to the same processes. • However, this does not mean they are treated the same – case management powers could mean that some parties are ordered to do some things that the others are not. By way of example, if one party has a significant volume of documents to discover, they may be given more time, as it may be unfair to treat them the same as a party that has very few or no documents.
Access	• The use of case management powers allows for greater access to the courts as it can avoid the need for trial, and it allows access to judicial staff such as judicial mediators. It can also mean that people do not have to go all the way to trial to get the outcome they were seeking. • The use of case management powers can depend on which judge a party gets, and which court they are in. Some judges are better than others at case management.

Source 3 The ability of increased use of case management to achieve the principles of justice

Recommended reform 3: Introduction of a National Justice Interpreter Scheme

As discussed in Chapter 5, from early 2017 the Law Council of Australia conducted a comprehensive review into the state of access to justice in Australia for people who experience disadvantage. The review considered both the criminal and civil justice systems.

One of the recommendations was to implement a National Justice Interpreter Scheme. It noted that the importance of free, professional and appropriately-skilled interpreter services for persons who are recently arrived in Australia and navigating the justice system could not be overstated. However, it is not only those who have recently arrived in Australia who need interpreters. The Law Council found that professional, appropriate and skilled interpreters are also needed for people from culturally and linguistically diverse backgrounds, which include Aboriginal and Torres Strait Islander peoples and asylum seekers.

The Law Council found that there was limited availability of free and appropriate interpreter services, and this affected all stages of the justice system. Sometimes the pool of available interpreters in a community where somebody is accessing a CLC is limited, and it was even more difficult to find someone who was qualified and appropriate for that person.

The National Justice Interpreter Scheme would implement a system whereby people with non-English speaking backgrounds would have access to free, professional and qualified interpreters, regardless of where they were or what issue they were facing. The Scheme would implement guidelines for courts to use to assess whether and when to engage an interpreter, how to engage one, and prescribe a set of standards for interpreters. It is not limited to courts, however – the Scheme is intended to work across both the civil and criminal justice system and in all areas where people get access to legal assistance or advice. The Scheme is intended to be fully funded.



Source 4 Former High Court Justice Robert French AC led a comprehensive review into access to justice.

Ability of a National Justice Interpreter Scheme to achieve justice

In relation to achieving fairness, equality and access, some of the points to consider are outlined below.

PRINCIPLE	NATIONAL JUSTICE INTERPRETER SCHEME
Fairness	• The use of a national scheme for interpreters allows for fairness because it provides a person from a non-English speaking background with a greater understanding of court processes and procedures, which may not otherwise exist without interpreters. • The success of the Scheme will wholly depend on the quality and availability of interpreters – if one is not available or does not adequately explain processes, then fairness may not be achieved.
Equality	• The use of interpreters assists vulnerable parties – those from non-English speaking backgrounds – to try to get to an equal footing with those who are able to understand court processes. That is, it is about treating someone differently to treat someone equally. • The Scheme does not address other equality issues such as those that arise for parties with a mental impairment, young children, or people of low socio-economic background.
Access	• The use of interpreters allows for greater access to court processes and procedures, understanding of court and tribunal documents, and understanding of rights. • A national scheme does not necessarily mean everyone will get access to appropriate and qualified interpreters – it may well depend on the community in which the person is located, and the type of interpreter they need. Some smaller communities often struggle to find interpreters that the person does not know.

Source 5 The ability of a National Justice Interpreter Scheme to achieve the principles of justice

8.5 CHECK YOUR LEARNING

Define and explain

1 Describe one recommended reform which is aimed to address one or more costs factors, and one or more accessibility factors.

Synthesise and apply

2 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:

- **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

3 Discuss the extent to which improved access to interpreters will assist parties in a civil dispute.

4 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

5 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 (for example, '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 (for example, '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



TOP TIPS FROM CHAPTER 8

1 Make sure you choose a recent reform that was implemented in the past four years. Always double-check the year that your chosen reforms were introduced before you sit your exam.

2 Recommended reforms cannot be made up. They must have been recommended from somewhere. It is a good idea to mention who that person or body is that recommended the reform in any assessment response about your chosen reform.

3 For each recent reform and recommended reform, make sure you can discuss them. Look at the positives and negatives of each; think about whether they will solve all the problems that exist in the civil justice system. The more you can talk about the benefits and downsides of each, the better.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Describe** how communication barriers can affect the ability of a person to be equal before the law.

(3 marks)

Difficulty: medium

2 **Identify** and **describe** one recent and one recommended reform that could reduce delays. In your answer, **comment on** the extent to which each reform could help improve the civil justice system.

(8 marks)

Difficulty: high

3 **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 dispute resolution method.

(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.

Read the case study and answer the questions that follow.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

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. Several employees were injured in the fire. The business was immediately closed, and WorkSafe authorities commenced an inquiry into what happened.

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', '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 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

Check your obook assess for these additional resources and more:

Student book questions
Chapter 8 Review

Revision notes
Chapter 8

assess quiz
Chapter 8
Test your skills with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

PRACTICE ASSESSMENT TASK

For Unit 3 – Area of Study 1

Ronald Rump and his criminal history

Ronald Rump, 45, had a difficult childhood because he 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 sentences 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 missed a number of days at work which got her fired, and is regularly 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 intentionally causing serious injury. Ronald has been refused bail and pleaded not guilty. He wants to negotiate with the prosecutor to drop the charges and for him to be found not guilty. Belinda does not like the idea of negotiations.

Practice assessment task questions

1 Identify who has the burden of proof in this case.
(1 mark)

2 Belinda is a witness for the prosecution. Describe one way in which Belinda may be able to give evidence in this case.
(3 marks)

3 Discuss the appropriateness of plea negotiations in this case.
(5 marks)

4 Explain the relationship between the judge and the jury at trial.
(5 marks)

5 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)

6 Describe one sanction that may be imposed on Ronald, and one of its purposes in this case.
(6 marks)

7 Provide four factors that may be considered in sentencing Ronald, and comment on how they may affect the sentence imposed if Ronald is found guilty.
(8 marks)

8 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: 44 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 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 their knowledge of the civil justice system. She tells your class 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 matters.

1 The likely parties in the case.
(2 marks)

2 Who has to prove the facts, and why.
(2 marks)

3 Will a jury 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 of the school if the plaintiff does issue the claim, including responsibilities in relation to documents and evidence.
(6 marks)

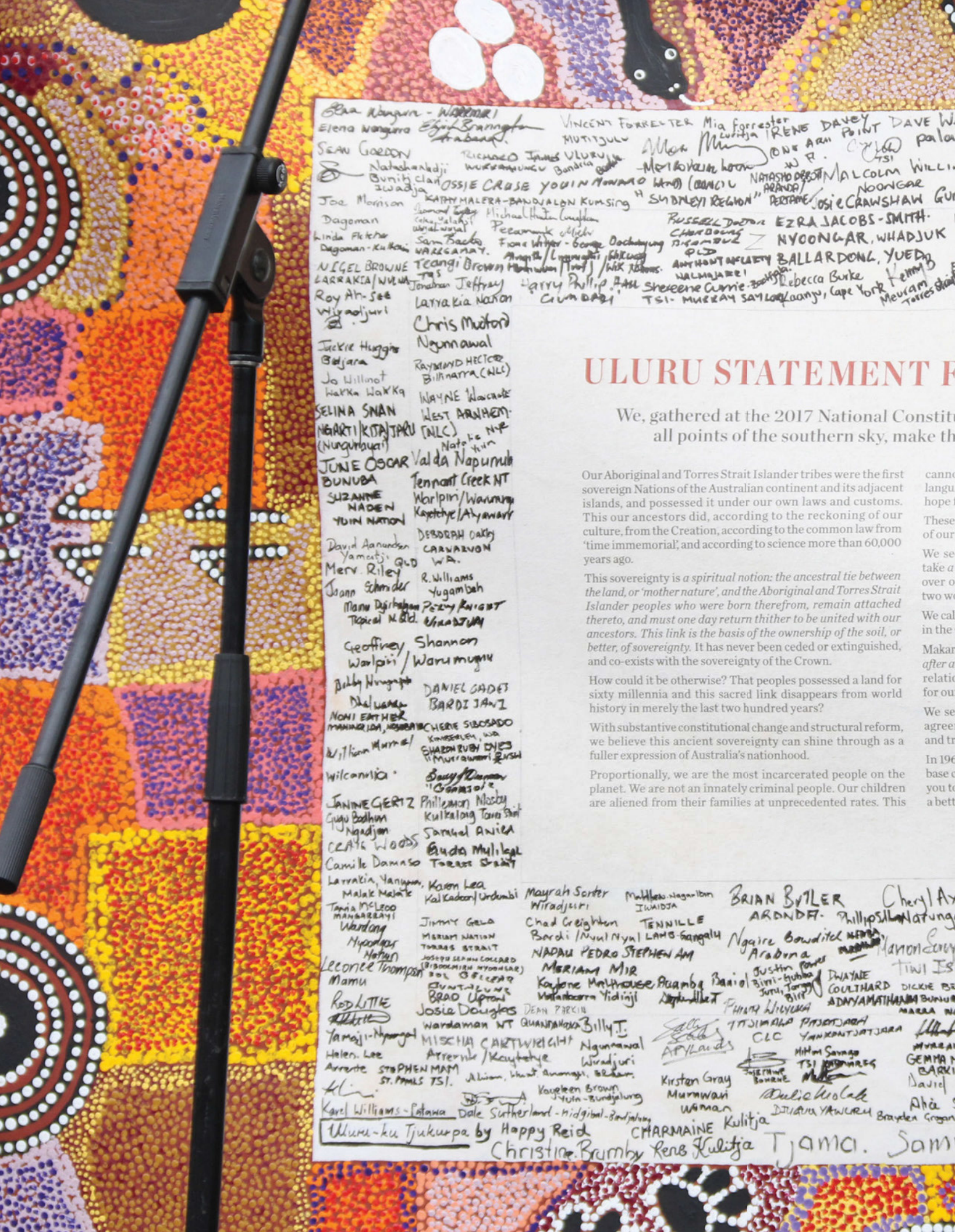
8 The possible costs that may be incurred by the school.
(4 marks)

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)

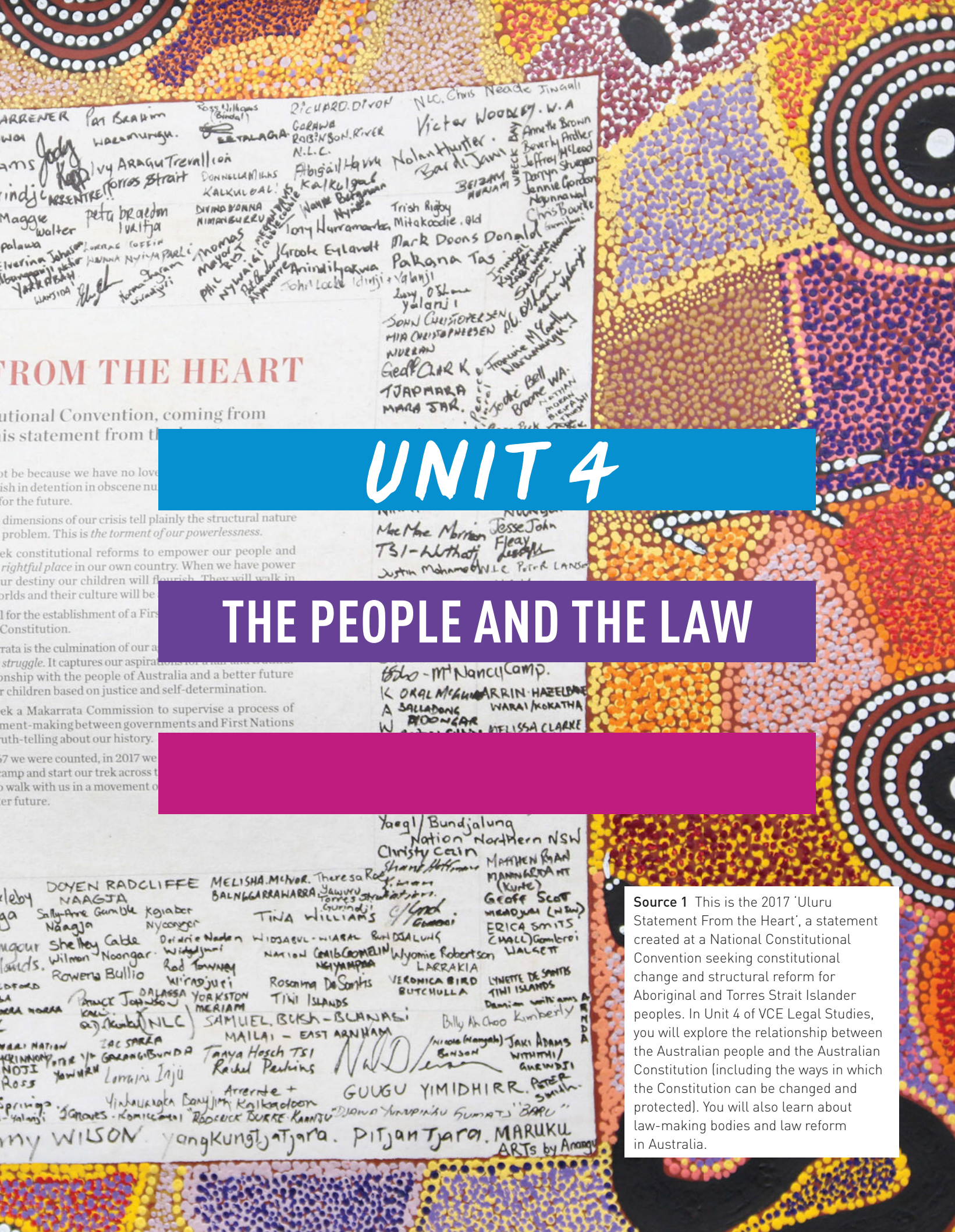
11 How the school should measure whether justice has been achieved in this particular case, addressing each of the principles of justice.
(8 marks)

Total: 50 marks


ULURU STATEMENT F
We, gathered at the 2017 National Constitu
all points of the southern sky, make th
Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.
This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.
How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?
With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.
Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This
Uluru-ku Tjukurpa by Happy Reid

UNIT 4

THE PEOPLE AND THE LAW



Source 1 This is the 2017 'Uluru Statement From the Heart', a statement created at a National Constitutional Convention seeking constitutional change and structural reform for Aboriginal and Torres Strait Islander peoples. 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 law-making bodies and law reform in Australia.

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, the parliament 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
	Chapter 11	Checks on parliament in law-making	• 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 12	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

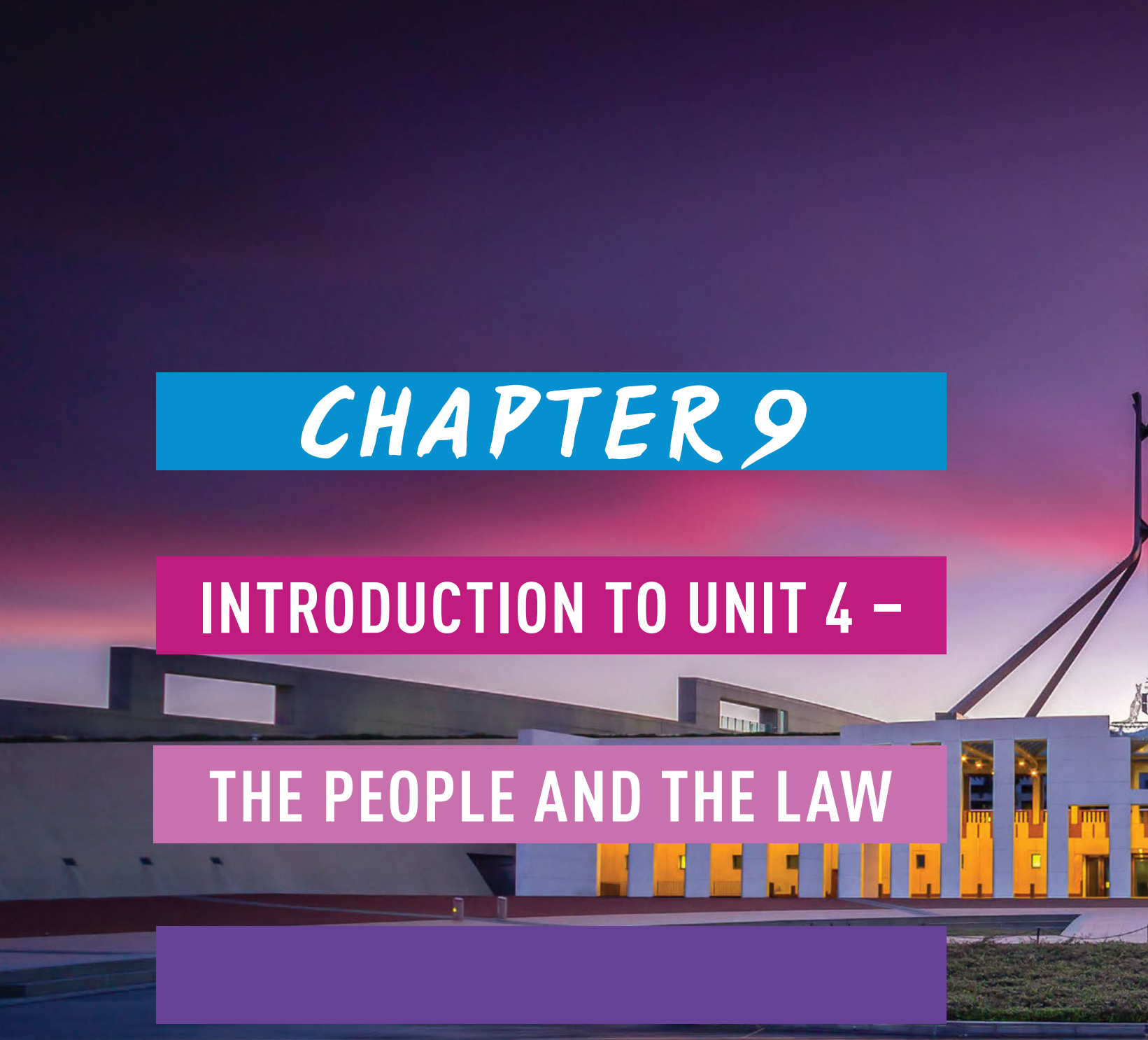
On completion of this unit the student should be able to discuss the factors that affect the ability of parliament and courts to make law, evaluate the ability of these law-makers to respond to the need for law reform, and analyse how individuals, the media and law reform bodies can influence a change in the law.

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 4 – AREA OF STUDY 2 THE PEOPLE, THE PARLIAMENT AND THE COURTS	Chapter 13	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 14	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 15	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 Parliament House in Canberra is the meeting place of the Parliament of Australia. The building was opened on 9 May 1988 by Elizabeth II, Queen of Australia.

Check your Student obook assess for these digital resources and more:

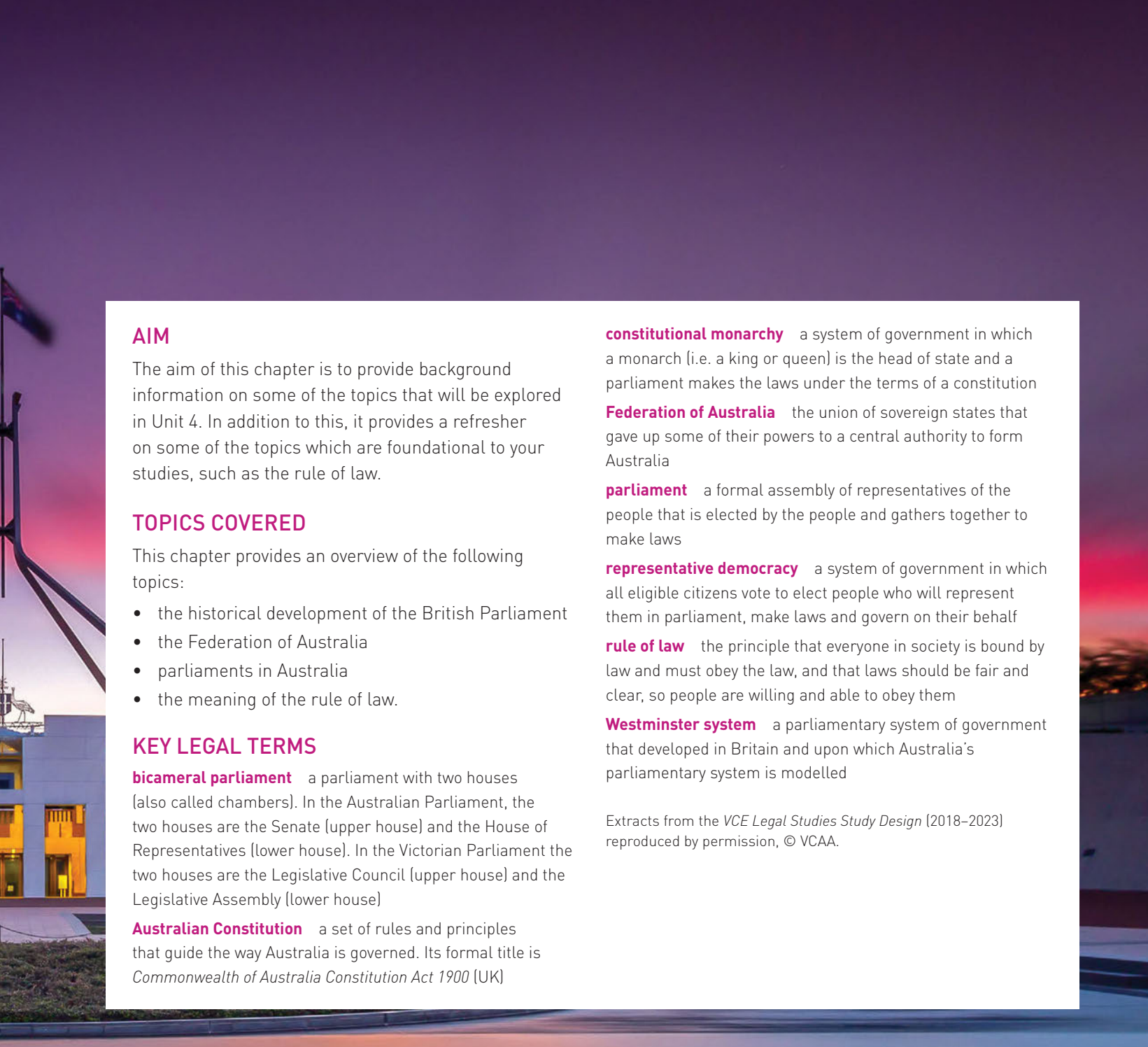
Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live

Launch a game of Quizlet live for your students



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 a set of rules and principles that guide the way Australia is governed. 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, and that laws should be fair and clear, so people are willing and able to obey them

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

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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.

9.1 THE HISTORICAL DEVELOPMENT OF THE BRITISH PARLIAMENT

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

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)

In 1215 King John was king of England. He was an unpopular monarch because he raised taxes and led the country to defeat in overseas wars. The English nobles (powerful landowners such as lords and barons) forced the King to sign a charter (a 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.



Source 1 *The Magna Carta being signed by King John, 1215*, illustrated by John Leech

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 and the clergy (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).

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 (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.

9.1 CHECK YOUR LEARNING

Define and explain

1 What does 'bicameral' mean?
2 Explain how the two houses of parliament in England came to be created.

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
- Video tutorial: Introduction to Unit 4
- Weblink: The Westminster System

9.2 THE FEDERATION OF AUSTRALIA

Australian Constitution a set of rules and principles that guide the way Australia is governed. Its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

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**.

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.

In the nineteenth century, following the arrival of the British, 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.

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

During the 1870s and 1880s people were concerned about the arrival of non-British immigrants and the lack of a common immigration policy. They realised 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. 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 colony 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?

Synthesise and apply

2 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** Was there any involvement of Aboriginal and Torres Strait Islander peoples in the conventions? Discuss as a class.

3 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
- **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.

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 the 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).



Source 1 Parliament of Victoria

9.3 CHECK YOUR LEARNING

Define and explain

1. Provide 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** Australian Institute of Aboriginal and Torres Strait Islander (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, and 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.

The rule of law is often mentioned in the media. In October 2019 front pages of newspapers in Australia were censored (blacked out) as part of a campaign to remove laws that criminalised journalism and targeted whistleblowers. The media sought to highlight a growing culture and laws which they said attempted to cover up information that was in the public interest. In response, the government said that although press freedom was important, the rule of law needed to be upheld and no one was above the law – including the prime minister and the media.



Source 1 In October 2019 Australia's newspaper front pages were blacked out to protest against media censorship.

In Unit 4 you will explore the following principles of the rule of law:

- 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.

9.4 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by the rule of law, and describe two principles of the rule of law.

Synthesise and apply

2 Conduct some more research on the media campaign in October 2019 to highlight media censorship. Explain one way in which the media may contravene the rule of law, and one way in which the media may uphold the rule of law.

3 Why do you think 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, THE PARLIAMENT AND THE CONSTITUTION



Source 1 Here, Victorian Health Minister Jenny Mikakos speaks in the upper house of the Victorian Parliament on 23 April 2020. The Parliament was recalled early for an emergency sitting day to pass legislation relating to rental relief in response to the COVID-19 pandemic. In this chapter, you will learn about the Commonwealth and Victorian Parliaments, and constitutional law-making powers.

Check your Student obook assess for these digital resources and more:

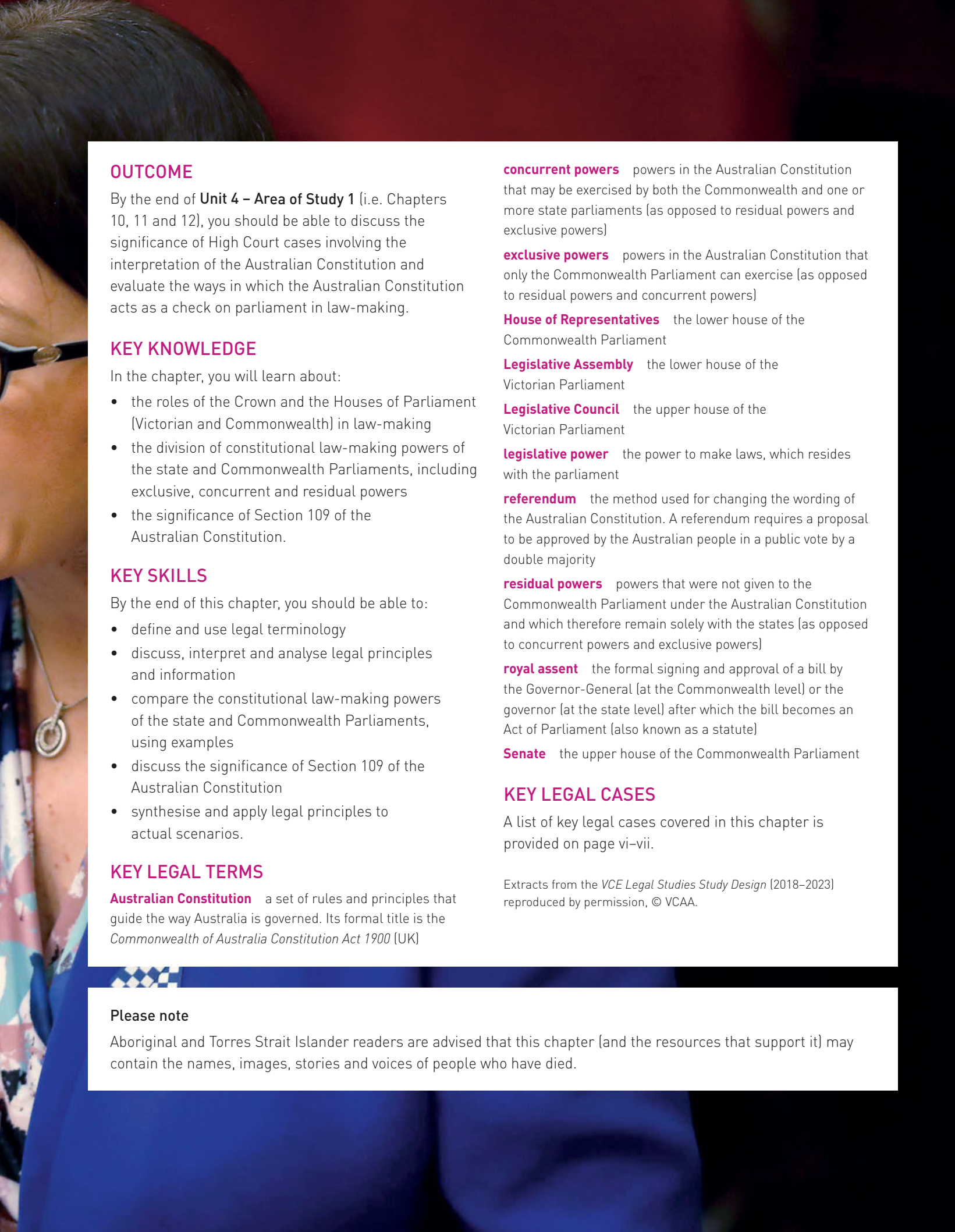
Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive

Launch a game of Quizlet live for your students



OUTCOME

By the end of **Unit 4 – Area of Study 1** (i.e. Chapters 10, 11 and 12), 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.

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
- synthesise and apply legal principles to actual scenarios.

KEY LEGAL TERMS

Australian Constitution a set of rules and principles that guide the way Australia is governed. Its formal title is the *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)

exclusive powers powers in the Australian Constitution that only the Commonwealth Parliament can exercise (as opposed to residual powers and concurrent powers)

House of Representatives the lower house of the Commonwealth Parliament

Legislative Assembly the lower house of the Victorian Parliament

Legislative Council the upper house of the Victorian Parliament

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 Australian 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 solely 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 (also known as a statute)

Senate the upper house of the Commonwealth Parliament

KEY LEGAL CASES

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

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Please note

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10.1 INTRODUCTION TO THE AUSTRALIAN CONSTITUTION

constitution
a set of rules that establishes the nature, functions and limits of government

Australian Constitution
a set of rules and principles that guide the way Australia is governed. Its formal title is the *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

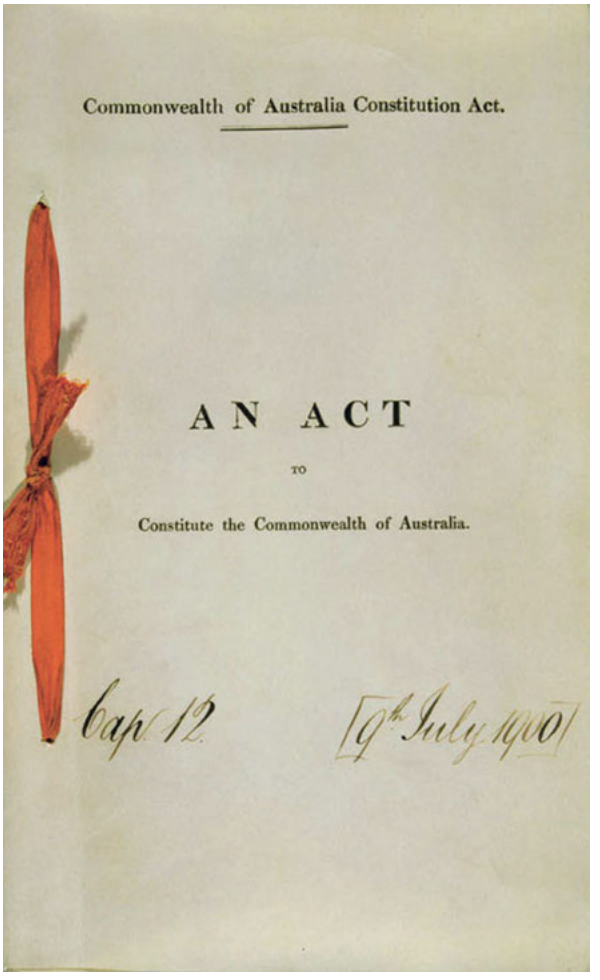
referendum
the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australian people in a public vote by a double majority

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, and determines the powers and duties of the government. Many countries (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.

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 in Chapter 9).

In comparison with other legal documents, the Australian Constitution is short – especially considering it is the most important legal and political document affecting the lives of all Australians.


Commonwealth of Australia Constitution Act.

AN ACT

TO

Constitute the Commonwealth of Australia.

Cap 12

[9th July 1900]

Source 1 The front cover of 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 wording of the Australian Constitution **can be changed** – i.e. by means of a **referendum**.

You will learn about all of the above features in Chapters 10, 11 and 12.

Many other countries' constitutions include a **bill of rights**, but Australia's does not. A bill of rights is a statement or document which protects basic human rights (such as freedom of speech). Although our Constitution does not contain a bill of rights, it does protect a limited number of rights, such as the right to a trial by jury in limited circumstances. The Australian Constitution also provides a series of protections

(also known as checks) to ensure that all areas of government can operate in a manner that is consistent with key principles that underpin a democracy such as ours. These checks will be explored in Chapter 11.

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 this chapter, and in Chapters 11 and 12.



Source 2 After the 2019 election Ken Wyatt became the first Indigenous Australian to serve as Minister for Indigenous Affairs. One of his first duties was to examine options for the wording of a possible referendum to formally recognise Indigenous peoples in the Australian Constitution.

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 to 12. This will help you understand key constitutional concepts in greater depth.

10.1 CHECK YOUR LEARNING

Define and explain

1 Which parliament created the legislation that became Australia's Constitution? Why was this so?

2 Identify three bodies or features of our legal and political systems that only exist because of the Australian Constitution.

Synthesise and apply

3 Using information provided in this topic, as well as your own research, provide two reasons why the colonies of Australia wanted to federate.

4 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

5 Constitution survey

- **a** Conduct a survey of five people not in your Legal Studies class. Ask them the following questions:
  - **i** What is the Australian Constitution?
  - **ii** 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 COMMONWEALTH PARLIAMENT IN LAW-MAKING

In this topic, you will learn about the roles of the Houses of the Commonwealth Parliament in law-making.

Governor-General
the Queen's representative at the Commonwealth level

government
the ruling authority with power to govern, formed by the political party or parties (known as a coalition) 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 aims 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 who 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

bill
a proposal to implement a new law or change an existing law

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

The Commonwealth Parliament

The Parliament of Australia (also known as the Commonwealth Parliament or the 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).



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 majority 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 151 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 (by being registered on the national electoral roll).

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 then appoints government **ministers** to look after certain areas (portfolios), such as health, education, and defence.

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 they are 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. A summary of the process of a bill through parliament can be found on your obook assess.

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.
- **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 normally initiates the vast majority of law reform.
- **provide responsible government** – ministers are responsible to parliament and therefore to the people. They are questioned by opposition members about their policies and legislative mandate 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.
- **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**.

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 bills or legislation 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

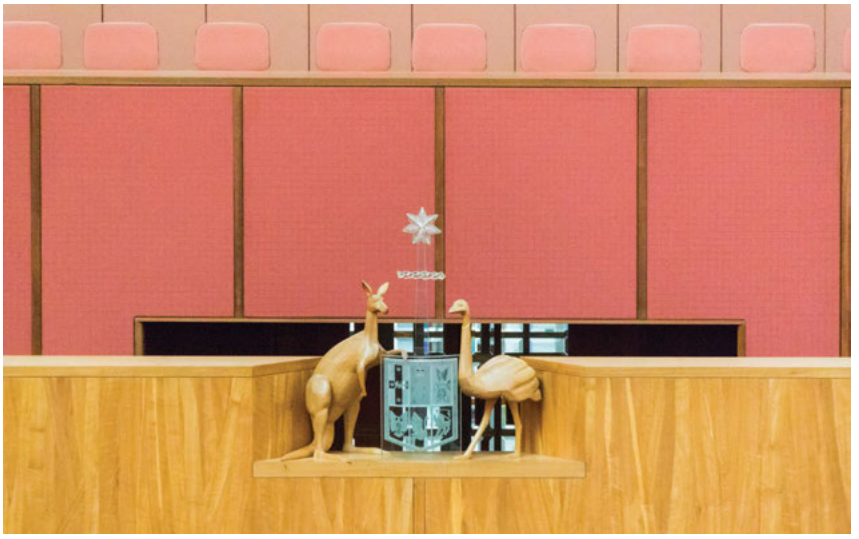
money bill
a bill that imposes taxes and collects revenue; also known as an appropriation bill

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



Source 2 During the COVID-19 pandemic in 2020, the Commonwealth Parliament sat to pass a $130 billion package to support workers. Given the difficulty of travel and the need for social distancing, only the necessary number of members (a 'quorum') required to pass the legislation sat in each house.



Source 3 The Senate is also known as the 'upper house' or the 'states' house'.

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 in the year following a general election.

The role of the Senate in law-making

The Senate's main role is to make laws. Its law-making powers are equal to those of the House of Representatives in that it can initiate proposed laws (bills). The Senate, however, cannot initiate money bills (which would include any bill that collects revenue). 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 lower house, more bills will be introduced in the lower house. 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. You will learn more about committees in Chapter 13.

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

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

The main roles of the Senate in law-making are as follows:

- **act as a house of review** – the majority of bills are initiated in the lower house, therefore the Senate (the upper house) reviews 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. This 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.

An example of the role of the houses in law-making is described in the scenario on the next page.

Did you know?

Cory Bernardi won a Senate seat for the Liberal Party at the 2016 election. In February 2017, he quit the Liberal Party to form the Australian Conservatives. In 2019, he quit politics and in January 2020, his Senate seat was returned to the Liberal Party, which was the party he originally represented when elected.

Crossbencher votes in Parliament seal the fate of sick refugees and asylum seekers

ACTUAL SCENARIO

The *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) was passed by the Commonwealth Parliament against the wishes of the Liberal-National Government (in power at the time). This legislation, known as the 'Medevac' laws, stated that if a refugee or person seeking asylum required urgent medical assistance, two independent Australian doctors could recommend their temporary transfer to Australia.

The legislation was introduced in the lower house. While a government could usually refuse the passage of a bill through the lower house, with the exit of former Prime Minister Malcolm Turnbull from the Parliament (and the election in his place of an independent member, Dr Kerryn Phelps), the Australian Labor Party and the crossbenchers united to pass the legislation.

In support for the legislation (which originated from a bill introduced by Dr Phelps but which was not passed), Dr Phelps said, 'Since the #KidsOffNauru campaign began on 20 August this year, some children and their families have been transferred to Australia for medical treatment ... A clinically led process for medical transfer of these sick asylum seekers and their families must be put in place.'

In December 2019 the re-elected Morrison Government repealed (overturned) the Medevac laws by passing the *Migration Amendment (Repairing Medical Transfers) Act 2019* (Cth). To pass this legislation through the Senate, the Government gained support from four of the six crossbenchers, including Tasmanian Senator Jacqui Lambie. The ultimate vote was 37 to 35 in favour of the new legislation, which restored the full discretion of Government ministers to reject medical transfers of refugees to Australia from offshore detention centres, such as the centre on Nauru. Senator Lambie was criticised by opposition senators when she supported the legislation. She claimed that she was driven by issues concerning 'national security' but refused to disclose the details of the agreement she had reached with the Government.

Source 4 The political life of a senator can involve difficult moral and legal choices. Senator Lambie is seen here after deciding to support the repeal of the Medevac laws.



10.2 CHECK YOUR LEARNING

Define and explain

1 Outline the structure of the Commonwealth Parliament.
2 Other than introducing bills, describe two roles of the House of Representatives in law-making.
3 Explain why the Senate is referred to as the 'states' house' and the House of Representatives is referred to as the 'people's house'.

Synthesise and apply

4 Conduct some research and describe the current composition of the Senate in terms of the number of seats held by political parties and independent members. Which members hold the balance of power when bills are being considered?
5 Access the Australian Parliament website and go to the 'Watch, Read and Listen' link. A link is provided on your obook assess. Choose a live video of one of the Houses (if Parliament is sitting) or an archived video. Make notes on the following:
   a the names and roles of three members of Parliament who feature in the footage shown
   b the titles of two bills that are being discussed and an outline of the purpose of one of those bills.

Analyse and evaluate

6 To what extent are the interests of democracy served when bills are passed through the lower house without the support of the government? Justify your answer.
7 Conduct some research on Senator Lambie's role in the repeal of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth). Discuss whether the passing of legislation should be based on the vote of one senator.

Check your obook assess for these additional resources and more:

- **Student book questions** 10.2 Check your learning
- **Weblink** Australian Electoral Commission
- **Weblink** The Senate
- **Weblink** The House of Representatives



Source 5 The Senate is also known as the red room because of its red carpet, walls and chairs (pictured).

10.3 THE ROLE OF THE VICTORIAN PARLIAMENT IN LAW-MAKING

In this topic you will learn about the roles of the Houses of the Victorian Parliament in law-making.

The Victorian Parliament

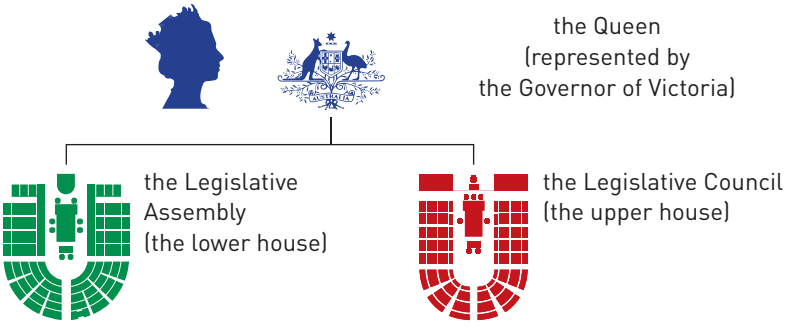
Like the Parliament of Australia, the Parliament of Victoria (also known as the Victorian Parliament) is a bicameral parliament. The Parliament of Victoria consists of:

- the Queen (represented by the **Governor** of Victoria)
- the **Legislative Council** (upper house)
- the **Legislative Assembly** (lower house).

