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LEGAL STUDIES

FOR VCE

LISA FILIPPIN
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PETER FARRAR

15TH EDITION

UNITS 1&2

obook pro

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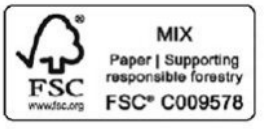
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Warning to First Nations Australians
Aboriginal and Torres Strait Islander peoples are advised that this publication may include images or names of people now deceased.

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State Government Insurance Commission (SA) v Trigwell (1979) 142 CLR 617

DPP v Bednar [2023] VSC 67 (21 February 2023)

Wilson v Bauer Media Pty Ltd [2017] VSC 521 (13 September 2017)

Chapter 4 Proving guilt

RP v The Queen [2016] HCA 53 (21 December 2016)

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DPP v Huby [2018] VCC 1621 (3 October 2018)

DPP v Hennessy [2022] VCC 1600 (19 September 2022)

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Chapter 6 Summary offences

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DPP v Cattanach [2023] VCC 357 (8 March 2023)

R v Skaf (2004) 60 NSWLR 86

Buckley v The Queen [2022] VSCA 138 (14 July 2022)

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High Quality Jewellers Pty Ltd v Ramaihi (Ruling) [2022] VCC 2240 (16 December 2022)

Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller [2021] HCA 27 (8 September 2021)

Hallett v City of Port Phillip [2015] VSC 313 (30 June 2015)

Gales Holdings Pty Ltd v Tweed Shire Council [2011] NSWSC 1128 21 September 2011)

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Chapter 13 Human rights

Dietrich v The Queen (1992) 177 CLR 262

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Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families & Children (2016) 51 VR 473

Palmer v Western Australia [2021] HCA 5 (24 February 2021)

Alqudsi v The Queen (2016) 258 CLR 203

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

Clubb v Edwards; Preston v Avery (2019) 366 ALR 1

Kaplan v State of Victoria

Northern Territory v Griffiths (deceased) & Jones on behalf of the Ngaliwurru & Nungali Peoples [2019] HCA 7 (13 March 2019)

Key features of the Student Book

- *Legal Studies for VCE Units 1 & 2* (15th edition) provides complete coverage of the VCAA *Legal Studies Study Design 2024–2028*.
- Each print Student Book comes with complete access to all the digital resources available on Student obook pro.



The legal toolkit

The Student Book begins with a stand-alone reference chapter that includes:

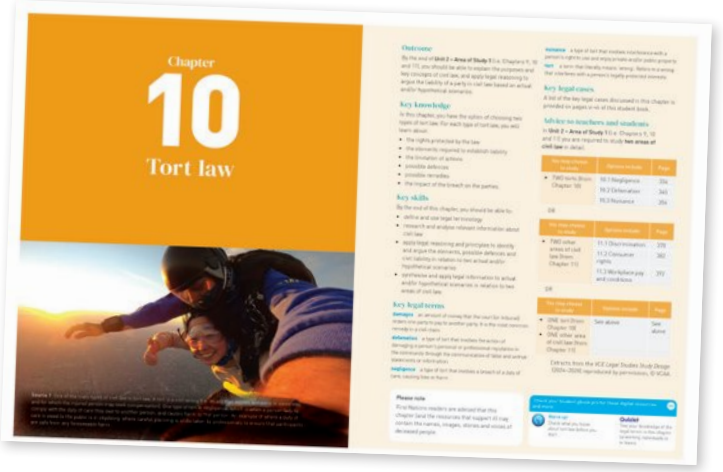
- an overview of the structure of the VCE Legal Studies course
- helpful tips for achieving success in VCE Legal Studies
- tips on mastering legal citation
- information about careers in the law.

Digital hotspots

Digital icons or hotspots found throughout the Student Book link to digital resources accessible via the obook pro, for example:

- Video – Watch a video, such as a short instructional video outlining key knowledge points
- Assessment – Access an interactive quiz
- Weblink – Direct access to relevant websites
- Student Book questions – Complete the 'Check your learning questions' online





Chapter openers

Each chapter begins with a chapter opener that includes:

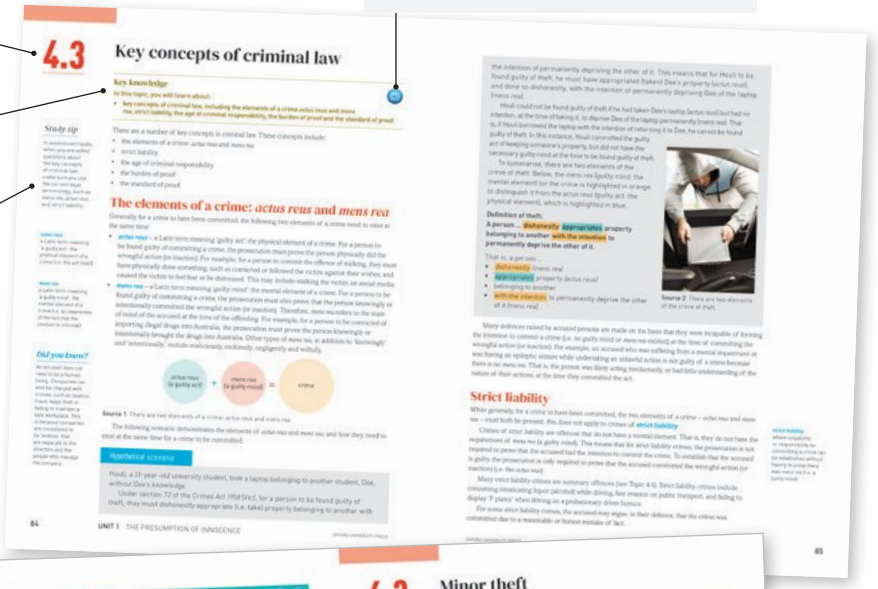
- the outcome for the Area of Study
- key knowledge and key skills from the Study Design
- a list of key legal terms
- a link to an interactive warm-up quiz
- a link to a Quizlet set for key legal terms in the chapter.

Short videos outlining key knowledge points can be used as an introduction to the topic or as a recap

Clear **topic-based** approach

Key knowledge points link topics to the Study Design

Targeted **study tips** help students to achieve better results on assessment tasks.



Check your learning questions, with bolded command words, enable students to consolidate and extend their learning. Questions are levelled to allow for differentiation:

- Remember and understand
- Examine and apply
- Reflect and evaluate

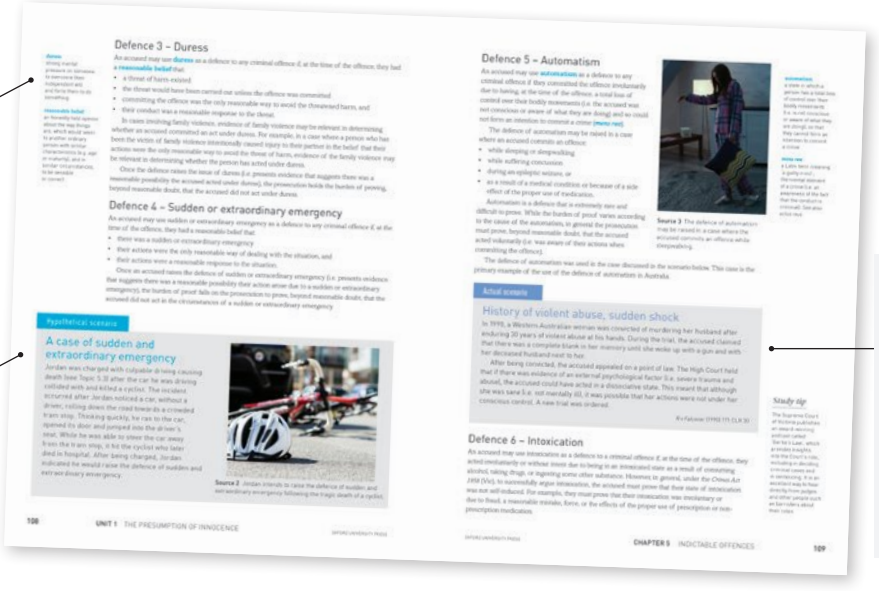


Digital hotspots link directly to resources on the Student obook pro

Extracts from relevant legislation support student learning

Did you know? features provide interesting or quirky facts about the law to engage students

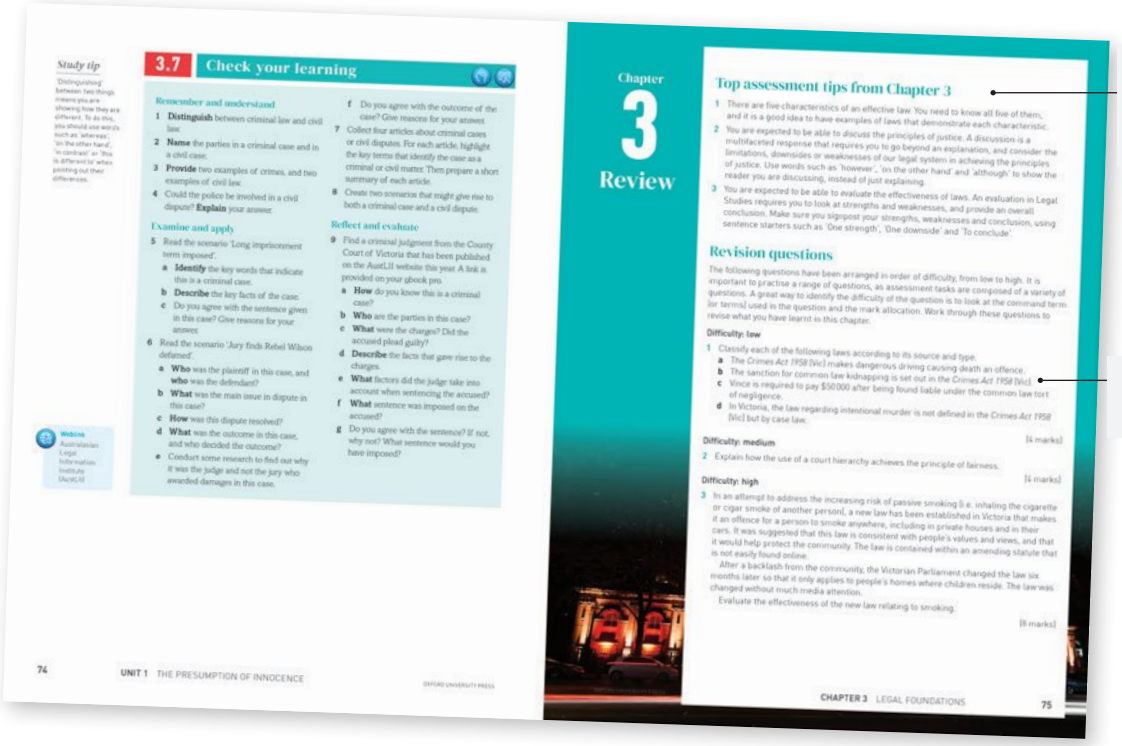
Definitions in the margin for **key legal terms** support student understanding at the point of learning. Key terms also appear in a combined glossary at the back of the book.