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 1 The Parliament of Victoria consists of the Queen's representative (the Governor of Victoria), the Legislative Assembly and the Legislative Council.

The Legislative Assembly

Study tip

It is easy to remember the names of the houses because they go in alphabetical order from lower (Legislative Assembly) to upper (Legislative Council).

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.

Like 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.

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 moving 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 2 Fiona Patten (Reason Party) was elected to the Legislative Council in 2014. She has introduced private member's bills on areas such as a medically supervised safe injecting room and assisted dying laws. In 2020, she introduced a bill to require charitable institutions who fail to sign the *National Redress Scheme for People Who Have Experienced Child Sexual Abuse* to pay tax. The deadline for signing onto the scheme was 30 June 2020. A number of organisations failed to meet the deadline.

The role of the Legislative Council in law-making

The role of the Legislative Council in law-making includes to:

- **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.

10.3 CHECK YOUR LEARNING

Define and explain

1 Outline two roles of the Legislative Assembly in law-making.

2 If you were elected to a seat in the Legislative Council, how many years would you serve before the next election?

Synthesise and apply

3 Access the Parliament of Victoria website and go to the Legislation page. A link is provided on your obook assess. Choose a statute that has been passed in the last four years. With specific reference to this legislation, and other source material related to the contents of the original bill, write three questions that an examiner might ask. Share your questions with the class and use this as a means of exam revision.

4 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 detail. It can be a poem, song, rap or visual diagram.

Analyse and evaluate

5 Undertake research to find out the current composition of the Legislative Council in terms of the number of seats held by political parties and independent members.

a Does the government have a majority of members in this house?

b To what extent does it serve the interests of democracy if opposition parties and independent members form a majority in the upper house? Give reasons for your answer.

Check your obook assess for these additional resources and more:

- **Student book questions** 10.3 Check your learning
- **Worksheet** Parliament
- **Weblink** Parliament of Victoria
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

10.4 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 (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**.

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

There are three main roles of the Crown in law-making:

- granting royal assent
- withholding royal assent
- appointing the **Executive Council**.

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

Granting royal assent

The Crown's representative in both the Commonwealth Parliament (the Governor-General) and the Victorian Parliament (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.

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 (also known as a statute)

Appointing the Executive Council

The Governor-General (or governor of each state) is responsible for 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 legislation or subordinate legislation). Secondary legislation is rules and regulations made by government bodies such as government departments or statutory authorities. For example, the *New Road Safety (Drivers) Regulations 2019* (Vic) regulates driver licences and learner permits, including the procedures for granting and cancelling licences.

In reality the Queen's representative acts on the advice of the prime minister or premier when approving secondary legislation.

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



Source 1 General David Hurley was appointed to the position of Governor-General in 2019 after a career in the military. He had previously served as Governor of New South Wales from 2014.

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.

10.4 CHECK YOUR LEARNING

Define and explain

1 What is royal assent?

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. Links to these websites are provided on your obook assess. Find a regulation that has been made by the Governor-General 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:

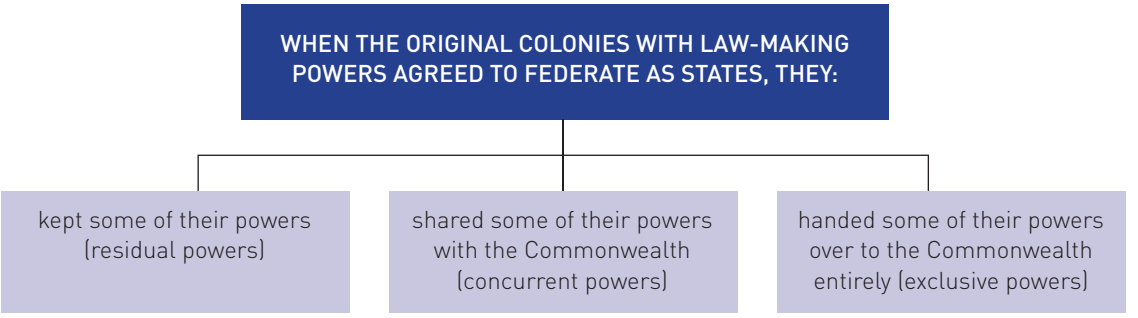
- **Student book questions** 10.4 Check your learning
- **Going further** Withholding royal assent
- **Worksheet** Granting royal assent
- **Weblink** Governor-General
- **Weblink** AustLII
- **Weblink** Commonwealth Parliament

10.5 THE DIVISION OF CONSTITUTIONAL LAW-MAKING POWERS

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 know similarities and differences.

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 Commonwealth 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.

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.

When the Commonwealth Parliament was established, it was necessary for the Australian Constitution to specify which powers were to be given to that parliament, and which powers were to be left with the states. 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 – law-making powers that were left with the states at the time of Federation. The Commonwealth Parliament has no authority 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 – law-making powers that are shared by the Commonwealth and the state parliaments.

The following is an explanation of each of the powers.

residual powers powers that were not given to the Commonwealth Parliament under the Australian Constitution and which therefore remain solely with the states (as opposed to concurrent 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 given 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.

Did you know?

In 2020 during the COVID-19 pandemic, the states imposed different penalties to deal with those who breached public health laws. Health is an area of residual power.

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.



Source 2 State governments have the power to make laws about public transport and related infrastructure. The $14 billion Melbourne Metro Tunnel project is an example of the exercise of such powers by the Victorian Parliament.



Source 3 The deployment of Australian troops to the Middle East is an example of the Commonwealth's exercise of its defence power under the Constitution.

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.

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**.

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)

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 (the Australian Defence Force including army, navy and air force)
- currency (printing and coining money)
- customs and border protection (immigration, controls on imports and exports, and border security).

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 5 on the following page.

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

In addition, as shown in the following extract, 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) – section 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 Under section 51(v) of the Constitution, the Commonwealth has power to make laws with respect to postal services. The Commonwealth has used this power since 1901 to have some postal services managed by government-owned authorities.

Comparison of law-making powers

There are some similarities and differences between the three law-making powers. Source 7 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

10.5 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 regarding assisted dying, which was legalised in Victoria because of the *Voluntary Assisted Dying Act 2017* (Vic). The law came into effect in June 2019.
   - **a** What human rights issues may occur in an area such as assisted dying 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? Justify your answer by reference to assisted dying laws.

Check your obook assess for these additional resources and more:

- **Student book questions** 10.5 Check your learning
- **Video tutorial** How and when to use examples
- **Worksheet** Law-making powers
- **Weblink** Section 51 of the Australian Constitution

10.6 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 exercising, or on the commute to and from school.

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.

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 therefore be invalid and unenforceable.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) – section 109

Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

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 cannot obey both laws at the same time, so the inconsistent part of the state law is invalid.

Example: 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 certain provisions of the *Infertility Treatment Act 1995* (Vic) were invalid because they were inconsistent with the Commonwealth's *Sex Discrimination Act 1984* (Cth).

ACTUAL SCENARIO

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 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*, passed by the Commonwealth Parliament, makes it unlawful for a person to refuse to provide a service to another person on

Did you know?

According to the Department of Health and Human Services, each year, more than 12 000 people undertake some form of assisted reproductive treatment in Victoria. Since 2016, approximately 3.8 per cent of all babies born in Victoria were conceived after some form of assisted reproductive treatment.

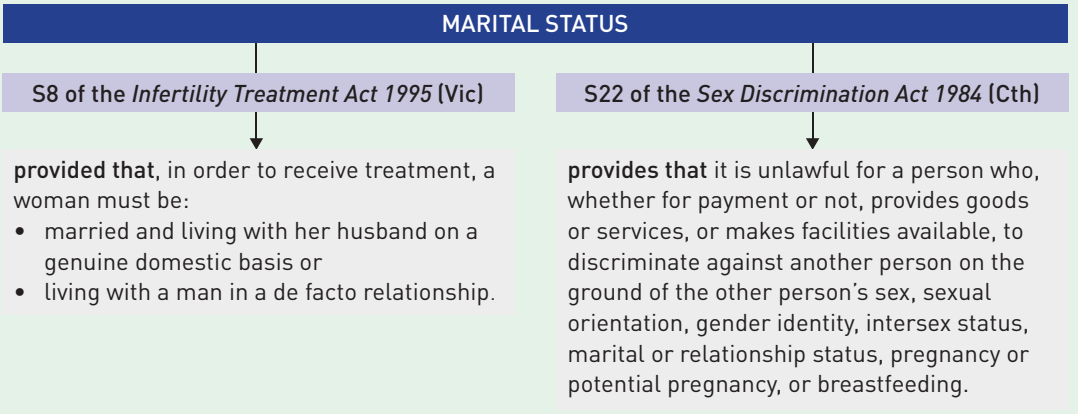
the grounds of the latter person's marital status. Marital status, under the *Sex Discrimination Act*, was defined to mean:

> 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 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*, which makes it an offence to discriminate against a person on the basis of areas such as marital status.

To establish the inconsistency, Dr McBain was required to show that a specific patient was being denied the service; in this case, Leesa Meldrum. The Federal Court upheld Dr 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 and the Victorian law was invalid to the extent of the inconsistency. 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.



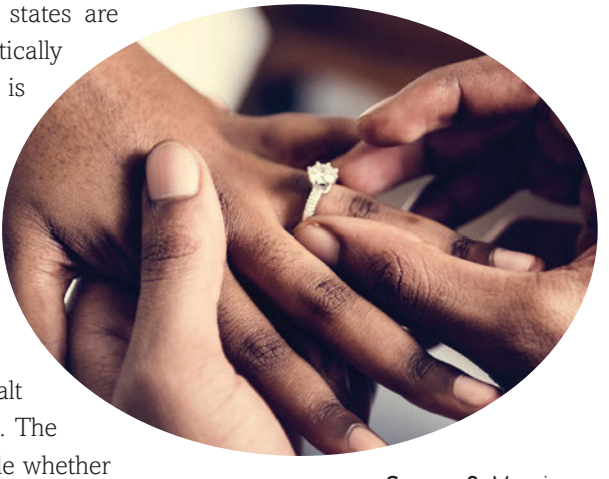
Source 1 The *McBain* case highlights the significance of section 109 of the Australian Constitution.

The significance of section 109

Section 109 can act as a restriction on the states in implementing their legislative programs and mandates. It states 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 any 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 so that the states are denied the power to pass an inconsistent law, or such that a law is automatically invalid when it is passed. The law needs to be challenged first 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.



Source 2 Marriage is an example of an area of concurrent power.

Section 109 is also significant because it imposes a consistent approach to the way that conflict between state and Commonwealth laws will be dealt with. That is, there is no doubt that the Commonwealth law will prevail. The courts are bound by the operation of section 109 when required to decide whether a state law and a Commonwealth law are inconsistent. For example, the High Court cannot decide the case on whether it believes one law is better than the other – in fact, whether one law is better than the other is irrelevant to the issue the Court has to decide. Instead, the question is whether the laws are inconsistent – and if they are (and they cannot operate together), then the Commonwealth law will take priority.

10.6 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 answers.

2 Explain the significance of section 109 in relation to the division of law-making power between the Commonwealth and state parliaments.

Synthesise and apply

3 Provide two reasons why the original writers of the Constitution may have included section 109 in the Constitution.

4 Read the scenario *McBain v Victoria*.
   - **a** What were the two statutes that were said to be in conflict?
   - **b** How were they in conflict?
   - **c** How 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

5 If Victoria passed a law which allowed for a 15-year-old to marry, would this law be operable? Discuss.

6 To what extent does section 109 of the Australian Constitution restrict the state parliaments in law-making? Give reasons for your answer.

Check your obook assess for these additional resources and more:

Student book questions
10.6 Check your learning

Going further
High Court interpretation of section 109

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

TOP TIPS FROM CHAPTER 10

1 The roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) are not only specifically examinable, but are important in understanding the rest of Unit 4. In particular, they will arise again when you consider the factors that affect the ability of parliament to make and change laws.

2 The Study Design requires you to know not only the constitutional law-making powers, but also be able to compare them. Therefore, you should be familiar with both similarities and differences between exclusive and concurrent powers, and concurrent and residual powers, and exclusive and residual powers.

3 Know the specific words of section 109 – many students generalise the words in their answers to questions. Know what it means when it says 'to the extent of the inconsistency'. Also, remember that you not only need to know what section 109 says, but you need to know its significance. Why is it important? What impact has it had? Finally, try to discuss its significance by reference to a particular case or scenario. This will not only help with recalling its significance, but also exploring its impact in relation to a given set of facts.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Describe** one role of each of the following in law-making:
   - **a** House of Representatives
   - **b** Legislative Council
   - **c** Governor of Victoria.

(6 marks)

Difficulty: medium

2 Using examples, **compare** the constitutional law-making powers of the state and Commonwealth parliaments.

(5 marks)

Difficulty: high

3 'Section 109 of the Australian Constitution inhibits the ability of the states to pass laws.' **Discuss** the extent to which you agree with this statement.

(6 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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

The power of one Senator: waiving Tasmania's housing debt

The expectation is that senators vote on bills according to the interests of the party they represent. Despite this, there are examples where a senator will put the interests of their state first.

Following the 2019 federal election, the opposition and independent members held the balance of power in the Senate. As of July 2020, the Coalition Government held 36 of the 76 seats, with the Australian Labor Party (ALP) holding 26 and crossbench members holding 14 seats. One of the crossbench Senators was Tasmanian Jacqui Lambie, founder of the Jacqui Lambie Network.

The Coalition went to the 2019 election with a tax cut policy worth $158 billion, which the ALP and the Australian Greens opposed. Both the Commonwealth and state parliaments can pass laws in relation to tax. Without opposition and Greens support, the Government needed the support of crossbench members. The Centre Alliance Party (two votes) confirmed it would support the legislation, together with former Liberal senator, Cory Bernardi. The Government needed one more vote to pass the legislation through the Senate.

Senator Lambie agreed to support the legislation, but she argued that homelessness and public housing were major issues, especially in Tasmania. She demanded that the housing debt that the Tasmanian Government owed to the Commonwealth be waived, arguing that she would 'go in hard' for Tasmania on this issue. The welfare sector in Tasmania said that the waiving of the debt would allow the state to build 30 new houses a year to support people in need. Until that point, the Tasmanian Government had spent $15 million annually repaying the debt and it was argued that this money could be spent to reduce the list of 3000 people awaiting public housing.

It was reported that the Federal Government agreed to waive the debt in full as part of a deal struck with Senator Lambie, to secure her vote. The legislation was ultimately passed with Senator Lambie's support.

Practice assessment task questions

1 Using one example of each, distinguish between concurrent powers and residual powers.
(3 marks)

2 Describe one way in which section 109 of the Australian Constitution may have a role to play in relation to the above legislation.
(3 marks)

3 Outline the structure of the Commonwealth Parliament. In your answer, explain one role of the lower house.
(5 marks)

4 Discuss the extent to which the composition of the Senate allows for effective law-making.
(6 marks)

5 'It is unfair that one senator, who is not a member of a major political party, is able to have so much power in deciding the outcome of legislation as important as introducing a new tax system in Australia. We would be best served by only having one house.' Discuss.
(8 marks)

Total: 25 marks

Check your obook assess for these additional resources and more:

- Student book questions: Chapter 10 Review
- Revision notes: Chapter 10
- assess quiz: Chapter 10 Test your skills with an auto-correcting multiple-choice quiz
- Video tutorial: How to tackle scenario-based questions
- Quizlet: Revise key definitions from this topic

CHAPTER 11

CHECKS ON PARLIAMENT IN LAW-MAKING

Source 1 In this chapter, you will learn about five ways in which the Australian Constitution acts as a check on parliament in law-making. These five ways ensure that the Commonwealth Parliament does not hold absolute power.

Check your Student obook assess for these digital resources and more:

Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive

Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 4 – Area of Study 1** (i.e. Chapters 10, 11 and 12), 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 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
- 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

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)

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. at least four states) to vote in favour of a proposal. A double majority is required for a change to be made to the wording of the Australian Constitution at a referendum

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

express rights rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

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

implied rights rights that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

judicial power the power given to courts and tribunals to enforce the law and settle disputes

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 Australian people in a public vote by a double majority

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

KEY LEGAL CASES

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

Extracts from the *VCE Legal Studies Study Design* (2018–2023) reproduced by permission, © VCAA.

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 INTRODUCTION TO CHECKS ON PARLIAMENT IN LAW-MAKING

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 providing checks on parliament when it comes to law-making. A 'check' on parliament involves a process or structure that is designed to reduce the potential for the abuse of power, such as corrupt or misleading practices by governments and their ministers.

There are five key means by which the Australian Constitution acts as a check on parliament in law-making.

The five means are:

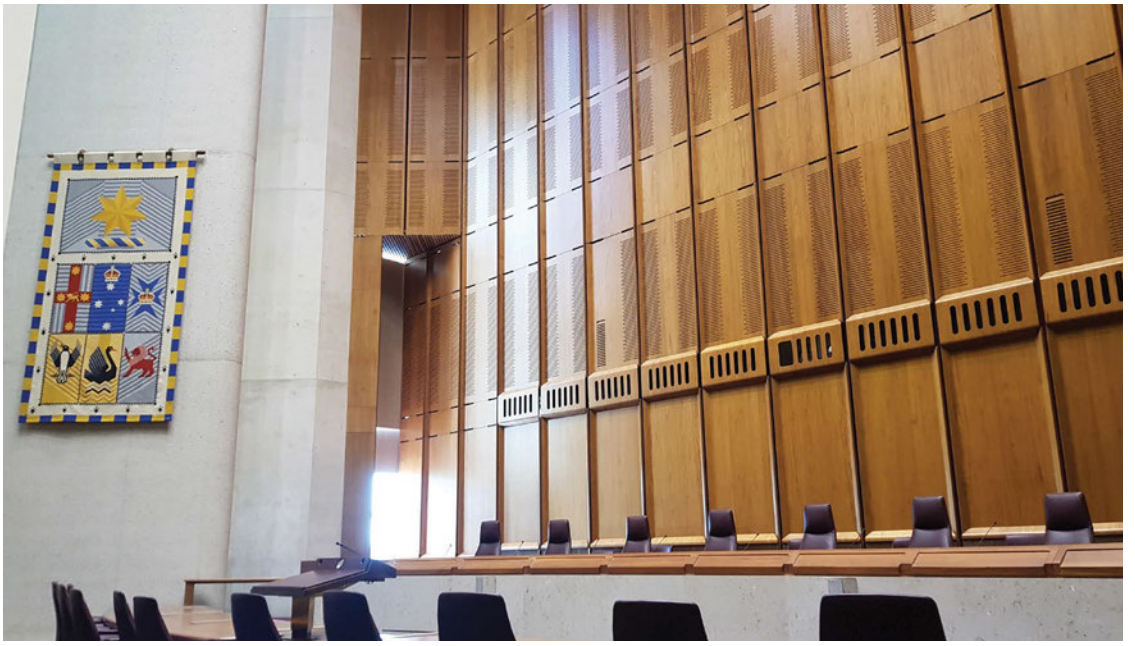
- the **bicameral structure of the Commonwealth Parliament**, where the House of Representatives and the Senate are required to scrutinise legislation to ensure that it is appropriate and effective (Topic 11.2)
- the **separation of the legislative, executive and judicial powers**. These three powers of government are designed to be independent so that power is not centralised too narrowly (Topic 11.3).
- the **express protection of rights**, which acts as a limitation on the law-making powers of the Commonwealth because statute law cannot infringe on these rights (Topic 11.4)
- the role of the High Court in interpreting the Australian Constitution is an essential means of ensuring that law-making bodies do not exceed their power (Topic 11.5)
- **the requirement for a double majority in a referendum**. The only means of changing the wording of the Constitution is if voters support the proposed change at a referendum (Topic 11.6).

Each of the key checks on law-making by parliament is discussed in more detail in this chapter.

supreme law-making body
the body (i.e. the parliament) that has the final law-making power, meaning it can make or change any law within its power and pass legislation to abrogate (cancel) common law

Australian Constitution
a set of rules and principles that guide the way Australia is governed. Its formal title is *Commonwealth of Australia Constitution Act 1900* (UK)

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. at least four states) to vote in favour of a proposal. A double majority is required for a change to be made to the wording of the Australian Constitution at a referendum



Source 1 The High Court was established by the Australian Constitution and is an important check on parliament and government in law-making.

Without these checks on power, there would be a lack of oversight over parliament and a lack of accountability. For example, without the referendum requirements for the changing of the words of the Constitution, the Commonwealth might seek to dominate the states by taking over powers that were not listed in the Constitution as belonging to the Commonwealth; that is, residual powers. As another example,

without the requirement that the courts be separate from parliament, the Commonwealth might seek to appoint politicians as judges so that it is not only able to make the laws, but can also interpret the laws whichever way it chooses.

The degree of significance of these checks on parliament has evolved in ways that could not have been foreseen in the nineteenth century. The checks imposed through the double majority provisions contained in section 128 have been so significant that amending the wording of the Constitution through this process has been extremely difficult. In contrast, the role of the High Court has been central to the development of modern Australia, as it deals with complex global issues in the third decade of the twenty-first century.



Source 2 Global issues, including the rights of children, have been central to the development of modern Australia.

11.1 CHECK YOUR LEARNING

Define and explain

1 Define the term 'bicameral system' and provide one reason why it was introduced at Federation.

2 Describe the relationship between judges being independent of parliament, and the rule of law.

Synthesise and apply

3 Conduct some research on other countries and identify at least one where the judiciary may not be independent from parliament. Come together as a class to discuss your findings.

Analyse and evaluate

4 'Governments are always intent on grabbing more power. We must be careful to protect our rights and keep governments accountable to the people.' Discuss this statement. In your response, refer to examples where governments (or individual people in government) have been held accountable for their actions.

5 Look at the five means by which the Australian Constitution acts as a check on parliament in law-making (on the previous page). Write down as many points as you can about each that you think will be explored in this chapter about how each of them reduce the potential for the abuse of power by parliament. Discuss these as a class, and expand on your points as part of this discussion.

Check your obook assess for these additional resources and more:

Student book questions
11.1 Check your learning

Video tutorial
Introduction to Chapter 11

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

11.2

THE BICAMERAL STRUCTURE OF THE COMMONWEALTH PARLIAMENT

Did you know?

A foreign citizen cannot be a member of the Commonwealth Parliament because of section 44 of the Australian Constitution. Several senators and members of parliament, including Barnaby Joyce and Senator Jacqui Lambie, were compromised by this section in 2017 when it was discovered that they were dual citizens. Joyce and Lambie were subsequently re-elected to parliament although others were not.

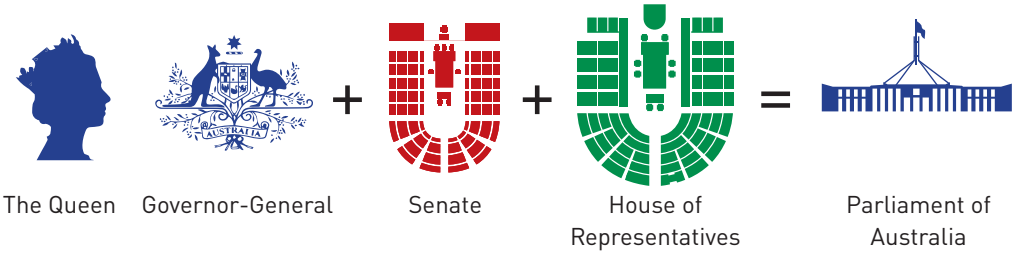
The first means by which the Australian Constitution acts as a check on parliament in law-making is by requiring the Commonwealth Parliament to be a bicameral parliament. This means that the Commonwealth Parliament has a lower house and an upper house. More specifically, section 1 of the Australian Constitution requires the Commonwealth Parliament to have two houses.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) – section 1

Legislative Power

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called The Parliament, or The Parliament of the Commonwealth.



Source 1 The Commonwealth Parliament has a bicameral structure, 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 sections of the Australian Constitution set out how the House of Representatives and the Senate are to be composed:

- section 7 requires the Senate to be composed of an equal number of elected members from 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).

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 increased the number of senators for each state to 12.

The Australian Constitution does not require state parliaments to have a bicameral structure. 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 in Chapter 10, 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 the states' 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 the wishes of their political party and in the interests of their state. This should enable a broad range of views to be considered before a bill can pass the Senate. It also means that any legislation that appears to support one state over the others would quickly be rejected.

In reality, however, some senators vote on bills according to the wishes of their political party rather than the interests of their state. If the government holds a majority in both the upper and lower houses, 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.

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 members of the government generally vote along party lines

Since 2007 the Commonwealth Government has not held the majority in the upper house, which has meant that there has been considerable debate about, and often substantial amendments to, legislation before it is passed. This is demonstrated in the following scenario.

Senate acts as a check on government

ACTUAL SCENARIO

The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (Cth) was introduced into the Commonwealth Parliament in 2019. The Bill would have enabled the Registered Organisations Commission (an independent regulator of unions) to refer a union to the Federal Court who would then decide whether the union should be deregistered. In his second reading speech for the Bill, the Attorney-General, Christian Porter MP, explained that the purpose of the legislation was to 'restore integrity to registered organisations and their officers to make sure that they work in their members' best interests'.

The Bill failed in the Senate after Pauline Hanson's One Nation party members and crossbencher Jacqui Lambie voted with the Australian Labor Party (ALP) and the Australian Greens to oppose the Bill. The vote was tied. The Bill therefore did not receive a majority of votes, and failed in the Senate. The Australian Council of Trade Unions (ACTU) applauded the refusal of the Senate to pass the Bill, arguing that smaller unions could be taken to the Federal Court for minor breaches of the law, therefore wasting precious resources.

This is an example of how the structure of the parliament acts as a check in law-making. When the Senate refuses to pass legislation it sends a message to the government that the contents of the bill are unacceptable and changes are required. This usually involves negotiations with Senators to address the concerns they have about the bill.



Source 2 After the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill was rejected, it was reintroduced into the House of Representatives by the Government. The Manager of Opposition Business, Tony Burke MP, attacked the Bill for what he regarded were unfair limits on employee rights.

independents individuals who stand as candidates in an election but do not belong to a political party

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 not reflect the will of the people. 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.

ACTUAL SCENARIO

The politics of WorkChoices legislation

The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) came into effect on 27 March 2006 after it was passed by both houses, both of which were controlled by the Liberal-National Government in power at the time. 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 stated 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 losing the 2007 election. Had the Coalition not controlled the Senate, the legislation would most likely have been amended or rejected, and the government may have survived the election.

Strengths and weaknesses

How effective is the Australian Constitution 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.

STRENGTHS	WEAKNESSES
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.	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 as there is no vigorous debate or checking on the law being made – the senators are simply voting in accordance with the wishes of their party.

STRENGTHS	WEAKNESSES
If the government holds a **slim majority** or there is a hung parliament, then **considerably more debate can occur in the lower house** than might otherwise occur. In 2018 the Liberal-National Government was thrown into minority after the resignation of Malcolm Turnbull as Prime Minister, following a leadership challenge. In order to pass bills, the Government had to negotiate with key independents to win support for legislation. This acted as a check on government because the members of the lower house needed to work together to develop legislation, taking into account a broad range of views. Non-government members in the lower house therefore played a key role in the operation of government and their views had to be taken into account.	If the government holds a majority in the lower house, then debate and negotiations in the lower house are **unlikely to occur**. This means there is minimal check on the activities of government in the lower house, because government members will most likely vote according to the wishes of their party rather than scrutinise the content of the legislation.
If there is a hostile Senate (one being an upper house that is not controlled by the government of the day) or there is 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 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 **guarantees periodic elections** (every three years at the Commonwealth level). If a government that has been chosen by the people fails to deliver on promises that were made during the lead-up to an election, the voters are likely to vote for other parties or independent members at the next election.	Because the lower house is usually controlled by the government, and members of parliament typically 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 government's own policies or views, are unlikely to get through parliament.
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). This operates as a check on parliament because it cannot pass legislation to alter the structure of the parliament itself. Members of parliament must respect what the voters have decided at an election in terms of which candidates they chose to represent them.	Where the government needs the support of a minor party or an independent member, whether in the lower house or the upper house, that member can **make demands on the government that may be considered excessive**. That individual has great power where their vote is crucial to the passage of the legislation. This was the case in 2019 when the Federal Government agreed to scrap Tasmania's $150 million housing debt that it owed to the Commonwealth in exchange for Senator Lambie's vote to achieve the successful passage of the Government's $158 billion tax package it promised at the 2019 election.

Source 4 Strengths and weaknesses of the bicameral structure acting as a check on parliament in law-making



Source 5 The existence of two houses of parliament allows for review of legislation by the second house. The 2017 legislation that brought about marriage equality was introduced as a private member's bill in the upper house by Liberal Senator Dean Smith. In a rare moment of bipartisanship, the Bill was supported by the ALP and the Australian Greens. The House of Representatives then acted as the house of review and the Bill was passed.

11.2 CHECK YOUR LEARNING

Define and explain

1 Briefly describe two sections of the Australian Constitution that set out the requirements in relation to the composition of the federal houses of parliament.

2 Explain how the bicameral structure of parliament acts as a check on parliament in law-making.

Synthesise and apply

3 Research the present composition of the Senate in terms of which party 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.

   Justify your answers.

Analyse and evaluate

4 Read the scenario 'Senate acts as a check on government'.
   - **a** In which House was the Bill introduced?
   - **b** Explain why there was opposition to this legislation.
   - **c** Discuss whether this scenario serves as an example of the Senate acting as a check on parliament in law-making.

5 Read the scenario 'The politics of WorkChoices legislation'.
   - **a** Outline the purpose of the WorkChoices law.
   - **b** Explain why there was opposition to the law in the community.
   - **c** Discuss the extent to which this scenario highlights weaknesses in the bicameral system acting as a check on parliament in law-making.

6 Do you think that the existence of minority parties and independent senators increases or decreases checks and balances on law-making in the Commonwealth Parliament? Discuss.

7 Conduct some research to determine how the Queensland Parliament passes laws. Following that research, discuss as a class whether a unicameral parliament can effectively act as a check in law-making.

Check your obook assess for these additional resources and more:

- **Student book questions** 11.2 Check your learning
- **Weblink** Senate – Parliament of Australia
- **Weblink** Queensland Parliament
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

11.3 THE SEPARATION OF EXECUTIVE, LEGISLATIVE AND JUDICIAL POWERS

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

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

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 the separation of powers 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**.

The three powers are:

- executive power
- legislative power
- judicial power.

The following information describes the separation of powers at a federal level. This is because the Australian Constitution specifically requires the powers at a federal level to be separated. However, the separation of powers also exists at a state level.

Executive power

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

Executive power is the power to **administer the laws and manage the business of government**. At a Commonwealth level, 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 power of the Commonwealth is vested in the Queen, and exercisable by the Governor-General.

In practice, the executive power is carried out by the prime minister (or premier at a state level), senior ministers and government departments (explained further below).

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) – section 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
the power to make laws, which resides with the parliament

Cabinet
the policy-making body made up of the prime minister (or the premier at a state level) and a range of senior government ministers who are in charge of a range of government departments. Cabinet decides which bills or legislation should be presented to parliament

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. At a state level, the legislative power is vested in each of the state parliaments.

In Australia, the legislative power and the executive power are **combined**. That is, 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 Queen's representative to become law. There are also many Acts of Parliament that give the Executive Council the right to make regulations, but parliament retains the right to disallow or reject these regulations.

Judicial power

judicial power
the power given to courts and tribunals to enforce the law and settle disputes

Judicial power is the power **given to courts and tribunals to enforce the law and settle disputes**. At a federal level, 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 vested 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) – section 71

Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, 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.

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

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 role 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).

Although the state and federal governments appoint judges, the courts are independent of political influence. This safeguards citizens against 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. This includes judges appointed to the High Court.

Did you know?

In the United States federal judges are appointed, then confirmed in a Senate hearing. State judges are elected. This system has been criticised in Australia because it makes the role of the judge political, bringing them under pressure to please voters.



Source 1 Judicial power is the power given to courts to enforce the law and settle disputes.

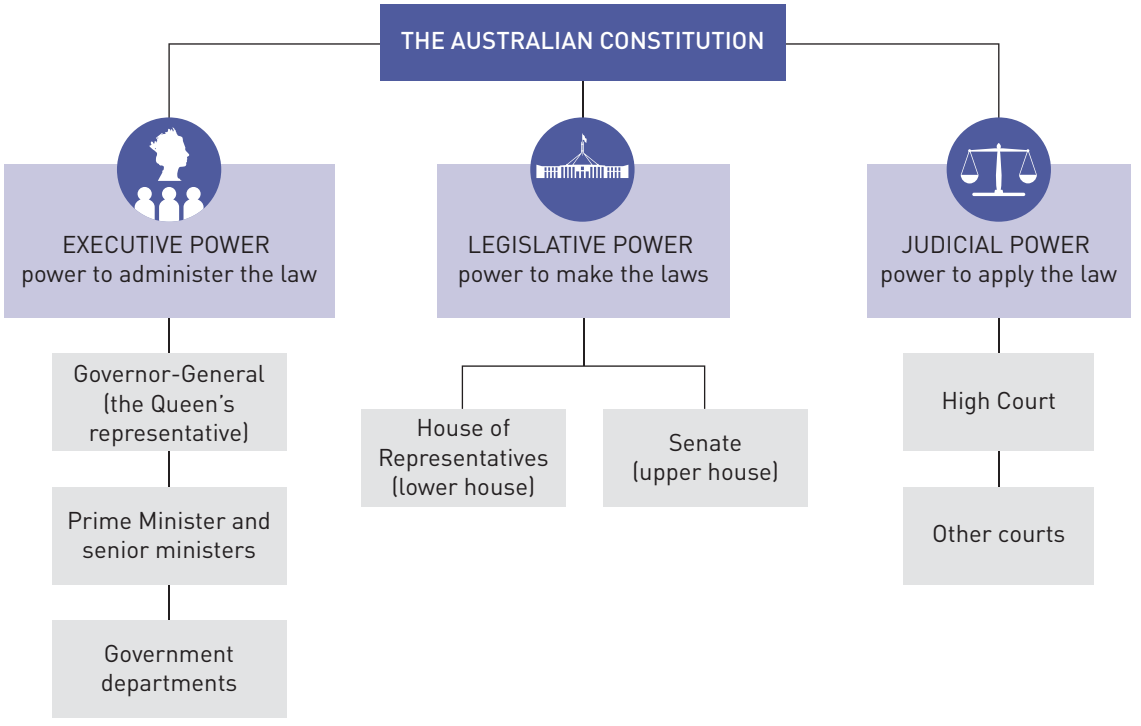
Reasons for the separation of powers

The 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 parliament. No one body can make law, administer law and also rule on its legality.

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 breaches the Constitution or basic human rights can take the matter to court. Such challenges would be futile if courts were not independent of the government and parliament.

judiciary
a legal term used to describe the courts and tribunals (which have the power to apply and interpret the law)

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.



COMBINED



The Governor-General and the Prime Minister



Parliament in action

SEPARATE



Judges in action

Source 2 The Australian Constitution requires the legislative, executive and judicial powers at a federal level 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 scenario below.

ACTUAL SCENARIO

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.

The Victorian Court of Appeal heard the appeals on 9 June 2017. 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.

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 Registrar 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 the DPP for contempt of court.

Source 3 Health Minister Greg Hunt was one of three federal ministers forced to apologise about the comments he made in the newspaper article.

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. Fiona McLeod SC, then 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 several strengths and weaknesses in the separation of powers acting as a check on parliament in law-making. They are set out in Source 4.

STRENGTHS	WEAKNESSES
The separation of powers allows for the **executive to be scrutinised by the legislature**. This provides checks and balances because the legislature as the law-making body can refuse to pass government legislation that is considered inappropriate.	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, because in practice the power to administer the law is carried out by the Cabinet.
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. It allows judges to independently interpret and apply the law which they themselves have not made.	Judges are **appointed by the executive**. This may be perceived as the executive 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).
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.	Where the government controls the Senate, there is **far less scrutiny** applied to proposed laws and therefore the exercise of legislative power, particularly given the legislative power and the executive power are in reality combined.
At times the upper house **is controlled by the opposition**, or is composed of minority parties and independent senators. This provides for greater scrutiny of the exercise of legislative power, and any amendments can enhance the law in question.	If the opposition controls the Senate, it can **obstruct bills** for political gain rather than providing authentic scrutiny.
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 later in this chapter).	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).

Source 4 The strengths and weaknesses of the separation of powers acting as a check on parliament in law-making

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 can hear complaints from the public or members of the legal profession regarding delays in judgments and courtroom demeanour. The most serious complaints may be referred to a special panel with coercive powers.



Source 5 The High Court is critical in ensuring the separation of powers.

11.3 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 two reasons for the separation of powers in the Australian parliamentary system.
3. Explain how the legislative and the executive powers overlap.

Synthesise and apply

4. Read the scenario *DPP (Cth) v Besim* and *DPP (Cth) v M H K (a Pseudonym)*.
   - **a** Outline the key facts of these cases.
   - **b** Why did the Court of Appeal ask the relevant ministers to appear in 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

5. 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.
6. In your view, should the executive appoint judges? Discuss as a class.

Check your obook assess for these additional resources and more:

- **Student book questions** 11.3 Check your learning
- **Worksheet** The separation of powers
- **Weblink** Separation of powers – PEO
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

11.4 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 by 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)

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. Express rights operate as an explicit check on the power of parliaments. Any law made by parliament that infringes an express right can be declared invalid by the High Court. 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.

Religion

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 or the extent of the protection.

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 established in *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth*
- requires a religious test as a requirement for holding any Commonwealth office.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) – section 116

Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

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 held 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 following scenario, the Commonwealth Government was able to provide funding to religious schools.

ACTUAL SCENARIO

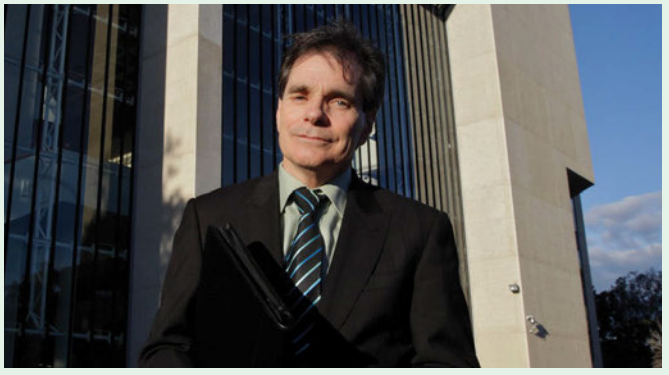
Challenging chaplaincy funding

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.



Source 1 Ronald Williams, who challenged the Federal Government's power to spend taxpayers' money on the national school chaplaincy program

Immediately following the High Court's decision, the parliament passed legislation (the *Financial Framework Legislation Amendment 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 Act and the 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 made pursuant to a Commonwealth law-making power.

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) – section 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.

This right mainly refers to trade and commerce, but it can also refer to movement of people between states.

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.

Did you know?

The High Court has accepted there can be limits placed on freedom of movement between states if they are imposed for a legitimate end, such as protecting public health. This occurred during the COVID-19 pandemic in 2020 when states such as WA closed their borders to outsiders. The legal basis for this came from Justice Brennan in *Nationwide News Pty Ltd v Wills* [1992] 177 CLR 1, who found that 'a law which expressly prohibits or impedes movement of the ... source of injury across the border into the State ... (can) be valid'.

ACTUAL SCENARIO

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.

Did you know?

The Australian movie *The Castle* focused on whether the acquisition of the Kerrigan's treasured family home was on 'just terms'.

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). 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.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) – section 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 the legal case of *JT International SA v Commonwealth* and involved a consideration of section 51(xxxi).

ACTUAL SCENARIO

Plain packaging for tobacco products

JT International SA v Commonwealth (2012) 250 CLR 1

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 (such as trademarks and copyright images) and this was not on just terms.



Source 3 Plain packaging of tobacco boxes was the subject of a High Court case relating to the acquisition of property 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 to 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) of the Australian Constitution 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) – section 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.

Interpreting section 80 in the twenty-first century

ACTUAL SCENARIO

Alqudsi v The Queen (2016) 258 CLR 203

In 2016 the High Court considered section 80 in relation to a trial for terrorism recruitment offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). This legislation makes it an offence for a person to give money, goods or services for the purpose of supporting or promoting an attack in a foreign country.

An application was made by one of the accused to be tried by a judge alone in the absence of a jury pursuant to the *Criminal Procedure Act 1986* (NSW). The prosecution also supported the use of trial by judge alone.

Years earlier, in the 1986 case of *Brown v The Queen* (1986) 160 CLR 171, a similar question arose as to whether an accused person charged with a Commonwealth indictable offence could elect a trial by judge alone. The prosecution did not support this request. In that case, the High Court's decision was clear: a jury trial could not be avoided in an indictable offence trial under the Commonwealth law.

In legal argument in the *Alqudsi* case, the Commonwealth Attorney-General stated that the express right under section 80 should be interpreted in light of its late-nineteenth century historical context and other developments since Federation. All state Attorneys-General, except South Australia's, supported the applicant's request for trial by judge alone. In a 6–1 decision, however, the High Court rejected the applicant's arguments. They stressed the importance of the role of trial by jury in the structure of government and found that contemporary trial judges have the capacity to address any concerns posed by pre-trial publicity in a case such as those involving terror-related offences. In his judgment, Justice Gageler noted that there was no flexibility in the application of section 80 once the Commonwealth Parliament decides that an offence is against a law of the Commonwealth:

> It is for the Commonwealth Parliament to determine whether an offence against a law of the Commonwealth is to be tried on indictment. Once that choice is made, s 80 is engaged and imposes limitations on the exercise of the legislative and judicial power of the Commonwealth. Those limitations cannot be avoided by granting to the States the flexibility of enacting provisions which permit trial by judge alone in certain circumstances.