Hypothetical scenarios stimulate discussion and illustrate how laws work in different contexts.

Actual scenarios provide key legal cases and articles to help students understand real-world examples of the law in action, and provide practice for students responding to scenario-based questions.

Chapter review



Three top **assessment tips** from the chapter

Graded **revision questions**

Chapter checklist encourages students to evaluate their understanding of the key knowledge for the chapter



Practice assessment tasks are structured in line with a range of suggested assessment tasks covered in the *VCE Legal Studies Study Design*.

Assessment essentials – put your skills into practice!



Tips to maximise results in assessment tasks

See it in action – annotated sample responses to questions

Think like an assessor – use **marking guides** to mark sample responses

Practice assessment tasks

More practice assessment tasks to help you hone your skills!

Key features of Student obook pro

obook pro

- Student obook pro is a completely digital product delivered via Oxford's online learning platform, **Oxford Digital**.
- It offers a complete digital version of the Student Book with interactive note-taking, highlighting and bookmarking functionality.
- The Student Book can be downloaded for offline use.

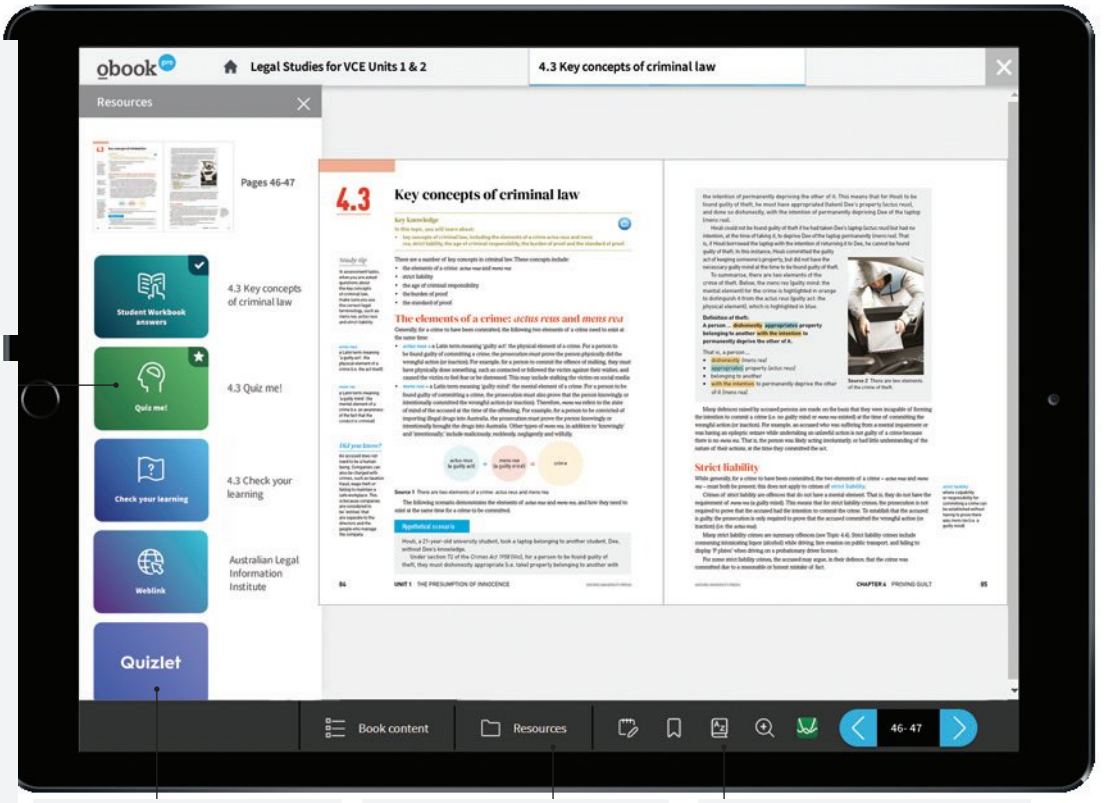
Focus on eLearning

Complete digital version of the Student Book

- This digital version of the Student Book is true to the print version, making it easy to navigate and transition between print and digital.

Interactive assessments

- Each topic in the Student Book is accompanied by an interactive assessment that can be used to consolidate skills and knowledge and for formative assessment.
- These interactive assessments provide a mix of auto- and teacher-corrected questions with results being fed back to students. Students can also access all their online assessment results to track their own progress and reflect on their learning.



Quizlet

- Integrated Quizlet sets, including real-time online quizzes with live leaderboards, motivate students by providing interactive games that can be played solo or as a class. Quizlet can be used for revision or as a warm-up activity when a chapter is introduced.

Additional resources

- A rich variety of additional resources such as Quizlet sets, videos, quizzes, weblinks and worksheets, revision notes and chapter summaries are linked to individual topics in the book so they can be accessed at the point of learning.

Integrated dictionary

- Each digital Student Book provides an integrated Australian Concise Oxford Dictionary look-up feature, so students can quickly access any terminology they aren't sure of and continue their learning.

Benefits for students

- integrated Australian Concise Oxford Dictionary look-up feature
- instructional key knowledge videos
- interactive assessments to consoidate understanding
- integrated Quizlet sets including real-time online quizzes with live leaderboards
- additional resources available at the point of learning
- access to their online assessment results to track their own progress

Key features of Teacher obook pro

obook pro

- Teacher obook pro is a completely digital product delivered via **Oxford Digital**.
- Each chapter and topic of the Student Book is accompanied by full teaching support. Lesson plans are provided that clearly direct learning pathways throughout each chapter.
- Teachers can use their Teacher obook pro to share notes and easily assign resources or assessments to students, including due dates and email notifications.

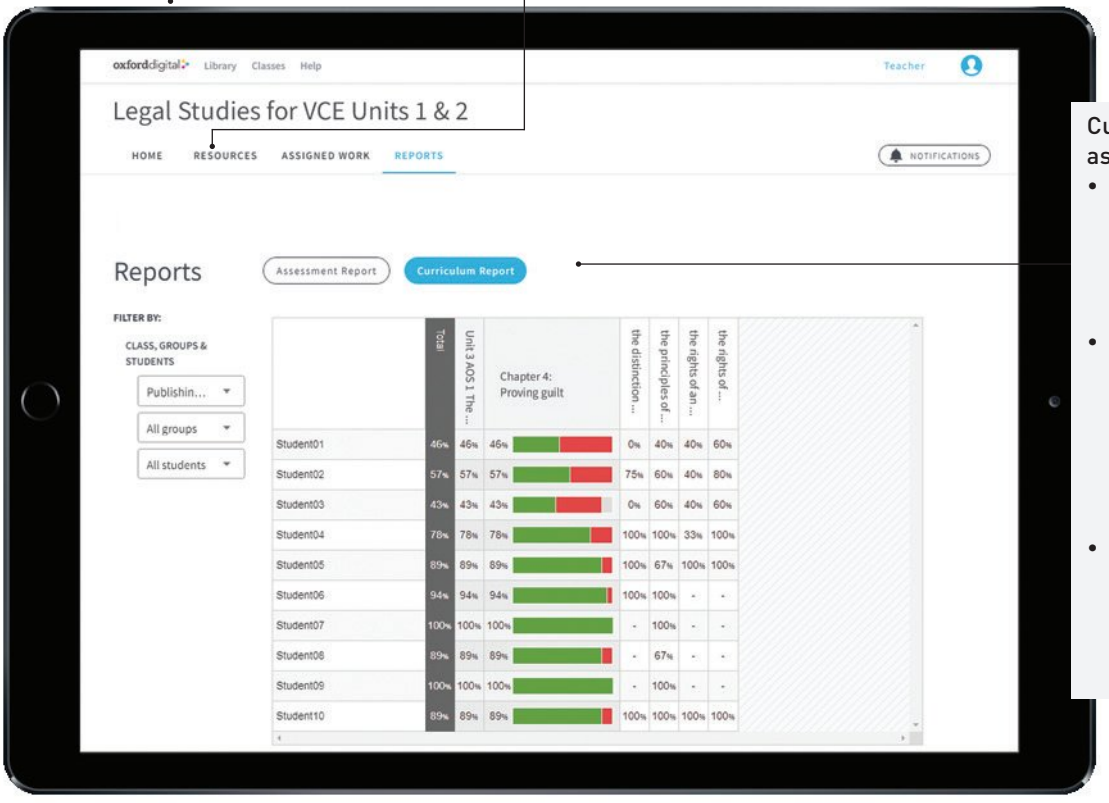
Focus on assessment and reporting

Complete teaching support

- Teaching support provides full lesson and assessment planning, ensuring there is more time to focus on students.

Additional resources

- Each chapter of the Student Book is accompanied by additional resources including lesson plans, answers to every Student Book question, videos, interactive quizzes, weblinks, revision notes and chapter summaries.



Curriculum and assessment reports

- Teachers are provided with clear and tangible evidence of student learning progress through curriculum and assessment reports.
- Assessment reports directly show how students are performing in each online interactive assessment, providing instant feedback for teachers about areas of understanding.
- Curriculum reports summarise student performance against Study Design key knowledge points.