The dissenting (minority) judge in this case was Chief Justice French AC. In delivering the dissenting judgment, His Honour stated:

> In my opinion the decision in *Brown* should be reopened. For the reasons which I have given, that does not involve any suggestion that the formal ruling in Brown was wrong. However, the principle which underpinned that ruling was too broad, imposing an unwarranted rigidity upon the construction of s 80. On that basis the decision should not be followed.

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.

Study tip

Try to 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) – section 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.

An example of the High Court interpreting section 117 is provided in the scenario below.

Challenge to Queensland barrister rules successful

ACTUAL SCENARIO

Street v Queensland Bar Association (1989) 168 CLR 461

In this case, Alexander Street challenged the Bar Admission Rules in Queensland, which at that time required that applicants for admission to the bar (to become a barrister) must have resided in Queensland for at least 12 months and ceased practising law elsewhere. Mr Street was a resident of New South Wales and was also admitted to practise as a barrister in Victoria, South Australia and the Australian Capital Territory. Mr Street had been refused admission as a barrister of the Supreme Court of Queensland based on his failure to comply with the Bar rules. Mr Street intended to remain a resident of New South Wales and he did not intend to cease practising law in other places of Australia where he had been admitted.

In argument before the High Court, Mr Street claimed he was unable to comply with the rules in Queensland without foregoing his place of residence in Sydney and his practice as a barrister in New South Wales. On this basis, he contended that the Bar rules in Queensland were in contravention of both sections 92 and 117 of the Australian Constitution.

The High Court agreed with Mr Street's arguments and declared that the Queensland Bar rules requiring an intention to be a resident of Queensland were invalid. After Mr Street had commenced his proceedings, the rules were amended to provide that an applicant must declare that he or she intended to practise principally in Queensland after admission. This change would not have prevented Mr Street from living in New South Wales and appearing as a barrister in other states.



Source 5 The Queensland Bar Association was established in 1903 as the professional body representing the interests of barristers practising in Queensland.

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 in Source 6 below.

STRENGTHS	WEAKNESSES
Express rights impose **limits** on parliament when making law in certain areas. For example, section 116 prohibits the Commonwealth Parliament from making a law which restricts the free exercise of any religion. This protects the public against the parliament being able to make any laws it wants to.	Express rights **can only be changed by a referendum**, which is a complex process. As a result, there is limited ability for rights to be added to the Constitution to provide additional checks on parliament in law-making. Not one right has been added to the Constitution since Federation.
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.	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.

STRENGTHS	WEAKNESSES
Express rights **cannot be removed by the Commonwealth Parliament**. The rights can only be changed or removed through a referendum process. Referendums are difficult to pass (see Topic 11.6), so this check on parliament in law-making ensures that express rights remain constant over time, instilling confidence and certainty.	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. For example, a law made by a state that abolished juries in indictable offence cases under state law would be valid and not in breach of the Constitution.
The High Court **can act swiftly** in declaring a law *ultra vires* if a person brings a court action, ensuring there is an ability to challenge a Commonwealth law that has been made beyond the power of the parliament.	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. This protection therefore does not significantly restrict parliaments in their law-making.
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.	**Our express rights are relatively few 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.

Source 6 Strengths and weaknesses of express rights in the Australian Constitution acting as a check on parliament in law-making

11.4 CHECK YOUR LEARNING

Define and explain

1 Define the term 'express rights'.

2 Outline three express rights that exist under the Australian Constitution. For each, identify a particular law that the Commonwealth Parliament could not pass.

Synthesise and apply

3 For each of the following cases, state:
- how the case highlights the role of express rights in providing a check on the exercise of authority by the legislature
- the outcome of the case, if available
- the significance of the case.

a *Alqudsi v The Queen*

b *Street v Queensland Bar Association*

c *Betfair Pty Limited v Western Australia*

4 Read the scenario *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 Explain why no property was deemed to be 'acquired' in this case.

d 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 few, as well as being limited in scope. They do not act as an effective check on parliament in ensuring our freedoms are protected.' Discuss.

6 With reference to three roles played by the High Court in interpreting the Australian Constitution, discuss whether you agree with the majority judges or the dissenting judge in the case of *Alqudsi v The Queen*.

Check your obook assess for these additional resources and more:

Student book questions
11.4 Check your learning

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

11.5 THE ROLE OF THE HIGH COURT IN INTERPRETING THE AUSTRALIAN CONSTITUTION

As seen in the scenarios 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.

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

The High Court cannot change the words of the Constitution but it can change the way those words are interpreted. Whenever the High Court is called on to interpret any section or word, the interpretation adds meaning to the Constitution.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) – section 76

Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

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

Role of the High Court

The role of the High Court in interpreting the Australian Constitution includes the following.

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 main 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.

standing
the requirement that a 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

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 decision about whether a law is constitutional. This can only be done by a party with **standing** (a concept you will study in Chapter 14); 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.

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

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 hold 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 gives meaning to the words in the Constitution by deciding what it means to the case before it. 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 scenario 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.

ACTUAL SCENARIO

Implied freedom of political communication

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. One of those cases was *Australian Capital Television Pty Ltd v Commonwealth*.



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 *Australian Capital Television v Commonwealth* 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 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.

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.

representative government
a political system in which the people elect members of parliament to represent them in government

The following scenario is an example of the High Court determining the extent to which the Commonwealth is able to directly influence the activities of the states in areas of residual powers through direct grants of money.

The right to give tied grants

ACTUAL SCENARIO

Victoria v Commonwealth (1926) 38 CLR 399

The right to make tied grants (the provision of funding by the Commonwealth to the states with strict conditions as to how that funding is used) was examined in this case. The ability to make **tied grants** is contained in section 96 of the Constitution, which allows the Commonwealth to 'grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

The legislation in this case was the *Federal Aid (Roads) Act 1926* (Cth). The tied grant specifically related to the construction and maintenance of roads. The Victorian Government wanted an unconditional grant on the basis that 'roads' is a residual power and the Commonwealth therefore had no right to influence road construction. The High Court ruled that the Act was valid, which has since allowed the Commonwealth to affect other areas of residual power when granting money to the states.

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



Source 2 In response to the global financial crisis (GFC) (2007 to 2010), the Commonwealth granted $16.2 billion to the states for new building programs in schools. The money could only be spent on specific areas, as stipulated by the Commonwealth, such as libraries and science rooms. Theoretically under the Constitution, such decisions on school buildings are residual powers belonging solely to the states.

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	WEAKNESSES
Judges are **independent of the executive** and the legislature and therefore decisions made on cases are based on legal principles rather than political pressure. It allows a rigorous consideration of the laws that are relevant to the case without the judges having a vested interest in the outcome.	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.
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.	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 judges of the High Court are experienced in making decisions, and 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 cases and can ensure, where possible, that Australian law is developed in light of other jurisdictions.	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. In addition, the requirement for **standing** and the **time** involved in bringing the case can deter valid claims being brought.
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.	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 difficulty in bringing cases before the High Court can be seen as a strength: it **avoids challenges to laws from being too easily made**, which could disrupt the necessity of parliaments making law to ensure social cohesion.	The High Court's role is **limited to interpreting** the Constitution rather than changing the words of the Constitution.

Source 3 Strengths and weaknesses of the role of the High Court acting as a check on parliament in law-making



11.5 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 Read the scenario *Victoria v Commonwealth*.
   - **a** In your own words, explain the meaning of section 96 of the Australian Constitution.
   - **b** Explain the High Court's decision in this case.
   - **c** Referring to this case, explain how the Commonwealth can influence the states' exercise of residual powers.

Analyse and evaluate

5 Read the scenario *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 and social media such as Facebook and Twitter) 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** 11.5 Check your learning
- **Going further** Other High Court cases
- **Weblink** High Court
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz



11.6 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 shifting 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.

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

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, with the key component of the process involving the need to achieve a double majority when the votes are counted following the referendum. Section 128 operates as a check on the power of parliament to pass laws that change the Constitution.



Source 1 The 1999 referendum, which sought to make Australia a republic, overwhelmingly failed. The proposals were rejected in all six states, as well as a failed vote nationally.

The procedure for changing the Australian Constitution, as set out in section 128, has three stages: the parliament, the people and the Governor-General.

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

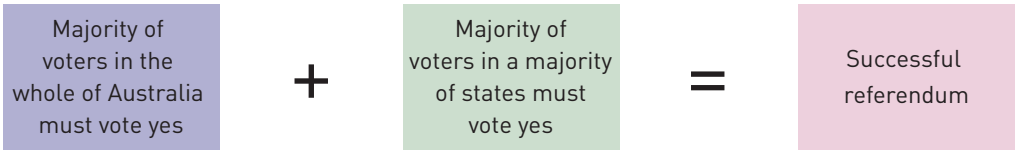
preamble
the introductory part of a statute that outlines its purpose and aims

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:

- **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. That is, each of the states has an equal voice regardless of their size or population.

Study tip

Students sometimes write the number of states incorrectly, and get answers wrong in relation to the double majority requirement. Make sure you know that there are six states in Australia!



Source 2 The double majority requirement is key to ensuring a change in the wording of the Australian Constitution.

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.

The referendum process has proven difficult to achieve – only eight out of 44 referendums have been successful so far in the history of Australia.

The double majority requirement 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. This strict requirement was demonstrated 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.

In the scenario below, section 128 of the Constitution acted as a check on the power of the parliament as a law-maker.

Banning communism

ACTUAL SCENARIO

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. The High Court held, however, 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



Source 3 Advertising encouraging 'yes' votes in the 1951 referendum.

Communist Party. When the issue was debated, the referendum question was opposed by the Communist Party and the Australian 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.

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.

Strengths and weaknesses

The double majority requirement acting as a check on parliament in law-making has several strengths and weaknesses. These are outlined in Source 4 below.

STRENGTHS	WEAKNESSES
Section 128 **allows the public** to refuse to support a proposed change to the wording of the Constitution if the proposal is deemed inappropriate. In this way, the Commonwealth is not able to increase its power in an arbitrary and unrestrained manner.	The public may not understand the **complex** details of the proposal, or may vote 'no' through fear of the consequences if the referendum were to succeed. Also, there exists a mistrust of politicians in society. This reluctance to allow for change might see a lack of needed reform in the Constitution.
The double majority requirement is **strict**, and has proven difficult to achieve. The requirement of a majority of voters in a majority of states gives the people the right to determine whether a change to the wording of the Constitution is to be made.	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
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 alone determine the success of the referendum.	It is a **time-consuming 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.
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 the power to all eligible voters in Australia.	If the referendum proposes an increase in the Commonwealth Parliament's power, the only action the states can take to stop the shift 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 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. There can be confidence that any outcome has been attained through an open process that reflects the will of the people in a democracy.	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.

Source 4 Strengths and weaknesses of the double majority requirement in acting as a check on parliament in law-making



Source 5 In Australia a government can hold a plebiscite, which is a non-binding national vote that does not affect the Constitution. In 1916, a plebiscite regarding compulsory military service (conscription) was defeated by the people.

11.6 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. There have been ongoing discussions about recognising Aboriginal and Torres Strait Islander peoples in the Constitution. Comment on the likely outcome of the people's vote on such a referendum.

Analyse and evaluate

7. To what extent could it be argued that the referendum process gives too much power to the smaller states? Give reasons. In your answer, refer to the 1977 referendum on simultaneous elections.
8. 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.
9. With reference to the 1951 referendum, evaluate the extent to which the double majority requirement under section 128 acts as a check on parliament in law-making.

Check your obook assess for these additional resources and more:

Student book questions
11.6 Check your learning

Going further
Other possible referendums

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz



THREE TOP TIPS FROM CHAPTER 11

1 You can be assessed on any one of the five means that act as a check on parliament in law-making. Two things are important for each: think about the role that the **people** have to play in each, and be able to draw out the strengths and weaknesses of each of those checks.

2 Express rights need to be studied and looked at in relation to how effective they are in acting as a check on parliament in law-making. That is, the focus is on the ability of these rights to act as a check on the parliament, rather than how effective they are in protecting individual rights.

3 There are themes threading through each of the five means so do not look at them in isolation. For example, the role of the High Court in deciding cases can be discussed in relation to the separation of powers, express rights, and its role in acting as a check on parliament.

REVISION QUESTION

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Explain** how the Senate acts as a check on parliament in law-making.

(4 marks)

Difficulty: medium

2 The following scenario contains errors.

Under the Australian Constitution, the separation of powers involves the law-making powers of the state and Commonwealth parliaments. The Senate's role is to reflect the interests of the states. To achieve this, state governments are able to directly appoint members of parliament to the Senate after each election. The High Court plays a key role in providing checks on the exercise of power. As part of their role, judges can issue advisory opinions to the Commonwealth and state governments regarding the contents of bills, even when a case has not arisen for the court to consider.

Identify and correct three errors in the above scenario.

(6 marks)

Difficulty: high

3 **Evaluate** the ability of express rights to prevent the Commonwealth Parliament from legislating to restrict those rights. In your answer, refer to one case you have studied.

(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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

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 Would the Governor-General have any role to play in passing this law? Justify your answer.
(2 marks)

2 Explain how the structure of parliament acts as a check on Senator Lambie in law-making.
(4 marks)

3 Describe one role that the Australian people could have in preventing the Commonwealth Parliament from passing this law.
(4 marks)

4 Discuss the extent to which the Australian Parliament is prohibited by section 116 of the Australian Constitution from passing this Bill.
(5 marks)

5 Another senator has proposed a change to the Bill such that any person who wears a full face covering in public has committed a Commonwealth indictable offence and must be tried by a judge alone. Discuss the extent to which the Australian Constitution would prevent this change to the Bill.
(10 marks)

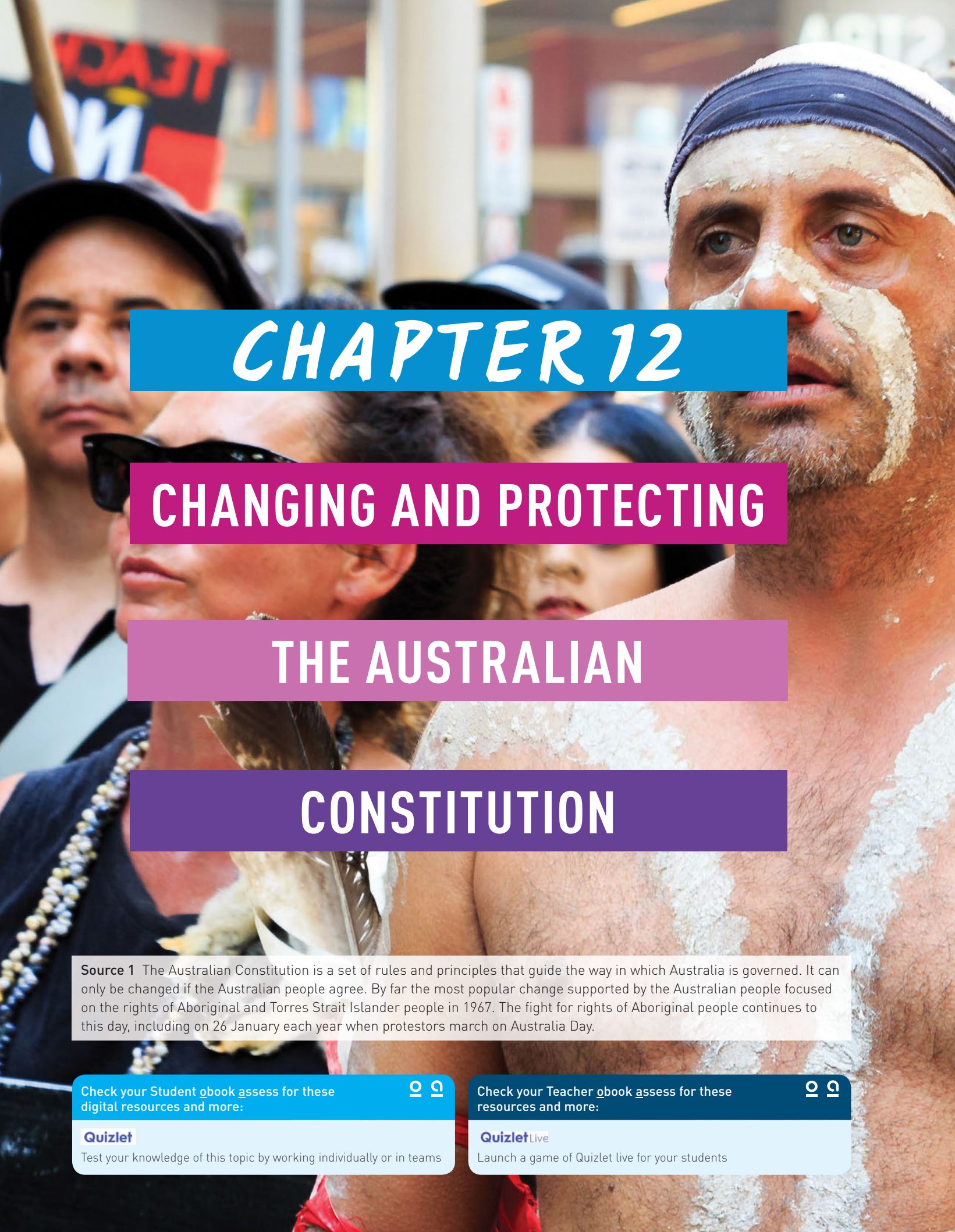
Total: 25 marks

Check your obook assess for these additional resources and more:

- **Student book questions** — Chapter 11 Review
- **Revision notes** — Chapter 11
- **assess quiz** — Chapter 11 Test your skills with an auto-correcting multiple-choice quiz
- **Video tutorial** — How to tackle scenario-based questions
- **Quizlet** — Revise key definitions from this topic

CHAPTER 12

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. It can only be changed if the Australian people agree. By far the most popular change supported by the Australian people focused on the rights of Aboriginal and Torres Strait Islander people in 1967. The fight for rights of Aboriginal people continues to this day, including on 26 January each year when protestors march on Australia Day.

Check your Student obook assess for these digital resources and more:

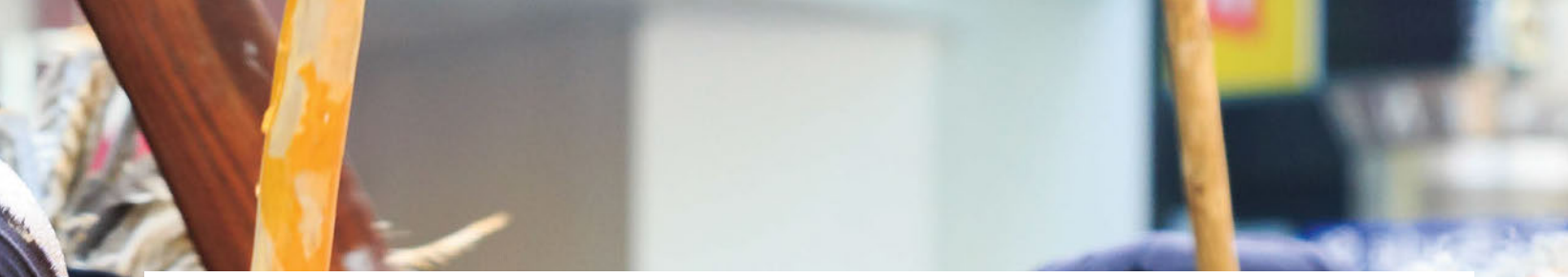
Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live

Launch a game of Quizlet live for your students



OUTCOME

By the end of **Unit 4 – Area of Study 1** (i.e. Chapters 10, 11 and 12), 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 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.

12.1 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
a set of rules and principles that guide the way in which Australia is governed. Its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

representative government
a political system in which the people elect members of parliament to represent them in government

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.

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 views and values of 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 must be 'directly chosen by the people' was said to be a 'constitutional bedrock'.

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.



Source 1 The High Court of Australia has had a significant influence on our nation's system of law-making as a result of cases that have arisen since the Court first sat in 1903.

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) – section 7

The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate …

… 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.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) – section 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 did not 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 serving in 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 11 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.

Did you know?

A political advertising blackout starts at midnight on the Wednesday before federal elections. This only affects radio and TV, but social media can still be used extensively for online advertising. During the 2019 election, there were calls for the radio and TV blackout to be lifted.

Cases confirming the freedom of political communication

Theophanous v Herald and Weekly Times Limited (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation*, 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 went further, saying there was a permanent freedom of political communication. That is, the freedom did not just apply immediately before an election.

Developing the implied freedom of political communication

ACTUAL SCENARIO

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 effect on defamation laws. The *Lange* case confirmed

and extended the freedom of political communication, which exists 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.

1 Does the law restrict the freedom of political communication about government or political matters?



Source 2 David Lange, former Prime Minister of New Zealand, sued the ABC in a case that would confirm the capacity of parliament to place reasonable limits on political communication.

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 political 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.

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.

EXTRACT

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

> 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.

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. This test has later been developed into a three-stage test in the case of *Clubb v Edwards* (described on the next page). The test, now established by the High Court to determine whether a law infringes on the implied freedom, is as follows:

judgment
a statement by the judge at the end of a case that outlines the decision and the legal reasoning behind the decision

1. Does the law effectively burden the implied freedom in its terms, operation or effect?
2. If 'yes' to question 1, is the purpose of the law legitimate in that it is compatible with the maintenance of representative and responsible government?
3. If 'yes' to questions 1 and 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner consistent with the maintenance of representative and responsible government?

The parliament has since relied on the legal principles in these cases to pass laws which prohibit the implied freedom of political communication. This includes laws which place restrictions on the movement of individuals who are involved in certain types of political protest, and laws which 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 recognised by the courts, the freedom remains limited in scope. 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. In addition, the freedom is not a general right to free speech, but a right to free communication on matters relating to political issues.

The application of the principles in the *Lange* case

The test established in the *Lange* case was affirmed and/or developed in later cases. Two of the cases are described in Source 3 below. In each case, the High Court considered a challenge to the validity of a law intended to place limits on behaviour that may be considered political in nature. As a result of drawing a 'yes' response to each of the questions developed by the High Court following the *Lange* judgment, the Court found the legislation in each case placed reasonable limitations on the freedom of political communication, and was therefore valid.

CASE	LEGISLATION THAT WAS CHALLENGED	KEY FACTS	SIGNIFICANCE
Monis v The Queen (2013) 249 CLR 92	Section 471.12 of the *Commonwealth Criminal Code*, which prohibited the use of a postal service in a way that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'.	Monis sent letters to the relatives of Australian soldiers killed while serving in Afghanistan. The letters criticised the deceased, claiming that they murdered innocent civilians. The letters also drew comparisons of the soldiers' actions to those of Adolf Hitler.	The Court focused on the law's purpose, which is to protect individuals from 'intrusion into their personal domain of unsolicited material which is seriously offensive'. The judges found that the Commonwealth Criminal Code was a reasonable protection of privacy and was therefore valid.

CASE	LEGISLATION THAT WAS CHALLENGED	KEY FACTS	SIGNIFICANCE
Clubb v Edwards; Preston v Avery (2019) 366 ALR 1	The *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic), which provides a buffer zone of 150 metres around abortion clinics to prevent certain conduct. That conduct includes 'harassing and intimidating behaviour' where the communication is 'reasonably likely to cause distress or anxiety'.	In 2016 Kathleen Clubb was convicted of breaching the Act and fined $5000. She was involved in a protest rally against abortion that had breached the buffer zone. A Queensland man, John Preston, was convicted of three breaches of a similar law in Tasmania. Clubb and Preston argued that the laws were an unreasonable interference with the implied freedom of political communication.	The Court held the law was 'reasonable' and consistent with representative government and that the protests can have a negative effect on people entering and leaving clinics. This could invade the privacy of people in a vulnerable situation and affect their safety and wellbeing. In a finding similar to the *Monis* case, the Court emphasised that political communication cannot excessively breach privacy.

Source 3 The application of the principles in the *Lange* case



Source 4 In 2019 Kathleen Clubb and Graham Preston unsuccessfully challenged the validity of Victorian and Tasmanian laws relating to exclusion zones for protestors around abortion clinics.

The validity of laws limiting the capacity to vote at elections

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 the ability to vote at elections is likely to be declared invalid.

The High Court considered this issue in the case of *Roach v Electoral Commissioner*.

Court finds it unconstitutional to deny all prisoners the right to vote

ACTUAL SCENARIO

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.

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 (such as 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.



Source 5 While in jail Vickie Lee Roach completed a master's degree in professional writing and commenced studies for a PhD.

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 (legal documents that establish the start of the election process) for an election. However, the 2006 Act stated that new enrolments and re-enrolments had to be received by the AEC by 8 pm on the day the election writs were issued, and changes to enrolment details could only be made up to three days after the issue of the writs. The High Court held that the sections were invalid as they contravened sections 7 and 24 of the Constitution. Justice Crennan found that the Commonwealth cannot unnecessarily deny access to voting in Australia, given the fact that the Constitution clearly allows the people to choose their members of parliament.

The High Court considered the principles established in both the *Roach* and the *Rowe* cases in *Murphy v Electoral Commissioner*. In this case, 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.

ACTUAL SCENARIO

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 (led by Anthony Murphy, pictured) challenged the validity of provisions in the *Commonwealth Electoral Act 1918* (Cth), arguing 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 relied on the *Rowe* 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 ability 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 held 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.

12.1 CHECK YOUR LEARNING

Define and explain

1 Describe the purpose of sections 7 and 24 of the Australian Constitution. In particular, explain in your own words what the phrase 'directly chosen by the people' means.

Synthesise and apply

2 Outline the three-stage test developed by the High Court used to determine whether a law infringes the implied freedom of political communication. In your answer, provide two circumstances where it may be considered reasonable for the law to restrict freedom of political communication.

3 Read the scenario *Roach v Electoral Commissioner*.

- **a** Outline the key facts of the case.
- **b** Explain the significance of the decision reached by the High Court in this case. In your answer, refer to sections 7 and 24 of the Australian Constitution.
- **c** Explain how the decision in the *Roach* case has influenced the outcome in at least one other High Court case.

Analyse and evaluate

4 The case of *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) involved a by-law made by the Adelaide City Council which prohibited preaching, canvassing or distributing materials on a road without the permission of the Council. A group called Street Church, led by two of its members, Caleb and Samuel Corneloup, challenged the validity of the by-law on the grounds that they were an 'expositor of the Gospel' and it was unreasonable to require the brothers to seek the permission of the Council for the act of preaching. They were each convicted and fined.

In the case, the Corneloup brothers argued that the by-law was a breach of the implied freedom of political communication. A majority of the High Court (Chief Justice French, Justices Hayne, Crennan, Kiefel and Bell; Justice Heydon dissenting) held that the by-law was valid.

Undertake research about the High Court's decision in this case.

- **a** Outline the main facts of the case.
- **b** Explain the legal issues that arose in the claims by Caleb and Samuel Corneloup.
- **c** Discuss the significance of the *Lange* judgment in light of this case. In your response, comment on whether you agree with the High Court's decision.

Check your obook assess for these additional resources and more:

- **Student book questions** 12.1 Check your learning
- **Video tutorial** Introduction to Chapter 12
- **Video tutorial** High Court cases
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

12.2 PROTECTING THE AUSTRALIAN CONSTITUTION – THE 1999 REFERENDUM

referendum
the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australian 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. at least four states) to vote in favour of a proposal. A double majority is required for a change to be made to the wording of the Australian Constitution at a referendum

coalition
an alliance of two or more political parties that join to form government

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 11, 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.

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 11, 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.

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 proposals, 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'), but also enables them to protect the Constitution (by voting 'no'). In this topic, you will learn about one referendum the people rejected (protecting the Constitution) and, in Topic 12.3, one that was supported, thereby changing the Constitution.



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.

The 1999 referendum on the republic

The most recent referendum 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.

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.

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.

preamble
the introductory part of a statute that outlines its purpose and aims

Two bills were 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), was essentially aimed at making Australia a republic rather than part of the English monarchy. It 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:

Study tip

For this topic, 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 wording of the Constitution). You can choose which of the two (reject or support) to study.

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.

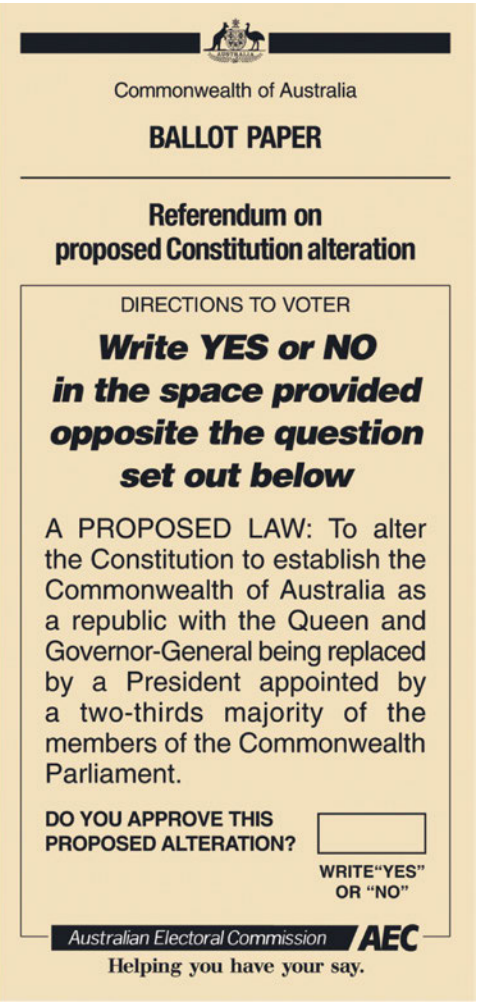
Before the referendum, the Australian Electoral Commission distributed a document to all households where a person who was eligible to vote lived. The document contained an explanation of the process for changing the Constitution, the existing parliamentary system and the proposed republican model.

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.

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.


Commonwealth of Australia

BALLOT PAPER

Referendum on proposed Constitution alteration

DIRECTIONS TO VOTER

Write YES or NO in the space provided opposite the question set out below

A PROPOSED LAW: To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.

DO YOU APPROVE THIS PROPOSED ALTERATION?

WRITE "YES" OR "NO"

Australian Electoral Commission AEC

Helping you have your say.

Source 2 A ballot paper from the 1999 referendum to see whether the people wanted Australia to become a republic.

The reasons for failure of the referendum

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.

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



- 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. 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.

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>

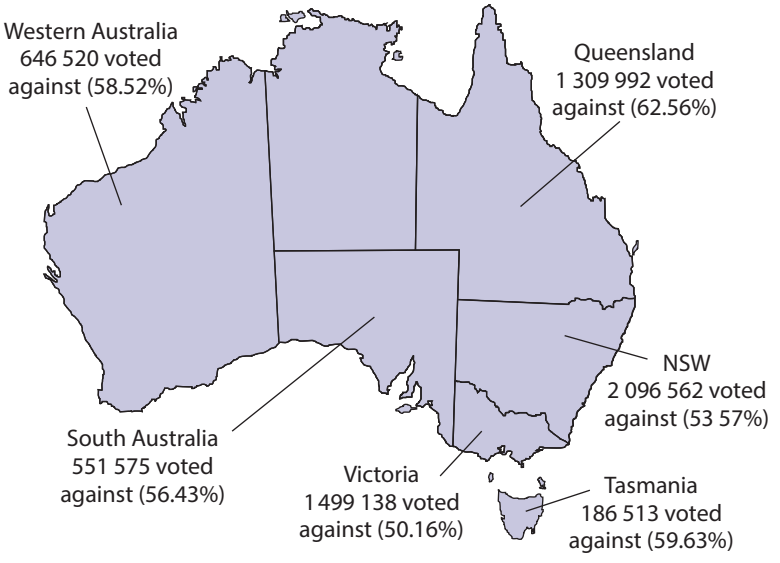
Did you know?

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.

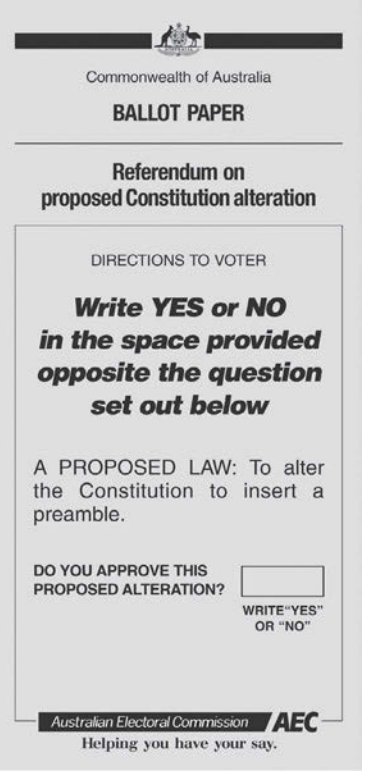
The ability of the people to protect the Constitution

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 of our political, legal and democratic systems.



Source 3 While all Australian states voted 'no' at the 1999 referendum, it is interesting to note that some states, such as Queensland and Tasmania, were much more conservative than Victoria.


Commonwealth of Australia

BALLOT PAPER

Referendum on proposed Constitution alteration

DIRECTIONS TO VOTER

Write YES or NO in the space provided opposite the question set out below

A PROPOSED LAW: To alter the Constitution to insert a preamble.

DO YOU APPROVE THIS PROPOSED ALTERATION?

WRITE "YES" OR "NO"

Australian Electoral Commission AEC

Helping you have your say.

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, rather than on the merits of the referendum. That is, were people reluctant to change, or did they genuinely, on an informed basis, decide that the change was not appropriate or beneficial for Australians?

Source 4 Ballot paper from the 1999 referendum to see whether the people wanted to change the wording of the Constitution to include a preamble.

12.2 CHECK YOUR LEARNING

Define and explain

1 Outline the requirements of the double majority set out in section 128 of the Australian Constitution.

2 Provide two reasons why section 128 was inserted into the Constitution prior to Federation.

Synthesise and apply

3 '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 put to voters in the 1999 republic referendum.

b Explain two reasons why the 1999 referendum failed.

c To what extent does the outcome of the 1999 referendum demonstrate the ability of the Australian public to protect the Constitution? Give reasons for your answer.

Analyse and evaluate

4 'It a good thing that the people have the power to protect the Constitution by voting no in a referendum and denying the Commonwealth's wishes. This is one of the most important checks available to the people. Without section 128, there would be unlimited power granted to the Commonwealth.' Discuss.

Check your obook assess for these additional resources and more:

Student book questions
12.2 Check your learning

Video tutorial
Things to know about referendums

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

12.3 CHANGING THE AUSTRALIAN CONSTITUTION – THE 1967 REFERENDUM

The Australian people have voted eight times in favour of changing the Australian Constitution. By far the most popular change supported by the Australian people focused on the rights of Indigenous Australians in 1967.

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. The Australian Constitution had stated as follows:

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) – sections 51 and 127

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.

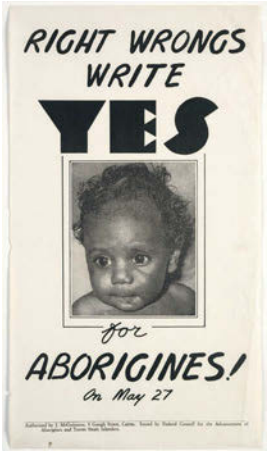
Proposals put to the people

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 peoples should be included in the national census and whether the Commonwealth Parliament should be allowed to create laws 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, whereas previously it had been a residual power.

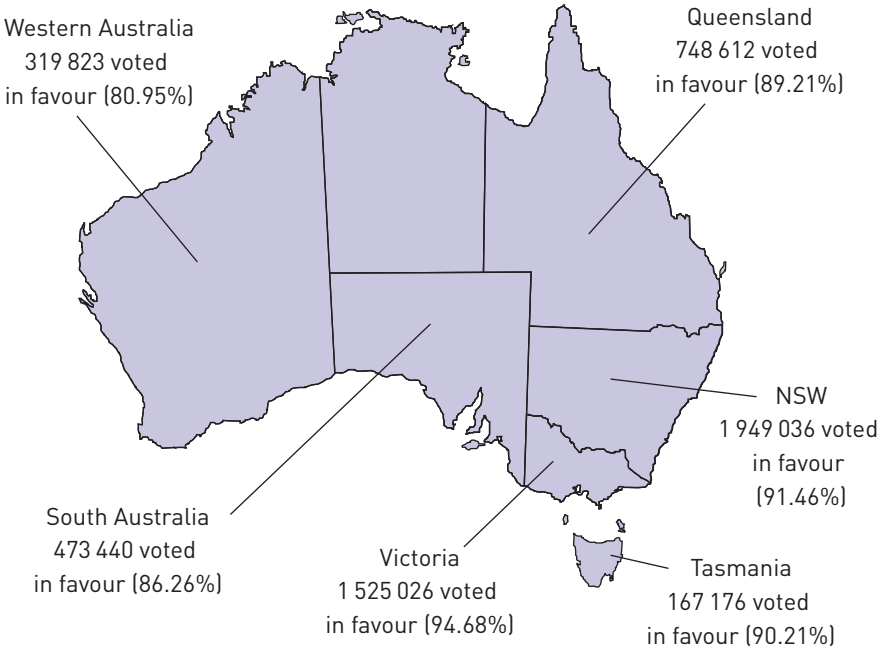


Source 1 There were two proposals put to the people in the 1967 referendum. Allowing Indigenous people to be counted in the Census was an important step in terms of allowing the Commonwealth to target funding for Indigenous health and education programs.

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 with 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 2 The referendum results for the 1967 referendum. Which states were the most supportive? Why might the lowest level of support have been found in Western Australia?

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.~~

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 an important step 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.

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.

12.3 CHECK YOUR LEARNING

Define and explain

1 Explain how the double majority requirement allows people in the smaller states to protect the Constitution despite significant support for change in larger states, such as NSW and Victoria.

Synthesise and apply

2 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.

3 The 1967 referendum represented a major shift in the capacity of the Commonwealth to recognise Indigenous Australians in the Constitution.

- **a** Explain the two proposals for changing the wording of the Constitution that were put to voters at 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 peoples became Australian citizens. In your explanation refer to the 1967 referendum.
- **e** Conduct some research to explain why Western Australia, in particular, was supportive of the 1999 referendum, and how this would have influenced voting in that state.

Analyse and evaluate

4 'Without the 1967 referendum, Australia would have a fragmented system of laws and funding models that would result in injustice and hardship.' Discuss the extent to which you agree with this statement.

Check your obook assess for these additional resources and more:

- **Student book questions** 12.3 Check your learning
- **Video tutorial** Things to know about referendums
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

12.4 THE HIGH COURT AND THE DIVISION OF LAW-MAKING POWERS

jurisdiction the lawful authority (or 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 describing unnecessary facts.

The *Brislan* case

A 1935 case involving a wireless set (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.

ACTUAL SCENARIO

Exploring Commonwealth control over electronic communications

R v Brislan; Ex parte Williams (1935) 54 CLR 262



Source 1 Wireless sets like this were common in homes during the 1930s in Australia.

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.

The defendant challenged the validity of the *Wireless Telegraphy Act* in the High Court, arguing that broadcasting to a wireless set was 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 defendant submitted that 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 Commonwealth would be acting beyond its law-making powers and the Act would be invalid.

Comments by the High Court in Brislan's Case

Four of the six High Court judges held that broadcasting to a wireless set was a form of telephonic service, and therefore fell within the scope of section 51(v) of the Australian Constitution. As a result, this judgment changed the division of law-making powers by extending the Commonwealth Parliament's power to include broadcasting to a wireless set – i.e. an additional form of communication service.

In his judgment, Chief Justice Latham also considered whether broadcasting to a wireless set could fall within the ambit of 'other like services'. He said:

> 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 anticipated reach of section 51 (v) was also explored by Justices Rich and Evatt, who noted that a 'wide operation' should be given to the Commonwealth to regulate this area:

> [Section 51(v)] is a constitutional power intended to provide for the future and bearing upon its face an attempt to cover unknown and unforeseen developments. A wide operation should be given to such a power. In the next place the description "telegraphic and telephonic" carries with it, not by derivation, but by use, a reference to electrical means of transmission of signals and speech.

The significance of the *Brislan* case

The High Court's interpretation of section 51(v) 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 parliament 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.

An example of a modern form of communication that could arguably be captured by section 51(v) is communications over the internet, which has brought significant benefits but also challenges such as interactive gambling and privacy issues. The internet was not invented, or even contemplated, at the time the Constitution was drafted, and so it is not certain whether the Commonwealth would have the power

Did you know?

In a submission to the Royal Commission Into Victoria's Mental Health System (July 2019), the Responsible Gambling Foundation stated that 39 per cent of Victorians with a gambling problem have a diagnosed mental illness.



Source 2 The *Interactive Gambling Amendment (National Self-exclusion Register) Act 2019* (Cth) allows people to exclude themselves from all interactive wagering. The Register is a key reform under the Commonwealth's policy to reduce harm caused by online gambling. The authority to create this law can be traced back to the broad principles in the *Brislan* case.

over the internet in Australia. The High Court has not yet been required to decide on this issue, as there has not yet been a challenge to a Commonwealth law regulating the internet that has been considered by the Court. However, given the comments made by the High Court in *Brislan*, and in particular that 'other like services' was designed to cover new developments, it is arguable that the Commonwealth has the power to regulate the use of the internet.