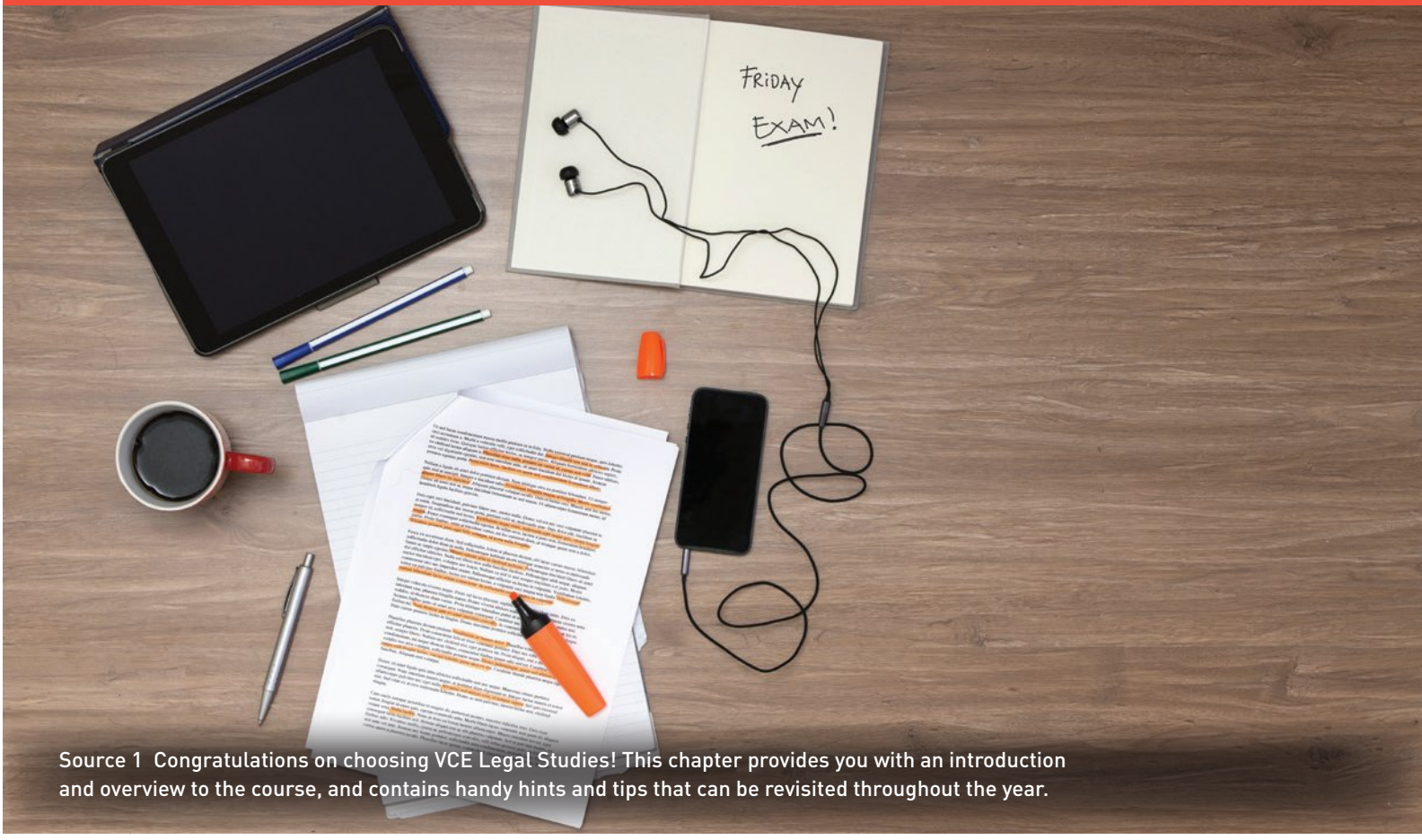
Benefits for teachers

- Teachers have access to all student resources.
- As students complete online assessments, their results are measured against Study Design key knowledge points through the curriculum report. This provides information about how students are progressing and where they may need support.

Chapter

1

The 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 1 & 2

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

Legal Studies is an exciting, relevant and engaging course that explores the Australian legal system and helps you become active and informed citizens. It will provide you with opportunities to develop critical thinking and problem-solving skills as you navigate your way through criminal and civil cases and legal issues and problems – both actual and hypothetical.

This Student Book has been purpose-written to meet the requirements of the *VCE Legal Studies Study Design* (2024–2028) and includes content you are required to cover in Units 1 & 2.

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 it is also designed as a handy reference that can be revisited throughout the year.

Topics covered

This chapter provides an introduction to:

- the VCE Legal Studies course
- tips for success in VCE Legal Studies
- tips for success in assessment tasks
- mastering legal citation
- legal institutions and bodies
- careers in the law.

Best of luck with your studies this year!

1.1 The VCE Legal Studies course

The requirements of the VCE Legal Studies course are set out in a document called the *VCE Legal Studies Study Design* (also called the Study Design). The 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.

Study tip

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

You will find a link to the current Study Design on your obook pro.

Weblink
VCAA: the current *VCE Legal Studies Study Design*

Structure of the VCE Legal Studies course

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

Unit	Comments
Unit 1 – The presumption of innocence	• Units 1 & 2 are commonly completed in Year 11
Unit 2 – Wrongs and rights	
Unit 3 – Rights and justice	• Units 3 & 4 are commonly completed in Year 12 • You do not have to complete Units 1 & 2 to undertake Units 3 & 4.
Unit 4 – The people, the law and reform	

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 1 & 2 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 1 – The presumption of innocence

Area of study	Outcome	Corresponding chapters in this book
Area of Study 1 Legal foundations	**Outcome 1** On completion of this unit the student should be able to describe the main sources and types of law, and evaluate the effectiveness of laws.	• **Chapter 3** Legal foundations
Area of Study 2 Proving guilt	**Outcome 2** On completion of this unit the student should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.	• **Chapter 4** Proving guilt • **Chapter 5** Indictable offences • **Chapter 6** Summary offences
Area of Study 3 Sanctions	**Outcome 3** On completion of this unit, the student should be able to explain the key concepts in the determination of a criminal case, discuss the principles of justice in relation to experiences in the criminal justice system, and discuss the ability of sanctions to achieve their purposes.	• **Chapter 7** Sanctions

Source 2 An overview of the content and structure of Unit 1. Extracts from the *VCE Legal Studies Study Design* (2024–2028) reproduced by permission, © VCAA

Unit 2 – Wrongs and rights

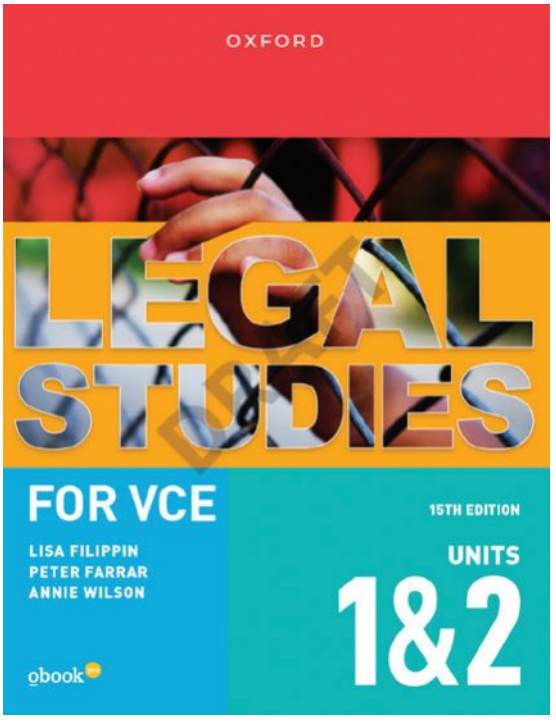
Area of Study	Outcome	Corresponding chapters in this book
Area of Study 1 Civil liability	**Outcome 1** On completion of this unit the student should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.	• **Chapter 9** Civil liability • **Chapter 10** Tort law • **Chapter 11** Other areas of civil law
Area of Study 2 Remedies	**Outcome 2** On completion of this unit the student should be able to explain the key concepts in the resolution of a civil dispute, discuss the principles of justice in relation to experiences of the civil justice system, and discuss the ability of remedies to achieve their purposes.	• **Chapter 12** Remedies
Area of Study 3 Human rights	On completion of this unit the student should be able to explain one contemporary human rights issue in Australia, and evaluate the ways in which rights are protected in Australia.	• **Chapter 13** Human rights

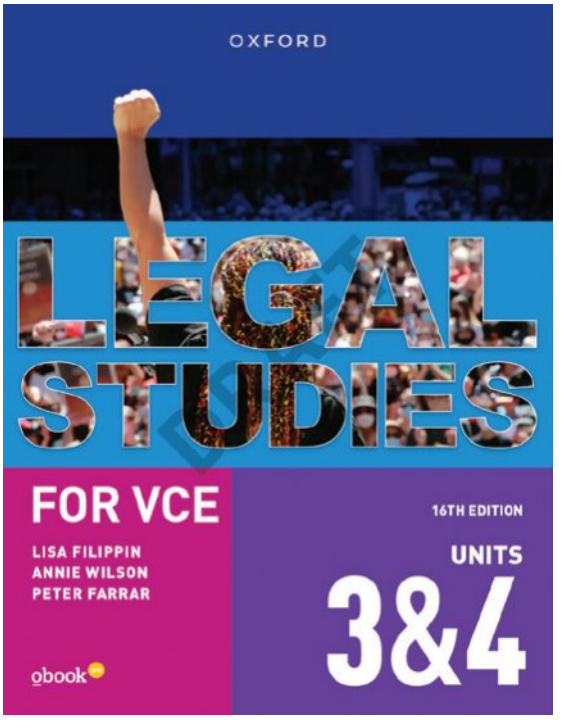
Source 3 An overview of the content and structure of Unit 2. Extracts from the *VCE Legal Studies Study Design* (2024–2028) reproduced by permission, © VCAA

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* (15th edition). Units 3 & 4 are covered in *Legal Studies for VCE Units 3 & 4* (16th edition).

Assessment and reporting

As you complete Units 1 & 2 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 1 – The presumption of innocence, you will need to demonstrate the required achievements for Outcomes 1, 2 and 3.

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 **assessment tasks**. 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 assessment tasks.

Assessment tasks

Your level of knowledge and understanding of the Outcomes in each Area of Study (shown in Sources 2 and 3) will be demonstrated through the completion of assessment tasks. All the assessment tasks that you complete in VCE Legal Studies Units 1 & 2 are decided by your school. This means all the assessment tasks are developed and assessed within your school. Your level of achievement (i.e. your mark) will not be reported to the VCAA. Note that for Units 1 & 2, there is no external end-of-year examination.

The types of assessment tasks that you may be required to complete include:

- a folio of exercises
- an oral or digital presentation, such as a podcast or video
- a Wiki, website or blog
- structured questions
- a mock trial or role play
- a debate
- a research report or media analysis
- an essay
- a question-and-answer session.

Your school will determine what these tasks are and will provide guidance on how the tasks will be assessed.



Source 5 Your knowledge and understanding of the Outcomes in each Area of Study will be demonstrated through the completion of assessment tasks. These assessment tasks may take the form of a research report or media analysis, a class debate, or even a mock trial or role-play.

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 6 below.