As an example, interactive gambling refers to gambling activities that occur on broadcasting, datacasting and online platforms. The *Interactive Gambling Act 2001* (Cth) regulates the advertising and promotion of live sports wagering over the internet. The Act makes it illegal to provide interactive gambling activities such as online casinos offering gaming such as roulette, poker and blackjack. These offences apply to all interactive gambling providers, regardless of whether they are based in Australia or offshore. The Commonwealth was careful to target the providers of interactive gambling rather than the gamblers themselves.

It is likely that the Commonwealth has relied on section 51(v), and other sections, of the Australian Constitution in support of its power to regulate the internet and pass laws such as the *Interactive Gambling Act*. However, the ability to regulate the internet is not limited to gambling activities. It could potentially extend to all types of activities that take place on the internet.

Given the High Court has not yet had to decide on more recent technological advancements such as the internet, there is a real question as to whether section 51(v) allows the Commonwealth to regulate online content or activities, or other technological advancements (even those not yet contemplated or invented).



Source 3 Television was invented in the 1930s, long after federation. 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.

The *WorkChoices* case

One area where the state and Commonwealth governments have disagreed about is workplace relations (laws about employment, wages and work conditions, and workers' rights). This is explored in the scenario on the following page.

The *WorkChoices* case

ACTUAL SCENARIO

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'. This is known as the corporations power.
- 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.
- 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 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.

Source 4 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 state level.

According to the Explanatory Memorandum of the *Workplace Relations Amendment (WorkChoices) Act*, 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 means that only 15 per cent of employees would 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, and 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.

12.4 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 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 affect 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 potential problems that may exist had the states retained control over industrial relations.

Analyse and evaluate

4 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** Discuss the extent to which the decision in the *Brislan* case is made even more significant given that it relates to electronic communications. In your answer, identify 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** 12.4 Check your learning
- **Video tutorial** Identifying the significant facts of a case
- **Going further** Interactive gambling
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

12.5 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

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 in areas of law-making that are neither exclusive nor concurrent areas of power. Therefore, the Commonwealth can potentially legislate on a residual power if the treaty topic covers that area. As a result of section 109 of the Constitution (studied in Chapter 10), the laws of the state in that particular area would then become invalid.

Before considering some important High Court cases in relation to the external affairs power, it is useful to understand the basics of international treaties and declarations.

international treaty a legally binding agreement between countries or intergovernmental organisations, in which they undertake to follow the obligations set out in the agreement and include them in their own local laws (also known as an international convention)

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

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** (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.



Source 1 Australia is an active member of the international community and is a founding member of the United Nations. Since 1948 Australia's Foreign Affairs ministers have addressed the United Nations General Assembly.

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.

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

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 it by law to adopt the various rights and responsibilities set out in the treaty

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.

International declarations

international declaration
a non-binding agreement between countries that sets out certain aspirations (hopes) 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 *Convention on the Rights of the Child* (1989). An example of a declaration is the *Declaration on the Rights of Disabled Persons* (1975), some of the key features of which are reflected in the *Disability Discrimination Act 1992* (Cth).

In this topic, international treaties and declarations are referred to as 'international agreements'.

Did you know?

One of the most important United Nations conventions was the Paris Agreement, which deals with issues such as greenhouse gas emissions. In November 2019 the United States advised the UN that it would withdraw from the Agreement. The process of withdrawal took 12 months. At the time, other countries that had not ratified the agreement included Angola, Eritrea, Iran, Iraq, Kyrgyzstan, Lebanon, Libya, South Sudan, Turkey and Yemen.

International agreements 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 *Commonwealth v Tasmania* (below), the High Court was required to interpret the words 'external affairs' in section 51(xxix) of the Constitution.



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.

ACTUAL SCENARIO

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* (1972) '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 a World Heritage listing (an international treaty).

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.


The Examiner

Geelong won't trouble NTFA, says Withers — Back Page

Doorknock appeal tomorrow

NO DAM!

"There is almost no aspect of life which . . . may not be the . . . possible subject of Commonwealth legislative power." — Sir Harry Gibbs

"I want to reassure Tasmanians that the Commonwealth will not in any sense retract from any of its commitments." — Mr Hawke

"... a sad, sad day for Tasmania, but the decision stands and we must accept it." — Mr Gray

Landmark ruling expands Federal powers

By PHIL BECK

CANBERRA — The High Court has ruled that the Gordon-below-Franklin dam will not go ahead, in a landmark decision which represents a significant expansion of Federal powers.

But the Prime Minister, Mr Hawke, moved quickly to assure the States that his Government would not rush into new areas as a result of the decision.

"That would be totally at odds with our consensus-building approach to government," Mr Hawke said.

He said he welcomed the four-three decision, which overturned the Fraser Government's force, but was not going to gloat over the victory.

The Tasmanian Premier, Mr Gray, said: "It's a sad, sad day for Tasmania, but the decision stands and we must accept it.

"While we disagree, no responsible Government can subsidise breaking the law."

After talks with Mr Hawke on alternative job schemes, Mr Gray said he was bitterly disappointed at the case's outcome, but would accept the ruling.

He said the decision to cut off the State's resources was akin to closing down Victoria's La Trobe Valley coalfields.

The represent will of the Tasmanian people has been thwarted by the Labor Government," Mr Gray said.

To PAGE 3

DAM SITE

GORDON

FRANKLIN

'No vendetta' — PM

The Prime Minister, Mr Hawke, yesterday pledged to heal the wounds caused Tasmania by the long-running dams debate.

Mr Hawke said there never had been, and there never would be, any vendetta.

"We are ready to co-operate totally in seeking the prosperity of Tasmanians are pro Mr Hawke said.

Mr Hawke said it was impossible to estimate the total cost of compensation until the

To PAGE 3

Examiner

click!

• More on the dam, Pages 2, 3, 4, 5, 6, 14, 15.

Editorial, Page 6.

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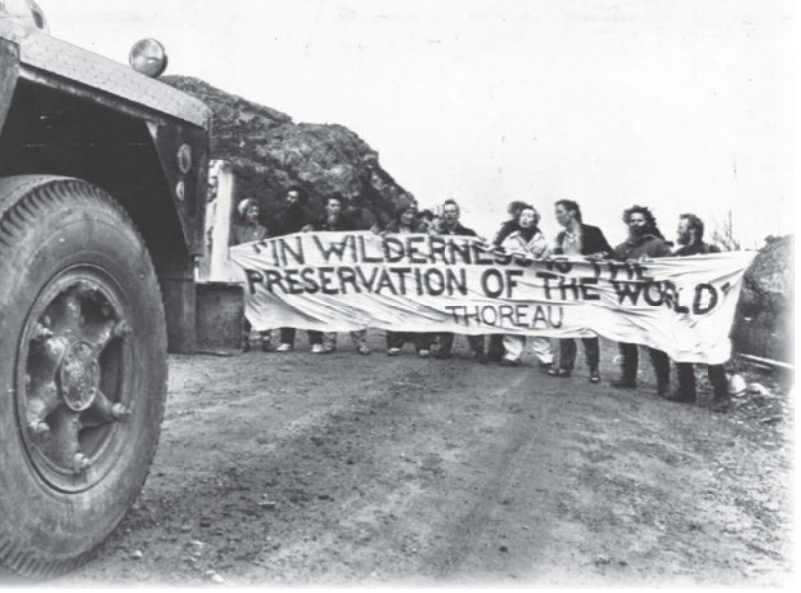
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Source 3 The front page of *The Examiner*, a daily newspaper in Tasmania, 2 July 1983.

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



Source 4 A protest against the damming of the Franklin River

Parliament assuming power over other issues involving international treaties, such as human rights, which are protected by the *United Nations Universal Declaration of Human Rights* (1948) and the *International Covenant on Civil and Political Rights* (1966).

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*. This case considered the same Convention as that in the *Tasmanian Dam* case. The High Court again interpreted the external affairs power as allowing the Commonwealth Parliament to pass laws which fulfilled an international obligation.

ACTUAL SCENARIO

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 ratification of the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (the 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 Act was to provide measures that would give effect to Australia's obligations under the Convention.

In this action the plaintiff, who was the federal Minister for the Environment and the Arts, and was responsible for the administration of the 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.

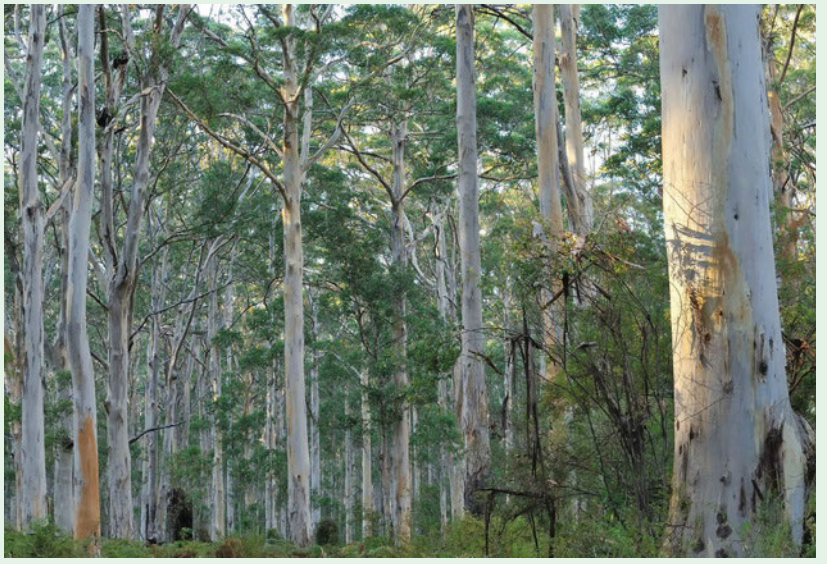
The central issue was whether the Act was invalid, and therefore whether the plaintiff could prevent harvesting while the Commission of Inquiry took place.

The decision of the High Court

The High Court held that the Commonwealth had the power to pass and enforce the Act because of 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'.



Source 5 The role of the Commission was to determine whether a particular section of the forest could be considered part of a World Heritage area.

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.

Study tip

When you are using a case in your answers, make sure you name it properly. You do not need the full citation, but you must name it in a way that makes it clearly identifiable.

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 Forest* 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.
- 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.

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.

Extending beyond the treaty

The High Court has held that having become a party to an international treaty, the Commonwealth Parliament is able to rely upon the external affairs power to give it authority 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.

legislative power
the power to make laws, which resides with the parliament

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 528.

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 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.

express rights
rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

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', 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.



Source 6 The High Court found that, having become a party to an international treaty, the Commonwealth Parliament is able to rely on the external affairs power to enact legislation which gives effect to an international obligation.

12.5 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 imposed on the Commonwealth Parliament when legislating to give effect to an international treaty.

Synthesise and apply

4 Read the scenario *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.

Analyse and evaluate

5 '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. In this case, the High Court has acted against the wishes of the founders of Australia's Constitution by adopting such a broad reading of the external affairs power. The states are much better placed to legislate on areas such as the environment than the Commonwealth.' Discuss.

Check your obook assess for these additional resources and more:

- **Student book questions** 12.5 Check your learning
- **Worksheet** Treaties, declarations and the High Court
- **Weblink** Rights and protections
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz



CHAPTER 12

REVIEW

TOP TIPS FROM CHAPTER 12

1 The Study Design requires you to know the impact of **both** international declarations **and** international treaties on the external affairs power. You should become familiar with the distinction between the two in relation to the interpretation of the power (rather than just a distinction between the two types of documents).

2 When reading a case, only highlight the significant facts relating to the overall impact of the case. It is not necessary to focus on more general information such as that David Lange was a former Prime Minister of New Zealand.

3 You can use the *Tasmanian Dam* case as a significant case in relation to the external affairs power, and in relation to the division of law-making powers (that is, why learn two separate cases for these two knowledges when you can use one case to demonstrate your understanding of both!).

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Describe** the role of the High Court in changing the division of law-making powers between the state and Commonwealth parliaments.

(4 marks)

Difficulty: medium

2 **Explain** the impact of international treaties and declarations on the interpretation of the external affairs power.

(5 marks)

Difficulty: high

3 'The Australian people are best able to protect the Australian Constitution by challenging cases through the courts.' **Discuss** the extent to which you agree with this statement.

(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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

Wotton v Queensland (2012) 246 CLR 1

The plaintiff in this case, Lex Wotton, was convicted of rioting causing destruction following a protest on Palm Island in 2004 over the death of another Indigenous man in police custody. Wotton served his minimum term of imprisonment and sought parole. When 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.

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 valid.

Practice assessment task questions

1 Describe one role played by the High Court in the *Wotton* case.

(2 marks)

2 Outline the purpose of sections 7 and 24 of the Australian Constitution.

(3 marks)

3 If the Commonwealth Parliament ratified an international treaty which prohibited the implied freedom of political communication, would such a law be valid? Justify your answer.

(4 marks)

4 Describe the relationship between the *Lange* case, the *Wotton* case and the *Clubb* case.

(6 marks)

5 Discuss the extent to which the Commonwealth Parliament could restrict the implied freedom of political communication. Refer in your answer, where possible, to what role, if any, the Australian people could play in preventing or allowing the Commonwealth Parliament to restrict the freedom.

(10 marks)

Total: 25 marks

Check your obook assess for these additional resources and more:

- **Student book questions** — Chapter 12 Review
- **Revision notes** — Chapter 12
- **assess quiz** — Chapter 12 Test your skills with an auto-correcting multiple-choice quiz
- **Quizlet** — Revise key definitions from this topic

CHAPTER 13

THE PARLIAMENT



Source 1 The main role of parliament is to make laws and change existing laws. In this image, Prime Minister Scott Morrison and Treasurer Josh Frydenberg leave Question Time in the House of Representatives in June 2020 amidst the COVID-19 pandemic. In this chapter, you will explore how parliaments make laws, and factors that affect the ability of parliament to make those laws.

Check your Student obook assess for these digital resources and more:

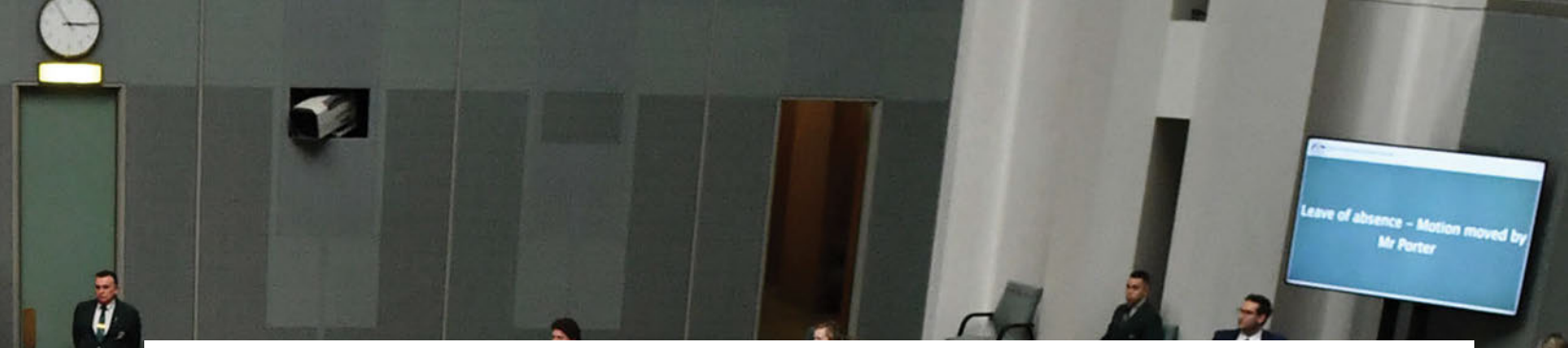
Quizlet

Test your knowledge of this topic by working individually or in teams

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Quizlet Live

Launch a game of Quizlet live for your students



OUTCOME

By the end of **Unit 4 – Area of Study 2** (i.e. Chapters 13, 14 and 15), 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) a situation where no single party has a majority of seats in one or both houses of parliament, meaning members of the crossbench (i.e. members of minor parties and independent members) may be able to vote in a bloc (together) to reject government bills so they do not pass

bill a proposal to implement a new law or change an existing law

crossbenchers independent members of parliament and members of minor parties (i.e. those who are not members of the government or opposition). They are named after the seating area provided for them in parliament, called the 'crossbench'

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 crossbenchers to have their bills passed

hung parliament a situation in which neither major political party wins a majority of seats in the lower house of parliament after an election

micro party a very small political party (e.g. one that is formed around a single issue)

minor party political parties that, despite not having enough members or electoral support to win government, are still 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 upper house of parliament automatically approves decisions made in the lower house because the government holds a majority of seats in both houses and members of the government generally vote 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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13.1 THE ROLES OF THE HOUSES OF 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)

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 may not be 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, it is a good idea to review the roles of the houses of parliament (both Victorian and Commonwealth) in law-making, examined in Chapter 10 (Topics 10.2 and 10.3). A brief summary is provided in the table below.

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

ROLE OF THE LOWER HOUSE	ROLE OF THE UPPER HOUSE
Initiate laws (most bills, or proposals for new laws, are introduced in the lower house)	Act as a house of review (given most bills are introduced in the lower house)
Determine the government	Examine bills through its committees
Provide responsible government and make laws that represent the views of the people	Initiate laws (other than money bills which approve government expenditure)
Control government expenditure	
Publicise and scrutinise government administration	

Source 1 A summary of the roles of the houses in law-making

The roles of the houses of parliament is one factor that can affect the ability of parliament to make law. Both the composition (make-up) of the houses of parliament and the parliamentary law-making process can influence the effectiveness of parliament as a law-maker.



Source 2 The main role of parliament is to make the law and change the law.

The composition of the lower house

The effectiveness of the parliament can depend on whether the government holds a majority or a minority of seats in the lower 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, any **bills** (proposed laws) introduced by the government will generally be accepted and passed by the lower house. Once a bill has been 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 implement its program of **law reform** (or legislative agenda).

bill
a proposal to implement a new law or change an existing law

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



Source 3 The Liberal–National Coalition formed a two-seat majority government after the 2019 federal election.

If the government has a majority in both houses, it has the power (sometimes referred to as its 'mandate') 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 enables the government to reject bills without debate when they have been introduced by a **private member**.

Private member's bills are proposed laws introduced by a member of parliament who is not a government minister. 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, and even passed, by the upper house before being rejected by the lower house.

While private member's bills often fail, the introduction of such bills into either house will at least raise some publicity for the proposed law change by gaining the attention of the media and members of parliament.

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

Private member's bill on lowering the voting age

ACTUAL SCENARIO

In October 2019 the Federal Member for Melbourne and leader of the Australian Greens, Adam Bandt, introduced the Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2019 (Cth) into the House of Representatives. The purpose of the Bill was to change the law to allow young people aged 16 and 17 the right to vote. More specifically, the Bill proposed amendments to the *Commonwealth Electoral Act 1918* (Cth) to lower the minimum voting age from 18 years to 16 years and therefore allow Australian citizens aged 16 and 17 years the option of voting in federal elections. If the Bill was

successful, the minimum age of compulsory voting would remain at 18 years but those aged 16 and 17 years would have the option of casting a vote in federal elections if they so desired.

Being a member of the Australian Greens, Mr Bandt was not a member of the government of the day (that is, the Liberal–National Coalition) and therefore the Bill was introduced as a private member's bill. This means it is not part of the Government's legislative program and does not have the support of the Government. At the time of the introduction of the Bill, the Government's policy was to maintain the compulsory minimum voting age at 18 years, so the Bill was unlikely to succeed.

The only way the Bill could successfully pass through the House of Representatives would be if, in addition to gaining the support of the **opposition** (Australian Labor Part) and **crossbench** (independent members of parliament or members of minor parties), some members of the Government were willing to 'cross the floor'; that is, vote against their party's policy and support the Bill. Despite being unlikely to succeed the Bill does, however, serve the purpose of raising awareness of the benefits of lowering the voting age and creating community discussion about the issue, which may help generate support for future change.

In 2018 Western Australian Senator Jordon Steele-John, also a member of the Australian Greens, introduced the same Bill into the Senate, although it lapsed after a Senate parliamentary committee (the Joint Standing Committee on Electoral Matters) recommended to the Senate that it not be passed.

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

crossbenchers
independent members of parliament and members of minor parties (i.e. those who are not members of the government or opposition). They are named after the seating area provided in parliament for them, called the 'crossbench'

Source 4 Adam Bandt MP introduced a private member's bill in 2019 to allow young people aged 16 and 17 the right to vote, but if it does not get the support of government it will fail.



Minority government

A **hung parliament** can also influence the effectiveness of parliament. A hung parliament is a situation 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 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 'dilute' its original policies, often to the annoyance of voters.

On the other hand, 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, a minority government led by Julia Gillard (often referred to as the Gillard Government) managed to get 432 bills passed by the Commonwealth Parliament.

The composition of the upper house

The effectiveness of the parliament can also depend on whether the government holds a majority of seats in the upper house.

Government majority in upper house

Since all bills must be passed by both houses of parliament before they can become law, 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 the parliament to make laws, and the 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 (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 give effect to 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 what is known as a '**rubber stamp**', being an upper house that merely confirms the decisions made by the government in the lower house.

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 legislative policy agenda. This is because the opposition and crossbench can vote together and force the government to make significant changes (i.e. amendments) to their bills, or reject the government's bills entirely.

At the Commonwealth level, the Senate is often hostile. While this may mean more thorough debate and scrutiny of bills, it can also prevent or obstruct the ability of the government to implement law reform. For example, in 2018 a hostile Senate blocked a Liberal–National Government bill to allow the introduction of a trial program requiring 5000 young people to undertake drug tests as a condition of receiving unemployment benefits (such as the Newstart Allowance and Youth Allowance).

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

Senate
the upper house of the Commonwealth Parliament

Legislative Council
the upper house of the Victorian Parliament

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 members of the government generally vote along party lines

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 balance of power

minor party
a political party that, despite not having enough members or electoral support to win government, are still 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)

balance of power
(between political parties) a situation where no single party has a majority of seats in one or both houses of parliament, meaning members of the crossbench (i.e. members of minor parties and independent members) may be able to vote in a bloc (together) to reject government bills so they do not pass

Another problem associated with having a hostile upper house is that it can allow a small group of independent members 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 small group of independents or minor political parties voting 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 get 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. Instead, 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. Over the years, various high profile independents and members of minor parties, such as Senator Pauline Hanson (the leader of the minor political party Pauline Hanson's One Nation) and Senator Jacqui Lambie (the leader of the Jacqui Lambie Network) have faced criticism from some political commentators for having narrow policy agendas that do not address the complexities associated with major areas of law-making such as reforming the taxation and social welfare systems and increasing economic stability and growth.



Source 5 Four members of the Senate crossbench (back row, left to right: Cory Bernardi (now resigned from politics), Rex Patrick, Jacqui Lambie and Stirling Griff) after the 2019 federal election

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 into account a wider range of views and better reflect community interests. Over the last two decades, support for minor and micro parties and independents has increased. For example, at the 2019 federal election, minor parties and independents won nearly 25 per cent of the vote. At the 2018 Victorian state election, 11 of the possible 40 seats in the Legislative Council were won by independents and members from a broad range of minor parties (including the Animal Justice Party, the Reason Party, the Shooters, Fishers and Farmers Party, the Transport Matters Party, and Sustainable Australia). While still relatively low compared with the major parties, an increase in voter support for independents and minor parties might suggest some voters are becoming dissatisfied with the major parties, and are becoming more attracted to minor parties with a narrower focus.

The impact that minor parties, micro parties and independents can have on the government's ability to implement its legislative agenda is demonstrated in the scenario on the following page.

The creation and repeal of the 'Medevac Bill'

ACTUAL SCENARIO

In December 2018 former independent MP Kerryn Phelps introduced a private member's bill (the Migration Amendment (Urgent Medical Treatment) Bill 2018 (Cth)) to amend federal immigration laws (the *Migration Act 1958* (Cth)). In simple terms, the Bill would allow asylum seekers held in offshore detention centres (on Manus Island or Nauru) to be temporarily transferred to Australia if they were assessed, by two or more doctors, to be in need of medical treatment.

Without the support of the Liberal–National Government, the Bill failed to progress through the lower house, but it did inspire independent Senator Tim Storer and members of the Australian Greens to add amendments to another bill, the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018 (Cth), which was being debated in the Senate at the same time. These amendments to the government's bill (which became known as the 'Medevac Bill') similarly allowed asylum seekers to be temporarily transferred to receive medical treatment in Australia.

Although the Liberal–National Government did not support Senator Storer's changes to their Home Affairs Legislation Amendment (Miscellaneous Measures) Bill, it did not have a majority in the upper house and so the Bill passed the hostile Senate with the support of the opposition and members of the crossbench. Following approval by the hostile Senate, the amendments were passed by the House of Representatives in February 2019 after the Liberal–National Government lost their majority in the lower house. While the Government had won the 2016 election with a one seat majority, it eventually lost two seats: the seat of Wentworth to independent Kerryn Phelps in October 2018 (after the seat had become vacant following the resignation of Malcolm Turnbull after he was replaced as Prime Minister by Scott Morrison), and the seat of Chisholm, when Liberal member Julia Banks resigned to become an independent.

After the Medevac Bill was passed, debate continued throughout 2019 with the Liberal–National Government promising to repeal (cancel) the Bill (now a law) if it was re-elected in the May 2019 federal election. After retaining government in that election, it introduced the Migration Amendment (Repairing Medical Transfers) Bill 2019 (Cth) to repeal the 'Medevac amendments'. The Bill was relatively quickly passed by the lower house in July 2019 and then passed by the Senate (37 votes to 35) in December 2019 after the Government successfully negotiated with independent Senator Jacqui Lambie, who initially supported the Medevac Bill. Ms Lambie chose not to disclose why she changed her stance after supporting the Medevac Bill, claiming the negotiations genuinely involved a matter of 'national security concern'.



Source 6 Senator Jacqui Lambie addressing the upper house during the repeal of the Medevac Bill.

The parliamentary law-making process

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).

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)

There are both strengths and weaknesses of the roles of the houses in this process. They are outlined in the table below.

STRENGTHS	WEAKNESSES
The requirement that a bill must be passed by both houses gives the second house (usually the upper house, because most bills are introduced by the government in the lower house) an opportunity to check the bill and suggest amendments.	The need to pass legislation through two houses before it can become law can slow the progress of legislative reform.
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. A wide range of views on the bill can then be considered during the debates that take place.	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 2019 the Senate and the House of Representatives only sat for 40 and 45 days respectively, compared with 63 and 76 days in 2014. The government can, however, extend the sitting period or even recall parliament for a special session.
Parliament can change the law quickly if necessary, particularly if the government has a majority in both houses of parliament, even though the legislative process can be relatively slow.	The parliament as a whole is restricted in its law-making ability in 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.
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).	A hostile upper house can obstruct the ability of the government to implement its policy agenda – possibly not for genuine, valid reasons but rather for the parliamentary member's own reasons/agenda.

Source 7 Strengths and weaknesses of the roles of the houses of parliament

Study tip

You must be able to discuss how the roles of the houses affect the ability of parliament to make law. This means you must be able to explain how the upper and lower houses can both assist and detract from the ability of the parliament to make law.

Parliament is often criticised for being slow to pass laws. However, as is demonstrated in the following two scenarios, it can act with incredible speed when a situation requires it to. In April 2020, the Victorian Parliament swiftly passed a bill amid the COVID-19 pandemic. This is explained in detail in the scenario on the following page.

Victorian Parliament temporarily allows judge-only trials

ACTUAL SCENARIO

In April 2020 the Victorian Parliament passed the COVID-19 Omnibus (Emergency Measures) Bill 2020 (Vic), which introduced a number of temporary emergency measures to manage the issues and problems raised by the pandemic and to ensure basic government services were able to continue functioning.

In particular, in an attempt to ensure the courts could continue hearing indictable offences during social distancing, the Bill inserted a new provision into the *Criminal Procedure Act 2009* (Vic) that temporarily allowed for judge-only criminal trials in the County and Supreme Courts, provided the prosecution was consulted and the accused had given their consent. Before making the order to allow the judge-only trial, the court had to be satisfied that the accused had obtained legal advice on whether to consent and consider that it was in the interests of justice to order a judge-alone trial. The change was, however, only temporary as the inclusion of a 'sunset clause' required measures implemented under the Bill to expire after six months, although any judge-only trials that had commenced within the six-month period were permitted to continue after the six months came to an end.

The Bill passed through the Parliament in one day, demonstrating the ability of the government, opposition and crossbench to work together to rapidly pass legislation when necessary to deal with a global crisis.



Source 8 In 2020, many businesses, facilities and establishments were closed due to the COVID-19 pandemic, including some government services, such as the courts. Temporary measures were introduced to keep the court system functioning during this period.

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 9.

FACTOR	SUMMARY
The composition 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 to allow them to govern. • Minority government ensures thorough discussion and debate of bills.
The composition 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.

FACTOR	SUMMARY
Parliamentary 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. • Law reform can be a slow process, especially given parliament sits for a limited number of days. • A hostile upper house can restrict law-making ability.

Source 9 The ways in which the roles of the houses of parliament may affect the parliament's ability to make laws

13.1 CHECK YOUR LEARNING

Define and explain

1 Using an example, define the following terms:
- **a** hostile upper house
- **b** hung parliament
- **c** minority government
- **d** minor party.

Synthesise and apply

2 Explain how a minority government may detract from the effectiveness of the lower house. Suggest how this problem might be overcome.

3 Conduct some research, and explain whether or not the terms 'hostile upper house' or 'rubber stamp' currently apply to the composition of the Senate and the Legislative Council.

4 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.

5 Read the scenario 'The creation and repeal of the "Medevac Bill"' and answer the following questions:
- **a** Suggest why the Migration Amendment (Urgent Medical Treatment) Bill 2018 (Cth), introduced by Kerryn Phelps MP, did not pass the house.
- **b** Explain why the Liberal–National Government was unable to prevent the amendments to their Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018 (Cth) (the Medevac Bill) being passed through each house of parliament.
- **c** Explain why the Liberal–National Government was able to repeal the Medevac Bill after the May 2019 federal election.

Analyse and evaluate

6 Discuss the extent to which having a bicameral system of parliament is a positive factor in law-making.

7 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.

8 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** 13.1 Check your learning
- **Weblink** Members (Federal)
- **Weblink** Members (Victoria)
- **Weblink** Victorian Parliament website, Victorian legislation and parliamentary documents

13.2 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 consist 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
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, they 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 areas of taxation and law and order. For example, governments may promote tax cuts to win the support of voters when it may not necessarily be in the best interests of the country. Similarly, governments may introduce harsher penalties for crimes in an attempt to win votes by demonstrating they are 'tough on crime', but 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 scenario below explores whether introducing penalties that the majority of society supports actually reduces crime rates.

ACTUAL SCENARIO

Increased penalties for stockpiling dangerous waste

In 2019 following an increase in incidents involving the storage of dangerous waste in warehouses, the Victorian Government introduced the Dangerous Goods Amendment (Penalty Reform) Bill 2019 (Vic) to increase penalties for a number of offences relating to the use and handling of dangerous goods (such as explosives for demolition, gunpowder, ammunition, fireworks, fuses and combustible liquids). For example, under the proposed law, any person in charge of premises where dangerous goods are made, stored or sold, who failed to take reasonable steps to prevent any fires, leakage, tampering or theft of the dangerous goods, would face a maximum penalty of two years' imprisonment (or a $300 000 fine) if their failure to act resulted in the serious injury or death of another person.

Increasing penalties for the failure to carefully store and dispose of dangerous goods is just one example of several crimes which now attract harsher penalties. Over recent years the Victorian Government has introduced mandatory minimum sentences for a range of crimes including aggravated home invasion, aggravated carjacking and attacking or injuring an emergency worker. While increasing penalties for specific crimes appears popular with voters, critics argue more severe penalties often do not reduce crime rates or address the underlying causes of crime.

Source 1 The failure to carefully store dangerous goods has serious consequences and is unlawful in Victoria.



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. The controversial nature of such change means that in the past, parliaments have been reluctant and slow to change the law in this area without overwhelming support from voters.



Source 2 After new laws were passed 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.

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 programs to teach sexual diversity and gender issues in schools in an attempt to increase acceptance and decrease bullying.

Law 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**, or refer 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 parliament, thus wasting the time and money spent on them.

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 to protect people from being discriminated against by potential employers.

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

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

Study tip

It is a good idea to use examples to demonstrate how the representative nature of parliament can assist or detract from the ability of the parliament to make law. For example, it took many years for the Commonwealth Parliament to legislate for marriage equality because both major political parties would not commit to changing the marriage law until they were certain the change had the support of a large majority of voters.

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 next 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 elections for the Victorian Parliament are held 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.



Source 3 In Australia, it is compulsory to vote.

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.

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.

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.

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 4.

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	• Allow a government that does not represent the needs of the majority to be voted out of office. • Fixed terms give governments a specified period to implement their programs but can make them reluctant to implement longer-term reforms. • Compulsory voting helps ensure the government has the support of the majority, not just those who bother to vote; but it can encourage those who are not interested to cast an ill-informed vote.

Source 4 A summary of the representative nature of parliament and how it may affect its ability to make laws



Source 5 Australian workers in Antarctica cast their vote in a federal election.

13.2 CHECK YOUR LEARNING

Define and explain

1 Define 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 to complete 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 Discuss two benefits of our parliamentary system being representative of the people. Use at least one example to support your response.

6 As at 1 January 2020, for the first time in Australia's political history, the Senate had equal gender representation (i.e. the Senate was comprised of 38 men and 38 women). By contrast, the House of Representatives was comprised of 105 men (approximately 70 per cent of the total 151 members) and 46 women. In a small group, discuss the extent to which the gender composition of the Commonwealth Parliament may affect its ability to be representative in law-making.

7 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** 13.2 Check your learning
- **Worksheet** The representative nature of parliament
- **Weblink** Australian Electoral Commission
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

13.3 POLITICAL PRESSURES

Study tip

The *VCE Legal Studies Study Design* requires you to know how political pressures affect the ability of the parliament to make law. This means you need to know at least two types of political pressures. The text provides you with lots of examples of political pressures to choose from including domestic, internal and international 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 rely on maintaining the support of 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 individuals, pressure groups, local businesses and business groups, other countries, international organisations and multinational corporations (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.

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 is that there is a link between the people, the parliament and the government. It ensures that members of parliament and the government are responsive to the needs of the people and make laws that reflect the views and values of the community. It also 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 reforms 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 15.

The scenario below is an example of the Victorian Government passing a law that is unpopular with some anti-abortion pressure groups. This scenario was also considered in Chapter 12 in relation to the implied freedom of communication in the Australian Constitution.

ACTUAL SCENARIO

Safe access zones limit anti-abortion protestors

In 2016 the Victoria Government implemented a 'safe access zone' law that prevented members of anti-abortion pressure groups from being within a 150-metre boundary of an East Melbourne fertility clinic that provides a number of services including 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 and staff were being approached, and sometimes felt intimidated and harassed, by anti-abortion protestors 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 'safe access 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.'

In 2018, in the case of *Clubb v Edwards; Preston v Avery* (2019) 366 ALR 1, the validity of this 'safe access zone' law was challenged by anti-abortion activists who claimed it breached the constitutionally implied right to freedom of political communication by impeding their right to publicly express their views on a political issue. In April 2019 the challenge was rejected by the High Court and the law remains in force.



Source 2 Pressure groups, like these anti-abortion activists, often demonstrate to gain community support and place pressure on members of parliament to change the law.

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 ALP conferences, where policy is determined.

Influential groups and organisations such as trade unions (for example, the Australian Council of Trade Unions, the Victorian Trades Hall Council and the Australian Nurses Federation), business organisations (for example, the Business Council of Australia and the Victorian Chamber of Commerce and Industry) and environmental groups (for example, the Wilderness Society (Australia) and the Australian Conservation Foundation) can also place political pressure on governments and political parties to support law reform that best represents their interests by organising strikes, protests and marches, and by contributing financial donations. While financial donations may not necessarily influence the decisions made by political parties, they can be used for promotions and marketing, especially during election campaigns.

Influential individuals, prominent businesspeople and members of community groups and organisations can also 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. During his time as a Victorian Senator (between 2016 and 2019), Mr Hinch supported banning live exports from Australia, voluntary euthanasia and the introduction of an ongoing national public register for all convicted sex offenders, by way of a website which shows the offender's name, aliases, address, and crime he or she has committed.

Internal political pressures

voting on party lines
when members of parliament vote in accordance with their party's policy or agenda

As explored in Topic 13.1, 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. For example, in 2017 George Christensen, a member of the Liberal–National Government, controversially crossed the floor of the House of Representatives to vote with the opposition in an attempt to prevent cuts to weekend penalty rates (increased wages for certain employees who work on weekends).

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

Over recent years, internal political party disputes over the direction of party policy and leadership have placed pressure on successive Labor and Liberal–National governments and, at times, have distracted the government from its law-making responsibilities.





Source 3 Prime Minister Scott Morrison faced pressure from some members of the community during the 2020 bushfire crisis for a perceived lack of leadership. Members of the state NSW Liberal–National Coalition and Young Liberals also called for greater action to be taken by the Commonwealth Government to address climate change.

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 compromise their policies to ensure their bills pass the lower house. 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.

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.

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.

The scenario on the following page highlights the increasing pressure Australia is facing from organisations such as the United Nations over breaches of Australia's international responsibilities.

international treat
a legally binding agreement between countries or intergovernmental organisations, in which they undertake to follow the obligations set out in the agreement and include them in their own local laws (also known as an international convention)

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 it by law to adopt the various rights and responsibilities set out in the treaty



ACTUAL SCENARIO

Australia faces international criticism over human rights issues

By ratifying the United Nations *Convention on the Rights of the Child* in 1990, the Australian Government agreed to take responsibility for protecting and promoting the rights of children in Australia. In recent years, the federal government has received international and domestic pressure from bodies including the United Nations and the Australian Human Rights Commission over its failure to protect and promote the rights of children. In particular, the United Nations has called on the Australian Government to raise the minimum age at which children can be imprisoned from 10 to 14 years.

The Australian Government also faces ongoing criticism over its treatment of asylum seekers with a range of organisations, including the United Nations, claiming various policies have breached the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, to which Australia is a signatory. In addition to ongoing condemnation of Australia's mandatory detention of asylum seekers and poor living conditions at offshore detention centres, in August 2018, the Australian Government was specifically criticised for its decision to remove income and housing support from asylum seekers living in Australia.

Australia was also prevented from speaking at the United Nations Climate Summit in 2019 because the Government's policies to reduce carbon emissions were 'unambitious'.

The dramatic overrepresentation of Indigenous Australians in prison also continues to attract ongoing condemnation from domestic and international human rights organisations. While Aboriginal and Torres Strait Islander people only account for 2 per cent of the total population, they account for approximately 25 per cent of the total prison population.

Source 4 By the end of 2019, more than 70 million people were forcibly displaced worldwide, with 37 000 per day forced to leave their homes and seek refuge from global conflict or persecution. The rise in the level of global refugees placed pressure on the Australian Government to examine its migration laws and policies and respond accordingly.



The government can also be subject to political pressure from major international trading partners and defence allies and must consider Australia's economic partnerships 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, Japan, Great Britain, Indonesia and New Zealand, which must be kept in mind when developing domestic law.



Source 5 Australia must consider its economic partnership and trade and defence agreements when developing foreign policy and domestic laws. This is the Port of Melbourne, Australia's largest capital city container and general cargo port. It handles over one-third of Australia's container trade.

Changing international circumstances and specific global events can also place pressure on local governments to make and change law. For example, with the ongoing threat of global terrorist attacks, the Australian Government remains under pressure to continually review and update anti-terrorism laws. International conflicts also place pressure on the government 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.

Summary of political pressures

A summary of the way political pressures can affect the ability of parliament to make laws is set out in Source 6.

FACTOR	SUMMARY
Domestic political pressures	• Individuals and groups can use demonstrations, petitions and court action to influence 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 and minor parties 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 but also distract the government from its legislative priorities.
International political pressures	• Ratifying international treaties can improve the quality of domestic laws and encourage stronger relationships with other countries but may also restrict the parliament's ability to pass different domestic laws to suit local circumstances. • International organisations and powerful nations can place pressure on the government to act in the interest of other countries rather than Australia's. • Major international trading parties and defence agreements, and global events, can influence legislative change.

Source 6 A summary of the way political pressures may affect the ability of parliament to make laws

13.3 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 these groups 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 is the single most important issue 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 that a single individual, business or organisation can donate to a political party each year? Give reasons for your view.

8 Discuss how members of parliament voting on 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 detracts from the effectiveness of parliament in law-making.

Check your obook assess for these additional resources and more:

Student book questions
13.3 Check your learning

Weblink
Pressures on the Australian Government (report)

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

13.4 RESTRICTIONS ON LAW-MAKING 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**.

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 solely 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)

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)

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).

Law-making powers

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.

Any areas of law-making power not listed in the Constitution are known 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
- 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. 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.

If the Commonwealth makes a tied grant, this can allow them to indirectly influence law-making in a states' residual area of law-making power (for example, by requiring funds to be used in a particular way). The Commonwealth may also make laws in areas of residual power if it is making laws with respect to its international obligations (as discussed in Chapter 12).

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 (for example, offshore detention centres such as on Manus Island). Test cases are often run with the assistance of not-for-profit bodies such as community 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 being enforceable.

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*.

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

abrogate
to cancel or abolish a court-made law by passing an Act of Parliament

Specific prohibitions

The Australian Constitution also restricts the law-making powers of the state and Commonwealth parliaments by the following means:

- 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).
- 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).
- restricting 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.
- stating in section 109 of the Commonwealth Constitution 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.

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)

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 restrictions on parliament

A summary of the ways the restrictions on parliament can affect its ability to make laws is set out in Source 3.

RESTRICTION	SUMMARY
Jurisdictional limitations	• Ensure parliaments can only legislate within their power. • Allow individuals and groups to challenge legislation potentially made *ultra vires*. • While the High Court can declare law made to be *ultra vires* it must wait for a dispute to be brought before the court before making a ruling. • Challenging legislation in the courts 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. • Section 128 ensures 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 ways restrictions on parliament may affect its ability to make laws

13.4 CHECK YOUR LEARNING

Define and explain

1. Identify three restrictions on the law-making powers of the Commonwealth Parliament.
2. Why is parliament referred to as the supreme law-making body?
3. Explain two ways in which the Australian Constitution limits the law-making powers of the Commonwealth Parliament.
4. What is a specific prohibition? Describe two examples of a specific prohibition that apply to the state parliaments and two examples that apply to the Commonwealth Parliament.

Synthesise and apply

5. 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

6. '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
13.4 Check your learning

Weblink
The Australian Constitution and the High Court

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

TOP TIPS FROM CHAPTER 13

1 While there are many factors that affect the ability of parliament to make law, you must make sure you can discuss the four that are listed in the Study Design (i.e. the roles of the houses of parliament; the representative nature of the parliament; political pressures; and restrictions on the law-making powers of parliament). You could be asked a specific question about each of these four factors.

2 You must be able to discuss the four factors that affect the ability of parliament to make law. This means you must be able to explain how each factor can both assist and detract from the ability of the parliament to make law, and consider the benefits and downsides of each factor. That is, look at both sides of the argument for each of the four factors.

3 You might be asked a question about how either the upper house or the lower house specifically affects the ability of the parliament to make law. Likewise, you might be asked a question that specifically relates to either the Victorian or Commonwealth parliaments. Make sure you know the correct names and roles of the houses in both parliaments.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Describe** one way in which an individual can place pressure on a government to initiate a change in the law.

(3 marks)

Difficulty: medium

2 **Explain** how international circumstances can place pressure on the Commonwealth Parliament to make law.

(4 marks)

Difficulty: high

3 **Evaluate** the role of the Senate in the law-making process.

(6 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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

The Federal Government under pressure

After retaining government in the May 2019 federal election (by winning 77 of the total 151 seats in the lower house, with the ALP only securing 68 seats

and the remaining six held by minor parties and independents), the Liberal–National Coalition quickly found itself under political pressure.

Despite their majority in the lower house, the Government faced a hostile upper house after only securing 35 of the total 76 Senate seats; the ALP won 26 seats and the remaining 15 were held by members of the crossbench (including nine held by the Australian Greens). This meant that in situations where the opposition and the Australian Greens opposed the Government's bills, it would need to gain the support of four of the six remaining members of the crossbench to implement its legislative agenda.

Winning the support of the crossbench can prove challenging, as the Government discovered in November 2019 when two crossbench Senators, Jacqui Lambie and Pauline Hanson, voted together with the ALP and Australian Greens to block the passing of the government's Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (Cth), a bill designed to increase the accountability of unions (organisations that aim to protect the rights of workers in various occupations and industries) by giving the Federal Court greater power to deregister unions and disqualify union officials for inappropriate conduct.

The Government was also put under pressure by an electorate that was increasingly concerned about the perceived lack of action on climate change, exacerbated by worsening drought conditions and the catastrophic 2019/20 bushfires. Prime Minister Scott Morrison received particular criticism from some members of the community for failing to show leadership during the national bushfire disaster, including taking too long to return from an overseas holiday and announce the Federal Government's response.

The Government also faced pressure from domestic and international organisations in relation to its continuation of the mandatory offshore processing of asylum seekers and the repeal of the 'Medevac Bill' which provided for the temporary transfer of asylum seekers on Manus Island and Nauru to Australia for medical treatment.

Practice assessment task questions

1 Distinguish between the government and the parliament.
(3 marks)

2 Explain why the Liberal–National Coalition was able to form government after the May 2019 federal election.
(3 marks)

3 Describe one way the federal parliament's law-making powers are restricted.
(2 marks)

4 Describe two reasons why Prime Minister Scott Morrison may have been under political pressure after the 2019 federal election.
(4 marks)

5 Discuss how the composition of the Senate (after the May 2019 election) affected the Government's ability to implement its legislative agenda and the representative nature of the parliament.
(8 marks)
Total: 20 marks

Check your obook assess for these additional resources and more:

Student book questions
Chapter 13 Review

Revision notes
Chapter 13

assess quiz
Chapter 13
Test your skills with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 14

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 can make laws when necessary. In this chapter, you will learn how courts make law. Pictured here is a court room in the Beechworth Historic Court House in Beechworth, Victoria. This court house was built in 1858 and now operates as a living history museum. Ned Kelly appeared in this court multiple times.

Check your Student obook assess for these digital resources and more:

Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive

Launch a game of Quizlet live for your students



OUTCOME

By the end of **Unit 4 – Area of Study 2** (i.e. Chapters 13, 14 and 15) 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. a 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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14.1 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)

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
a set of rules and principles that guide the way Australia is governed. Its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

The Australian legal system consists of a significant number of laws that regulate society. These laws include 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 parliament (also referred to as the **legislature**) is to make and change the law on behalf of the people. Parliament is referred to as the supreme law-making body: it can make and change any law within its constitutional power.

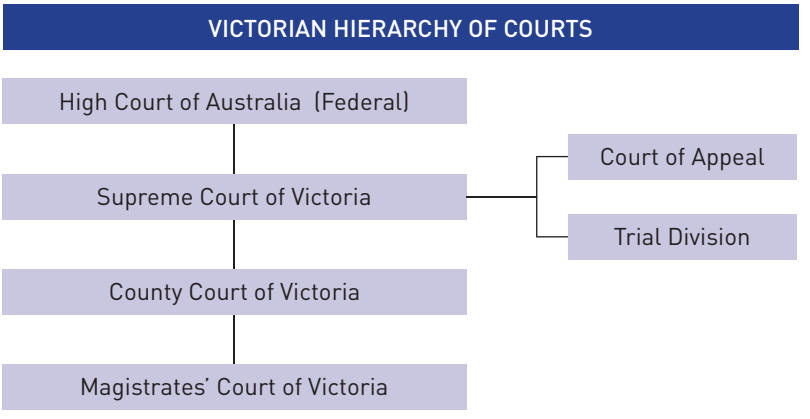
The main role of the courts (also referred to as the **judiciary**) is to apply existing laws made by parliament to resolve disputes. The courts are also able to make law when necessary and are vital in the process of law-making. However, as we will see throughout this chapter, like parliament, their 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 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 has 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.

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. Being appointed by government and not elected by the people, judges 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.

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

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)



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

14.1 CHECK YOUR LEARNING

Define and explain

1 Distinguish 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 12, 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: 14.1 Check your learning
- Video tutorial: Introduction to Chapter 14
- Going further: Federal courts
- Weblink: Court Services Victoria

14.2 THE ROLE OF COURTS IN LAW-MAKING

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 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)

material facts
the key facts or details in a legal case that were critical to the court's decision

When do courts make law?

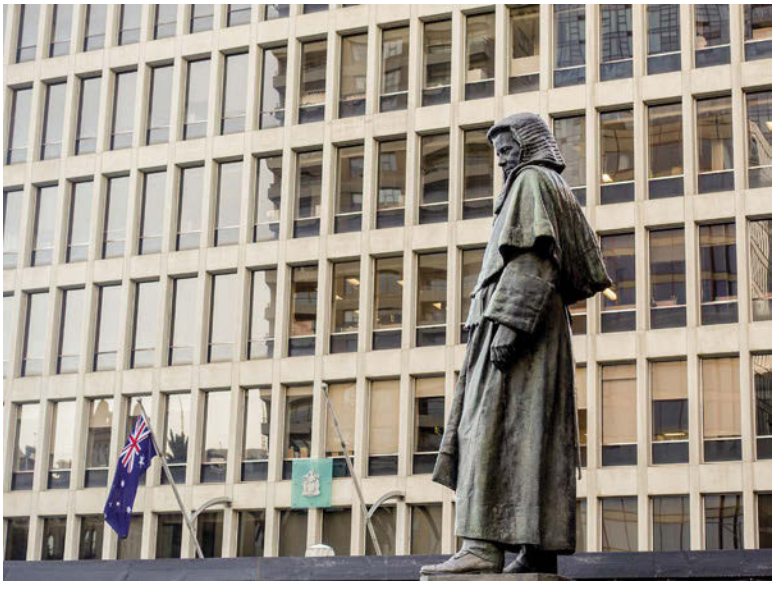
The main role of the courts is to resolve disputes and hear cases. Judges in superior courts (the Supreme Court and the High Court) are also sometimes able to make law when deciding cases that have been brought before the court. This is known as common law (or judge-made law, or case law).

More specifically, judges in 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 (legislation) 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 on 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 which may be followed in future cases (referred to as a **precedent**).

Law-making through the courts generally occurs when a court is hearing an appeal (so there is no jury) or in a case where there is no 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. By contrast, when judges resolve a dispute they must give reasons for their decision. It is this legal reasoning behind the decision that forms the precedent.



Source 1 A bronze statue of one of Victoria's earliest Chief Justices, George Higinbotham, who served on the bench from 1886 to 1892, stands outside the Supreme Court in Melbourne.

How do courts make law?

The doctrine of precedent

Courts or judges make law by establishing precedents. A precedent is the reasoning behind a court's decision. It establishes a legal principle or legal rule which can be used by judges to provide guidance when deciding future cases. A precedent established by a superior court in the same court hierarchy must be followed by judges and magistrates in lower courts when they are deciding future cases with similar **material facts**. The 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. A party that takes a case to court can look at past cases and 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. It can sometimes, however, be time-consuming and costly for parties to locate relevant precedents due to the large volume of cases and precedents in existence. It can also be difficult to establish the legal reasoning behind decisions in cases heard on appeal where more than one judge may give reasons for their decision.

The doctrine of precedent requires lower courts to follow precedents set in superior courts. Precedent, therefore, depends on the courts being organised or ranked in a hierarchy from lowest to highest, according to 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. The superior courts in the Victorian court hierarchy are the Supreme Court (Trial Division), the Supreme Court of Appeal and the High Court.

The High Court is the highest-ranked court in Australia and a decision made by the High Court on appeal is binding on courts in all states and territories.

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.

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.

stare decisis
a Latin term meaning 'let the decision stand'. The basic principle underlying the doctrine of precedent

Ratio decidendi

As stated above, *ratio decidendi* is a Latin phrase meaning 'the reason for the decision'. It is the binding part of a court judgment. A court judgment is a statement by the judge 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 the legal reasoning behind the decision or statement of law to be followed in the future.

Binding precedents

A **binding precedent** is a precedent that has been established in the 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.

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

For a precedent to be binding on a particular case, it must be established by a superior court from within the same court hierarchy. For example, with reference to the Victorian court hierarchy, in cases where the facts are similar:

- the Magistrates' Court and County Court are bound to follow precedents set by the Supreme Court of Victoria (Trial Division or Court of Appeal) or the High Court of Australia
- the Supreme Court (Trial Division) is bound to follow precedents set by the Supreme Court of Appeal or the High Court of Australia
- as it is the highest court in Australia, the High Court is not bound by precedents set by any Australian state or territory court.

Persuasive precedents

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)

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 (for example, the Victorian Supreme 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. Although these precedents are not binding, in reality and in the interests of consistency, judges will almost inevitably follow them. One exception to this 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 (for example, the justices consider the law to be outdated due to changes in community attitudes, technologies or other circumstances that occur over time).

A famous example of a persuasive precedent is the British case of *Donoghue v Stevenson*, which expanded the law of negligence. While this case was not binding on Australian courts, it was used as persuasive precedent in *Grant v Australian Knitting Mills Ltd*, which was the first case to establish the law of negligence in Australia.

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.

ACTUAL SCENARIO

The snail in the bottle

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.

Mrs Donoghue sued the manufacturer, Mr David Stevenson, for negligence. This was because she claimed that the fault lay with him because he had not cleaned the bottle correctly, rather than the seller, who could not know the goods were faulty because the bottle was sealed and opaque.

Because a friend had bought the ginger beer for Mrs Donoghue, she was not party to a contract with either the seller or the manufacturer, and so could not sue for breach of contract.

The House of Lords (the highest court in the United Kingdom) ruled in favour of Mrs Donoghue and the law of negligence was established in Great Britain. The legal reasoning (*ratio decidendi*) provided by the judges 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.



Source 2 A decomposed snail was found in the bottom of a ginger beer bottle (similar to this one) manufactured by Stevenson.

In giving its decision the House of Lords 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'.

Dr Grant's underpants

ACTUAL SCENARIO

Grant v Australian Knitting Mills Ltd [1932] All ER 209

In this case, the plaintiff, Grant, sued the manufacturer of a pair of long woollen underpants, which had carelessly left a chemical in the material that caused Grant to suffer chronic dermatitis. The Court chose to follow (i.e. was persuaded by) the precedent set in *Donoghue v Stevenson* and similarly deciding that the manufacturer of a product owes a duty of care to the ultimate consumer. The decision established the law of negligence in Australia.



Source 3 Grant was affected by dermatitis from wearing a pair of long woollen underpants.

Obiter dictum

Statements made as ***obiter dictum*** contained in **court judgments** from the same or another court hierarchy may also be considered as persuasive. *Obiter dictum* (also called just '*obiter*', or its plural *obiter dicta*) is a Latin term meaning 'a thing said by the way'. It refers to those statements or 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. Rather than being an essential part of the reason for the decision, comments made as *obiter dictum* can be a matter the judge contemplated and reflected upon when making his or her decision and forms part of their considered opinion.

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)

court judgment
a statement by the judge at the end of case that outlines the decision and the legal reasoning behind the decision



Developing and avoiding precedents

When deciding cases, judges will consider precedents established in earlier cases. If a judge is **not** bound to follow the earlier precedent, they may decide to:

- **adopt** the precedent (follow or apply the precedent, in which case the precedent will be affirmed or have been considered favourably)
- choose **not to follow** the existing precedent.

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 allows the court to express their disagreement with an existing precedent; it does not allow a court to avoid following that precedent.

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

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

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

In cases where judges are not bound to follow an existing precedent they may also be able to create new precedents. This allows a degree of **flexibility** in the common law; that is, it allows precedents and the common law to change and develop over time.

Apart from following a precedent (whether binding or persuasive), there are four other ways that judges can treat previous precedents: **distinguishing, reversing, overruling** and **disapproving**. These different ways of treating a precedent are set out in Source 4.

Distinguishing a precedent	• A judge may be able to avoid following an existing binding precedent if he or she can find a difference between 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 court can decide to distinguish a precedent, and not follow it, 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.
Reversing a precedent (in the same case on appeal)	• When hearing a case on appeal from a lower court, a judge in a superior court may disagree with and decide to change the previously established precedent set by the lower court. This is called **reversing a precedent**. • When a court reverses an earlier decision or precedent, in the same case on appeal, a new precedent is created by the superior court's decision. This new precedent becomes the one to follow in future cases.
Overruling a precedent (in a different and later case)	• A judge in a superior court may decide not to follow a previously established precedent set by a lower court in a different and earlier case. This is called **overruling a precedent**. When a court overrules a precedent, a new precedent is created by the superior court that makes the earlier precedent inapplicable. • Overruling a precedent 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 Victorian Supreme Court (Trial Division) in 'Case A' can be overruled by the Victorian Supreme Court of Appeal in 'Case B'.
Disapproving a precedent	• Judges and magistrates in lower courts who are bound to follow precedents set by superior courts in the same hierarchy may express their dissatisfaction with the precedent. This is called **disapproving the precedent**. While this statement of discontent **does not** allow the lower court to avoid following the precedent, it may be used during an appeal to indicate the original judge's dissatisfaction with the precedent or encourage parliament to change the law. • Judges in courts of the same standing (who by convention rarely overrule precedents set by their own court) and judges in superior courts may also express their disapproval of an existing precedent rather than overruling it, preferring a more superior court or the parliament to change the law.

Source 4 There are four other ways that judges can treat previous precedents.

The scenario below is an example of a judge distinguishing a previous precedent because there was a difference in the material facts of the case.

Distinguishing a case: Driving drunk in charge of a motor vehicle

ACTUAL SCENARIO

Davies v Waldron [1989] VR 449

In this case the accused was found guilty of being in charge of a motor vehicle while having a blood alcohol concentration over the legal limit (i.e. while being intoxicated). The police gave evidence the accused was seen sitting in the driver's seat of his car, with the seat belt on, and starting the engine. The car then moved approximately 15 cm and stopped as if it stalled.

The accused claimed that one of his friends was driving his car when it stalled, and the friend was unable to restart the car. When the accused was discovered by the police in the driver's seat of his car, he was not intending to drive the car but was simply checking as to whether or not it could be started.

The defence counsel urged the judge to be persuaded by *Gillard v Wenborn* (unreported), arguing that it was a similar case in which an accused was found not guilty of being in charge of his car while intoxicated. In *Gillard v Wenborn* the accused had fallen asleep in the back seat of his car while being intoxicated, and after waking the next morning, moved into the front seat to call for assistance on his car phone. He turned on the engine to turn the heater on and then fell asleep again. He was found by police at 6 am, asleep in the front seat of his car with the engine running.

When making his decision in the *Davies v Waldron* case as to what constitutes being 'in charge' of the car while intoxicated, the judge was required to consider whether the accused had or was attempting to 'start to drive' the car. In deciding this, the judge said it was necessary to link the intoxicated person in charge of the car with a risk that he would drive the car when in an unfit state. On this basis the judge distinguished between the two cases stating the accused in *Davies v Waldron* had attempted and succeeded in starting the engine of the car and was at risk of driving the car, whereas the accused in *Gillard v Wenborn* was found asleep in the driver's seat with the engine running, and was not at risk of driving. The accused in *Davies v Waldron* was found guilty of the charge.



Source 5 In this case, the judge found that the accused had been 'in charge' of the car while having a blood alcohol concentration over the legal limit. In Victoria, it is an offence to drive a motor vehicle if your blood alcohol concentration is higher than 0.05%.

While the High Court is not bound to follow its own previous decisions, in an attempt to maintain consistency, it will usually do so unless the justices consider a past precedent to no longer be a good law. The following scenario is an example of the High Court overruling its own previous precedent.

ACTUAL SCENARIO

High Court overrules its own past precedent

Imbree v McNeilly (2008) 236 CLR 510

In this case, Mr Imbree, a fully licenced driver, allowed Mr McNeilly, a 16-year-old who had just obtained his learner driver permit, to drive his car while on a trip to the Northern Territory. While driving, McNeilly swerved to avoid the remains of an old tyre on the road, causing the vehicle to roll over and Imbree to sustain severe injuries. Imbree sued McNeilly for damages in the New South Wales Supreme Court.

While the Supreme Court, and in the subsequent appeal case the NSW Supreme Court of Appeal, found in favour of Imbree, the amount of damages awarded was significantly reduced due to the courts being bound by a precedent. The High Court in *Cook v Cook* (1986) 162 CLR 376 had held that an inexperienced learner driver owed a lower standard of care to a passenger who was supervising their driving than that owed by an experienced, fully licenced driver. As a result of this precedent, it was held that McNeilly, as an inexperienced learner driver, had a reduced liability for the injuries sustained by Imbree.

Imbree was granted leave to appeal his case to the High Court, where six justices overruled the precedent set in *Cook v Cook* on the basis that it was not good law. The justices held that the standard of care owed by a learner driver should be the same as that owed by other fully licenced drivers. That is, a learner driver must take reasonable care to avoid driving in a manner that will cause injury to others and the standard of care they owe to passengers is not lowered because they are an inexperienced driver.



Source 6 When a superior court decides not to follow a previously established precedent it can choose to reverse or overrule the existing precedent.

The following scenario is an example of the High Court being persuaded by (and expressing their disapproval of) an existing precedent. It also demonstrates the ability of parliament, as the supreme law-making body, to abrogate a court decision.

Disapproving a precedent: The *Trigwell* case

ACTUAL SCENARIO

State Government Insurance Commission v Trigwell (1979) 142 CLR 617

Mr and Mrs Trigwell were injured when a vehicle driven by Ms Rooke collided with their car. Ms Rooke had lost control of her car after swerving to avoid hitting two sheep, owned by the Kerins, which had strayed onto the highway. As Ms Rooke was tragically killed in the incident, the Trigwells sued their insurance company (the State Government Insurance Commission) and the Kerins for damages. The Trigwells claimed the Kerins were negligent because they failed to provide adequate fencing to keep their sheep from regularly 'escaping' onto the highway.

When making its decision, the High Court decided to follow an old common law principle, set in the British case of *Searle v Wallbank* [1947] 1 All ER 12. This principle was that landowners did not owe a duty of care to road users for damage caused by their livestock (such as sheep and cows) straying from their land onto highways.

While the justices of the High Court considered the possibility that the stray sheep were a significant cause of the accident and that the Kerins should have provided more reliable fencing to prevent their sheep from entering the highway on a regular basis, they chose to uphold the existing common law and follow the precedent set in *Searle v Wallbank*, preferring to leave any change in the law to parliament. More precisely, 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.

Five years after the *Trigwell* case, the Victorian Parliament followed the suggestion made by Justice Mason and passed legislation (the *Wrongs (Animals Straying on Highways) Act 1984* (Vic)), to abolish the existing common law and make landowners legally responsible for any damage negligently caused by their animals straying on to highways.

Source 7 The Victorian Parliament abrogated the High Court's decision in the *Trigwell* case that landowners were not responsible for damage caused by their straying animals.



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, such as the law of negligence, have developed through the courts in this way, piece by piece.

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

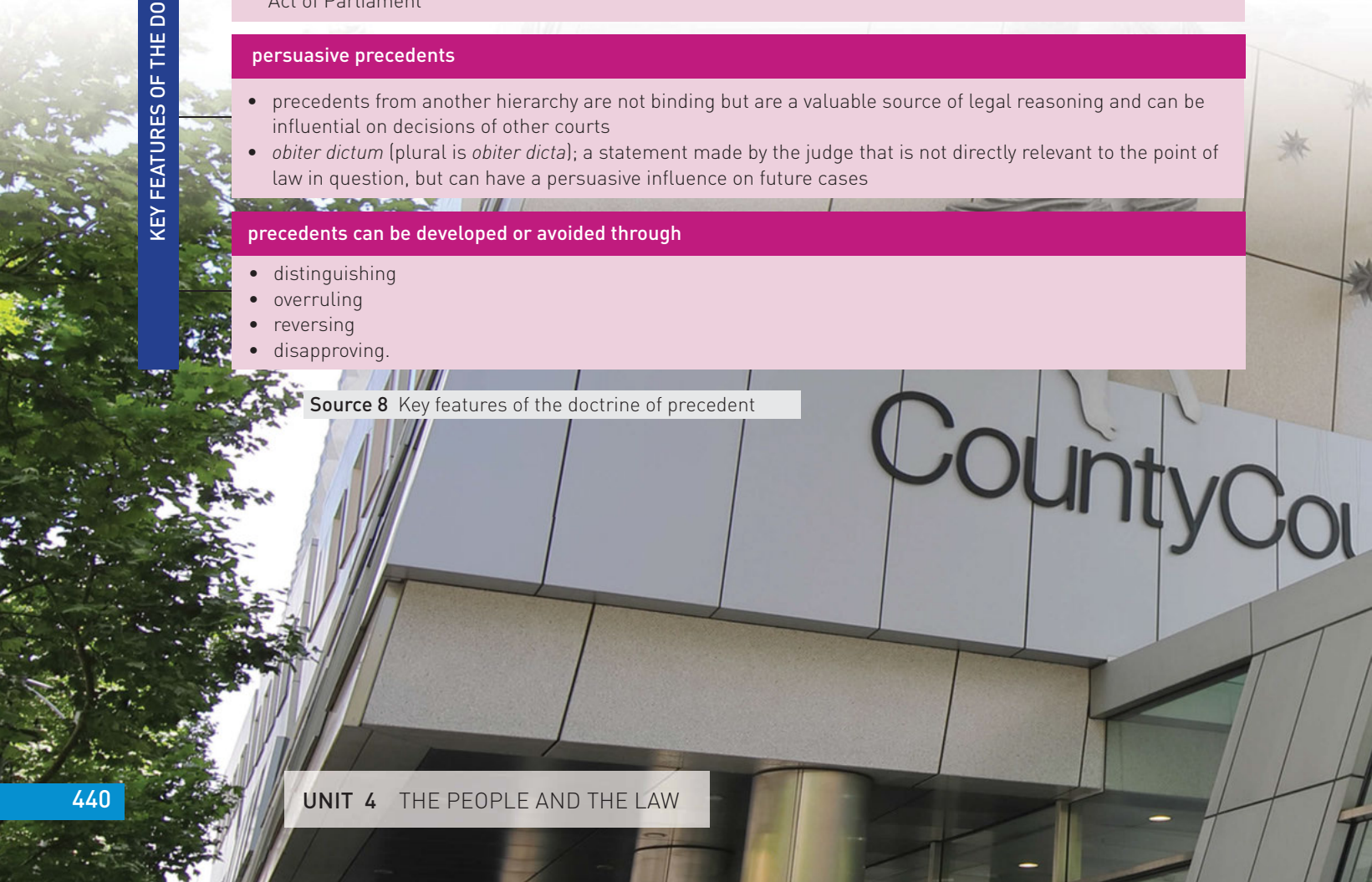
persuasive precedents

- 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*); a 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 8 Key features of the doctrine of precedent



14.2 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 common law.

3 Identify two reasons why it may be difficult to establish the legal reasoning behind a previous decision.

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 Distinguish between reversing and overruling a precedent.

6 Explain how lower courts can avoid following a binding precedent.

7 Explain why a judge may express his or her disapproval of a binding precedent.

Synthesise and apply

8 Read the scenario *Donoghue v Stevenson*.

- **a** Research more into the facts of this case. Create two columns, and label one 'significant facts' and label the other 'insignificant facts' (significant facts being facts that are important to know the reasoning behind the decision of this case). Fill in both columns, and discuss as a class.
- **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.

9 Read the scenario *Imbree v McNeilly*.

- **a** Outline the key facts in this case.
- **b** Explain why the NSW Supreme Court and the NSW Supreme Court of Appeal found in favour of Imbree but reduced the amount of damages he was awarded.
- **c** Explain why the precedent set in *Cook v Cook* is referred to as being overruled, rather than reversed, by the High Court in *Imbree v McNeilly*.
- **d** Do you agree with the precedent set in *Cook v Cook* or *Imbree v McNeilly*? Justify your response.

Analyse and evaluate

10 Discuss the ability of judges to change the law.

Check your obook assess for these additional resources and more:

- **Student book questions** 14.2 Check your learning
- **Going further** Developing the law of negligence
- **Worksheet** Developing precedent The *Miller v Miller* case
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

14.3 STATUTORY INTERPRETATION

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.

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 statute (known as an 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.

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.

parliamentary counsel lawyers who are responsible for drafting bills in accordance with the policies and instructions of a member of parliament

Reasons for statutory interpretation

There are many reasons why courts are called upon to interpret legislation. These reasons can be divided into two broad categories:

- to resolve problems that occur as a result of the drafting process, and
- to resolve problems that occur when a court is applying the Act of Parliament to resolve a case.



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.

Resolving problems as a result of the drafting process

Drafting bills can be a complex task because **parliamentary counsel** must gain information from a range of policy documents and, at times, follow imprecise instructions from members of parliament (usually government ministers). Similarly, bills are often phrased using *general* terms to ensure they can be applied to and cover a wide range of future circumstances. On some occasions, by contrast, bills are drafted using *precise* terms that clearly define the law being proposed so it cannot be misinterpreted. The complexities involved in drafting legislation mean that inevitably some terms and phrases used will be unclear and in need of interpretation before they can be applied to resolve the case before the courts.

The following is an example of why precise terms need to be used to clearly define the law.

What does 'supply' really mean?

HYPOTHETICAL SCENARIO

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 service. 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 Rob leaves illegal drugs in his friend Khloe's car, and Khloe returns the drugs, is Khloe 'supplying' drugs and therefore committing a crime according to the proposed legislation? Can returning the drugs to Rob be regarded as Khloe 'supplying' drugs? Similarly, could a courier who is employed by Rob to deliver drugs to Khloe be charged with 'supplying' drugs, or would Rob be the 'supplier'? If Rob places the drugs in a bank deposit box for safekeeping does this mean that the bank has been 'supplied' with drugs?

Other problems may occur as a result of the drafting process. These are set out below.

- **Mistakes in 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.
- **The bill 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 bill might not have been 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.

Resolving 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 described 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 before they can be applied to specific circumstances. For example, in the case of *Deing v Tarola* (see page 445) 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 and no longer reflects community views and values**. For example, while each state has laws banning the use of obscene and indecent language in a public place, what is considered offensive and indecent language changes over time, as is demonstrated in the scenario on the next page.

ACTUAL SCENARIO

Activist charged with offensive behaviour

In 2019 Danny Lim, a 75-year-old activist, was found not guilty of offensive behaviour in a public place after he was charged for wearing a billboard containing a jumbled set of letters to indicate a commonly considered 'swear word'. During the hearing, Mr Lim's lawyer argued the Mr Lim intended his billboard to be thought-provoking and fun rather than offensive, and likened the use of the jumbled letters to the advertising campaign used by the global clothing store French Connection UK. In dismissing the charges, the magistrate commented that a reasonable person would not be so easily offended by the 'provocative and cheeky' billboard.



Source 2 Danny Lim's use of language on some of his billboards has forced the courts to examine the meaning of offensive behaviour.

- **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* on page 437, the Supreme Court judge was asked to interpret the phrases 'in charge of a motor vehicle' and 'start to drive', as stated in the *Road Safety Act 1986* (Vic). The judge had to determine whether an intoxicated driver, who was sitting in the front seat of his car while the engine was running, was guilty of being 'in charge' of his motor vehicle with more than the prescribed concentration of alcohol in his blood. The judge found that the accused was 'in charge' of his motor vehicle and did 'start to drive' the motor vehicle within the meaning of the *Road Safety Act*.
- **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**. For example, the original legal meaning of the term 'de facto relationship' was a man and a woman living in a domestic relationship. However, this definition has changed over time to now mean a couple living in a domestic relationship, regardless of gender.

The case of *Deing v Tarola* demonstrates the need for statutory interpretation and how judges make law through statutory interpretation. This is explained in more detail on the next page.

Is a studded belt a weapon?

ACTUAL SCENARIO

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 1990* (Vic), which states 'A person must not possess, carry or use any regulated weapon without lawful excuse'.

Section 5 of the *Control of Weapons Regulations 1990* (Vic) contained a long list of weapons that are 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'.

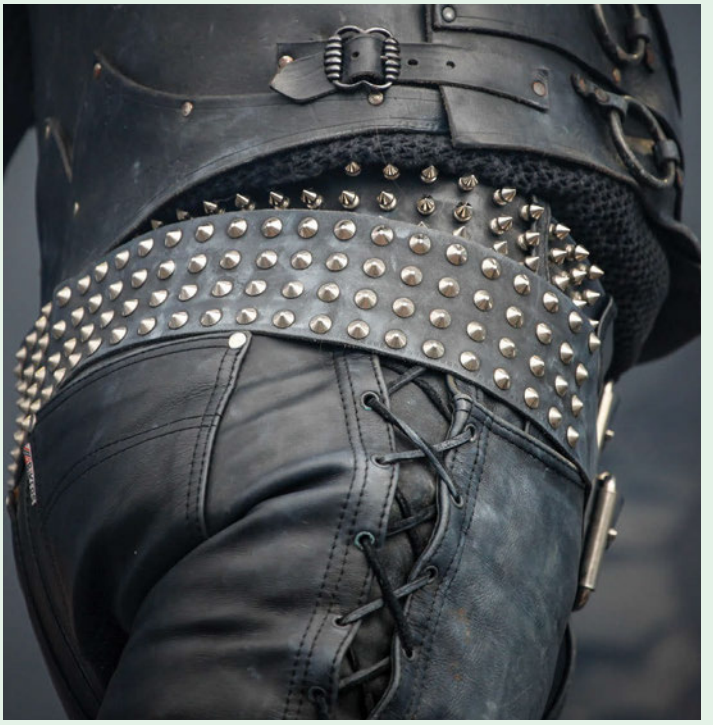
To determine whether Mr Deing was guilty of the charge, the Court was required to interpret the words 'regulated weapon' as found in the *Control of Weapons Act* and the *Control of Weapons Regulations*, and then decide if regulated weapons included studded belts.

In the original Magistrates' Court hearing, the Magistrate 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*.

Mr Deing appealed against the Magistrates' Court's decision to the Supreme Court on the basis that the Magistrate had made an error when interpreting the law. The Supreme Court allowed the appeal and held 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 courts, 'weapon' could include any number of things such as pieces of timber or lengths of pipe. His Honour also looked for assistance from *Halsbury's Laws of England*, which defined 'offensive weapon' as 'anything that is not in common use for any other purpose but that of a weapon. But a common whip is not such a weapon; nor probably a hatchet which is caught up accidentally during the heat of an affray'.

In his judgment, Justice Beach also referred to other previous cases that had interpreted the words 'offensive weapon'. For example, in *Wilson v Kuhl; Ryan v Kuhl* [1979] VR 315, Justice McGarvie examined the meaning of an offensive weapon and stated: 'Any physical article is an offensive weapon if it is an article of a kind normally used only to inflict or threaten injury … 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.'



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.

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.

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 listed 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 and any person who may bring a similar case in the future**. 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. The meaning of the legislation as determined by the court also applies to any person who may bring a similar case in the future. This is because 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** (cancel) a High Court decision involving constitutional matters).
- **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 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,

abrogate
to cancel or abolish a court-made law by passing an Act of Parliament

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. See Chapter 12 for a detailed description of the *Tasmanian Dam* case.

The case of *Lansell House Pty Ltd v Commissioner of Taxation* illustrates the need for and effects of statutory interpretation by exploring the definition of what is considered to be a bread product compared to what is considered to be a biscuit product. This is outlined in the scenario below.



Source 4 The meaning of law can be expanded through statutory interpretation, as was the situation with the *Tasmanian Dam* case, regarding the Franklin River (pictured here).

Bread or biscuit?

ACTUAL SCENARIO

Lansell House Pty Ltd v Commissioner of Taxation (2011) 190 FCR 354

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.

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.



Source 5 Ciabatta – bread or biscuit?

14.3 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 Explain how a word you know of has changed its meaning over time.
4 What does it mean to say an Act of Parliament is 'silent on an issue'?

Synthesise and apply

5 In the case of *R v Pink*, Justice Beyonce was required to interpret whether or not Pink had used 'offensive language in a public place' in accordance with the *Summary Offences Act 1966* (Vic).
   a Explain one reason why statutory interpretation may be necessary in this case.
   b Explain two possible effects of Justice Beyonce's interpretation of the *Summary Offences Act*.
6 Read the scenario *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?
7 Read the scenario *Deing v Tarola*.
   a What was Chanta Deing (the accused) 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 Could this case be used as an example of a reversed decision? Explain.
   f 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*.
   g What was the outcome of this case? Why was action taken to amend the law? Explain.
8 Read the scenario *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.
9 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
   - the section of the statute that was interpreted
   - whether any precedent is being referred to and if so, the title of the case.

Analyse and evaluate

10 '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.

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Student book questions
14.3 Check your learning


Worksheet
Statutory interpretation


assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

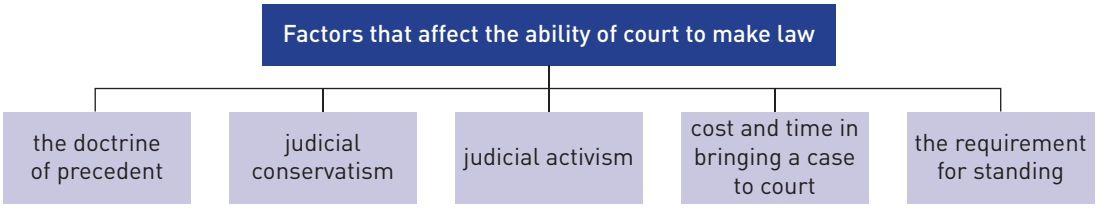
14.4 FACTORS THAT AFFECT THE ABILITY OF THE COURTS TO MAKE LAW – THE DOCTRINE OF PRECEDENT

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.



Source 1 Factors that affect the ability of the courts to make law

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.

The doctrine of precedent allows for consistency

The doctrine of precedent requires judges in lower courts to follow the legal reasoning behind the decisions of higher courts in the same hierarchy when resolving disputes in which the material facts are similar. This application of precedents to current cases helps ensure common law (or law made by the courts) 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 principles 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.

However, while the doctrine of precedent helps ensure consistency and predictability there are limitations associated with this, including:



Source 2 Lawyers refer to earlier judgments or precedents when they give advice. They also need to put their arguments to the court based on the precedents.

- **the difficulty and cost involved in locating 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
- **the difficulty in identifying the legal reasoning behind a decision.** 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. Further, 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.

The doctrine of precedent allows for flexibility

Another strength associated with the doctrine of precedent is that it is **flexible**. Through the process of reversing, overruling, distinguishing and disapproving, precedents change and develop over time to allow the gradual expansion of common law. For example, superior 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.

Even if judges do not distinguish, overrule, reverse or disapprove of past decisions, they may still need to interpret the meaning of the words and phrases used in the past precedents and refine the law and make it clearer as they apply a precedent to a new case. This also allows the law to expand and develop over time.

However, while the doctrine of precedent allows for flexibility and the development of common law, the extent to which this can be achieved is limited due to a number of factors. These factors are outlined below.



Source 3 Judges of the Victorian Court of Appeal can overrule or reverse precedents set by the Trial Division of the Supreme Court of Victoria, enabling common law to develop over time.

- **The doctrine of precedent restricts the ability of the lower courts to change the law in cases where they are bound to follow a previous precedent established by a higher court.** This may 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.
- **Judges in superior courts may be reluctant to reverse or overrule existing precedents**. For example, in the *Trigwell* case (see page 439), the High Court decided not to overrule the existing common law that landowners had no duty of care for damage caused by their stray animals, preferring to leave the law-making to parliament in this area.

- **While not being technically bound by their own court's previous decisions, judges in courts of the same standing consider these precedents to be highly persuasive and rarely overrule them**. This is 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.

Study tip

You must be able to specifically discuss how the doctrine of precedent affects the ability of the courts to make law. This means you must be able to explain how the key features and operation of precedent can both assist and limit the ability of judges to make law.

Other ways the doctrine of precedent limits the ability of the courts to make law

There are a number of ways that the doctrine of precedent limits the ability of the courts to make law. These are outlined below.

- Judges must wait for a relevant case to be brought before them and 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 in superior courts are restricted to making law that is needed to clarify some issue or matter raised in the case before them. Any thoughtful or considered comments made 'by the way' are *obiter dictum* and do not form a part of the precedent and law.
- Judges make law ***ex post facto***. As the doctrine of precedent only permits courts to 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.
- While judges can make law through the establishment of precedents and have the power to clarify and expand or limit the meaning of legislation (via statutory interpretation) so it can be applied to resolve the dispute before the court, with the exception of High Court decisions in constitutional matters, parliament can always legislate to abrogate (cancel) common law. This is because parliament is our supreme law-making body. This limits the ability of judges to make and change 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

Summary of the doctrine of precedent

A summary of the ways in which the doctrine of precedent assists and limits the ability of the courts to make law set out in Source 4 below.

WAYS THE DOCTRINE OF PRECEDENT ASSISTS THE ABILITY OF THE COURTS TO MAKE LAW	WAYS THE DOCTRINE OF PRECEDENT LIMITS THE ABILITY OF THE COURTS TO MAKE LAW
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 possibility that different judges will use different legal reasoning in the same case, the **process of identifying the relevant precedent can be time-consuming and costly** for the parties.

WAYS THE DOCTRINE OF PRECEDENT ASSISTS THE ABILITY OF THE COURTS TO MAKE LAW	WAYS THE DOCTRINE OF PRECEDENT LIMITS THE ABILITY OF THE COURTS TO MAKE LAW
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 change the law. Similarly, with the exception of the High Court, courts of the same standing, by convention, rarely overrule their own precedents.
Judges can make law through the **establishment of precedents** and have the power to clarify and expand or limit the meaning of legislation (via statutory interpretation) so it can be applied to resolve the dispute before the court.	Judges can only interpret legislation and establish precedents **when an appropriate case is brought before a superior court**, which is generally reliant on parties being willing to pursue a dispute through the appeals process.
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*).

Source 4 A summary of the ways in which the doctrine of precedent assists and limits the ability of the courts to make law

14.4 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 assists or limits the ability of the courts to make law.

Synthesise and apply

4 For each of the following scenarios, explain how the doctrine of precedent will both assist and restrict the courts in making or developing law.

- **a** Ellul 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 Ellul's favour.
- **b** Leandra is suing her local supermarket in the County Court of Victoria after she slipped on a grape while buying groceries. She has been advised that some of the facts in her case are similar to the facts in a precedent established in the High Court, but some facts are different.
- **c** Turner 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.

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- **Video tutorial** Tackling the doctrine of precedent
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14.5 FACTORS THAT AFFECT THE ABILITY OF THE COURTS TO MAKE LAW – 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 in the next topic of this chapter.

The Honourable Susan Kiefel was appointed as Australia's first female Chief Justice of High Court in 2017. Legal commentators have categorised her as a conservative justice.

ACTUAL SCENARIO

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 AC 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 speculate on whether the High Court is 'conservative' or 'active', based on its judges at the time. Chief Justice Kiefel has been categorised by some as conservative. In particular, Kiefel CJ often writes joint judgments with other High Court justices and does not often dissent in cases (that is, she does not often disagree with the majority of justices). Other observers criticise those who label justices as being conservative or activist, claiming such classification is too simplistic and demonstrates a lack of understanding about the role of the judge.