Key theme	Description
Active citizenship	Many parts of the course demonstrate the ways in which you can become an active and informed citizen. This is known as active citizenship. You will study this through Units 1, 2, 3 and 4 and come to an understanding and appreciation of how individuals can influence changes in the law, and how individuals and groups can actively participate to influence changes in the law and the Australian Constitution and use the court system to enforce their rights.
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**.
Critical thinking, problem-solving and application skills	A key purpose of this course is to encourage you to develop your critical thinking, problem-solving and application skills. Legal Studies requires you to consider a range of actual and/or hypothetical scenarios and apply your knowledge and skills to those scenarios. This will enable you to develop the ability to: • argue a case for or against a party in a criminal or civil matter • discuss the extent to which our legal processes, methods and institutions are effective • evaluate the ability of the justice system to achieve the principles of justice.
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 Units 1 and 2 you are required to study recent criminal cases and civil cases. 'Recent' in Legal Studies means within four years. You should review the VCAA advice (available on its website) about the use of recent examples.

Source 6 Key themes covered in VCE Legal Studies Units 1 & 2

fairness
one of the principles of justice; in VCE Legal Studies, fairness means all people can participate in the justice system and its processes should be impartial and open

equality
one of the principles of justice; in VCE Legal Studies, equality means people should be treated in the same way, but if the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage

access
one of the principles of justice; in VCE Legal Studies, access means that all people should be able to engage with the justice system and its processes on an informed basis

1.2 Tips for success in VCE Legal Studies

While your final years of secondary school will include fun and exciting opportunities, completing your VCE can be challenging and, at times, stressful. This topic includes advice to help you manage your VCE studies, develop good study habits and prepare for success. Some of the tips 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 may already have developed your own successful strategies and work habits. If so, stick with those. Your friends and teachers may also have some great study tips, so be sure to ask them, and implement the strategies that work best for you!

Weblink
VCAA: the current *VCE Legal Studies Study Design*

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 2024. You can download a copy from the VCAA website link on your obook pro.
- The VCAA also has several other useful documents on its website. They are free, and they include past exam papers, examination reports and other support materials (such as a glossary of command terms). The examination reports are particularly important to read.
- 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. Get copies of any assessment advice related to assessment tasks (such as marking criteria or assessment rubrics). Your teacher will use these documents 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. You also need copies of any assessment advice related to assessment tasks (such as marking criteria or assessment rubrics).

Tip 2 – Plan to study effectively

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 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' before assessment tasks.

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, 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 artwork, posters or plants).
- If you like to listen to music while you study, make sure you can do this without disturbing others. Think about the types of music you listen to, as recent research suggests listening to music containing lyrics is distracting when completing tasks that involve reading.

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, when they feel re-energised after a good night's sleep, 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 you need a good night's sleep so you are not tired at 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 have practical strategies to stay on track. Try one or more of the time management strategies set out in Source 3 below.

Additional resource
Study timetable template

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. A template for a study timetable is available on your obook pro. • 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 – Use different strategies to help you learn

Using a range of learning strategies can help you remain focused when studying and improve your learning. Throughout the year, try some of the different learning strategies set out in Source 4 below.

Learning method	Learning strategies and tools
Visual – visual learning strategies involve learning by 'seeing and looking'	Visual learning strategies include using pictures, images, diagrams, charts, posters, colour coding, mind maps and flashcards to help you organise and learn information. You can also watch (or create your own) instructional videos or PowerPoint presentations that summarise important concepts and information.
Auditory – auditory learning strategies involve learning by 'hearing and listening'	Auditory learning strategies include listening to audio recordings, podcasts and recorded lessons, reading your notes aloud, participating in class discussions and working with a 'study buddy'. You can also create your own recordings or podcasts and mnemonics (songs, rhymes or phrases designed to aid memory) to help you learn multiple factors or processes.
Read/Write – read/write learning strategies involve learning through 'reading and writing'	Read/write strategies include reading notes, glossaries, flashcards, worksheets, textbooks, study guides and questions and answers, as well as writing notes, writing questions and answers and writing your own flashcards and resources.
Kinaesthetic – kinaesthetic learning strategies involve learning through 'doing'	Kinaesthetic strategies include role playing, teaching others, playing games, attending excursions, and any activities that involve movement or use of the senses.

Source 4 Different learning methods, strategies and tools



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.

Tip 5 – Take care of yourself

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

- **eat a balanced diet** – try to avoid having too much caffeine and junk food
- **get enough sleep** – research shows that the ideal amount of sleep for teenagers is around 9 to 10 hours per night to support brain development and physical growth
- **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.

Staying healthy is not just about good physical health. It is also essential to maintain 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 – Revise regularly

At the end of each week of class it is 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 in Source 6. Try one or more of the strategies throughout the year.

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.
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.
Complete 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.

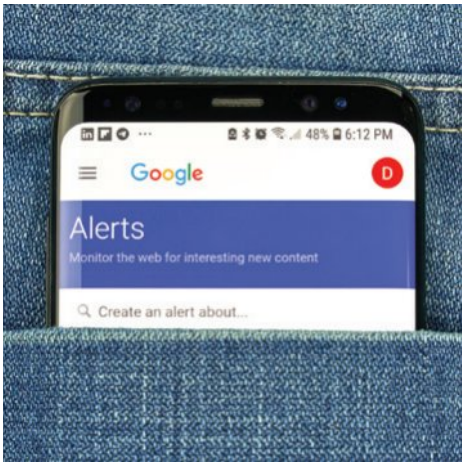
Source 6 Revision strategies that you can use in VCE Legal Studies

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 radio programs 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. You could also use social media platforms and follow key legal bodies such as those in Topic 1.5 of this chapter.

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



Weblink
Google Alerts

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 pro.

Tip 8 – Make time for breaks

Make sure you plan to take regular study breaks. Aim to work in 50-minute blocks and then take a meaningful 10-minute break.

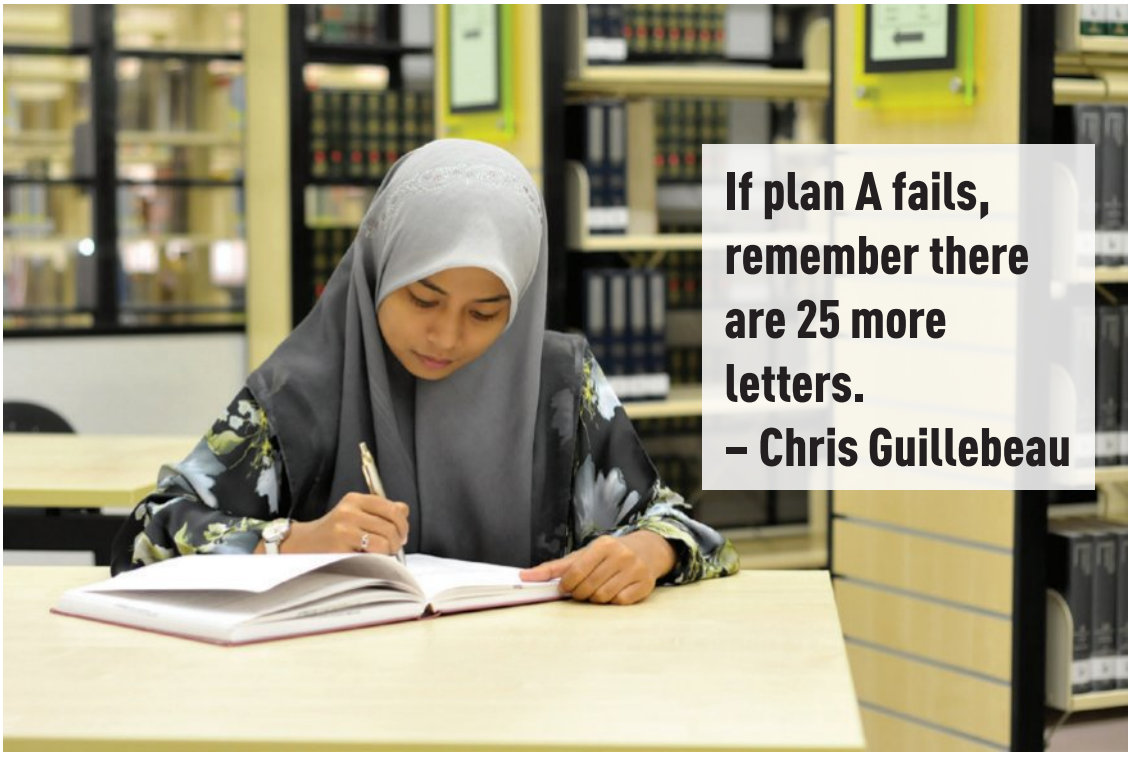
Your break should have nothing to do with your studies. Get up from your desk and leave your study space. Go for a quick walk, make something to eat or chat to your family or friends.

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.

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, 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, 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.



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

Tip 10 – 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.

1.3 Tips for success in assessment tasks

As you work your way through the VCE Legal Studies course, your teacher will use a variety of learning activities and assessment tasks to assess your understanding of key knowledge and key skills of the course. To give yourself the best chance of success on these assessment tasks, try to follow these five tips.

Tip 1 – Use key legal terminology

One of the key skills you are expected to demonstrate throughout Units 1 & 2 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 Quizlet sets provided on your obook pro to test yourself and compete against others
- getting into the habit of using legal terms in your responses (e.g. use 'plaintiff' instead of 'a person who is suing another person').

Study tip

The VCAA website provides a glossary of commonly used command terms in VCE study designs and VCE examinations. The list is not complete, so you may find other command terms being used in assessment tasks and exams. Also, not all of these terms relate specifically to Legal Studies, and their meanings may differ across different studies. For example, when answering an 'evaluate' question in Legal Studies, you should provide a conclusion to your evaluation, even if that is not required in some other VCE subjects.

Tip 2 – Understand command terms

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

Command terms range in level of difficulty. Some (such as **identify** or **define**) are simple to understand and master. Others (such as **evaluate, analyse** or **justify**) are more challenging to understand and will take practice to master. In the Check Your Learning questions in this book, command terms are in **bold**, to remind you to think about what you are being asked to do.

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 the common command terms used in VCE Legal Studies. It provides a definition and an indication of the level of difficulty of each command term. The difficulty level of a question or task can depend on the command term, and the key knowledge being assessed – so an **explain** question, for example, may range from medium to high in terms of difficulty.

The table also provides example questions so you can see each command term in context. While these questions have come from exam papers for past Study Designs, they still reflect the key knowledge and key skills in the current Study Design. You should check with your teacher about this.

Command terms	Definition	Difficulty	Example question from past exam*
Advise	Offer suggestions about the best course of action or make recommendations	Medium to high	Section B, Question 1a (2018) *See the examination for the stimulus material.* **Advise** Ada on one enforcement issue she should consider before initiating this claim.
Analyse	Examine facts, data or issues in detail. Where possible, identify the parts or components and give a detailed commentary on those parts, including how they relate to one another	High	Section B, Question 1d (2020) *See the examination for the stimulus material.* **Analyse** two factors that Guy should consider before initiating civil action against Tom.
Compare	Recognise the similarities and differences between approaches, roles or institutions (by identifying the qualities or features they have in common as well as those they do not)	Low to medium	Question 6 (2016) **Compare** the role of a criminal jury with that of a civil jury.
Define	State the precise meaning, qualities or features of a term, phrase, feature or concept	Low	Question 1a (2015) A plaintiff is seeking an injunction and damages of $1 million in the Supreme Court of Victoria. **Define** the term 'injunction'.
Describe	Give a detailed account of the characteristics, features or qualities of a system, process, role or institution	Low	Section A, Question 1 (2020) **Describe** one role of community legal centres in assisting an accused.
Discuss	Give a clear and reasoned argument for and against a particular issue by providing points for and against, benefits and limitations or restrictions (and strengths and weaknesses if applicable). You can also give your opinion, and should do so if the question asks	High	Section A, Question 5 (2021) **Discuss** the roles of the Victorian courts in law-making.
Distinguish	Show the clear differences and distinctive characteristics between two or more features, concepts, roles, methods or institutions	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	Identify key features and assess their relative merits by considering the strengths and weaknesses and providing a concluding judgment about the (overall) benefit or worth of what is being evaluated	High	Section A, Question 6 (2018) *See the examination for the stimulus material.* **Evaluate** two ways in which the Australian Constitution enables the Australian people to act as a check on parliament in law-making.

Command terms	Definition	Difficulty	Example question from past exam*
Explain	Clarify a point, feature or concept by describing it in more detail or revealing relevant facts about it; give a detailed account of how or why with reference to the causes or effects	Medium to high	Section A, Question 2 (2021) **Explain** how the separation of powers acts as a check on parliament in law-making.
Identify	State or recognise a feature, factor or part from a list, description, scenario or system (and possibly provide some basic facts about it)	Low	Section A, Question 1a (2021) **Identify** two participants in the plea negotiation process.
Justify	Show or prove a statement, opinion, argument or contention to be right or reasonable by providing evidence, information or examples	Low to medium	Section B, Question 1b (2021) *See the examination for the stimulus material.* Referring to the Mabo judgment, **justify** how judicial activism is a strength of the law-making process. **Provide** two reasons in your response.
Outline	Give a brief overview or summary of the main features of a system, role, scenario or argument	Low	Section A, Question 2 (2020) **Outline** how a victim impact statement is used when determining a sentence.
Provide	Give, supply or specify	Low	Section A, Question 3 (2020) *See the examination for the stimulus material.* Would the proposal for change have been successful in either or both referendums? **Provide** reasons for your answer with reference to the table.
To what extent	Describe the degree or level to which a statement, opinion or contention is (or is believed to be) correct or valid	Medium to high	Section A, Question 4 (2020) **To what extent** do fines achieve two purposes of sanctions?
What	Specify or provide further information about a feature, concept, issue or circumstance	Low	Section A, Question 5a (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	Specify an individual (person), group, institution or organisation	Low	Section A, Question 5a (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	Give a reason or explanation for the cause or purpose of an action or impact	Low to medium	Question 8 (2016) **Why** is it possible for a Victorian law to be in conflict with an existing Commonwealth law? In your answer, **describe** the impact that section 109 of the Commonwealth Constitution could have on a Victorian law.

*Selected VCE Legal Studies examination questions (2015–2021) reproduced by permission, © VCAA

Source 2 Common VCE Legal Studies command terms, definitions and examples

See it in action

Two sample answers to actual exam questions are provided below. Read the sample answers and see how they address command terms in the questions. Reference to the command terms has been highlighted (and underlined) in green.

Sample Question 1

Bob, 24, has been charged with four offences, including armed robbery and common assault. The prosecution alleges that:

- Bob robbed a service station with a firearm
- the offences caused distress to several victims, including a young family and Ada, who was working in the service station
- Bob was serving a community correction order (CCO) at the time of the offences. Bob has been cooperative with the police since his arrest.

Bob cannot afford legal representation and is concerned about being sent to prison as he has served time in jail for numerous offences, including theft. A committal hearing was held last week. The magistrate decided that the evidence against Bob was of sufficient weight to support a conviction for the offences. The court ordered that Bob stand trial. The trial is expected to last three weeks. Ada is concerned about giving evidence as she is still distressed about the armed robbery. Bob has pleaded not guilty.

Distinguish between mitigating factors and aggravating factors to be considered in sentencing, and provide an example of each in Bob's case. (4 marks)

Source: Section B, Question 1b, 2018 VCE Legal Studies examination, © VCAA

A sample response:

Mitigating factors differ from aggravating factors in regard to the effect they have on the sentence imposed. Mitigating factors are facts or circumstances about the offender or the offending that can reduce the offender's culpability and lead to a less severe sentence being imposed. In contrast, aggravating factors are facts or circumstances about the offender or offending that increase the offender's culpability and can lead to a more severe sentence being imposed.

In Bob's case, the fact that he had been cooperative with the police since his arrest would be considered a mitigating factor that could lead to a less severe sentence whereas the use of the firearm is an aggravating factor that increases his culpability and would likely lead to a more severe sentence.

Additional notes:

- In this question the command term **distinguish** requires you to show the differences and distinctive characteristics between mitigating and aggravating factors. The use of words like 'in contrast' and 'whereas' can help you show (or *signpost*) where you have done this.
- The example of one mitigating factor and one aggravating factor are drawn from the stimulus material (i.e. the examples directly relate to the facts and circumstances in Bob's case).
- Other mitigating factors include Bob's relatively young age. Other aggravating factors include that Bob committed the offences while serving a Community Correction Order, Bob had a number of previous convictions, and the violent nature of the offence.

Sample Question 2

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? 2 marks

Source: Section A, Question 5a, 2018 Legal Studies examination, © VCAA

A sample response:

Kylie holds the burden of proof in this case. The standard of proof required for her to succeed in the civil action is on the balance of probabilities.

Additional notes:

- The command terms **who** and **what** are 'low level' and require the provision of information (i.e. no explanation or discussion is required). For example, to address the command term *who*, you only need to state that *Kylie* holds the burden of proof; it is not necessary to explain why she holds the burden of proof (i.e. because she is the party initiating the civil action).
- The question requires you to make use of the stimulus material (i.e. recognise that the case is a civil action, and use Kylie's name in the response).

Tip 3 – Understand the structure of questions

To give yourself the best chance of doing well in assessment tasks, you should become familiar with types of questions that typically appear. Assessment tasks will assess your understanding of key knowledge and key skills.

Legal Studies exam questions usually contain a number of key features (or components). Once you identify and understand these key features, 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.

Study tip

A short video explaining the structure of Legal Studies exam questions is provided on your obook pro. 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!

Key features of exam questions	Purpose
Command terms	Command terms are words that tell you how to demonstrate the knowledge you have learned. For example, you may be required to identify, explain, discuss or evaluate a feature or process.
Content	The content is the subject matter or 'topic' you are required to write about in your answer. For example, you may be required to write about the roles of key personnel in a criminal or civil trial, including the judge, jury and parties.
Mark allocation	The mark allocation is the total number of marks available for the question. You should consider the total marks available when deciding 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 (or combination of both). While stimulus material may appear in either section of the VCE Legal Studies examination, questions in Section B will be scenario-based.
Limiting (any other qualifying) words	Limiting words state the specific numbers (i.e. quantities) of examples or definitions you should provide in your answer. For example, a question may require you to provide two features or examples. Questions may also include other 'qualifying' words and phrases that will limit or restrict what you should provide in your answer. For example, a question may require you to discuss the ability of one sanction, *other than* (or *apart from*) fines, to achieve their purpose. You need to follow any limiting or 'qualifying' words carefully and provide exactly what is asked.

Source 3 Legal Studies questions are typically made up of some or all of the above key features.

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 examinations

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

Tip 4 – Use the stimulus or scenario material

Your assessment tasks may include stimulus or scenario material. This is material that you may need to use in your responses. Some questions are stand-alone, which means that you answer them without reference to any stimulus material. Other questions may be attached to stimulus material. To avoid any risk of not achieving full marks, you should refer to and use stimulus material when provided, and you must do so when the question specifically asks.

Tip 5 – Practise answering 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, consider 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 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 or 5 marks
Q3: **Evaluate** the ability of the criminal justice system to achieve the principle of fairness in this case.	High	• Consider strengths and weaknesses of the criminal justice system in achieving fairness in this case • Requires a detailed consideration of events • Likely to be worth at least 6 marks

Source 5 Sample questions and levels of difficulty

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, it is useful to have a basic understanding 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 that 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).

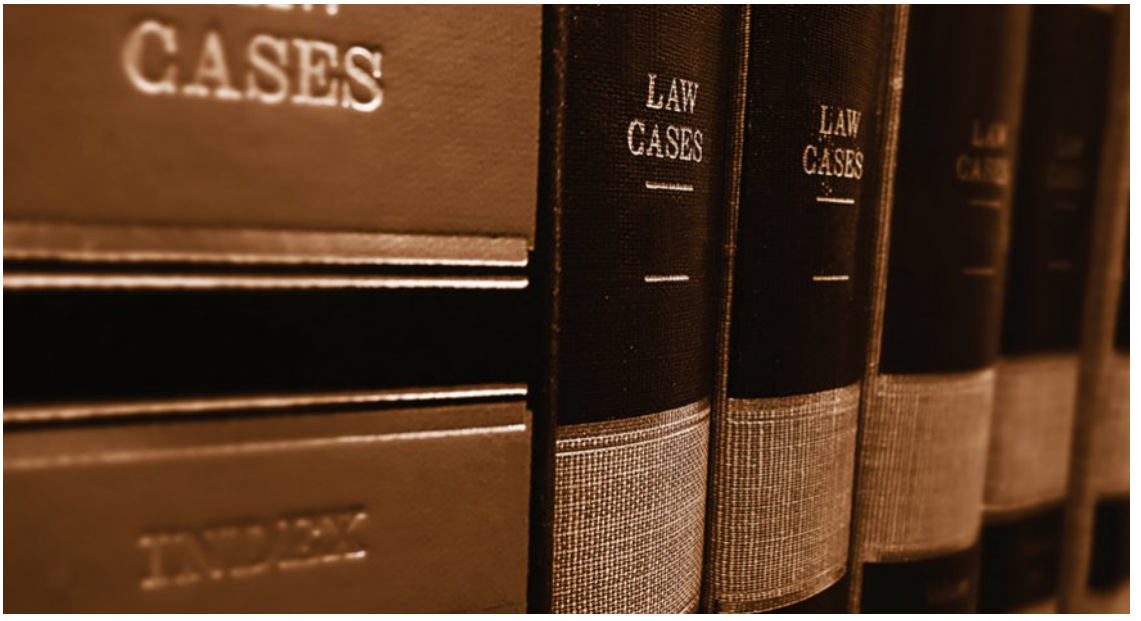
The following information will help you when reading and understanding legal citations. It will also help you cite legal documents correctly in your coursework and assessment tasks.