Source 1 The full bench of the High Court of Australia, after the Honourable Susan Kiefel (shown centre) was appointed as Australia's first female High Court Chief Justice

Over the years the High Court has exercised both judicial conservatism and judicial activism when resolving disputes and establishing precedents. For example, as you have seen in the *Trigwell* case (see page 439) the justices adopted a conservative approach by upholding the old common law principle that landowners did not have a legal responsibility for damage caused by their stray animals.

By contrast, in 1992, the justices of the High Court adopted an 'activist' approach in the *Mabo* case by establishing a precedent that recognised land rights for Aboriginal and Torres Strait Islander people. The *Mabo* case is discussed in the next topic.

Over the years the High Court has also taken a conservative approach when resolving a number of constitutional disputes, upholding the view that the courts should limit their role as law-makers when determining constitutional disputes, and be reluctant to declare Acts of Parliament invalid unless they are obviously unconstitutional. The reasoning behind this approach is that the main purpose of judicial interpretation is to give effect to what parliament intended when it passed the statute that is being interpreted.

The High Court decision in the case of *Re Gallagher* (following) is generally considered to be an example of the High Court taking a conservative rather than an activist approach when interpreting the Australian Constitution to resolve a dispute over the eligibility of a senator to be elected to the Federal Parliament.

ACTUAL SCENARIO

Politician disqualified from sitting in parliament

Re Gallagher [2018] HCA 17 (9 May 2018)

In 2018 the High Court was required to determine whether Senator Katy Gallagher, who had been elected as a Senator for the Australian Capital Territory, was ineligible to sit as a serving member of parliament.

More specifically, the High Court was required to determine whether Ms Gallagher, who was a dual British citizen at the time she was nominated for the 2016 federal election (on 31 May), should be disqualified from her Senate seat under section 44(i) of the Australian Constitution which, in simple terms, disqualifies any person who is a citizen of a foreign country from being chosen or elected as a member of either house of Federal Parliament.



Source 2 Senator Katy Gallagher was forced to resign from the Senate after the High Court ruled she was ineligible to be elected due to holding dual British citizenship at the time she was elected.

An added complexity to the case was that after becoming aware of her British citizenship, Ms Gallagher applied to the United Kingdom Home Office to have her citizenship renounced. This occurred approximately one month after she had been elected to Parliament.

In May 2018 the full bench of the High Court (i.e. all seven justices) adopted what is generally regarded as a conservative approach when applying section 44(i) of the Constitution and ruled that Ms Gallagher was not eligible to be elected to the Senate because her British citizenship had not been revoked at the time she nominated for the Senate. The ruling upheld a similar precedent set in the early case of *Re Canavan* (2017) HCA 45 (27 October 2017) in which seven members of parliament were similarly declared ineligible from sitting in the Federal Parliament because they held dual citizenship. Three other members of the House of Representatives resigned following the decision in *Re Gallagher*.

The High Court's ruling is considered conservative because it took a literal and narrow approach to interpreting the meaning of section 44(i), with some critics claiming the ruling failed to acknowledge changes in the multicultural composition of the Australian people since Federation and may not have reflected the intent of those who drafted the Constitution.

As mentioned earlier in this chapter, judges may also be conservative in circumstances where their interpretation of legislation may potentially lead to a major or controversial change in the law. They may 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 on whole areas and in anticipation of future circumstances. The role of parliamentary committees and the VLRC is examined in Chapter 15.

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

extrinsic material
material (i.e. information) that is not part of an Act of Parliament, but may assist a judge to interpret the meaning of the Act

Summary of judicial conservatism

A summary of the way judicial conservatism affects the ability of courts to make laws is set out in Source 3.

WAYS JUDICIAL CONSERVATISM ASSISTS THE ABILITY OF THE COURTS TO MAKE LAW	WAYS JUDICIAL CONSERVATISM LIMITS THE ABILITY OF THE COURTS TO MAKE LAW
Helps maintain stability in the law because judges are cautious and show restraint when making decisions that could lead to significant changes in the law	Restricts the ability of the courts to make major and controversial changes in the law
Lessens the possibility of appeals on a question of law	Can discourage judges from considering a range of social and political factors when making 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	May be seen by some as not being progressive enough and not factoring in twenty-first century views or values when deciding cases

Source 3 A summary of the way judicial conservatism may affect the ability of judges to make new laws

14.5 CHECK YOUR LEARNING

Define and explain

1 Define the term 'judicial conservatism'.
2 Explain how judicial conservatism can affect the way a statute is interpreted.

Synthesise and apply

3 Explain the role of the High Court in *Re Gallagher* and suggest why its decision was considered to be conservative.

Analyse and evaluate

4 Discuss one strength 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
14.5 Check your learning

Going further
Rape in marriage cases

Weblink
Australian Electoral Commission – enrolling to vote

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

14.6 FACTORS THAT AFFECT THE ABILITY OF THE COURTS TO MAKE LAW – JUDICIAL ACTIVISM

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 *Mabo* case described below.

ACTUAL SCENARIO

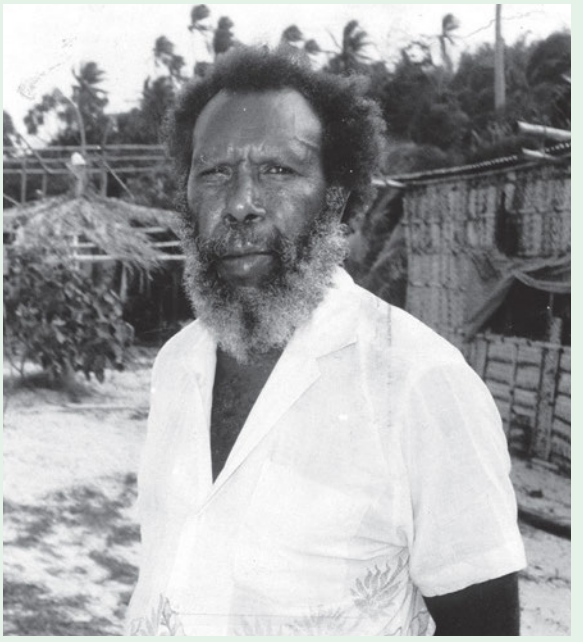
terra nullius
a Latin term meaning 'empty land'; a false common law principle that Australia belonged to no one when the British first arrived in Australia to establish a colony in 1788

native title
the right of Indigenous peoples to have ownership of land (property) based on having a spiritual, religious and cultural connection with the land.

The *Mabo* case

Mabo v Queensland (No. 2) (1992) 175 CLR 1

In 1992 the justices of the High Court (6:1 in favour) made a significant ruling to give Aboriginal and Torres Strait Islander people 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' (referred to as the principle of ***terra nullius***) before British colonisation in the late 1700s. The Court legally recognised the right of Indigenous Australians to make claims over their traditional land and be granted **native title** to land. The case, which became known as the *Mabo* case, commenced in 1982, when five men who were members



Source 1 Eddie Mabo, whose successful High Court challenge saw the legal recognition of native title land rights for Aboriginal and Torres Strait Islander peoples

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 Meriam men, led by Eddie Mabo, lodged a test case against the Queensland Government and the Commonwealth of Australia in the High Court to determine the legal rights of the Indigenous Meriam people.

On 3 June 1992 after a 10-year struggle, the High Court gave its ruling in the *Mabo* case, finding in favour of Mabo by deciding 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. The High Court's ruling was an example of judicial activism in that the Court broadly interpreted the law to protect the rights of the Meriam people. The Court boldly overruled the common law principle of *terra nullius*, which had existed since colonisation, and set a precedent that established the right of Indigenous people to claim, and in certain circumstances, be granted native title of their land.

In 1993 following the *Mabo* decision in the High Court, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth), to confirm and enshrine the High Court's decision in legislation and establish procedures for dealing with and settling native title claims.

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 *Timber Creek* case, the High Court exercised judicial activism by ruling against the Federal Government.



Source 2
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.

ACTUAL SCENARIO

Compensating Indigenous peoples for the loss of native title land

Northern Territory of Australia v. Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor [2019] HCA 7 (13 March 2019)

In March 2019 the High Court awarded the Indigenous Ngaliwurru and Nungali peoples, who had been recognised as the native title holders of the land in and surrounding the small town of Timber Creek in the Northern Territory (approximately 600 km via road south of Darwin), $2.5 million in damages to compensate for the loss of part of their land.

The ruling was made after the Northern Territory Government passed a number of statutes which allowed for the construction of roads and infrastructure, resulting in the loss of approximately 1.2 km^2 of the Ngaliwurru and Nungali peoples' land.

While the $2.5 million in damages was less than the $3.3 million originally awarded by the Federal Court in 2016, it included $1.3 million in recognition of the cultural and 'spiritual' harm caused by the loss of spiritual connection to the land, although no amount of money may genuinely be able to compensate for such non-economic loss.

The High Court ruling was viewed as an important decision because it recognised the right of Indigenous people to be compensated for the loss of their native title land, including being compensated for the spiritual and cultural loss suffered as a result of land loss.

Source 3 In 2019 the Ngaliwurru and Nungali peoples were awarded $2.5 million in damages to compensate for the loss of part of their land.



Summary of judicial activism

A summary of the way judicial activism affects the ability of courts to make laws is set out in Source 4 below.

WAYS JUDICIAL ACTIVISM ASSISTS THE ABILITY OF THE COURTS TO MAKE LAW	WAYS JUDICIAL ACTIVISM LIMITS THE ABILITY OF THE COURTS TO MAKE LAW
Allows judges to broadly interpret statutes in a way that recognises the rights of the people.	Can lead to more appeals on a question of law.
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.	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.
Allows judges to be more creative when making decisions and making significant legal change (as occurred in the *Mabo* case).	

Source 4 A summary of the way judicial activism may affect the ability of judges to make law

Did you know?

As at January 2020, 491 native title determinations had been made resulting in upholding the existence, or partial existence, of native title in the area claimed. In fact, native title has been recognised on over 30 per cent of Australia's land mass. However, most of the successful land claims have been over land located in very remote areas of Australia, with very limited or no infrastructure.

14.6 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 Read the scenario *Mabo v Queensland (No 2)*.
   - **a** Describe the basic facts of the *Mabo* case.
   - **b** Explain why the High Court's decision was regarded as an example of judicial activism.

4 Read the scenario *Northern Territory of Australia v. Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor.*
   - **a** Describe the basic facts of the case.
   - **b** Explain why the case is viewed by some legal commentators as the most significant case since the *Mabo* case.
   - **c** Explain why the High Court's decision in the *Timber Creek* case is considered an example of judicial activism.

Analyse and evaluate

5 Discuss the strengths associated with judges taking a more activist approach when resolving cases.

6 'Labelling judges as conservative or activist is too simplistic and demonstrates a lack of understanding about the role of judges.' Discuss the extent to which you agree with this statement.

Check your obook assess for these additional resources and more:

- **Student book questions** 14.6 Check your learning
- **Worksheet** *Rowe v Electoral Commissioner* (2010) 243 CLR 1; an example of the High Court taking an activist approach.
- **Worksheet** The *Malaysia Solution* case (2011); an example of the High Court taking an activist approach.
- **Weblink** French CJ and Judicial Activism

14.7

FACTORS THAT AFFECT THE ABILITY OF THE COURTS TO MAKE LAW – COST AND TIME IN BRINGING A CASE TO COURT

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.

litigant
a person who takes a matter before the court to be resolved

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.

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

The cost of legal representation

To ensure a party has 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 and barristers need to conduct research into the case (including researching previously established relevant precedents that may be 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.

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 2020 a standard application (i.e. for an 'ordinary' person, not a corporate or concession application) for leave to appeal to the Victorian Supreme Court of Appeal costs $2257, and hearing fees cost $835.30 for every day or part day, after the first day. If a party requests a jury in the Supreme Court, it will cost $804.20 for the first day, $577.80 per day for days two to six, and $1146.00 per day from day seven onwards. These fees increase on a yearly basis.

Study tip

Before including examples and cases, you should make sure that they are relevant and will improve or enhance your response.

Time involved in bringing a case to court

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.

The following scenario is an example of how the complexity of a dispute can lead to lengthy delays in a resolution being reached.

Eleven-year legal battle over failed mining project

ACTUAL SCENARIO

Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 11) [2020] QSC 5 (31 January 2020)

The events in this case began in 2002, when Chris Wallen and Ken Talbot (now deceased) made an agreement to develop a coal mine in Monto, Queensland. Mr Wallen, a billionaire mining entrepreneur and owner of mining company Sanrus, made the agreement with Mr Talbot, the founder of Macarthur Coal.

According to Mr Wallen, Mr Talbot began to reconsider the agreement. By 2003 Macarthur Coal, which owned a 51 per cent share of the coal mine project, suspended the development, leaving Sanrus unable to continue the venture.

In October 2007 Sanrus (and two other companies) sued Macarthur Coal (and its subsidiary companies including Monto Coal) for $1.1 billion in damages to compensate for lost earnings associated with the failure to develop the mine and the lost opportunity to sell their share of the project at the price it would have been worth should the coal mine have been developed.

In 2008 Mr Wallen commenced a civil action against Macarthur Coal. Mr Wallen claimed Macarthur Coal was responsible for Sanrus losing more than $1 billion after it pulled out of an agreement to develop the coal mine.

In April 2019, 11 years after the civil action was initiated, the case finally proceeded to trial in the Queensland Supreme Court. In the 11 years during the pre-trial stage, the Court convened 62 times and approximately 400 files were lodged with the Court's registry. The trial was also complex, with multiple rulings being made regarding the disclosure of documents and admissibility of evidence.

In November 2019, after months of hearings, the Supreme Court ruled in favour of Macarthur Coal. Following this ruling, in January 2020, Sanrus (and the other plaintiffs) informed the Court that they had reached an undisclosed settlement with Macarthur Coal, and its subsidiary companies, and so no order was made by the Court for costs.



Source 1 A breach of contract dispute between two mining companies took nearly 12 years to resolve.

Summary of costs and time factors

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 2.

FACTOR	WAYS THE FACTOR ASSISTS THE ABILITY OF COURTS TO MAKE LAW	WAY THE FACTOR LIMITS THE ABILITY OF THE COURTS TO MAKE LAW
Cost	• The courts are able to manage disputes so that the issues in dispute are narrowed, possibly saving the parties' costs and allowing them to proceed all the way to trial for a final determination. • The high costs may mean that only meritorious and legitimate claims are pursued all the way to appeal courts.	• High 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. • High costs can deter parties from pursing the appeals process.
Time	• Courts can make law relatively quickly once a dispute has been brought before them and cases must continue until a decision has been made to resolve the dispute. • Courts are not required to follow lengthy processes like those involved in the process of developing, drafting and passing a bill through parliament when deciding cases.	• Some courts, particularly appeal courts where most precedents are established, can take months to hear and determine more complex cases. • Parties can be delayed in getting a case ready for trial.

Source 2 A summary of the way costs and time affect the ability of courts to make new law

14.7 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 scenario *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 11)*.

a Identify the plaintiff and the defendant in this case.

b Suggest two reasons why this dispute may have taken so long to resolve.

c List some of the costs that would have been incurred by the plaintiff in pursuing this legal action.

d Suggest two benefits of resolving a civil dispute in a timely manner.

Analyse and evaluate

5 '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.

Check your obook assess for these additional resources and more:

- **Student book questions** 14.7 Check your learning
- **Worksheet** How long will it take?
- **Weblink** Unaffordable and out of reach – Community Law Australia
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

14.8 FACTORS THAT AFFECT THE ABILITY OF THE COURTS TO MAKE LAW – THE REQUIREMENT OF STANDING

Courts must wait until a party decides to pursue a case before they can create precedent and make law. A party cannot take a case to a court unless a court has the authority or jurisdiction to hear the case or matter.

standing
the ability of a party involved in a case to demonstrate to the court that there is sufficient connection to the issues, legal and factual, to support that party's involvement in 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.

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 involve 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.

The main purpose of the requirement for legal standing is to ensure cases are only pursued through the courts by people who are genuinely affected by an issue or matter. This ensures the courts resources (time, money and personnel) are not wasted on resolving cases in which the plaintiff is not directly affected by the matter and outcome of the case. It can also help ensure cases brought before the courts have merit and discourages frivolous actions.

By contrast, however, the requirement for standing can prevent plaintiffs who have a general interest in a case from pursuing the matter on behalf of another person or in the interest of the general public. For example, the requirement for standing prevents a person from taking court action in a case where legislation potentially might breach their rights or the rights of other individuals. It also might prevent a person who may have greater financial capacity, time, oral skills and confidence from pursuing a matter on behalf of another less able and willing party who has directly had their rights breached.

The scenario below is an example of a case where the High Court refused to make a ruling on the basis that the plaintiff had no 'special interest' and was not explicitly affected by the law.

ACTUAL SCENARIO

Are anti-bikie laws a breach of human rights?

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 introduced by the Queensland Government in September 2013.

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.

The laws aimed to make it difficult for 'declared criminal organisations' (which included more than 25 bikie clubs such as the Bandidos, Finks, Hells Angels and Rebels) to organise



Source 1 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.

criminal activities and recruit new members by banning three or more of these individuals from meeting in a public place.

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. The High Court held that because Kuczborski had not been charged with any crimes under the new 'anti-bikie' laws, he had no '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.

Interestingly, in April 2016 the newly elected Queensland Government set up a task force 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 following scenario because, in this case, the bishops did not have any legal, financial or special interest in the case.

ACTUAL SCENARIO

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 of how legal standing affects the ability of courts to make law

A summary of the way the requirement for standing affect the ability of courts to make law is set out in Source 2 on the next page.

WAYS LEGAL STANDING ASSISTS THE ABILITY OF THE COURTS TO MAKE LAW	WAYS LEGAL STANDING LIMITS THE ABILITY OF THE COURTS TO MAKE LAW
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.	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.
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 potential improvements to the law that could have been made by listening to those with only intellectual interest in the case are lost.

Source 2 A summary of the way the requirement for standing affects the ability of courts to make law

14.8 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 scenario *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 scenario *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** Shari was on a school camp. While riding a bike as part of one of the camp activities she fell into a large ditch and suffered injuries to her left leg. A girl who watched the injury has suffered anxiety and depression as a result. Shari's teachers are furious at the camp organisers.
- **b** Lucy 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. Michael, who has no children, also wishes to challenge it as he believes it is contrary to freedom of religion.
- **c** Eloise and her friend Langley intend to sue a power company after a faulty powerline caused a fire which destroyed their house. Their neighbours Ella and Renzi also wish to sue as they witnessed the fire and worried it would also destroy their house.

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.

Check your obook assess for these additional resources and more:

Student book questions
14.8 Check your learning

Going further
Same-sex marriage postal survey and standing

The *Australian Conservation Foundation Inc. v Commonwealth* (1980) 146 CLR 493, a leading case on standing

Worksheet
Who has standing in these cases?

14.9 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 could be asked a specific question about each of these five features.

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, as the supreme law-making body, has the power to confirm, add to or change 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.

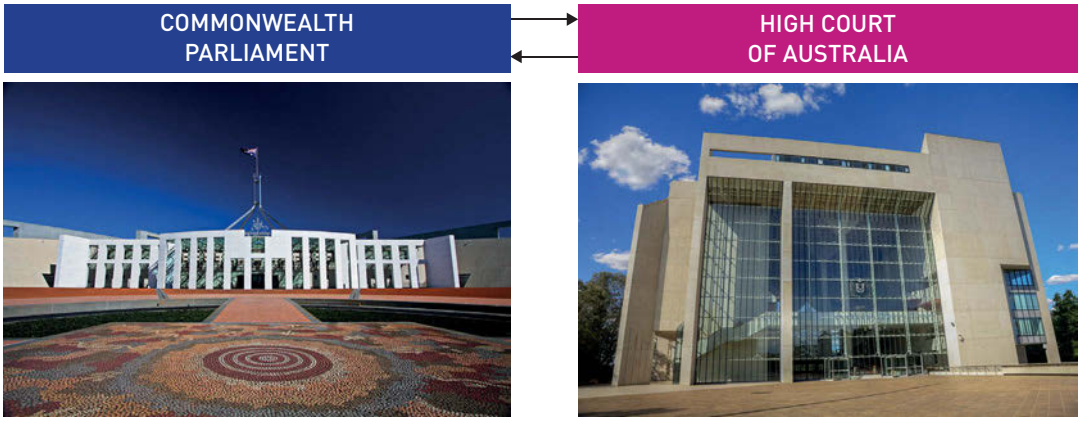
The supremacy of parliament

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 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.

Koori Court
a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Indigenous people

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).



Source 1 The parliament and the courts have a complementary relationship in law-making

As the supreme law-making body, parliament is also able to pass Acts of Parliament 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.

An example of the Victorian Government introducing legislation which restricted the ability of the courts to make decisions regarding the sentencing of offenders can be found below.

Mandatory minimum sentences

ACTUAL SCENARIO

In September 2018 the Victorian Government passed the *Justice Legislation Miscellaneous Amendment Bill 2018* (Vic). The Act restricted the ability of judges when imposing sentences for injuring an emergency worker (including police, paramedics, firefighters, doctors and nurses delivering or supporting emergency care and prison officers) by mandating or making it compulsory for judges to impose a term of imprisonment (referred to as a custodial sentence) on convicted offenders. The legislation means that judges are not able to impose a non-custodial sanction, such as a community correction order, upon offenders unless special circumstances exist, such as where the offender has a mental impairment.

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 arguable that by passing legislation such as this, the parliament infringes on the independence of judiciary by restricting the court's ability to apply legislation and decide on the sentence on a case-by-case basis.



Source 2 The Justice Legislation Miscellaneous Amendment Bill 2018 (Vic) restricted the ability of judges when imposing sentences for injuring an emergency worker, such as firefighters.

The ability of courts to influence parliament

Courts can 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 encouraged parliament to examine the need to change the law.

A court's decision may also highlight a problem or even cause public uproar that can lead to the parliament changing the law. For example, in 2014 in response to an increase in the incidence of 'one-punch' killings in Victoria and the perceived dissatisfaction with the sentences being imposed by the courts on offenders, the Victorian Parliament introduced 'one-punch' laws requiring those found guilty of a fatal one-punch attack to serve a minimum of 10 years in jail before being eligible for parole. Similarly, in 2019 the perceived community dissatisfaction with the sentence imposed in the *Ristevski* case increased pressure on the Victoria Government to change the law, as highlighted in the scenario below.

ACTUAL SCENARIO

Sentencing reform for domestic violence-related crime

In 2019 various members of the community, including victim support groups (such as Domestic Violence Victoria) and the state opposition, called for the Victorian Government to investigate the need to reform sentencing laws for domestic violence-related offences.



Source 3 Karen Ristevski's brother, Stephen Williams, expressed great dissatisfaction with the original sentence imposed upon the man who killed his sister.

This call came following the sentencing of Borce Ristevski. Mr Ristevski was sentenced to nine years' imprisonment with a minimum non-parole period of seven years, after pleading guilty to the manslaughter of his wife. While Mr Ristevski's sentence was increased by the Supreme Court of Appeal from nine to 13 years imprisonment with a non-parole period of 10 years, the Government remained under pressure to change the law. In February 2020, the Government introduced the Crimes Amendment (Manslaughter and Related Offences) Bill 2020 into the Victorian Parliament in an attempt to increase the maximum penalty for manslaughter, including child homicide and industrial manslaughter, from 20 years' imprisonment to 25 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. Following the High Court's decision, the Commonwealth Parliament passed the *Native Title Act*, to confirm and enshrine the decision in legislation and establish procedures for dealing with and settling native title claims.

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 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 legal 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*.

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.

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.

Jury directions in a criminal trial

ACTUAL SCENARIO

In 2017 the Victorian Parliament passed legislation to change 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.

14.9 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 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.

Analyse and evaluate

5 'Courts can change how an Act of Parliament is applied.' To what extent is this statement true? Discuss.

Check your obook assess for these additional resources and more:

Student book questions
14.9 Check your learning

Weblink
Mandatory sentences

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

TOP TIPS FROM CHAPTER 14

1 While there are many factors that affect the ability of parliament to make law, you must make sure you can discuss the five that are listed in the Study Design (i.e. the doctrine of precedent, judicial conservatism, judicial activism, costs and time involved in bringing a case to court, and the requirement for standing). You could be asked a specific question about each of these five factors.

2 The doctrine of precedent is one of the most complex parts of Unit 4 Legal Studies, and is often where students struggle on the final examination. It's worth spending a bit of extra time in your revision on this topic.

3 You must be able to analyse the features of the relationship between parliament and courts. This means you must be able to methodically explain the meaning or components of each feature and show how they establish a link or relationship between the parliament and the courts.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 Assume the Victorian Supreme Court of Appeal has resolved a dispute by interpreting an Act of Parliament. **Describe** one possible effect of the court's decision.

(3 marks)

Difficulty: medium

2 **Explain** two features of the relationship between courts and parliament in law-making.

(5 marks)

Difficulty: high

3 **Discuss** the extent to which the doctrine of precedent and judicial conservatism restrict the ability of the courts in law-making.

(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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

'Kevin and Jennifer's' 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 better 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.

Two years later, Kevin and Jennifer (both pseudonyms) married and subsequently had two children conceived through the *in vitro* fertilisation process. At the time of their marriage in 1999, the Commonwealth Parliament had not passed legislation to allow for marriage equality (same-sex marriage) and so it was largely accepted, under the *Marriage Act 1961* (Cth), that a lawful marriage could only take place between a man and a woman. Given this, in October 1999 Kevin and Jennifer applied to the Family Court of Australia to validate their marriage. Although the Family Court confirmed the validity of their marriage, this decision was 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 Full Court of the Family 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 Court considered, but ultimately did not follow, the English case *Corbett v Corbett* [1970] 2 All ER 33, in which the court ruled that a marriage between a woman and a man who had undergone a sex change was invalid. The Court also looked back to the parliamentary debates that took place when the *Marriage Act* was passed, to try to determine the intention of parliament at the time. During these debates, the Attorney-General commented that it was up to the courts to define marriage.

Ultimately, the Full Court of the Family Court dismissed the appeal and 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 Describe one reason for statutory interpretation.
(3 marks)

2 What role, if any, could the High Court have had in this case?
(2 marks)

3 With reference to the above case, explain the term 'persuasive precedent'.
(4 marks)

4 In your view, did the Full Court adopt a conservative or activist approach in this case? Justify your answer.
(3 marks)

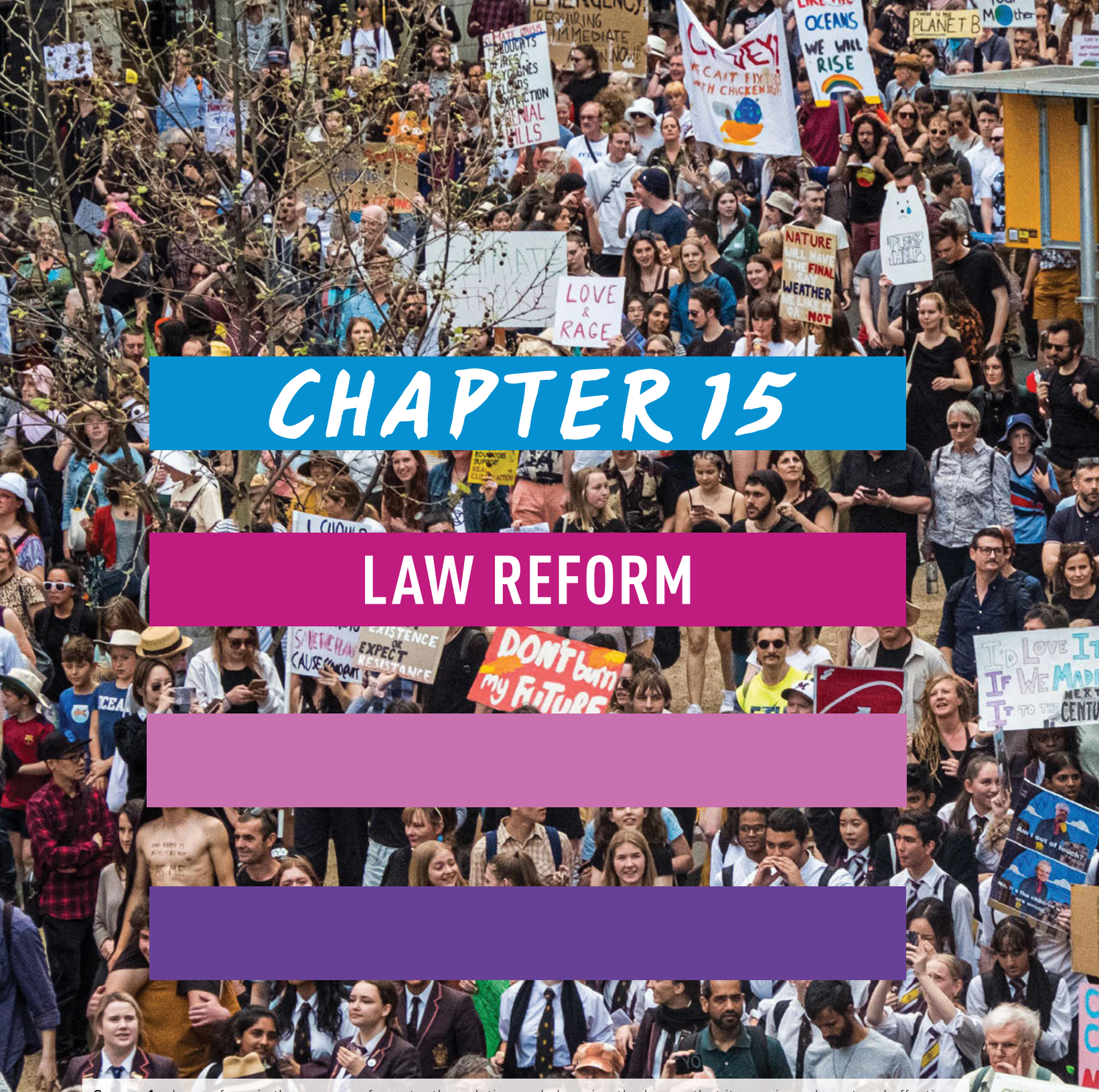
5 Evaluate the ability of the courts to change the *Marriage Act*.
(8 marks)
Total: 20 marks

Check your obook assess for these additional resources and more:

- **Student book questions** Chapter 14 Review
- **Revision notes** Chapter 14
- **assess quiz** Chapter 14 Test your skills with an auto-correcting multiple-choice quiz
- **Additional practice assessment task** AB and AH case
- **Quizlet** Revise key definitions from this topic

CHAPTER 15

LAW REFORM



Source 1 Law reform is the process of constantly updating and changing the law so that it remains relevant and effective. One way people can influence parliament to change the law is by participating in demonstrations. In 2019, approximately 100 000 people attended a demonstration in the Melbourne CBD as part of the global movement known as 'School Strike 4 Climate'. In this chapter, you will explore the effectiveness of demonstrations, petitions and the use of the courts in influencing law reform.

Check your Student obook assess for these digital resources and more:

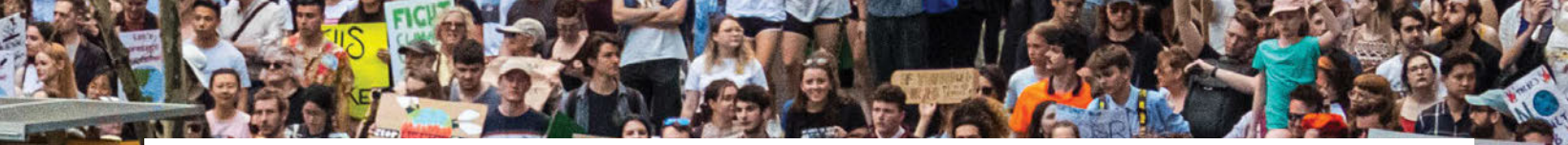
Quizlet

Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive

Launch a game of Quizlet live for your students



OUTCOME

By the end of **Unit 4 – Area of Study 2** (i.e. Chapters 13, 14 and 15), 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 gathering of people to protest or 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 (1776–1833), 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 parliament 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 established by the government and are given wide powers to investigate and report on an important matter of public concern

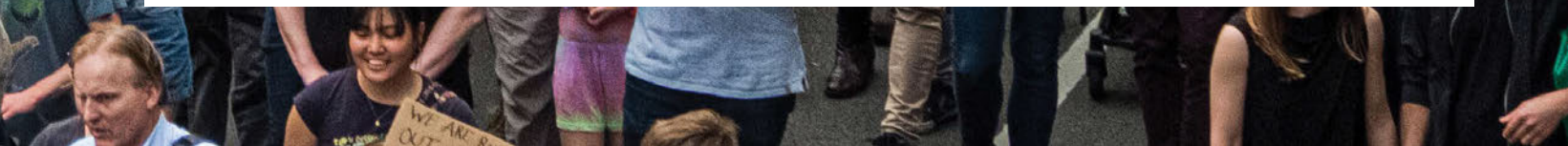
terms of reference instructions given to a formal body (e.g. a law reform body or royal commission) to investigate an important matter. Terms of reference set out the precise scope and purpose of the inquiry and the date by which the final report must be completed

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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15.1 REASONS FOR LAW REFORM

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 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.

Laws therefore provide guidelines of acceptable behaviour to prevent or minimise conflict within society. Given that conflict will inevitably arise, laws must also provide ways to resolve disputes.

To be effective, laws need to be:

- known by the community
- easily understood
- able to be changed
- acceptable to individuals within society and society as a whole
- enforceable.

These are characteristics of effective laws. If a law is missing one or more of these characteristics, it may not be as effective as it could be.

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

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.

These are described in further detail below.

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. 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.

Changes in beliefs, values and attitudes

In any society, beliefs, 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 them, 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 banning 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 toward smoking and the tobacco industry have changed. A range of anti-smoking laws have been introduced throughout Australia. In 2007 Victoria's law was first changed to prohibit smoking in enclosed public places (such as restaurants and office buildings). Since this time a range of other law reforms have been introduced to regulate and discourage smoking, including laws banning smoking within the grounds and four metres from the entrance of all schools, childcare centres, hospitals, courts and police stations. New laws also regulate the sale, promotion and use of e-cigarettes and products. The cost to

individuals to achieve these laws is a loss of personal freedom to smoke anywhere they choose. However, the restrictions were implemented for the greater good of the whole community. At first many people, including smokers, complained, but over time people have adjusted to the new laws. In this way changes in the law can encourage further changes in community values.

Society's increasing awareness of animal welfare issues has resulted in Australian laws being changed to help prevent animal cruelty. An example of this is outlined in the scenario below.

Positive attitude change towards animal welfare

ACTUAL SCENARIO

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 legal protection. For example, in 2018 after the Victorian Parliament passed the *Domestic Animals Amendment (Puppy Farms and Pet Shops) Act 2017* (Vic), it became illegal to sell dogs and cats in pet shops unless the pets are obtained from rescue shelters or pounds (i.e. local council facilities that hold stray or surrendered pets). Similarly, since July 2019 any person wishing to sell or give away dogs and cats in Victoria, including breeders, is required to enrol on the Pet Exchange Register. This allows local councils to monitor sellers, and members of the public to check that they are obtaining their pet from a registered and legitimate seller.



Source 1 Many of the changes to the law in relation to animal welfare followed the introduction of 'Oscar's Law'. 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 called 'Oscar's Law' to abolish 'puppy factories' where puppies are mass-produced, often in poor and overcrowded conditions, so they can be sold at a profit.

In the past the right to equal treatment before the law has not extended to LGBTIQA+ people. This is gradually changing as both state and federal parliaments introduce legislation to support equality and legally recognise the rights of LGBTIQA+ people.

The following scenario highlights some of the law reforms made to ensure LGBTIQA+ people are treated equally before the law.

Equality for LGBTIQA+ people

ACTUAL SCENARIO

Over the years society has become more aware of the difficulties faced by members of our community who are lesbian, gay, bisexual, transgender, intersex, queer and asexual (i.e. LGBTIQA+ people) as a result of inequalities in the law, and the need for the greater recognition and acceptance of LGBTIQA+ people. As a result the state and Commonwealth parliaments have introduced law reform to ensure all people, regardless of their sexuality, are treated equally by the law. For example, in December 2017 after many unsuccessful

attempts to change the marriage laws which had previously banned same-sex marriage, the Commonwealth Parliament passed the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) to allow marriage equality throughout Australia.

The Victorian Parliament has also introduced and amended a number of laws over the past decade to improve equality for LGBTIQA+ people. For example, in 2015 the Parliament passed the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) to allow LGBTIQA+ couples to apply to lawfully adopt children in Victoria. This amendment was made, in part, to reflect changing community views and increasing acceptance that a person's sexual orientation or gender identity does not affect their ability to be a loving and caring parent.

In 2019 the Victorian Parliament also passed the *Births, Deaths and Marriages Registration Amendment Act 2019* (Vic) to allow transgender Victorians (people who self-identify as a different gender to their gender at birth) to be able to choose their gender (i.e. as being male, female or non-specific) on their birth certificates without having to undertake gender reassignment surgery (also known as a 'sex change'). Despite being opposed by the opposition (the Liberal Party), the Bill, initiated by the Andrews Labor Government, successfully passed both houses.



Source 2 Members of Parliament Warren Entsch and Linda Burney, who were from opposite sides of politics, embrace after the 2017 vote in favour of marriage equality.

To achieve such changes in the law, LGBTIQA+ groups and the many people who support equality in the law have continually campaigned to maintain pressure on the government and increase community awareness and support for legislative change.

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 (such as the anti-abortion protesters discussed in Topic 14.3). For example, Israel Folau, the former Australian Rugby League player and fundamentalist Christian, and Margaret Court, Australian tennis champion and founder of the Victory Life Centre, publicly expressed their disapproval of the marriage equality legislation.

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, some laws 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 30 years include that our population will be greater than 40 million by 2055 and that the average life expectancy of a baby born during that year will be 95 years. This has implications for law reform in many areas including health care, taxation, welfare payments (including 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.

Should Australia have a 'sugar tax'?

ACTUAL SCENARIO

Statistics from the Australian Bureau of Statistics indicate that approximately two-thirds of Australian adults and one-quarter of Australian children (aged between 5 and 17 years) are categorised as being overweight or obese (meaning, for an adult, they have a Body Mass Index of 30 or above).

Obesity can have an economic impact on the wider community. For example, some economic costs associated with high obesity rates include increasing demand for medical and hospital services, rising costs of healthcare and lower worker productivity.

For these reasons and others, the Australian Government is under pressure to introduce legislation to combat obesity. For example, various interested individuals and health organisations and professionals believe the federal parliament should introduce legislation to ban the advertising of 'junk' food (i.e. food that is high in fat and sugar and has little nutritional value), particularly advertising that is directed at young people or appears on television, billboards, public transport or at government events. There is also a push to introduce a tax on sugary drinks, such as non-diet soft drinks, energy drinks and sport drinks, as well as sugary foods. The purpose of such a tax is to increase the price of these items to discourage their consumption.

More than 30 countries (including the United Kingdom, France, South Africa and Portugal) have implemented legislation to impose a 'sugar tax', but the Australian Government has so far resisted following their lead. Research indicates that the sugar tax has been successful in reducing the consumption of sugary drinks and other products.

While there are health benefits associated with introducing a sugar tax, politicians would inevitably face great pressure not to do so from businesses within the fast food and packaged food industry. Critics of the sugar tax also suggest they impose a greater tax burden on low income earners compared to high income earners. Others oppose the tax on the basis that the government should not be able to have so much control over the personal choices made by individuals.



Source 3 The introduction of legislation to impose a tax on sugary drinks could help lower obesity in Australia.



Source 4 Following a rapid increase in the popularity of gift cards, consumer laws relating to their use have been revised.

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.

Changes in the workforce (such as increasing part-time and casual employment) and in consumer trends (such as an increase in online shopping) have necessitated changes in industrial relations law (i.e. the law regulating wages and workplace conditions), consumer protection and banking law (for example, laws regulating the enforcement of banking products such as credit cards, loans and guarantees) and international trading law (laws that regulate importing and exporting). For example, in 2018, following the rapid increase in the purchase of gift cards, the *Treasury Laws Amendment (Gift Cards) Act 2018* (Cth) was passed by the Commonwealth Parliament to improve Australia's consumer laws. Under the Act, gift cards and vouchers purchased after 1 November 2019 must be valid for a minimum of three years and the expiry date must be clearly shown on the card.

Changing political conditions

Changing political circumstances (within Australia) as well as international circumstances or global events often influence law reform. One example is increasing global violence and the threat of terrorist attacks. 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 stricter, as highlighted in the following scenario.

ACTUAL SCENARIO

Frequently updated and strengthened counter-terrorist laws in Australia

In 2019 the Commonwealth Parliament passed the *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019* (Cth) to make it more difficult for individuals charged with terrorist-related offences (such as suspected terrorists and those suspected of supporting terrorist organisations) and have also had previous convictions for terrorist offences to be granted **bail**. The law also makes it more difficult for those who have been convicted of terrorist offences to be released on parole.

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

In particular, the law ensures that individuals charged with terrorist offences and have previous convictions for terrorist offences will not have the presumption of being granted bail. In addition, individuals who have been convicted of terrorism offences will not be able to presume that they will be released on parole after they have completed serving their sentence. The courts may issue an order (called a 'continuing detention order') for the offender to be held in custody for a longer period of time.

Over recent years the Federal Government has continually updated and strengthened counter-terrorism laws in an attempt to prevent terrorist attacks within Australia and provide for the safety of the community. While such laws are necessary, it can also be argued that they may impede one of the basic principles of our criminal justice system: the right to a presumption of innocence.