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 not written in full; instead, abbreviations for each parliament are used (e.g. 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 *Justice Legislation Amendment Act 2022* (Vic) is an amending Act that amends the *Crimes at Sea Act 1999* (Vic), the *Equal Opportunity Act 2010* (Vic) and various other Victorian Acts. The sole purpose of the *Justice Legislation 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 example, but not always.

Example 3 – an amending Act passed by the Victorian Parliament

Justice Legislation Amendment Act 2022 (Vic)

Title Year Parliament

This amending Act (the *Justice Legislation Amendment Act*) was made in 2022 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 *Justice Legislation Amendment Act* stated that it would be repealed on 5 October 2024.

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.

Study tip

If you are looking for an Act on the Victorian legislation website and you can't find it in the list called 'Acts in force', it might be an amending Act rather than a principal Act. If you know the year, you can look it up under 'Acts as made'. 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 pro. Watch it to help develop your skills!

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 said as '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 person with the surname Styles.
- The 'v' between the names of the parties is short for versus, but it is said as 'against' or '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 – Victorian rules

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

Title | Year

These rules (i.e. *Supreme Court (General Civil Procedure) Rules*) were made in 2005 by the judges of the Supreme Court.

Example 8 – Commonwealth rules

Native Title (Federal Court) Regulations 1998 (Cth)

Title | Year

These regulations (i.e. *Native Title (Federal Court) Regulations*) were made in 1998.

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 made in 2009 by the Melbourne City Council.

1.5 Legal institutions and bodies

As you work your way through the VCE Legal Studies course you will come across various institutions in the Australian legal system. As you read and hear about legal issues and cases, you will also encounter a range of legal bodies and organisations that promote improvements in the legal system, help people with their legal issues and educate the community about the law.

Source 1 below sets out some of the significant Victorian and Australian legal institutions and bodies you will come across in Legal Studies. You will find weblinks to these bodies on your obook pro.

Institution or body	Key role
Australian Human Rights Commission (AHRC)	The AHRC protects and promotes human rights in Australia and throughout the world. It has been given the power by the Commonwealth Parliament to assist in resolving disputes involving discrimination and human rights complaints. It also provides advice and recommendations to the Commonwealth Government on ways to achieve greater protection of human rights in Australian law. The AHRC raises awareness of human rights issues by providing information and education to the Australian community. Its website has a section for teachers and students that provides information and resources (including booklets, video and case studies) on human rights issues and the law.
Australian Law Reform Commission (ALRC)	The ALRC is an Commonwealth Government agency that reviews, researches and makes recommendations to the Commonwealth Parliament about possible changes to Commonwealth law. It influences law reform by investigating the need for change in areas suggested by the Commonwealth Government and providing it with impartial advice and recommendations for change.
Federation of Community Legal Centres Victoria (FCLCV)	The FCLCV is Victoria's main body for community legal centres (CLCs) and Aboriginal legal services. It aims to improve the ability of Victorians to access community legal services. It coordinates and supports CLCs, which provide free legal advice, information and representation to people who are unable to pay for, or access, other legal services.
Law Council of Australia (Law Council)	The Law Council works to support and represent more than 90 000 Australian lawyers at a national level and provides advice to the government, courts and Commonwealth bodies on ways to improve the law and Australia's legal system. It also represents the Australian legal profession nationally and internationally, as well as a number of state and territory legal bodies, including the Victorian Bar and Law Institute of Victoria.
Law Institute of Victoria (LIV)	LIV is a not-for-profit organisation that supports the Victorian legal profession; it represents more than 18 000 lawyers and people who work in the legal system. It works to uphold the legal standards and professionalism of lawyers by providing a range of programs and services. LIV also promotes justice and the rule of law and contributes to the improvement of Victorian, and Australian law by, for example, making submissions to law reform inquiries.
National Aboriginal and Torres Strait Islander Legal Services (NATSILS)	NATSILS is an expert body that aims to improve the ability of First Nations peoples to access the Australian legal system and achieve justice by providing legal advice and assistance services. It also provides community legal education and expert advice to the government and other organisations on ways to improve the rights of First Nations peoples by changing the law and policies.
Sentencing Advisory Council (SAC)	The SAC aims to educate the community about sentencing issues and advise the Victorian Government on ways to improve Victoria's sentencing laws. The SAC website contains excellent information about sentencing in Victoria, including the types and purposes of sanctions and factors judges must consider when sentencing (all topics you will examine in Legal Studies). It also provides information on sentencing statistics and trends and has a section for Legal Studies teachers and students.

Victoria Law Foundation (VLF)	VLF aims to ensure members of the Victorian community are able to understand the law and access legal services. It provides information and resources to people who work in the legal system to ensure they are better able to communicate with the public, and to the wider community so they are more able to understand and participate in the Victorian legal system. VLF's website has a section that provides information and resources (including video recordings and case studies) for VCE Legal Studies teachers and students.
Victorian Bar (Vic Bar)	Barristers are lawyers who specialise in representing clients and arguing cases in courts. They are skilled in the rules of evidence and court procedures. Vic Bar is a professional association that represents and supports more than 2200 Victorian barristers. It provides services (including training and resources) to ensure Victorian barristers are highly trained and skilled. All barristers who wish to practise in Victoria must pass an entrance examination set by Vic Bar and complete a Victorian Bar Readers' Course. Vic Bar also contributes to the improvement of Victorian and Australian law by, for example, making submissions to law reform inquiries. It also organises and provides free legal assistance and representation in certain cases.
Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	VEOHRC is the Victorian body that seeks to protect and promote human rights in Victoria. It provides education and information about human rights laws in Victoria, including laws around discrimination and sexual harassment. It also undertakes reviews, investigations and advocacy activities to promote human rights. VEOHRC provides dispute resolution services to people who have been the subject of discrimination, sexual harassment, vilification or victimisation. The service is free.
Victorian Law Reform Commission (VLRC)	The VLRC is Victoria's leading independent law reform organisation. It reviews, researches and makes recommendations to the Victorian Parliament about possible changes to Victoria's laws, influences law reform by investigating the need for change in Victorian laws, and provides the government with impartial advice and recommendations for change. You will examine the role of the VLRC and one of its recent inquiries in Unit 4. The VLRC's website is a valuable source of information.
Victoria Legal Aid (VLA)	VLA is a government agency that provides free legal advice and information to the Victorian community and free or low-cost legal representation to people who cannot afford to pay for a lawyer. There is high demand for its services so it provides legal advice and representation to those who need it most. VLA also promotes improvement of Victorian law by, for example, making submissions to law reform inquiries.

Source 1 Some of the legal institutions and bodies you will come across in Legal Studies

Weblink
Parliament of Australia: Education resources

Weblink
Victorian Parliament: Resources for teachers and students

Each of the Victorian state courts, and the federal courts, has its own website that provides extensive information on court processes, cases and the justice system. The Commonwealth Parliament and each of the state and territory parliaments also has its own website that provides a wide range of information and resources on the role, operations and activities of parliament (including education resources specifically for students).

VICTORIAN LAW REFORM COMMISSION

Source 2 The logo of the Victorian Law Reform Commission (VLRC)

1.6 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 gives advice about the law and a person's rights under the law

barrister
an independent lawyer with specialist skills in dispute resolution and advocacy who is engaged on behalf of a party (usually by the solicitor). In Victoria, the legal profession is divided into two branches: solicitors and barristers

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**.

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

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.

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.

A solicitor may choose to provide legal services across many different areas of law, or they may choose to specialise in one area of law. Following are some of the many different areas of law that a solicitor may specialise in:

- wills and inheritance
- family law
- employment law
- personal injury
- class actions
- commercial disputes
- property
- entertainment
- building and construction
- charities and not-for-profit
- government
- intellectual property.

Barristers

A barrister is a lawyer who specialises in giving advice in difficult cases and representing clients in court. Barristers are skilled in resolving disputes and in advocacy (arguing their client's case before the 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. 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. A description of the role of the Victorian Bar is on page 24.

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 a solicitor or law firm, and generally not directly by the client who needs legal advice (though there are exceptions for some experienced or corporate clients).

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

In Victoria, the most senior barristers are called King's Counsel or Senior Counsel and all other barristers are described as junior counsel (and are called Counsel).



Source 3 Some people who have studied law work as mediators to help resolve legal disputes without having to go 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. Source 4 sets out some of the many career options for people who have studied law.

Careers	Tasks performed
Law clerk	Performing a wide range of legal tasks under the supervision of a lawyer or qualified court staff, including assisting solicitors and barristers to prepare legal information and documents and providing information about legal processes to clients.
Court personnel	Working in the court system, for example as a *bench clerk* (who performs tasks such as announcing the cases, calling people into the court and reading the charges in a criminal case) or *court registrar* (who manages and administers the court).
Policy analyst or adviser	Reviewing and developing policies for government departments and agencies or for senior managers in corporate organisations.
Paralegal	Performing a wide range of tasks to assist legal firms and organisations to deliver their legal services, including undertaking administrative tasks and legal research, and analysing legal documents.
Conveyancer	Providing a service to people who are buying and selling property.
Journalist	Researching, writing and reporting on the news. Journalists may specialise in legal or political journalism.
Mediator	Helping the parties to a legal dispute resolve their conflict through discussion and compromise rather than having a decision imposed upon them by a court.
Teacher	Teaching in secondary school in Legal Studies, Australian and Global Politics or Civics and Citizenship, or at university in law subjects.
Politician	Entering state or national parliament. Approximately 10 per cent of Australian politicians have law degrees
Police officer	Enforcing the law as a first responder to reported crimes, accidents, emergencies, incidents of antisocial behaviour and other areas of community need.

Source 4 Some of the many career options for people who have studied law


Police
Public Order Response
501
Police
501

Unit 1
The presumption of innocence

Source 1 The law aims to protect the rights of individuals and to ensure society remains cohesive. This includes criminal law, which is aimed at maintaining social order and establishing criminal offences. Committing a criminal offence can result in charges and a sentence such as imprisonment being imposed on an offender. In Unit 1, you will develop an understanding of legal foundations, such as the different types and sources of law, and explore criminal law, how to argue criminal culpability, how criminal cases are determined, and sentencing options and approaches.

Area of Study 1 – Legal foundations

OUTCOME 1

On completion of this unit, you should be able to describe the main sources and types of law, and evaluate the effectiveness of laws.

	Chapter	Title	Key knowledge
Unit 1 – Area of Study 1: Legal foundations	Chapter 3	Legal foundations	• the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals • the principles of justice: fairness, equality and access • characteristics of an effective law, such as reflecting society's values; is enforceable; is known; is clear and understood; and is stable • an overview of the roles of the parliament and the courts and their relationship in law-making • sources of law such as common law and statute law • an overview of, and reasons for, the Victorian court hierarchy • types of law such as criminal law and civil law • the distinction and relationship between criminal law and civil law

Area of Study 2 – Proving guilt

OUTCOME 2

On completion of this unit, you should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.

	Chapter	Title	Key knowledge
Unit 1 – Area of Study 2: Proving guilt	Chapter 4	Proving guilt	• the purposes of criminal law • the presumption of innocence • key concepts of criminal law, including: – the elements of a crime: *actus reus* and *mens rea* – strict liability – the age of criminal responsibility – the burden of proof – the standard of proof • types of crime, such as crimes against the person and crimes against property • the distinction between summary offences and indictable offences • possible participants in a crime such as principal offenders and accessories
	Chapter 5	Indictable offences	• two criminal offences and for each offence: – the elements of the offence – possible defences – possible sanctions – trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction – the possible impact of the offence on individuals and society
	Chapter 6	Summary offences	• two criminal offences and for each offence: – the elements of the offence – possible defences – possible sanctions – trends and statistics in relation to the offence in Victoria and in one other jurisdiction – the possible impact of the offence on individuals and society

Area of Study 3 – Sanctions

OUTCOME 3

On completion of this unit, you should be able to explain the key concepts in the determination of a criminal case, discuss the principles of justice in relation to experiences of the criminal justice system, and discuss the ability of sanctions to achieve their purposes.

	Chapter	Title	Key knowledge
Unit 1 – Area of Study 3: Sanctions	Chapter 7	Sanctions	*The principles of justice and experiences of the Victorian criminal justice system* • the principles of justice: fairness, equality and access • institutions that enforce criminal law, such as the police and delegated bodies • the balance between institutional powers and individual rights • an overview of the role and criminal jurisdictions of the Victorian courts • the role of the jury in a criminal trial • the difficulties faced by different groups in the criminal justice system, such as First Nations people, young people, culturally and linguistically diverse people, people with mental health issues, and people with disabilities *Sentencing* • the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation • types of sanctions such as fines, community correction orders and imprisonment • factors considered in sentencing • alternative approaches to sentencing, such as the use of the Drug Court, Koori Courts and diversion programs • sentencing practices in one other Australian jurisdiction

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Chapter

2

Introduction to Unit 1 – The presumption of innocence



Source 1 The Australian legal system includes a number of different bodies, such as parliaments (including the Victorian Parliament, pictured) and courts. It also incorporates several important legal principles, such as the rule of law. This is the principle that everyone in society is bound by the law and must obey it, and nobody is above the law. Chapter 2 provides an introduction to laws and the Australian legal system, including parliaments and courts. It also explores the rule of law and how it is upheld.

Aim

The aim of this chapter is to introduce you to some underlying concepts in the Legal Studies course. These concepts will provide you with an understanding of the foundations of Australia's legal system and of the VCE Legal Studies course.

Topics covered

The following topics are covered in this chapter:

- laws and the Australian legal system
- parliaments and courts
- 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. The Australian Constitution is set out in the *Commonwealth of Australia Constitution Act*

bicameral parliament a parliament with two houses (also called chambers). In the Commonwealth 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)

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

governor the King's representative at the state level

Governor-General the King's representative at the Commonwealth level

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 to make laws

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

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

Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

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

Warm up!
Check what you know about the presumption of innocence before you start.

Quizlet
Test your knowledge of the key legal terms in this chapter by working individually or in teams.

2.1 Laws and the Australian legal system

An introduction to laws

In any society, it is necessary to have rules that govern family, social, political and economic life to provide some form of social order.

Rules tell us what we can and cannot do or what we can expect in dealing with others. Imagine playing a tennis match or participating in a tournament without rules. Would you know what to do or expect? Would you be treated without discrimination? What might happen if you argued with your opponent during the game? Rules help to resolve the conflicts that are inevitable when people live or interact in groups.

Throughout our lives we are bound by rules. Some of these are **laws** (also known as legal rules). Laws are generally made by **parliament** and apply to all members of society. Laws are enforceable by the courts. An individual who breaks certain laws may receive a penalty (also known as a **sanction**). Penalties can include fines or, for a serious breach, spending time in prison. Laws made by parliament are generally referred to as legislation, statutes or **Acts of Parliament**.

There are also **non-legal rules**. Non-legal rules are made by private individuals or groups in society. For example, parents, schools and sporting clubs make rules that are imposed upon the members of that specific group (i.e. family members, students or team members) so the group can operate in a peaceful and unified manner. Non-legal rules are not enforceable by the courts but, as with laws, there are consequences for breaking non-legal rules.

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 to make laws

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

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

Australian Constitution
a set of rules and principles that guide the way Australia is governed. The Australian Constitution is set out in the *Commonwealth of Australia Constitution Act*

An introduction to the Australian legal system

First Nations peoples have lived on the Australian continent for at least 65 000 years. They have their own systems and practices that were developed over time, and that regulate human behaviour. The current Australian legal system was formed in 1901 after the passing of the **Australian Constitution**. This followed the colonisation of Australia by the British, which began in the late 1700s. The development of new laws and systems meant that the systems and practices of First Nations peoples were threatened and in many cases severely disrupted. However, many communities survived and were eventually able to revive these systems and practices so that they continue to this day.

As the states of Australia (then known as colonies) grew throughout the 1800s, it became clear that, in addition to having separate parliaments in each colony, a central parliament was needed to make consistent laws for the entire country.



Source 1 First Nations peoples have inhabited Australia for at least 65 000 years, and have their own laws and customs.

By the 1880s, the six colonies had begun formal discussions to consider what laws would be best made by a central parliament and what areas of law-making power should be kept by the individual colonies. It was considered best for a central parliament to be given the power to make laws on national matters that affected the whole country. These powers included laws relating to defence, currency, postal services, overseas matters, and immigration and trade.

In the 1890s, each of the colonies sent a group of representatives to special meetings (called constitutional conventions), where it was decided that a new central Commonwealth Parliament would be created. On 1 January 1901, the date celebrated as the anniversary of the **Federation** of Australia, the Australian Constitution came into force.

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

The Australian Constitution

A constitution is a legal document that outlines the basic rules of government and the law-making powers of the elected parliament (also known as the legislature). The Australian Constitution established Australia as a federation. It outlines the structures of Australia's central parliament (the Commonwealth Parliament), which you will study in the next topic, and it sets out the division of law-making powers; that is, which law-making powers are given to the Commonwealth Parliament and which remain with the states. It also establishes the High Court of Australia (our highest court).



Source 2 The Australian Constitution outlines the composition, role and powers of the Commonwealth Parliament and establishes the High Court.

2.1 Check your learning

Remember and understand

1 **Describe** the different consequences that may apply if you break a law as opposed to a non-legal rule.
2 Did Australia exist as a unified nation before 1901? If not, **what** did exist?
3 **What** is the Australian Constitution, and **what** does it do?

Examine and apply

4 The UK Parliament passed the law that established the Australian Constitution. **Why** do you think this parliament passed the law?
5 **Identify** five laws that, as an Australian citizen, you must obey. For each law, **justify** why the law was made and the likely consequences of breaking the law.

2.2 Parliaments and courts

In Australia, there are two main sources of law: statute law and common law. You will learn more about these sources of law in Chapter 3. To understand the different sources of Australian law, it is necessary to have some background to the parliaments and courts in Australia. This topic provides you with an overview of these.