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 (such as laptops, smartphones, 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.

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 cannot be sold to third parties such as prospective employers and health insurance companies. Patent law is a Commonwealth area of responsibility. An example of genetic testing resulting in a need for law reform is explored in the scenario on the next page.



Source 5 Recent advances in drone technology, together with the widespread availability of drones, have created a host of new challenges for lawmakers to deal with.

ACTUAL SCENARIO

Ownership of breast cancer gene codes

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.



Source 6 Yvonne D'Arcy took legal action against Myriad Genetics over ownership of the BRCA1 gene mutation.

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 short, 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.

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 (such as broken bones from violent assault), emotional harm (such as the destruction of self-esteem and depression that can come from bullying, sexual harassment or neglect) or economic harm or financial damage (such as 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 (for example, 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, as you have seen in Chapters 13 and 14, increased penalties for stockpiling dangerous waste, the introduction of 'safe access zones' outside facilities that provide for the termination of pregnancies, and the introduction of laws requiring judges to impose a term of imprisonment on offenders found guilty of injuring an emergency worker are just a few examples of laws introduced by the Victorian Parliament to offer greater protection to members of the community.



Source 7 Some people within our community have specific needs and rights that must be protected, especially if they are unable to protect themselves.

15.1 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 one other reason why laws need to change. Provide an example of a recent change in the law to support your explanation.

Synthesise and apply

4 Read the scenarios 'Positive attitude change towards animal welfare' and 'Equality for LGBTIQA+ people'.

a Describe one legislative change that has been made by the Victorian or federal parliaments to:

i protect the rights of animals; and

ii improve equality in the law for LGBTIQA+ people.

b Between 2010 and 2017, four bills were introduced into the Commonwealth Parliament in an attempt to change the law to allow marriage equality throughout Australia, but each was defeated. Suggest reasons why it took so many years for the parliament to pass marriage equality laws.

c **i** Suggest one reason why Victoria's birth registration laws were changed in 2019.

ii Explain how the Victorian Parliament was able to pass the *Births, Deaths and Marriages Registration Amendment Act* despite the opposition opposing the bill.

5 Read the scenario 'Frequently updated and strengthened counterterrorist laws in Australia'.

a Describe one change to the law made under the *Counter-Terrorism Legislation Amendment Act.*

b Do you think this reform will be effective in making the Australian community safer? Justify your response.

c Describe one way in which this legislation might impede upon the right of an accused person to the presumption of innocence and explain whether you believe this impediment is justified.

6 Suggest two other reforms 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.

Analyse and evaluate

7 Read the scenario 'Should Australia have a "sugar tax"?' and discuss in a small group whether you think the Commonwealth Parliament should impose a tax on sugary drinks and/or other high-sugar and low-nutrient products.

8 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** 15.1 Check your learning
- **Video tutorial** Introduction to Chapter 15
- **Worksheet** Reasons for law reform
- **Weblink** Oscar's Law

15.2 INDIVIDUALS INFLUENCING LAW REFORM THROUGH PETITIONS

People in our community can influence a change in the law in a number of ways. One of the common ways individuals can try to raise awareness of the need for law reform and influence change is by preparing a **petition** to be presented directly to the parliament. In fact, petitions are the only way an individual can directly put their concerns or complaints before the parliament.

petition
a formal, written request to the government to take some action or implement law reform

Petitions

A petition is a request to the parliament to take action on a matter. For example, a petition might request the parliament to introduce a new law, amend an existing law or take a particular course of action in relation to a policy matter or complaint. A petition may be either on paper or online.

For a petition to be accepted for consideration by the parliament it must be prepared in a particular format. This format varies depending on whether the petition is presented to one of the state parliaments or the Commonwealth Parliament, and the house in which it is to be presented.

In general, however, a petition must:

- be addressed to the house in which it is being presented
- contain a clear statement of the request for action or terms of the petition (such as a statement outlining the desired change in the law)
- contain the name, address and signature of at least one individual who supports the need for action
- be legible and not contain any offensive or disrespectful language
- be an original document; that is, a photocopy of a petition will not be accepted. Where a petition has been posted or 'signed' online, a certified print-out of the petition, containing the name and email address of the signatories, may be accepted. Alternatively, the parliament will provide a direct link on their website for the creation and submission of an online petition.

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 Yolngu people of Yirrkala, NT. Their traditional land was under threat from mining. The Parliament responded by setting up a select committee to investigate.

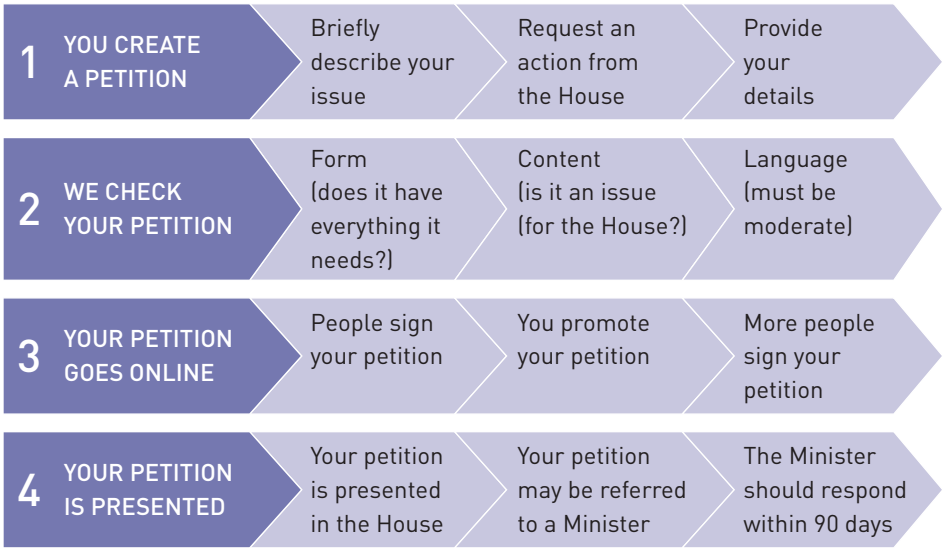
In general, petitions must also be presented to the parliament by a member of the parliament. This means that once the person who has created the petition believes it has a sufficient number of signatures, they need to forward it to a local member of parliament to table (or present) at the next sitting of parliament.

The effectiveness of a petition depends on a number of factors including, most obviously, the number of people who show their support by signing the petition. A petition with a large number of signatures will appear more representative of the community and indicate a high level of community support for the requested action. This is important because members of parliament, in accordance with the principle of **representative government**, will be more likely 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

Each year the state and Commonwealth parliaments receive hundreds of petitions. The petitions may be in relation to an issue of general community interest (such as preventing logging of certain forests, banning live animal exports or banning the release of helium balloons) or an issue relevant to a small group of people (such as the need for a supervised school crossing in a local area). The parliaments may even be presented with several petitions on the same subject.

The scenario on the next page provides an example of a petition presented to the Commonwealth House of Representatives demanding immediate action on climate change.



Source 1 The Australian parliament provides guidelines to the general public on how to create and submit a petition.

ACTUAL SCENARIO

Petition demands action on climate change

In October 2019 Ms Zali Steggall, an independent member of parliament, tabled the largest-ever petition presented to the Commonwealth Parliament in the House of Representatives. The online petition, which contained 404 538 signatures, demanded that the House of Representatives declare a climate emergency in Australia and introduce legislation to immediately and directly reduce the causes of human-made climate change.

The petition was created by Noah Bell, a 23-year-old Australian citizen, who was greatly concerned about the lack of action being taken by the Australian Government to reduce the causes of climate change. The reasoning for his petition, as stated on the petition, was that the 'overwhelming majority of climate scientists around the world have concluded that the climate is changing at unprecedented rates due to anthropogenic (human-made causes) and ... as a result we must act now to minimise both human and environmental destruction'.

Remarkably, the online petition gained more than 404 000 signatures in a four-week period. After the petition was tabled in the Parliament, the Minister for Energy and Emissions Reduction took the opportunity to respond to the position by outlining the Federal Government's plan to reduce emissions and greenhouse gases by 2030 while ensuring a strong economy.

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 2.

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.
Online petitions are particularly easy to set up and enable access for members of the public to submit and sign petitions online, and to track their progress.	Some people may sign a paper petition more than once, which compromises the integrity of the petition.
In an attempt to make laws that reflect the views of the majority of the community, members of parliament are more likely to consider a petition for law reform that has many signatures demonstrating strong support within the community.	The influence of the petition may depend upon who tables it and their influence within the parliament, and valuable requests for law reform may be overlooked if there is no other source of community pressure beyond the petition.
The act of creating a petition 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. Opposing petitions (putting opposite points of view) can also lower the impact of a petition.

Source 2 The strengths and weaknesses of petitions in influencing law reform

15.2 CHECK YOUR LEARNING

Define and explain

1 What is a petition?

2 Where does a petition get tabled, and how?

Synthesise and apply

3 Briefly explain how to submit an online petition in the House of Representatives. Go to the Parliament of Australia weblink 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?'

4 Investigate two other petitions 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'. State the name and purpose of each of your selected petitions and explain what you think the government's response to each petition should be.

Analyse and evaluate

5 Read the scenario 'Petition demands action on climate change' and describe the purpose of Mr Bell's petition. Discuss the likelihood of Mr Bell's petition being acted upon by the parliament.

6 Evaluate the ability of a petition to influence a change in the law. Provide one example to support your response.

Check your obook assess for these additional resources and more:

Student book questions
15.2 Check your learning

Sample
Petition

Weblinks
Parliament of Australia – Petitions
Parliament of Victoria – Petitions

Weblink
The Conversation: Not another online petition! But here's why you should think before deleting it.

15.3 INDIVIDUALS INFLUENCING LAW REFORM THROUGH DEMONSTRATIONS

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**.

demonstration
a gathering 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

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. Members of parliament 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 lawmakers 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 designated as Australia Day.

ACTUAL SCENARIO

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, 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'.

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.



Source 1 While many 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. Each year tens of thousands of people gather in Melbourne's CBD for an 'Invasion Day' rally.

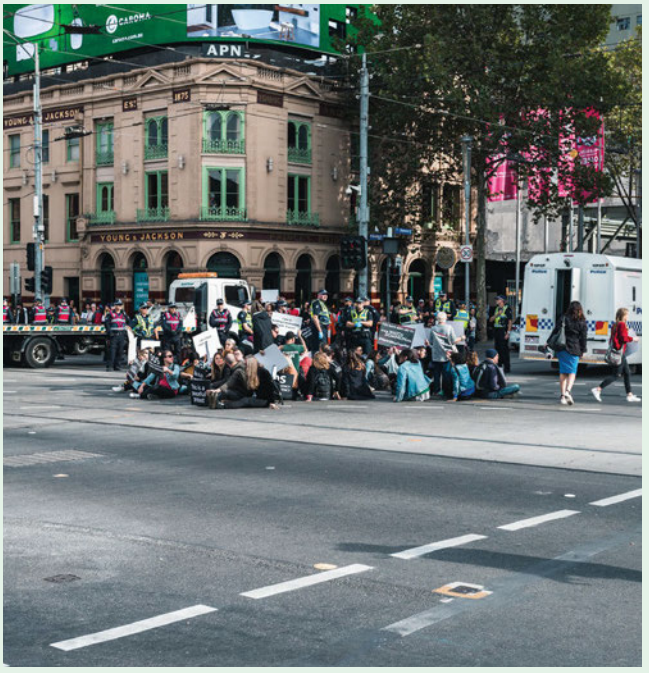
Over recent years many people have joined demonstrations to draw attention to their desire for the parliament to introduce legislation to prevent animal cruelty, including banning live animal exports from Australia. On occasions these demonstrations have caused public inconvenience and created controversy.

ACTUAL SCENARIO

Animal activists shut down Melbourne CBD during peak hour

In 2019 animal rights activists, including concerned individuals and members of organised pressure groups (such as Vegan Rising and Justice for Captives), undertook a number of protests and demonstrations throughout Australia in an attempt to draw attention to animal cruelty. The activists hoped that these demonstrations would place pressure on the federal and state parliaments to pass legislation to stop animal abuse (including a ban on live animal exports from Australia), and legislation to stop manufacturers and distributors from intentionally using deceptive marketing labels and images on animal products.

At one demonstration in the Melbourne CBD, approximately 150 activists disrupted peak hour traffic by blocking one of the city's busiest road intersections outside Flinders Street Station. Approximately 39 protestors were arrested for obstructing a roadway and resisting and obstructing police. Protestors chained themselves to the entrance of the Melbourne Aquarium to highlight the cruelty associated with keeping animals (including marine life) in captivity for the purposes of entertainment and generating profit.



Source 2 Animal activists demonstrate in Melbourne to pressure the government to introduce law reform to stop cruelty to animals. This protest did not lead to arrests for traffic obstruction.

At other demonstrations held throughout Australia, activists entered farms and businesses involved in the production of animal products (without the permission of the owners) to photograph and record livestock farm practices. While this action may have generated community awareness, many members of the community viewed the activists' unauthorised entry into private property as an invasion of the property owners' rights. The action prompted Prime Minister Scott Morrison to call the activists 'green-collared criminals' and encouraged the Commonwealth Parliament to pass the Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth) to make it an offence for an individual to publish or distribute material that encourages another person to trespass or commit property offences, such as theft and the destruction of property, on agricultural (or farm) land.

Are demonstrations effective?

Demonstrations have the potential to generate community interest in, and awareness of, issues and the need for law change, 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, cause inconvenience to the public or involve a breach of the law, 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 on the next page.

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. Also, 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 by the Commonwealth Parliament will be less effective (e.g. demonstrating against a trade deal between the United States and China). 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

15.3 CHECK YOUR LEARNING

Define and explain

1 Using an example, define the term 'demonstration'.

Synthesise and apply

2 Read the scenario 'Animal activists shut down Melbourne CBD during peak hour'.

- **a** Outline the purpose of the demonstrations held by the animal activists throughout Australia in 2019.
- **b** What action did the Federal Government take in response to the animal activist demonstrations?
- **c** Describe two possible benefits associated with the animal activist demonstrations with respect to influencing a change in the law.
- **d** Discuss two factors which may have detracted from the effectiveness of the animal activist demonstrations.

3 Conduct online research into two recent demonstrations that have taken place in Melbourne.

- **a** Describe the approximate size of the demonstration, its location and any other relevant information.
- **b** Outline the main purpose of the demonstration and discuss the extent to which you believe the demonstration was effective in achieving its purpose.

Analyse and evaluate

4 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** 15.3 Check your learning
- **Video tutorial** How and when should acronyms be used in answers?
- **Weblink** The Conversation: Why vegan activists should switch gears
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

15.4 INDIVIDUALS INFLUENCING LAW REFORM THROUGH THE COURTS

People in our community can influence a change in the law in many ways. A common way that individuals can try to 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 in changing the law.

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.

The role of the courts in influencing a change in the law can also be limited in other ways. First, the courts can only decide a point of law or case (and in doing so change the law) when resolving a dispute that has been brought before them. This is reliant on people being prepared to challenge an existing law in the courts. People can be deterred or put off from taking a case to court by the high costs involved (such as the cost of engaging legal representatives and court fees), the amount of time the case may take to resolve and the uncertainty of the outcome. A party must also have legal standing to be able to initiate a court action.

Second, the courts can only rule on the issues directly involved in the case before them.

The case of *NSW Registrar of Births, Deaths and Marriages v Norrie* is an example of an individual trying to influence change by challenging a law in the courts.

ACTUAL SCENARIO

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.

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.

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, renowned Nobel Prize-winning climate scientist Dr Penny Whetton (who has now passed away), transitioned from male to female 14 years into their 30-year marriage. At the time of her transition, Dr Whetton was not able to change the gender on her Victorian birth certificate from male to female while she remained married to Senator Rice. This was despite being granted an Australian passport that identified her as female.

As you have seen earlier in this chapter, in 2019 the Victorian Parliament did change the law to allow transgender Victorians to be able to choose their gender (i.e. as being male, female or non-specific) on their birth certificates without having to undertake gender reassignment surgery. Sadly, Dr Whetton – a role model and highly respected champion of LGBTIQA+ rights – died within months of this legislation being passed.



Source 1 Norrie, who does not identify as either male or female, tested the law in court.



Source 2 Senator Janet Rice (right) and her spouse, the late Dr Penny Whetton, faced legal difficulties after Dr Whetton transitioned from male to female during their marriage.

As we saw in Chapters 11 and 14, individuals may also challenge existing legislation in the courts in the hope that a judge might rule the legislation has been made ***ultra vires*** or beyond the power of the parliament and declared invalid. Similarly, an individual may challenge existing state legislation on the basis that it conflicts with federal legislation and, in accordance with section 109 of the Australian Constitution, should be declared unconstitutional and invalid.

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

The case of *Masson v Parsons* is an example of the High Court resolving a dispute by interpreting the meaning of state and federal legislation to determine the meaning of the word 'parent'. In making its decision, the Court declared the relevant state legislation to be invalid.

ACTUAL SCENARIO

Sperm donation case sets precedent in High Court

Masson v Parsons [2019] HCA 21 (19 June 2019)

In the case of *Masson v Parsons*, a man (referred to by the pseudonym Robert Masson) who agreed to be a sperm donor for his female friend (referred to by the pseudonym Susan Parsons) and her wife in the belief that he would be involved in the child's life undertook court action in an attempt to be legally recognised as the father of the child. The case went all the way to the High Court, where Mr Masson was successful in having his parental rights recognised.

Mr Masson and Ms Parsons had been friends for many years when, in 2006, Mr Masson agreed to donate his sperm to Ms Parsons so that she could have a child. Mr Masson believed he would be involved, as the biological father, in the care and support of their child. Once the child was born, she lived with Ms Parsons and her partner. Mr Masson, who was named as the child's father on her birth certificate, maintained a strong relationship with the child and financially contributed to her care.

In 2014 Ms Parsons and her partner decided to move to New Zealand to fulfil a long-held desire. Ms Parsons was originally from New Zealand. By then the couple had also had another child, using a different sperm donor. In 2015 Mr Masson commenced legal proceedings in the Family Court to stop the couple from moving to New Zealand so his child would remain in Australia. A key issue for the Court to determine was whether Mr Masson was legally considered the child's parent and, as such, had any parental authority to prevent the relocation of the child.

The Family Court found in favour of Mr Masson, but the decision was reversed on appeal when the justices of the Full Court of the Family Court ruled, in a majority verdict, to apply state legislation (the *NSW Status of Children Act 1996* (NSW)) which clearly stated that a man who donated sperm to a woman who was not his wife was not considered the father of the resulting child.

Dissatisfied with this verdict, Mr Masson lodged a successful appeal to the High Court which resulted in him being recognised as a legal parent. The High Court ruled that the NSW state legislation was inconsistent with the *Family Law Act 1975* (Cth), which had been interpreted by the judge in the original Family Court trial as including a broader definition of a 'parent'. In accordance with section 109 of the Australian Constitution, the Commonwealth law prevailed.

The High Court's ruling set a precedent that a sperm donor who has been actively involved in his child's life may be recognised as a parent and have parental rights, including the right to have his child remain living in Australia despite the mother's wish to relocate overseas. It has been reported that Ms Parsons and her partner have incurred in excess of $800 000 in legal costs.

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 and on the next page.

STRENGTHS	WEAKNESSES
Challenging an existing law (either common law or statute law) in a superior court can clarify a vague or unclear law. For example, courts can expand or limit the meaning of legislation through statutory interpretation.	Courts are limited in their ability to change the law because they can only do so when a case is brought before them and only in relation to the issues in the case. This relies on individuals being willing to pursue a court challenge – which requires them to have legal standing and be willing to pursue costly, time-consuming and stressful cases, with no guarantee of success.

STRENGTHS	WEAKNESSES
Even if a court challenge is unsuccessful it may gain significant media coverage which may generate community interest in the decision and the possible need to change a law.	As above, individuals can be reluctant to challenge existing laws through the courts 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 abrogated (cancelled) 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

15.4 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.

Synthesise and apply

3 Read the scenario *NSW Registrar of Births, Deaths and Marriages v Norrie* and explain why Norrie challenged the law through the courts.

4 Read the scenario *Masson v Parsons*.

- **a** Outline why Mr Masson initiated legal action against Ms Parsons.
- **b** Mr Masson could not have pursued court action without legal standing. What is legal standing and why is a plaintiff required to have legal standing to undertake a court action?
- **c** What was the original ruling of the Family Court?
- **d** State why the original ruling of the Family Court was reversed on appeal by the Full Court of the Family Court.
- **e** Use your knowledge from Chapter 14 to explain whether the High Court reversed or overruled the decision of the Full Court of the Family Court.
- **f** With reference to section 109 of the Australian Constitution, explain why the High Court found in Mr Masson's favour.
- **g** Given the basic facts of this case, explain whether or not you agree with the High Court's ultimate decision.
- **h** To what extent is the decision of the High Court in this case a final statement in law?

Analyse and evaluate

5 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** 15.4 Check your learning
- **Worksheet** The use of courts
- **Weblink** Climate case: The student v the minister
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

15.5 THE ROLE OF THE MEDIA IN LAW REFORM

traditional media conventional ways of communicating information to the public, such as newspapers, magazines, television and radio, that were used before the internet

The media, both **traditional media** and **social media**, have an important role to play in influencing changes in the law. Since 2006 when Facebook went global and Twitter was launched, the rapid growth in use of social media in Australia has allowed individuals, pressure groups, businesses and organisations to generate massive interest in, and awareness of, legal, social and political issues on a local, domestic and global scale. Because approximately 60 per cent of the Australian population actively use Facebook and approximately 15 million Australians visit YouTube per month, individuals, groups and organisations can almost instantaneously communicate information (with little restriction or censorship) to potentially millions of people.

Over the years a number of television programs, radio broadcasts, podcasts and movies have been created to generate interest in legal and political issues. The following scenario is an example of media being used to generate support for changing the laws relating to asylum seekers and animal cruelty.

ACTUAL SCENARIO

social media websites and applications (e.g. Facebook, Twitter, Instagram and Snapchat) that enable individuals, groups and organisations to make connections and create their own content in real time

Documentary films aim to influence change

Over recent years several documentary films have been made with the aim of raising community awareness of injustices and influencing a change in the law. 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 had been forced to leave their home countries (due to war and fear for their lives) and were seeking asylum in Australia. The film was marketed as 'The film the Australian Government doesn't want you to see' and contained footage, secretly recorded, of the poor conditions in Australian detention centres at Nauru and Manus Island. 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.

The film generated great interest on traditional and social media. Clips were circulated on social media platforms such as YouTube and Facebook and discussed on television and radio programs, including the ABC's *Q&A* and Radio National programs and Network 10's *The Project*. A Facebook page, Twitter account and website (www.chasingasylum.com.au) were also created to encourage people to take action to influence a change in asylum seeker laws, including by signing an online petition and writing to their local member of parliament.



Source 1 *Chasing Asylum* was made to increase community awareness and support for law reform so that people seeking asylum in Australia are always treated with dignity and humanity.

Similarly, in 2018 the Australian documentary film *Dominion* was released to raise community awareness of animal abuse in Australia. The film, classified for viewing by a mature audience aged 15 years and over due to its strong content, contains confronting images and footage of animal cruelty which takes place during the production of food, clothing and entertainment in Australia.

The filmmakers hoped the documentary would raise awareness of the abuse and exploitation of animals in Australia to change consumer practices and encourage members of the community to support law reform to stop animal cruelty. The film's website provides a range of information on animal cruelty in Australia and promotes the activist group Dominion Movement. After the April 2019 animal activist demonstrations throughout Australia (see page 486) the documentary was viewed 55 000 times in a 48-hour period.

Over the years, a number of Australian television programs have been created to investigate and report on problems in our community. These programs, such as the ABC's *Four Corners* or the Nine Network's *60 Minutes*, can influence public opinion and assist governments to decide whether or not there is sufficient community support for a change in the law.

TV program highlights the need for legislative reform

ACTUAL SCENARIO

In September 2018 Prime Minister Scott Morrison announced that the Federal Government would set up a special inquiry (referred to as a royal commission) to investigate the quality of services provided in aged care facilities and the extent to which these services meet the needs of the elderly people, and some younger people with disabilities, who live in these facilities. After conducting investigations, the inquiry was asked to make recommendations about ways to improve aged care services and implement legal changes to ensure the services are safe and of a high quality.

Interestingly, the announcement of the Royal Commission into Aged Care Quality and Safety was made one day before the ABC broadcast the first of a two-part *Four Corners* program (titled 'Who Cares?') which highlighted the poor, and at times neglectful and abusive, treatment of elderly people in some aged care facilities.

The first instalment of the program, which was viewed by an estimated 755 000 people throughout Australia, contained footage from hidden cameras, and stories of neglect, poor quality food, inadequate personal care and intense loneliness from personal carers who worked in aged care facilities, families of residents and health care professionals.

The program highlighted a range of problems facing the aged care industry and created much discussion and interest in the Royal Commission.



Source 2 Cota Victoria, an organisation which represents the interests of people aged over 50 years, encouraged elderly Victorians to make submissions to the Royal Commission into Aged Care Quality and Safety.

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 3 on the following page.

Did you know?

Traditional media is still influential. In 2020 more than 50 per cent of Australians still relied on traditional media to gain information. For example, more than 4.3 million Victorians read content from the *Herald Sun* newspaper, in print and online, every month and more than 4.1 million read content from *The Age*.

MEDIA ORGANISATION	PUBLICATIONS/PROGRAMS	PERCEIVED POLITICAL BIAS
News Limited	*The Australian* *Daily Telegraph* (Sydney) *Herald Sun* (Melbourne) *The Bolt Report*	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* *Insiders* *Q&A*	Often viewed as being pro-Labor and the Australian Greens

Source 3 Perceived biases of some traditional media organisations

How the media can influence law reform

Individuals, groups and organisations (including members of parliament and political parties) can use both traditional and social media to generate community interest in, awareness of and support for a desired law change. This is important, because 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. There are, however, limitations associated with the use of traditional and social media to influence law reform. Source 4 sets out the benefits and limitations of using social media to influence law reform.

BENEFITS OF USING SOCIAL MEDIA TO INFLUENCE LAW REFORM	LIMITATIONS OF USING SOCIAL MEDIA TO INFLUENCE LAW REFORM
Social media users can create interest in, and raise awareness of, legal issues on a massive scale.	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. This means much information on social media may not be accurate, authenticated or impartial.
The use of social media and mobile devices allows people to capture and broadcast images and videos and live stream events to generate great interest in and awareness of legal and political issues, and the need 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.	Social media platforms are highly visual and can include graphic images and live streams that portray complex legal issues in a simplistic way and may evoke emotional responses based on limited facts and knowledge. This means individuals may make decisions about law reform without having a basic understanding of the issue involved.
Social media connects people around the world and can be used by global reform movements to create local branches to influence law reform on global issues (such as addressing climate change and the global refugee crisis) at a domestic level. For example, Extinction Rebellion Australia is a branch of the global Extinction Rebellion movement that uses non-violent civil disobedience to force governments to act on climate change.	Excessive exposure to graphic or vivid images may cause people to feel overwhelmed and become desensitised to social, political and legal injustices.

BENEFITS OF USING SOCIAL MEDIA TO INFLUENCE LAW REFORM	LIMITATIONS OF USING SOCIAL MEDIA TO INFLUENCE LAW REFORM
Social media can give individuals, groups and organisations direct access to political parties and local members of parliament to gain insight into their views on legal issues and receive up-to-date information, which can in turn increase accountability for political entities' actions.	Owners of social media platforms have struggled to stop the spread of harmful or inaccurate stories in the past, given how fast they can be shared. For example, following the tragic shooting in Christchurch at two mosques, which was live-streamed by the shooter, Facebook removed 1.5 million copies of videos of the attack during the first 24 hours after the shooting.
Lawmakers themselves, particularly parliamentarians and government departments and bodies, can monitor social (and traditional) media coverage, including remarks in online comment forums, to gauge or measure public opinion and public responses to recent events and proposed law reform.	

Source 4 The benefits and limitations of using social media to influence law reform

There are also benefits and limitations to using traditional media to influence law reform. Some of these are outlined below in Source 5.

BENEFITS OF USING TRADITIONAL MEDIA TO INFLUENCE LAW REFORM	LIMITATIONS OF USING TRADITIONAL MEDIA TO INFLUENCE LAW REFORM
Traditional media can influence 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, and are accessed by millions of readers, viewers and listeners each week. They can shape the views and attitudes of their audience depending on the manner in which they present a legal or political issue or argument.	Traditional forms of media may not always present information in an unbiased and independent manner in preference to reflecting the vested political interests of their owners.
Television programs such as *Sunrise*, *Today*, *The Project, The Drum*, *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.	Television and radio producers and newspaper editors can manipulate content in an attempt to alter the community's perception of a particular individual or pressure group if the owners of their media organisation do not support their views, and discredit it. 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.
Some television programs 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* and the Nine Network's *60 Minutes*, can influence public opinion and assist governments to decide whether there is sufficient community support for a change in the law.	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 media organisations. In Australia the ABC and 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), are often criticised for showing political bias, as summarised in Source 3.

Source 5 The benefits and limitations of using traditional media to influence law reform.

15.5 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 that 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 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; global warming; euthanasia; safe injecting rooms; illicit drugs; the provision of aged care services or asylum seekers.

5 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.

6 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.

7 Prepare a list of the strengths and weaknesses associated with using the traditional media to gain support for their law reform.

Analyse and evaluate

8 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.

9 Discuss the ability of the Australian media to influence public views and attitudes towards law reform. Provide two recent examples to support your view.

Check your obook assess for these additional resources and more:

Student book questions
15.5 Check your learning

Weblink
Chasing Asylum trailer

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

15.6 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 with 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.

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.

Source 1
The Victorian Law Reform Commission is an organisation that reviews and researches possible changes in Victorian laws.

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.
- **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 matters referred by the Attorney-General, the VLRC can also examine minor issues without a reference, provided the review will not consume too many of its resources.
- **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.

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

Study tip

The VLRC website provides information on all their law reform projects. It also has an excellent student resource section containing 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.

- **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.

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.

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 its first 20 years of operation the VLRC completed 31 references from the Victorian Attorney-General to investigate major areas of law reform and undertook another eight 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 recently completed projects include an examination of:

- the *Victims of Crime Assistance Act 1996* (Vic)
- neighbourhood tree disputes
- contempt of court, the *Judicial Proceedings Reports Act 1958* (Vic) and enforcement processes
- committal and pre-trial procedures in indictable criminal matters.

The last of these projects is explored further on the next page.

Investigating Victoria's committal system

ACTUAL SCENARIO

In March 2020 the VLRC completed an inquiry into Victoria's **committal system**, which forms part of Victoria's pre-trial criminal procedures for an indictable offence (see Chapter 4 for more details). The VLRC undertook the inquiry after receiving a reference from the Attorney-General, asking the VLRC to make recommendations regarding whether the committal system in place at the time needed to be abolished, replaced or reformed, to ensure its processes best supported victims and witnesses and procedural fairness for the accused.

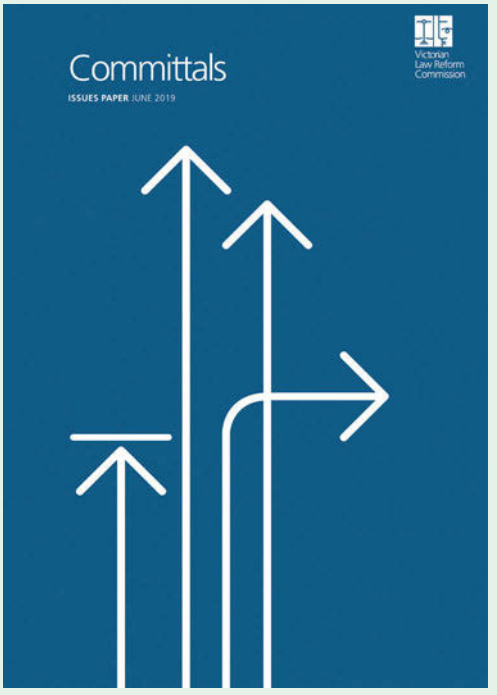
committal system (or committal proceedings) the processes and hearings that take place in the Magistrates' Court for indictable offences

Some of the areas the VLRC examined during its inquiry included whether reforms could be made to:

- enable earlier identification of less serious indictable cases that can be determined summarily (i.e. in the Magistrates' Court)
- encourage appropriate early guilty pleas
- improve the processes used to encourage early disclosure of information or material to the parties (such as examining ways to improve disclosure between the investigating bodies (e.g. police) and the Director of Public Prosecutions, and between the prosecution and accused)
- encourage the parties to undertake appropriate preparation for their trial
- minimise the trauma to victims and witnesses associated with the committal system, including minimising the need for witnesses to give their evidence multiple times and offering the best possible support for victims
- ensure the rights of the accused to a fair trial are upheld
- ensure more efficient use of the court's time.

During the inquiry into committals, the VLRC received numerous submissions from members of the community, including from academics, lawyers, legal and civil liberties organisations (including Victoria Legal Aid, the Law Institute of Victoria and Liberty Victoria), Victoria Police, the Magistrates' Court of Victoria, and the Director of Public Prosecutions. Views expressed within these submissions ranged from recommending reforms to the existing committal system right through to recommending the complete abolishment of committal proceedings on the basis that they unnecessarily increase the costs for the accused and the criminal justice system, delay the process of finalising prosecutions, and add to the stress placed on victims and witnesses.

After all investigations were completed the VLRC prepared a final report (which was delivered to the Attorney-General in March 2020) which included recommendations for law reform to improve the committal system. The details of these recommendations are in your obook assess.



Source 2 The VLRC Committals Issues Paper raised various issues or questions for consideration by the public.

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 its website) about the use of recent recommendations.

As well as examining areas of law reform referred to it by the Attorney-General, the VLRC is also able to investigate, report and make recommendations to the Attorney-General on any minor matters or areas of law reform of concern to the general Victorian community. Such investigations are called community law reform projects.

The VLRC has the authority to undertake community law reform projects without a reference from the Attorney-General, as long as the investigation will not consume too many of its resources. In addition, any member of the public can suggest a community law reform project for the VLRC to undertake. The majority of community law reform projects are undertaken in response to suggestions from members of the community.

A recent community law reform project on neighbourhood tree disputes is described below.

ACTUAL SCENARIO

Community law reform project: Neighbourhood Tree Disputes

In November 2019 the VLRC completed a community law reform project, Neighbourhood Tree Disputes, in response to community concern. It undertook the project after being advised about the large number of tree disputes being resolved by the Dispute Settlement Centre of Victoria (DSCV) and the need to make it easier for neighbours to resolve such disputes.

Some of the matters the VLRC examined during its inquiry included disputes about branches hanging over boundary fences, tree roots destroying neighbouring properties, the cutting or removal of trees without neighbours' consent and trees increasing bushfire risk.

After receiving 38 submissions from members of the community (including individual homeowners, arborists who are qualified in tree trimming and removal, local councils, academics and lawyers, and legal bodies such as Victorian Legal Aid), the VLRC made 63 recommendations for law reform.



Source 3 Disputes over trees are one of the most common types of neighbourhood disputes.

One of the most important recommendations was that the Victorian Parliament should introduce a new Neighbourhood Tree Disputes Act, to be managed by the Victorian Civil and Administrative Tribunal (VCAT), outlining when neighbours are able to take their dispute to VCAT for resolution and the type of remedies available. The benefit of having tree disputes resolved by VCAT is that VCAT can resolve disputes in an informal, cost-effective and timely manner compared to the courts, by encouraging disputes to be resolved by the parties themselves (such as through mediation) rather than a third party. However, in cases where the parties cannot reach a mutually acceptable resolution, the dispute can be resolved at a VCAT hearing where a member can make and impose a legally binding decision.

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 are set out in Source 4.

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 (i.e. the Attorney-General), or minor community law reform issues that will not consume too many resources. Inquiries are also limited to the terms of the reference, meaning the VLRC can only investigate and make recommendations for law reform on areas included in the reference even if it considers there are other areas of reform required in that particular matter.
The VLRC can measure community views on areas of investigation by holding consultations and receiving public submissions, and then reflect them in its recommendations. This should increase the likelihood of the Government implementing its recommendations, because, to maintain and increase voter support, governments generally implement law reforms that reflect the views of the people.	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. Also, while the Government may support the VLRC's recommendations, it may need the support of the crossbench to pass law reform through the Parliament, particularly if the upper house is hostile.
The VLRC is independent of the parliament and political parties so it remains objective and unbiased in making its recommendations. It can also investigate an area comprehensively so the Government can initiate new legislation that covers a whole issue.	The VLRC's investigations can be time-consuming and costly. For example, inquiries may take 12–24 months.
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.
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.	The VLRC can only recommend changes to Victorian law, not Commonwealth law. If certain areas it is investigating are governed by a Commonwealth law, the VLRC cannot directly recommend that the Victorian Parliament change this law as that Parliament has no ability to do so.

Source 4 The strengths and weaknesses of the VLRC in influencing law reform

15.6 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 scenario 'Community law reform project: Neighbourhood Tree Disputes'.
   - **a** Explain why the VLRC was able to investigate changes to the way the Victorian legal system deals with tree disputes between neighbours when the matter was not referred by the Attorney-General.
   - **b** Describe two examples of neighbourhood tree disputes that the VLRC examined during its investigations.
   - **c** Explain the main recommendation for law reform made by the VLRC.

4 Go to the VLRC website. A link is provided on your obook assess. View or download a copy of the VLRC's Committal Report (available under the 'All completed projects' menu).
   - **a** Briefly explain the main areas the VLRC was required to examine during their investigations into Victoria's committal system.
   - **b** How long did the VLRC take to complete its investigation into Victoria's committal system?
   - **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 Victoria's committal system.
   - **e** Describe three of the main recommendations made by the VLRC.
   - **f** Do you support or oppose allowing a magistrate to determine whether there is evidence of sufficient weight to support a conviction at trial? 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.

7 'The Commission aims to make a significant contribution to maintaining and further developing a just, inclusive and accessible legal system for all Victorians.' (VLRC Annual Report 2018–2019). Discuss the extent to which you believe the VLRC achieves its aims as outlined in the statement above.

Check your obook assess for these additional resources and more:

- **Student book questions** 15.6 Check your learning
- **Sample** Submission to a VLRC
- **Weblink** Victorian Law Reform Commission
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

15.7 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: 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 parliament 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.

committee system
a system used by federal and state parliaments in Australia that uses 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 committee system

A **parliamentary committee** is a 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.

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

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 that 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.



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.

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. Remember that 'recent' means 'within the last four years.' 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.

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.

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 the federal level, committees generally range from seven to 32 members and, as at the state level, participation is considered one of the duties of an elected member of parliament.

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 processes listed below.

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 reference** are given when parliament decides to have a committee investigate a particular issue or matter. The committee receives 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.
- **The media publicises the committee's investigations and seeks input**, once the terms of reference are established, via written submissions from interested individuals, experts, groups and organisations within the community. This includes advertising in traditional media such as newspapers, and using the internet and social media.
- **Formal public (or on occasion private) hearings** will usually be held by committees. The committee will invite a range of people (experts in the matter under review and representatives from different interested groups) to provide their input, 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.

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

- **The committee will prepare a written report** once all of the submissions have been received and considered, and all hearings have concluded. 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.

Hansard
the official transcript (i.e. written record) of what is said in parliament. Hansard is named after T.C. Hansard (1776–1833), 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.

These are described in Source 2.

TYPES OF PARLIAMENTARY COMMITTEES	DEFINITION
Standing committees	Parliamentary committees appointed for the life of a parliament (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. Standing committees can be set up solely within each house, or they can be joint committees with members from both houses. 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.
Select committees	Parliamentary committees 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.
Joint investigatory committees	Parliamentary committees 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.
Domestic committees	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.

Source 2 The main types of parliamentary committees

One example of a joint investigatory committee is the Scrutiny of Acts and Regulations Committee. An example of an investigation conducted by this committee is provided below.

Victorian parliamentary inquires into safe injection clinics

ACTUAL SCENARIO

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 affects certain rights and freedoms, including whether it directly or indirectly:

Study tip

The *VCE Legal Studies Study Design* requires you to know **one recent** example of a recommendation for law reform by one parliamentary committee **or** one Royal Commission. While the term 'recent' means a recommendation that has occurred within the last four years, you may examine recommendations proposed more than four years ago if there has been recent discussion about it in the media.

- 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 2001* (Vic)
- 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 2006* (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, which was introduced into the Legislative Council as a private members' bill by the leader of the Reason Party (formerly called the Australian Sex Party), Fiona Patten, proposed changing the law to allow a medically supervised drug injecting centre to be opened in North Richmond, an inner-city suburb of Melbourne, on a trial basis for 18 months. The aim of the controversial Bill was to provide a safe injecting room for heroin addicts in an attempt to control drug use and save lives.

The role of the Scrutiny of Acts and Regulations Committee was to investigate 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.

The Bill was also referred to the Legal and Social Issues Committee for review. The role of this Committee was to gather and consider information both in support of and against the establishment of the trial supervised injecting room and recommend whether or not the Bill should be supported.



Source 3 Local residents and traders protest against the safe injecting room in Richmond, Victoria.

As part of its investigations the Committee gathered submissions from 49 interested individuals and organisations, both in favour and against the Bill, including submissions from local residents, local traders (such as the Victoria Street (Richmond) Business Association), community health services (such as the Victorian Alcohol and Drug Association), faith-based organisations (such as the Salvation Army and the Australian Christian Lobby) and Victoria Police.

After an extensive review the Legal and Social Issues Committee released its comprehensive report which recommended that the trial supervised injecting room be established in North Richmond. The Bill was ultimately passed by parliament in October 2017 and Victoria's first medically supervised injecting room was opened in North Richmond, for a two-year trial, in June 2018.

The supervised injecting room continues to cause debate within the community, with media reports suggesting some local residents are concerned there has been an increase the concentration of drug dealers and drug-related arrests in the Richmond area since its opening. A group of local traders also organised a demonstration in November 2019 to place pressure on the Government to relocate the supervised injecting room to a more appropriate area.

By contrast, the Victorian Government claims the facility has saved lives by promoting safe disposal of used needles and encouraging people who attend the facility to seek support for addiction. Within the first two years of operation the supervised injecting room had been used by 4350 people and managed more than 3200 drug overdoses. Staff also provided support to assist clients with other issues, including housing, family violence and mental health matters.

In June 2020 the Victorian Government announced its intention to expand the supervised safe injecting room program by opening a second facility in Melbourne, possibly in the CBD.

The Commonwealth Parliament also has an extensive committee system, which provides the opportunity for members of parliament to investigate the need for law reform and allows individuals and organisations to provide their input and have their views considered in the law-making process. An example of a federal parliamentary committee, the Senate Standing Committee on Community Affairs, is provided in the following scenario.

New bill proposes drug testing for those on unemployment benefits, Senate Committee investigates

ACTUAL SCENARIO

In 2019 the Senate Standing Committees on Community Affairs was asked by the Senate to conduct an inquiry into the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth), which requires people who receive unemployment benefits (such as the Newstart and Youth Allowances) to undergo drug testing in order to receive the payment.

More specifically, the Bill sets up a two-year trial in three areas. In these areas 5000 new applicants for unemployment benefits will be required to submit a drug test to a Centrelink office before receiving unemployment benefits. The test is designed to detect a range of drugs, including cannabis, cocaine, heroin and methamphetamine (or 'ice'). People who refuse to undergo the drug test will have their welfare payment postponed for four weeks before they can re-apply. Those who submit a positive drug test while receiving unemployment benefits will be required to undergo further random drug tests and ultimately may be required to undergo drug treatment in order to receive payment.

The role of the Senate Standing Committees on Community Affairs was to investigate the drug testing trial, as proposed in the Bill, and recommend to the house whether it should accept the Bill. During the month-long investigation, the Committee conducted one public hearing and received written submissions, both in support of and against the Bill, from over 50 interested parties including doctors, academics, local councils, human rights organisations, and drug, alcohol and community welfare organisations.



Source 4 Various parliamentary committees have examined the proposal to introduce a drug test for recipients of unemployment benefits.

The Committee also received two dissenting reports (one from the Australian Labor Party Senators and one from the Australian Greens Senators) stating their opposition to the Bill on the grounds that evidence received from medical experts, drug and alcohol treatment agencies, social and health policy experts, and community services organisations suggested the Bill 'did not have an evidence base and would be ineffective and counterproductive'.

While most people who made submissions acknowledged the benefit of providing medical assistance and/or community support to people with drug abuse issues, many were not convinced that denying unemployment benefits would help people overcome their drug abuse issues. Others expressed concern that drug use is not a common reason why many people are unemployed and could therefore increase the negative stigma associated with being unemployed. The denial of benefits could also increase poverty and crime in the trial areas.

After examining each of the main issues and concerns the Committee prepared its final report and recommended to the Senate that the Bill be passed.

The ability of parliamentary committees to influence law reform

Although parliamentary committees have some limitations, they 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.

The strengths and weaknesses of parliamentary committees in being able to influence law reform are summarised in Source 5.

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 (e.g. funding and time constraints on members of parliament) a committee cannot be formed to examine all worthy issues and concerns.
Committees play a vital role in ensuring that bills do not breach or impinge on basic rights and freedoms and making sure the government is provided with independent advice and recommendations for law change.	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.
Parliamentary committees 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.	Committees are restricted to examining matters and issues within the scope of the terms of reference.
Committees can examine issues more efficiently (i.e. more quickly, 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.

STRENGTHS OF PARLIAMENTARY COMMITTEES	WEAKNESSES OF PARLIAMENTARY 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 public may not be aware that a committee inquiry into a specific matter is being undertaken and calls for public submissions have been made.
The final reports prepared by committees enable the parliament to be more informed before deciding whether 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 5 The strengths and weaknesses of parliamentary committees in influencing law reform

15.7 CHECK YOUR LEARNING

Define and explain

1 What are parliamentary committees?
2 Distinguish between standing and select parliamentary 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 Read the scenario 'Victorian parliamentary inquires into safe injection clinics'.
   a Describe the role of the Victorian Scrutiny of Acts and Regulations Committee in relation to the passing of the Drugs, Poisons and Controlled Substances Amendment (Pilot Medically Supervised Injecting Centre) Bill 2017 (Vic).
   b Describe the role of the Legal and Social Issues Committee in relation to the passing of this Bill and discuss two strengths associated with having the Bill investigated by this Committee.
   c If you were a member of the Victorian Parliament would you support the establishment of more medically supervised injecting rooms throughout Victoria? Give reasons for your response.

Analyse and evaluate

8 Conduct research into one other current Victorian 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 the VLRC? Justify your response.

Check your obook assess for these additional resources and more:

- **Student book questions** 15.7 Check your learning
- **Weblink** Victorian Parliament – Committees
- **Weblink** Commonwealth Parliament – Committees
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

15.8 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

governor
the Queen's representative at the state level

Governor-General
the Queen's representative at the Commonwealth level

Royal commissions are major public inquiries established by the government to investigate something of public importance or concern in Australia.

These commissions are called 'royal' commissions because they are created by Australia's head of state through their representatives. They are one of the oldest forms of inquiry. The inquiry is given terms of reference and asked to report on its findings and make recommendations.

Royal commissions are given special investigatory powers, including the power to summon (or compel) people to attend hearings, give evidence under oath, and be subject to cross-examination.

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 2019 the Governor-General, the Honourable David Hurley, established the Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability on the advice of the Federal Government to investigate and expose the violence, abuse, neglect and exploitation suffered by people with disability and recommend law reform to ensure this ill-treatment stops and people with disability are protected.

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.



Source 1 Australian Greens Senator Jordon Steele-John, who has fought for the rights of people with disability for many years, strongly supported the need for a Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

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.

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 have been issued, the commission conducts an extensive investigation of the matter of public interest or concern by undertaking a range of tasks, such as those listed below.

- **Consultation, research and background papers** may be prepared to provide information to interested parties and the community and form the basis for discussion and submissions. A consultation (or issues) 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 Commonwealth Royal Commission into Aged Care Quality and Safety (established in October 2018) prepared a consultation paper to explain the concerns being examined by the royal commission. It encouraged written submissions from any individual or organisation that could provide information about the quality and safety of services provided by aged care facilities in Australia or suggestions on how such services might be improved. It also prepared several research papers outlining findings and recommendations from previous investigations and reviews of the aged care system.
- **Consultation sessions** may be conducted 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 (completed in March 2016) 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 LGBTIQA+ community.
- **Public hearings** may be held or the commission may sit in private to gather evidence relevant to the terms of reference. Royal commissions have extensive powers to gather 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 (completed in December 2017) held a number of formal public hearings to examine evidence about how different institutions (such as 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 relevant prosecutor (Commonwealth or state level) is not required to act on these recommendations. The prosecution 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.

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 2020 there had been 135 Commonwealth 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 were unique to this particular royal commission so that commissioners could hear from survivors in private.

Examples of royal commissions

Over the years, there have been more than 135 royal commissions at the Commonwealth level on a range of issues of significant public interest or concern. Not including recent ones, some examples of Commonwealth royal commissions over the years include the following:

- Aboriginal Deaths in Custody (1987–91)
- Institutional Responses to Child Sexual Abuse (2016–17)
- Royal Commission into the Protection and Detention of Children in the Northern Territory (2016–17)
- Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2017–19)

Not including more recent ones, some of the Victorian royal commissions over the years have included inquiries into:

- the collapse of the West Gate Bridge (1971–72)
- the Esso Longford Gas Plant accident (1998–99)
- the 'Black Saturday' Bushfires (2009–10), to inquire into the bushfires in which more than 100 people lost their lives and thousands of properties were destroyed in February 2009
- family violence (2015–16).

Recent royal commissions

Recent royal commissions include:

- the Commonwealth Royal Commission into Aged Care Quality and Safety (2018–20)
- the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2019–22)
- the Victorian Royal Commission into the Management of Police Informants (2018–20)
- the Victorian Royal Commission into Victoria's Mental Health System (2019–21).

Details of the Royal Commission into the Management of Police Informants are outlined further below and on the next page.



Source 2 The public hearing into the nature, cause and impact of child sexual abuse was one of many public hearings held during the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse. Evidence is being given at this hearing for the Commission to consider when writing their report and recommendations.

ACTUAL SCENARIO

Royal Commission into the Management of Police Informants

In December 2018 the then-Victorian Governor, Her Excellency the Honourable Linda Dessau, established the Royal Commission into the Management of Police Informants on the advice of the Victorian Government.

While the Royal Commission had specific terms of reference, it was established to generally investigate and report on the recruitment and management of **police informants** (also referred to as 'human sources') who are subject to legal obligations of confidentiality or privilege by Victoria Police.

police informant a person who secretly gives information to police about criminal offending, including information about the people involved in criminal activity, which may be used during the investigation and prosecution of a crime.

Why was the Royal Commission established?

To understand why the Royal Commission was established, it is important to appreciate that legal practitioners have a *legal obligation of confidentiality and privilege* to their clients. This means that lawyers are not permitted to disclose or reveal information given to them by their client during discussions about their case, without the client's permission. This obligation of confidentiality and privilege is an essential feature of the criminal justice system because it ensures that the accused is able to speak openly with their lawyer, and to gain assistance and advice, without fearing any information or evidence they provide will be used against them.

The Royal Commission was called after a High Court ruling and subsequent revelations that criminal defence barrister Ms Nicola Gobbo was used as a police informant for Victoria Police between January 1995 and January 2009. Ms Gobbo (referred to as 'Lawyer X' in the media, 'EF' in court cases and 'Informant 3838' by Victoria Police) represented a number of convicted criminals but was used as a police informant. This means Ms Gobbo secretly provided information about some of her clients and their associates, without their knowledge or permission, to Victoria Police, which was used to assist in the investigation and prosecution of cases.

As a result, the outcomes of several criminal cases during the designated period were most likely affected. For example, the information gained by Victoria Police possibly led to some offenders being found guilty on the basis of inadmissible evidence. Depending on the information gathered by the Royal Commission, some of these offenders would have grounds to appeal their conviction or sentence. This could lead to convictions being overturned and convicted offenders being released from prison, with the added possibility of seeking compensation for a wrongful conviction. Such action would affect victims of crime and witnesses and lead to decreasing public confidence in the criminal justice system.

What was the Royal Commission's terms of reference?

The Royal Commission was set up to investigate and report on:

- the number of times and extent to which the conduct of criminal defence barrister Nicola Gobbo, in becoming a police informant for Victoria Police between January 1995 and January 2009, affected the outcome of criminal cases during that period
- the conduct of current and former police in disclosing their use of Ms Gobbo as a police informant
- the effectiveness of the processes in place at Victoria Police governing how people who are subject to legal obligations of confidentiality or privilege (such as lawyers who become police informants) are recruited and managed
- whether the police should recruit and use people who are subject to legal privilege during investigations of criminal cases and, if so, how the use of these people might be best managed.

The Royal Commission was also required to make recommendations for changes that could be implemented by Victoria Police and the Government to address any problems related to the use and management of people who are subject to legal obligations of confidentiality or privilege (such as lawyers).

Who 'managed' the Royal Commission?

Upon the announcement of the Royal Commission, former Queensland Supreme Court of Appeal Justice Margaret McMurdo AC was appointed as Chair of the Commission and former member of the Victorian Police and South Australian police commissioner, Malcolm Hyde, was appointed as a Commissioner to oversee the Royal Commission. Interestingly, however, Mr Hyde resigned from his position as commissioner within months of being appointed to ensure the independence and impartiality of the Royal Commission after it became known that Ms Gobbo was registered as an informant with Victoria Police in 1995, 10 years earlier than originally understood when the terms of reference were established, and at a time when Mr Hyde was working at Victoria Police.

How did the Royal Commission gather information?

With an initial budget of $28 million, the Royal Commission was given nearly two years to investigate and prepare its final report, which was completed in November 2020. During this time the Commission called for submissions from interested parties by placing advertisements in major newspapers and prisons and via its website and other types of media.

Within six months of the Commission being established it received submissions from more than 130 individuals and organisations (including members of Victoria Police, legal practitioners and government authorities). One problem facing the Commission was the delay in receiving the thousands of documents requested by the Commission from Victoria Police. When apologising for the delay, Victoria Police commented it was required to sort through millions of emails and documents to identify the requested information.

In addition to accepting written submissions the Commission conducted weeks of public hearings, which were streamed live on its website, and approached individuals and organisations with relevant knowledge and experience dealing with the management of police informants and the broader criminal justice system. For example, the Commission gained information from various Australian and international law enforcement agencies, police integrity and corruption authorities and bodies that oversee the regulation of legal practitioners.

What did the Royal Commission discover?

After months of investigations the Royal Commission discovered many faults in Victoria Police's police informant processes and the criminal justice system. Former and current Victoria Police commissioners were exposed as authorising the recruitment of Nicola Gobbo, despite knowing information provided by her would be in breach of her legal obligations of confidentiality and privilege. These breaches could lead to criminal charges being laid.



Source 3 Faruk Orman, second from right, after his conviction was overturned

The information obtained by the Royal Commission also, most significantly, led to the review of more than 20 cases in which convictions may have been obtained as a result of Ms Gobbo's role as a police informant. In fact, within six months of the Royal Commission being established, Faruk Orman, who was found guilty of murder and sentenced to 20 years' imprisonment with a minimum of 14 years, became the first person to have his conviction overturned by the Victorian Supreme Court of Appeal on the basis that the evidence presented at his trial was 'tainted' evidence due to Ms Gobbo, his defence lawyer, being a police informant (see Chapter 2 for more details).

The ability of royal commissions to influence law reform

As the highest form of inquiry into matters of public concern and importance, royal commissions can (while having limitations) be an effective way to influence law reform. Royal commissions usually generate significant public interest, which places pressure on governments to respond to the findings and recommendations. The strengths and weaknesses of a royal commission as a way to influence law reform are examined in Source 4.

STRENGTHS OF ROYAL COMMISSIONS	WEAKNESSES OF ROYAL COMMISSIONS
Governments can use the findings and recommendations of royal commissions to justify the need to make changes in the law and government policy.	Royal commissions 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 call the royal commission on a matter to win voter support.
Royal commissions can be important in raising community awareness and interest in a particular area of community concern. They can encourage 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.	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.
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 famously expensive (one of the more expensive ones cost $60 million).
Royal commissions have the power to call anyone to appear before them to give evidence.	Royal commissions 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.
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 it is to report immediately after an election, its influence might be diminished.

Source 4 The strengths and weaknesses of royal commissions in influencing law reform



Source 5 There have been more than 135 royal commissions at the Commonwealth level.

15.8 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 inquiries 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.

5 Read the scenario 'Royal Commission into the Management of Police Informants'.

b What is a police informant and what is the principle of 'legal obligation of confidentiality and privilege'?

c Briefly describe why the Victorian Government established the Royal Commission.

d Outline two ways the Royal Commission gained information from interested parties and the broader community.

e With reference to this Royal Commission, evaluate two strengths of royal commissions as a means of influencing law reform.

Analyse and evaluate

6 Go to the websites of the Victorian or Commonwealth Parliaments and conduct some research into one recent royal commission. Links are provided on your obook assess.

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.

7 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
15.8 Check your learning

Video tutorial
How to find recent examples online

Weblink
Victorian Parliament – Inquiries and Royal Commissions

Weblink
Commonwealth Parliament – Royal Commissions and Commissions of Inquiry

15.9 THE ABILITY OF PARLIAMENT AND THE COURTS TO RESPOND TO THE NEED FOR LAW REFORM

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. The use of recent examples can help in your evaluation.

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.



Source 1 The Australian Parliament and the High Court of Australia. They have complementary roles in law reform.

The ability of the parliament to respond to the need for law reform

There are many factors which influence the ability of the parliament and the courts to respond to law reform. For example, the ability of the parliament to respond to the need for law reform can depend upon a number of factors including:

- the constitutional power of the parliament
- the level of community support for the proposed change in the law
- the ability of the parliament to assess the need for law reform and measure the level of community support for any proposed change
- the composition of the houses of parliament
- financial constraints.

The constitutional power of the parliament

Parliament is the supreme law-making body, able to make new laws and change any existing laws within its constitutional power or authority. Parliament can therefore change the law in response to changing needs and demands. For example, it ensures that the law is kept up to date with and reflects changes in community views and values and ever-changing domestic, international, economic and political circumstances.

parliamentary sovereignty the overriding power or authority of the parliament to make, change or repeal any law within its constitutional law-making power

As supreme law-making bodies, both state and Commonwealth parliaments have 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 **parliamentary sovereignty**, 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, providing they have the constitutional power, can change or amend existing legislation whenever the need arises.

As you examined in Chapter 10, the areas in which the Commonwealth Parliament can make law are outlined in the Australian Constitution. If an area is not stated in the Constitution as belonging to the Commonwealth, it belongs solely to the state parliaments. In a circumstance where a parliament passes legislation to make or change an existing law in an area outside their constitutional law-making powers (referred to as being made *ultra vires*), the validity of the legislation may be challenged in the courts and declared invalid.

Furthermore, while courts can change the meaning of law made by the parliament, when required to interpret the meaning of legislation in order to resolve a case before them, the state and Commonwealth parliaments have the power to **abrogate** (or cancel) law made by courts (except for decisions made by the High Court in relation to constitutional matters). Parliaments can also pass legislation to reinforce (**codify**) court-made law.

abrogate
to cancel or abolish a court-made law by passing an Act of Parliament

codify
to collect all law on one topic together into a single code or statute

The level of community support for the proposed change in the law

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 proposed law reform and they fear losing voter support. For example, parliaments can be slow or reluctant to introduce controversial laws, such as allowing people the right to make end-of-life decisions (euthanasia) or establishing medically supervised injecting rooms to address problems caused by drug abuse, due to members fearing they may lose electoral support.

Members of parliament can even be reluctant to vote in favour of law reform in situations where opinion polls suggest the reform has the support of the majority of the community because they fear they may lose the electoral support of a vocal minority or powerful organisation. Members of parliament can also be subject to internal political pressure and unwilling to vote against their party's policy stance on a particular issue.

Similarly, because elections are held every three (federal) or four (Victorian) 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.

ACTUAL SCENARIO

Should parliament ban gambling advertising?

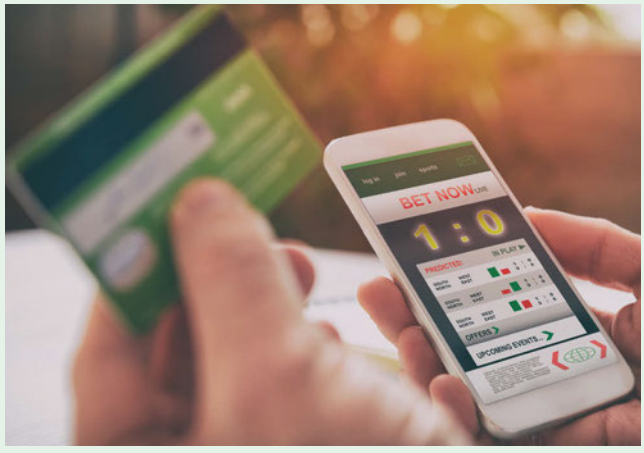
Gambling is a problem in Australia. According to statistics released by the Queensland Government Statistician's Office in December 2019, more than $24 billion is spent on gambling in Australia each year. This includes approximately $12.5 billion on electronic gaming machines (also referred to as poker machines or 'pokies'), $5 billion at casinos, $3.5 billion on race betting and $1.2 billion on sports betting.

Evidence also suggests that, despite laws banning teenagers from gambling until 18 years of age, approximately 50 per cent of all young people have undertaken some form of gambling by the time they are 15 years old. This increases to approximately 75 per cent by the time young people are aged 19.

While many people undertake gambling as a form of entertainment, gambling is addictive and for those people who develop an addiction, gambling can result in loss of income and savings,

breakdowns in personal relationships, mental health issues, job loss and crime. For these reasons and more, many individuals, anti-gambling organisations, and community welfare groups including the chief advocate for the Alliance of Gambling Reform, Reverend Tim Costello, believe the Australia should have more laws restricting gambling. For example, Reverend Costello has called for the Federal Government to introduce law reform to ban all advertising of gambling in Australia. It is, however, highly unlikely that such legislation will be introduced for many reasons, including the power of businesses involved in the gambling industry (for example, major supermarket chains Woolworths and Coles are the largest owners of electronic gambling machines in Australia), the amount of revenue governments gain from gambling taxes, and perhaps disinterest for such law reform from within the broader community.

While the Federal Government has introduced some laws to restrict the advertising of gambling, such as banning advertising on streaming services during the live coverage of sport (between 5 am and 8.30 pm) and banning advertising for betting products on television programs directed at children (i.e. rated 'G' or lower) at various times throughout the day, anti-gambling advocates claim that much more law reform needs to take place at both state and federal level.



Source 2 Anti-gambling campaigners believe parliaments should pass more legislation to restrict the advertising of gambling products and services in Australia.

The ability of the parliament to assess the need for law reform and measure the level of community support for any proposed change

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 can 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, they may take years) and parliament is not compelled to adopt any of their recommendations.

Parliaments can also obtain recommendations from independent law reform bodies (like the VLRC) to investigate, report and make recommendations for changes to the law; and they can listen to and be influenced by people who elected them, 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.

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 called delegated legislation

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

Parliaments can respond to the need for law reform relatively quickly, especially compared to the courts. There is no need to wait for a conflict to arise or an issue to be brought before them before initiating a change in the law, and they can change the law in anticipation of future needs. Parliaments can also delegate law-making powers to **subordinate authorities** (such as local councils, government departments, and 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).

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.

Finally, another factor that might limit the ability of a parliament to assess, and therefore respond to, the need for law reform is that the need for change itself can occur so rapidly that it can be difficult for the government of the day to keep pace. For example, scientific, technological 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 quickly enough to keep up with the change.

Subordinate authorities, such as local councils, are often more accessible to the general public than parliament and are more able to accurately measure the need for law reform in local communities and on confined issues. They may also have more localised and specialised expertise in specific areas and can more effectively make and change the laws in their particular field.



Source 3 A wide range of subordinate authorities make secondary (delegated) legislation on behalf of parliament.

The composition of the houses of parliament

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

As mentioned in Chapter 13, the composition of the houses of parliament can also affect the ability of the parliament to respond to the need for law reform. For example, it can be difficult for the government of the day to implement law reform as promised during their election campaign if they do not have a majority of support in the upper house of parliament (i.e. if the **upper house** is **hostile**) because the opposition and crossbench has the power to block their proposed law changes or force amendments to original proposals. Similarly, a **minority government** (a government without a majority in the lower house) 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.

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 2017 the House of Representatives and the Senate generally only sat for 64 and 56 days respectively.

The following scenario explores some of the difficulties a minority government may face in implementing their law reform agenda.

The Gillard Government (2010–2013)

ACTUAL SCENARIO

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 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 such as the introduction of plain packaging for cigarettes and paid parental leave were successfully introduced during the Government's term in office.



Source 4 Australia's first female prime minister, Julia Gillard, was the leader of a federal minority government between 2010 and 2013.

Financial constraints

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).

The government may also be reluctant to support a change in the law that might lead to a decrease in government revenue. For example, implementing laws to limit gambling may lead to a loss of government income earned from gambling taxes. Likewise, lowering the rate of the goods and services tax (currently set at 10 per cent) or increasing the range of items that are exempt from GST (such as removing the GST from 'essential items' like toilet paper and breastfeeding pumps) will reduce government income.

A summary of the factors that can affect the ability of parliament to respond to the need for law reform are set out in Source 5 on the next page.

FACTORS THAT ASSIST PARLIAMENT	FACTORS THAT LIMIT PARLIAMENT
Parliament is an elected supreme law-making body with the power to make and change any law within their constitutional power.	Any law made outside the parliament's constitutional law-making power may be challenged in and declared invalid by the courts.
Parliament has the power to abrogate (cancel) law made by courts (except for decisions made by the High Court in relation to constitutional matters). It can also pass legislation to codify court-made law.	Parliaments may abrogate an independent and valid common law to gain political advantage and voter popularity.
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 assess the need and community support for law reform by establishing parliamentary committees and royal commissions to investigate the need to change the law. It can also use independent organisations like the VLRC to investigate the need for law reform.	Investigating the need for law reform can be costly and time-consuming.
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. Parliament can change the law in anticipation of future needs.	The composition of the houses of parliament can limit the ability of the government to implement law reform. For example, 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. The parliamentary process to change 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).
	The ability of parliament to respond to the need for law reform may also be diminished by financial or budget restrictions.

Source 5 Factors that affect 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. The ability of the court to respond to the need for law reform depends upon a number of factors including the:

- jurisdiction and law-making authority of the courts
- independence of the courts
- willingness of the courts to adopt an activist approach.



The jurisdiction and law-making authority of the courts

While the main role of the courts is to apply existing law and resolve disputes, courts do have the ability to respond to the need for law reform, by creating law where none exists and through statutory interpretation. For example, when the courts are called to resolve a dispute in a case in which no law exists, depending on the superiority of the court, a **precedent** may be set and law created. Similarly, as seen in Chapter 14, courts can expand or limit the meaning of the law when required to interpret legislation in order to resolve the case before them.

precedent
a 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

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 1958* (Cth).

The courts are, however, limited in their ability to respond to the need for law reform because they 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.

An unsuccessful court challenge may, however, gain significant media coverage and help increase awareness of the possible need to change a law.

Similarly, a court ruling which generates controversy within the community, or highlights a problem that requires parliament's intervention, may influence a change in the law. This occurred in a case that involved what ultimately became known as 'Brodie's Law'.

ACTUAL SCENARIO

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 1958* (Vic) to allow a maximum of 10 years' imprisonment for bullying.



Source 6 Rae and Damian Panlock on the steps of parliament after the passing of Brodie's Law. Courts may highlight problems that inspire parliament to change the law.

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.

Courts are also restricted in their ability to respond to the need for law reform because, with the exception of High Court rulings in constitutional disputes, parliament can always pass legislation to abrogate (cancel) a court decision which creates a new law. Furthermore, 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 14, in the *Trigwell* case (*State Government Insurance Commission v Trigwell*) 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.

The independence of the courts

Courts can also effectively respond to the need for law reform because judges are politically independent lawmakers and can make decisions without fear of losing voter support. In contrast to members of parliament, judges are not elected and do not have to be concerned about making decisions that may not be politically popular. This means that judges may be more willing to make a 'controversial' ruling that changes the law than members of parliament who may fear electoral backlash (the loss of voter support). For example, the High Court's decision in the *Mabo* case (*Mabo v Queensland (No 2)*) recognising limited land rights for Indigenous Australians established a new area of law that had not previously been addressed by the Federal 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.

The willingness of the courts to adopt an activist approach

The ability of the courts to respond to the need for law reform also depends on the willingness of judges to adopt a more activist rather than conservative approach when interpreting the law. For example, as in Chapter 14, judges who adopt an activist approach are more willing to consider a range of social and political factors, such as 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. In contrast, judges who adopt a more conservative approach generally show restraint or caution when making decisions and rulings that could lead to significant changes in the law.

A summary of the factors that can affect the ability of courts to respond to the need for law reform are set out in Source 7 below.

FACTORS THAT ASSIST THE COURTS	FACTORS THAT LIMIT THE COURTS
Courts can respond to the need for law reform by making law in situations where none exists and giving 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 politically independent and can make decisions to create and change the law 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.

FACTORS THAT ASSIST THE COURTS	FACTORS THAT LIMIT THE COURTS
Judges can declare legislation invalid if it was made *ultra vires*.	Judges must wait for a case to be challenged in the courts before making a decision as to whether legislation has been made *ultra vires*.
Courts can make a ruling that highlights a problem and in turn raises community awareness for the need for law change.	Parliament may abrogate (or cancel) common law (other than cases involving the interpretation of the Constitution).
Judges who adopt an activist approach are often willing to consider a range of social and political factors, such as 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.	Judges may adopt a more conservative approach and show restraint or caution when making decisions and rulings that could lead to significant changes in the law.

Source 7 Factors affecting the ability of the courts to respond to the need for law reform

15.9 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 Read the actual scenario 'Should the parliament ban gambling advertising?'.

- **a** Suggest reasons why some anti-gambling campaigners want the Federal Parliament to pass legislation to ban advertising in gambling in Australia.
- **b** Suggest reasons why the Federal Parliament may be reluctant to pass legislation to ban gambling advertising in Australia.
- **c** Do you think the Federal Parliament should pass more laws to restrict gambling in Australia? Justify your view.

7 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

8 Discuss how delegating its law-making powers can enable parliament to more effectively respond to the need for law reform.

9 Evaluate the extent to which parliament is able to respond to the need to change the law. Use two examples to illustrate your response.

10 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** 15.9 Check your learning
- **Video tutorial** Developing good exam technique
- **Weblink** Malaysia Solution
- **Weblink** Brodie's Law



CHAPTER 15

REVIEW

TOP TIPS FROM CHAPTER 15

1 Remember when providing responses to questions in the final examination, it is not necessary to define key legal terms or organisations (such as parliament, the Victorian Law Reform Commission, parliamentary committee and royal commission), unless the question specifically *asks* for a definition.

2 You must be able to provide examples of the reasons for law reform, the means by which individuals can influence law reform (i.e. through petitions, demonstrations and the courts) and the influence of the media in law reform. Many examples are included in this chapter.

3 You must be able to evaluate the ability of the Victorian Law Reform Commission and either parliamentary committees or royal commissions to influence a change in the law. You must provide one recent example of the Victorian Law Reform Commission recommending law reform and one example of a recommendation for law reform by either one parliamentary committee or one royal commission.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments (including the exam) are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Describe** how social media can be used to influence a change in the law.

(3 marks)

Difficulty: medium

2 **Compare** the role of the Victorian Law Reform Commission (VLRC) to that of a parliamentary committee **or** a royal commission.

(6 marks)

Difficulty: high

3 'Without the Victorian Law Reform Commission, the Victorian Parliament would not be able to make laws that reflect the views of the community.' **To what extent** do you agree with this statement? Give reasons for your answer.

(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.

Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.



Freedom of religion

In 2019 the federal Liberal–National Coalition Government began drafting the Religious Discrimination Bill 2020 (Cth) to prohibit discrimination, in specified areas, on the grounds of religious belief or activity. In simple terms, the Bill proposed making it unlawful for an individual or organisation to discriminate against a person for *holding* a religious belief or for *not holding* a religious belief. For example, it would be unlawful for an employer to decide not to employ an individual, or conversely terminate the employment of an individual, based on their religious beliefs (for example, because they are Jewish or Catholic). Conversely, it would also be unlawful to prevent religious-based organisations, such as religious schools, hospitals, aged care facilities and conference centres, from refusing prospective customers in order to preserve their 'religious beliefs' or ethos.

The Bill would also make it unlawful for an employer or organisation to impose conditions or rules upon an employee or member that may discriminate against them on the basis of their religious beliefs. An employer or organisation could not establish a rule banning its employees or members from making statements about their religious beliefs in their private lives (that is, outside their employment), even if these statements were potentially against the 'belief or ethos' of the organisation. For example, a fertility clinic that performed terminations of pregnancy may not be able to set a rule preventing their employees from making 'anti-abortion' statements on social media in their private life.

As expected, the Bill caused great controversy in the community. While the Coalition emphasised that many aspects of the Bill reflected the recommendations of the Religious Freedom Review Expert Panel, a panel set up by the Government to investigate whether Australian law adequately protects the freedom of religion, it was also criticised by many community, legal and human rights organisations. Some individuals against the Bill signed petitions and participated in demonstrations to express their dissatisfaction with the proposed law reform.

Critics of the Bill claim that the difficulty in defining 'religious beliefs' would lead to an increase in discrimination against individuals, particularly members of minority groups, by allowing religious organisations to refuse to accept or employ an individual if they do not uphold or adhere to the faith and religious views of the organisation.

1 Outline one reason why laws need to be changed. (2 marks)

2 Explain why the Federal Government did not ask the Victorian Law Reform Commission to investigate the need for reforming Australia's freedom of religion laws. (2 marks)

3 Discuss one way the Liberal–National Coalition have used the media to gain support for their Religious Discrimination Bill 2020 (Cth). (3 marks)

4 Evaluate the effectiveness of using a petition or demonstration as a method of expressing dissatisfaction with the proposed change in the freedom of religion laws. (5 marks)

5 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 or royal commission in your response. (8 marks)

Total: 20 marks

Check your obook assess for these additional resources and more:

- Student book questions — Chapter 15 Review
- Revision notes — Chapter 15
- assess quiz — Chapter 15 Test your skills with an auto-correcting multiple- choice quiz
- Quizlet — Revise key definitions from this topic

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, provide one example of each type of power.

(4 marks)

3 Explain what is meant by 'double majority' in the context of a referendum.

(3 marks)

4 'The separation of powers offers important checks and balances on the operation of parliaments in Australia.' Discuss this statement.

(5 marks)

5 '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)

6 '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 one case.

(6 marks)

7 '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: 40 marks

PRACTICE ASSESSMENT TASK

UNIT 4 – Area of Study 2

R v Klinkermann [2013] VSC 65 (25 February 2013)

The *Voluntary Assisted Dying Act 2017* (Vic) came into effect on 19 June 2019. Victoria became the first state in Australia to allow people who are suffering with a terminal illness who have less than six months to live, in some circumstances and under strict conditions, the right to choose to end their life. The law came into effect after many years of lobbying by pro-choice groups, community debate and investigation. For example, in 2015 the Legal and Social Issues Committee of the Victorian Parliament conducted an extensive 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 guidelines. 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 met strict criteria including being of sound mind, was in the final weeks or months of life and was 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 accept food orally 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 Explain how a conscience vote on an assisted dying bill might guarantee its success through the parliament.

(4 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 Provide two reasons for and two reasons against introducing legislation 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.

(4 marks)

b 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.

(7 marks)

Total: 40 marks

GLOSSARY

A

abrogate (abrogation)
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
the 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 (e.g. encouraging another person to cause the harm)

accused
a person charged with a criminal offence

Act of Parliament
a law made by parliament; a bill that 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
facts or circumstances about an offender or an offence that can lead to 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 methods

appeal
an application to have a higher court review a ruling (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 (an arbitrator) is appointed to listen to both sides of a dispute and to 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 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 some proceedings

Australian Constitution
a set of rules and principles that guide the way Australia is governed. Its formal title is the *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) a situation where no single party has a majority of seats in one or both houses of parliament, meaning members of the crossbench (i.e. members of minor parties and independent members) 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 their version of the facts is correct

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

bias
inclination or prejudice for or against one person or group, especially in a way considered to be unfair

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
a proposal to implement a new law or change an existing law

bill of rights
a document that sets out the basic rights and/or freedoms of the citizens in a particular state or country

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 the premier at a state level) and a range of senior government ministers who are in charge of a range of government departments. Cabinet decides which bills or legislation should be presented to 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 (e.g. an order that the parties attend mediation)

civil dispute
a dispute (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

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

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

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 a committal hearing, the magistrate will decide whether there is sufficient evidence to support a conviction for the offence charged

committal proceedings
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)

Commonwealth offences
crimes that break a law passed by the Commonwealth Parliament

community correction order (CCO)
a non-custodial sanction (one that does not 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

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 that uses an independent third party (i.e. a 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 ends 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 themselves

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

contingency fee agreement
a contract or arrangement between a lawyer and their client which allows the lawyer to charge a fee for legal services

which is calculated as a share of the amount recovered if the litigation is unsuccessful

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 judgment
a statement by the judge at the end of case that outlines the decision and the legal reasoning behind the decision

Court Services Victoria (CSV)
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 behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them

crossbenchers
independent members of parliament and members of minor parties (i.e. those who are not members of the government or opposition). They are named after the seating area provided in parliament for them, called the 'crossbench'

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

D

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

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 gathering of people to protest or express their common concern or dissatisfaction with an existing law as a means of influencing law reform

denunciation
one purpose of a sanction, designed to demonstrate the community's disapproval of the offender's actions

deterrence
one purpose of a sanction, designed to 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 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

discrimination
the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or gender identity). Discrimination can be direct or indirect

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. at least four states) to vote in favour of a proposal. A double majority is required for a change to be made to the wording of 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 an equal opportunity to present their case as anyone else, without advantage or disadvantage

evidence
information used to support the facts in a legal case

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

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
evidence (testimony) given by an independent expert about an area within their expertise

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

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 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. This means that 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

fast track mediation and hearing (FMAH)
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)

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

governor
the Queen's representative at the state level

Governor-General
the Queen's representative at the Commonwealth level

government
the ruling authority with power to govern, formed by the political party or parties (known as a coalition) that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

group member
a member of a group of people who are part of a representative proceeding (i.e. a 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 (1776–1833), 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 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 that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

imprisonment
a sanction that involves removing 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 whether 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
a serious offence generally heard before a judge and a jury in the County Court or Supreme Court of Victoria

indictable offence heard and determined summarily
a serious offence that can be heard and determined as a summary offence if the court and the accused agree

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 a wrong

international declaration
a non-binding agreement between countries that sets out the aspirations (hopes) of the parties to the agreement

international treaty
a legally binding agreement between countries or intergovernmental organisations, in which they undertake to follow the obligations set out in the agreement and include them in their own local laws (also known as an international convention)

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 their own political beliefs or the views of the community)

judicial power
the power 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 (or 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 Indigenous 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
the process of constantly updating and changing the law so it remains relevant and effective

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

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 (e.g. a barrister or a solicitor)

lay evidence
evidence (testimony) given by a layperson (an ordinary person) about the facts in dispute

lead plaintiff
the person named as the plaintiff in a representative proceeding (i.e. a class action) and who represents the group members

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 law 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 the costs and expenses associated with initiating a claim in return for a share of the amount recovered. Litigation funders are often involved in representative proceedings

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

M

majority verdict
a decision where all but one of the members of the jury are in agreement. In a criminal trial, this means 11 of the 12 jurors are in agreement

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 to reach a settlement of the matter

member
the person who presides over final hearings and compulsory conferences at the Victorian Civil and Administrative Tribunal (VCAT). Members include the VCAT President, vice-presidents, deputy presidents, senior members 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 who is in charge of a government department

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

minor party
a political party that, despite not having enough members or electoral support to win government, are still able to place pressure on the government to address specific issues and introduce law reform

mitigating factors
facts or circumstances about the offender or the offence that can lead to a less severe sentence

money bill
a bill that imposes taxes and collects revenue; also known as an appropriation bill

N

native title
the legal recognition of the right of Aboriginal and Torres Strait Islander people to be the owners of land and waters based on their traditional ownership of the land (which existed thousands of years before the British colonisation of Australia)

negotiation
informal discussions between two or more parties in dispute, aiming to come to an agreement about how to resolve that dispute

O

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)

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

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

parliamentary sovereignty
the overriding power or authority of the parliament to make, change or repeal any law within its constitutional law-making power

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

party control
a term used to describe the power that each party in a legal case has to decide how they will run their case

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 party (i.e. the defendant) in court

plea negotiations
(in criminal cases) pre-trial discussions 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

police informant
a person who secretly gives information to police about criminal offending, including information about the people involved in criminal activity, which may be used during the investigation and prosecution of a crime

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

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
a 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
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
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

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

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

protection
one purpose of a sanction, designed to safeguard the community from an offender by preventing them from committing a further offence (e.g. by imprisoning the offender)

punishment
one purpose of a sanction; a strategy designed to penalise (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 it by law to adopt the various rights and responsibilities set out in the treaty

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

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, designed to reform an offender in order to prevent them from committing offences in the future

remedy
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 solely 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 (also known as a statute)

royal commission
the highest form of inquiry into matters of public concern and importance. Royal commissions are established by the government and are given wide powers 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 because the government holds a majority of seats in both houses and members of the government generally 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 parliament. Also called delegated legislation

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 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

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 gives 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

standing
the ability of a party involved in a case to demonstrate to the court that there is sufficient connection to the issues, legal and factual, to support that party's involvement in the case

stare decisis
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
a law made by parliament; a bill which has passed through parliament and has received royal assent (also known as legislation or an Act of Parliament)

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

statutory interpretation
the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. a statute) so it can be applied to resolve the case before them

subordinate authorities
secondary bodies that have been given the power by parliament to make rules and regulations by parliament

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
a Latin term meaning 'empty land'; a false common law principle that was used by the British to declare that Australia belonged to no-one when they 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, such as newspapers, magazines, television and radio, that were used before the internet

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

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

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

U

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

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

victim impact statement
a statement filed with the court by a victim that is 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

Victims' Charter
the *Victims' Charter Act 2006* (Vic), which recognises the impact of crime on victims and provides guidelines for the provision of information to victims

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)

Victoria Legal Aid (VLA)
a government agency that provides free legal advice to all members of the community and low-cost or no-cost legal representation to some people who cannot 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

volenti non fit injuria
a Latin term meaning 'to a willing person, injury is not done'; a defence in which the defendant claims that the plaintiff accepted the dangers of a known and understood risk, either expressly or by implication

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 at risk. This might be a child, a person who has a cognitive impairment, or the victim of a sexual offence

W

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

writ
usually the first legal document filed by the plaintiff to start a civil proceeding in court. A writ explains the action being taken against the defendant and the place and mode of trial

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