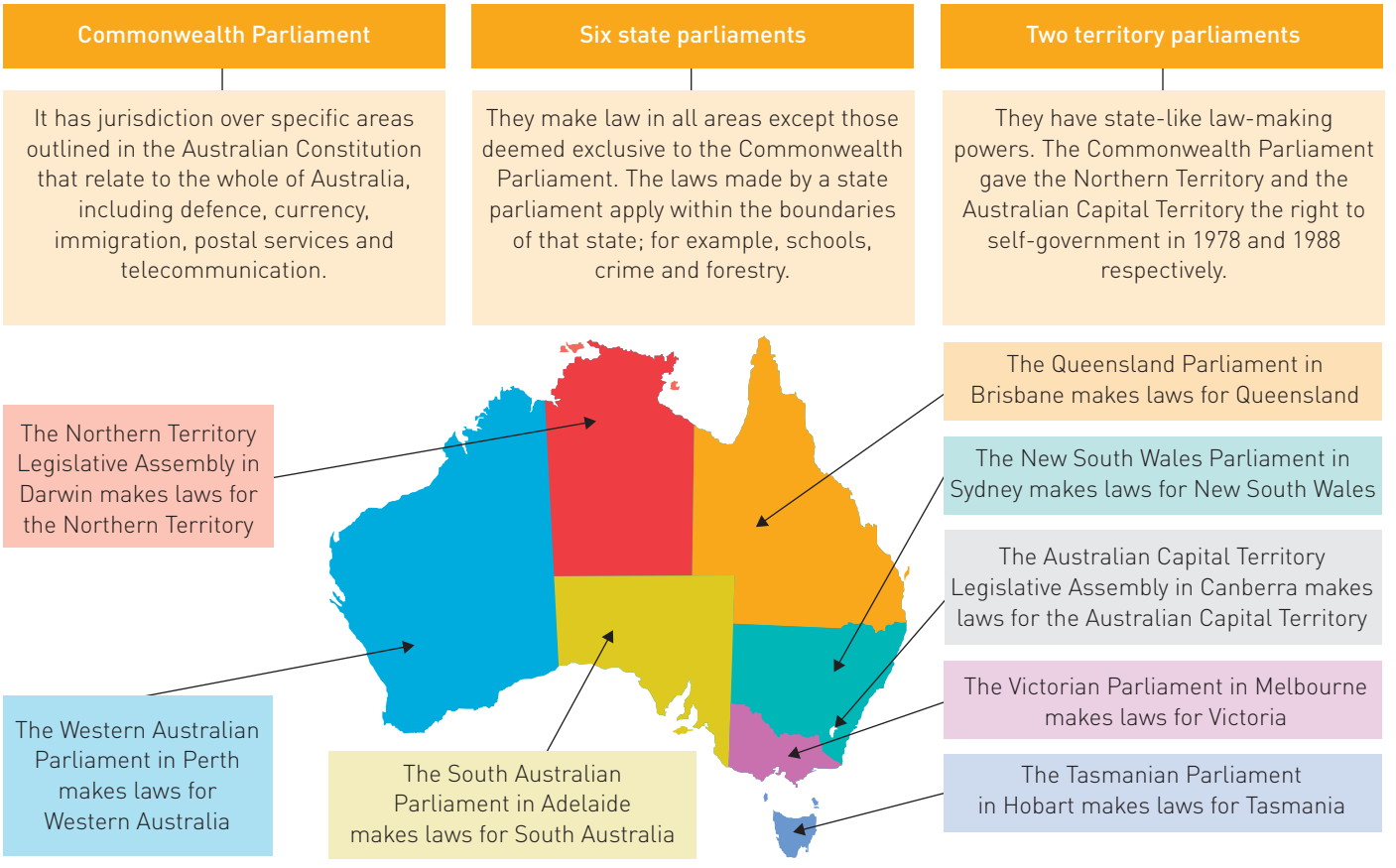
Parliaments

A parliament is a formal assembly made up of representatives of the people who are elected by the people, and who gather to make laws.

There are nine parliaments in Australia. They are:

- one Commonwealth Parliament (the Parliament of Australia, also known as the Federal Parliament)
- six state parliaments (in New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania)
- two territory parliaments (in the Australian Capital Territory and the Northern Territory).

Each parliament is a supreme law-making body within its area of law-making power. This means that each parliament can make or change laws within its area of law-making power, subject to any restrictions on that power.



Source 1 There are nine parliaments in Australia.

The areas of law-making power are established by the Australian Constitution. For example, the Australian Constitution states that only the Commonwealth Parliament can make laws in areas such as defence and immigration. Other areas, such as health and education, were left with the states to make laws on. Some areas are shared between the Commonwealth and state parliaments so that they can both make laws on these areas, such as marriage and taxation (that is why there are some Commonwealth taxes and some state taxes).



Source 2 Australia's system of government is known as a constitutional monarchy. This means that Australia's head of state is the King (the monarch), but our parliamentary system is governed by the Australian Constitution. Pictured is King Charles III, Australia's current head of state.

Structure of parliaments

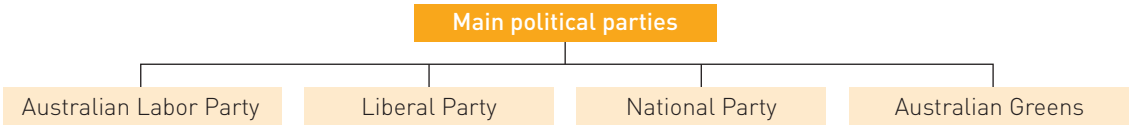
Most of the parliaments in Australia consist of:

- the King – who is the head of the parliament (but who is represented by the **Governor-General** in the Commonwealth Parliament and by a **governor** in state parliaments)
- two houses – an upper house and a lower house.

The reason for having two houses of parliament is the idea that laws should be made by two separate groups of people, who 'sit' in two separate 'houses' (which are also known as 'chambers'). If a parliament has two houses, this means that it is a **bicameral parliament**. All the parliaments in Australia are bicameral, except for the Queensland Parliament and the parliaments of the territories, which all only have one house of parliament.

Houses of parliament consist of elected members or representatives known as parliamentarians or members of parliament (MPs). Most parliamentarians belong to a **political party.** Political parties are made up of people who have a common belief in values, ideas, future directions and political objectives. Those parliamentarians who do not belong to a political party are known as **independents**.

The main political parties in Australia are shown in Source 3.



Source 3 The main political parties in Australia are the Australian Labor Party, the Liberal Party, the National Party and the Australian Greens.

Courts

As you will explore in Chapter 3, the main role of the courts is to resolve disputes and cases brought before them. There are many different courts in Australia – some are federal courts, and some are state courts. Federal courts generally deal with issues that arise under federal law, and state courts generally deal with issues that arise under state law.

Governor-General
the King's representative at the Commonwealth level

governor
the King's representative at the state level

bicameral parliament
a parliament with two houses (also called chambers). In the Commonwealth 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)

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

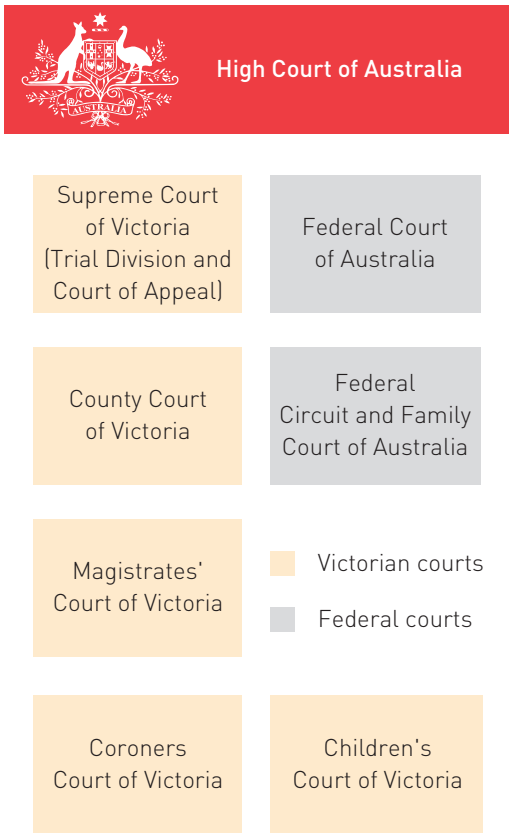
independents
individuals who stand as candidates in an election or are elected to parliament but do not belong to a political party

The three federal courts are the High Court, the Federal Court, and the Federal Circuit and Family Court. The High Court was established by the Australian Constitution and is the highest court in Australia.

The three main Victorian courts are the Supreme Court, the County Court and the Magistrates' Court. There are also two specialist courts in Victoria – the Coroners Court and the Children's Court – which hear very specific types of cases. In addition, there are specialist divisions within the main courts. One of these is the Koori Court, which sentences Aboriginal offenders. The Koori Court aims to reduce the inequality that First Nations Victorians experience when dealing with the courts, providing a culturally safe place for First Nations people to tell their story. The Koori Court sits in the Magistrates' Court and the County Court (as well as in the Children's Court).

The courts are arranged in a **court hierarchy**. The highest court in Victoria is the Supreme Court, and the lowest court is the Magistrates' Court. You will learn more about the Victorian court hierarchy, including the reasons why a hierarchy exists, in Chapter 3.

court hierarchy the ranking of courts from lowest to highest according to the seriousness and complexity of the matters they deal with



Source 4 Victorian and federal courts

2.2 Check your learning

Remember and understand

1 **How** many parliaments are there in Australia?
2 **What** is a bicameral parliament?
3 **Identify** two federal courts and two Victorian courts.

Examine and apply

4 Conduct some research. **Explain** why the Queensland Parliament only has one house.
5 **Identify** four political parties in Australia. Research one of these political parties, then answer the following questions:
   a **When** was the party created or established?
   b **Who** is the current leader of the party at the federal level?
   c **Identify** four main policies, values or laws that the party supports.
   d Would you consider voting for this political party? Give reasons for your response.
6 Access the Parliament of Australia's website. A link is provided on your obook pro.
   a Which political party is currently in government?
   b When will the next federal election be held?
   c Locate the calendar. **State** when each house next sits.
   d Find two interesting facts about the Commonwealth Parliament, and share them with the class.
7 Access the Parliament of Victoria's website. A link is provided on your obook pro.
   a Which political party is currently in government?
   b When will the next state election be held?
   c Locate the calendar. **State** when each house next sits.
   d Find two interesting facts about the Victorian Parliament, and share them with the class.

Weblink Parliament of Australia

Weblink Parliament of Victoria

2.3 The rule of law



Source 1 Protests about the death of Mahsa Amini spread across the world. This mural by street artist Lexi Bella is in New York City.

The concept of the **rule of law** underpins much of what you will study in Legal Studies. The rule of law means that everyone – individuals, groups and **government** – is bound by and must adhere to laws, and that the laws should be such that people are willing and able to abide by them. Even the people who made the laws are bound by them. These include the Prime Minister (the leader of the Commonwealth Government), the Premier of Victoria (the leader of the Victorian Government), government departments, judges and public officials.

The principle of the rule of law is often mentioned in the media, in relation to international issues as well as issues in Australia. For example, the rule of law has been discussed in relation to the ongoing revolution in Iran, and issues such as the violation of women's rights, lack of religious freedoms for those who follow different religions, and restrictions on people's liberties. In September 2022, a 22-year-old Iranian woman named Mahsa Amini was arrested for not wearing a hijab in accordance with government standards. She was severely beaten and died. Her death sparked worldwide protests and defiance by many Iranians, including teenage girls seeking to fight against oppression. Many have claimed that issues that have arisen in Iran – including the detention of people who have not committed crimes, and the lack of proper trial processes – are against the rule of law.

As part of the Legal Studies course, you will come across principles designed to uphold the rule of law. These principles include:

- the law must be clear, understood, known and enforceable – you will explore this further in Chapter 3
- the law must uphold the right to be presumed innocent unless proven otherwise – you will look at the **presumption of innocence** in Chapter 4
- hearings and trials must be heard by independent and impartial adjudicators – you will look at the role of the courts and judges in Units 1 and 2 (Chapters 7 and 12)
- the law must be applied equally and fairly – you will explore the concepts of fairness and equality further in Chapter 3, and throughout Units 1 and 2.

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

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

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

Weblink
Rule of Law Institute of Australia

2.3 Check your learning

Remember and understand

1 **Define** the term 'the rule of law'.
2 **Describe** three principles that aim to uphold the rule of law.

Examine and apply

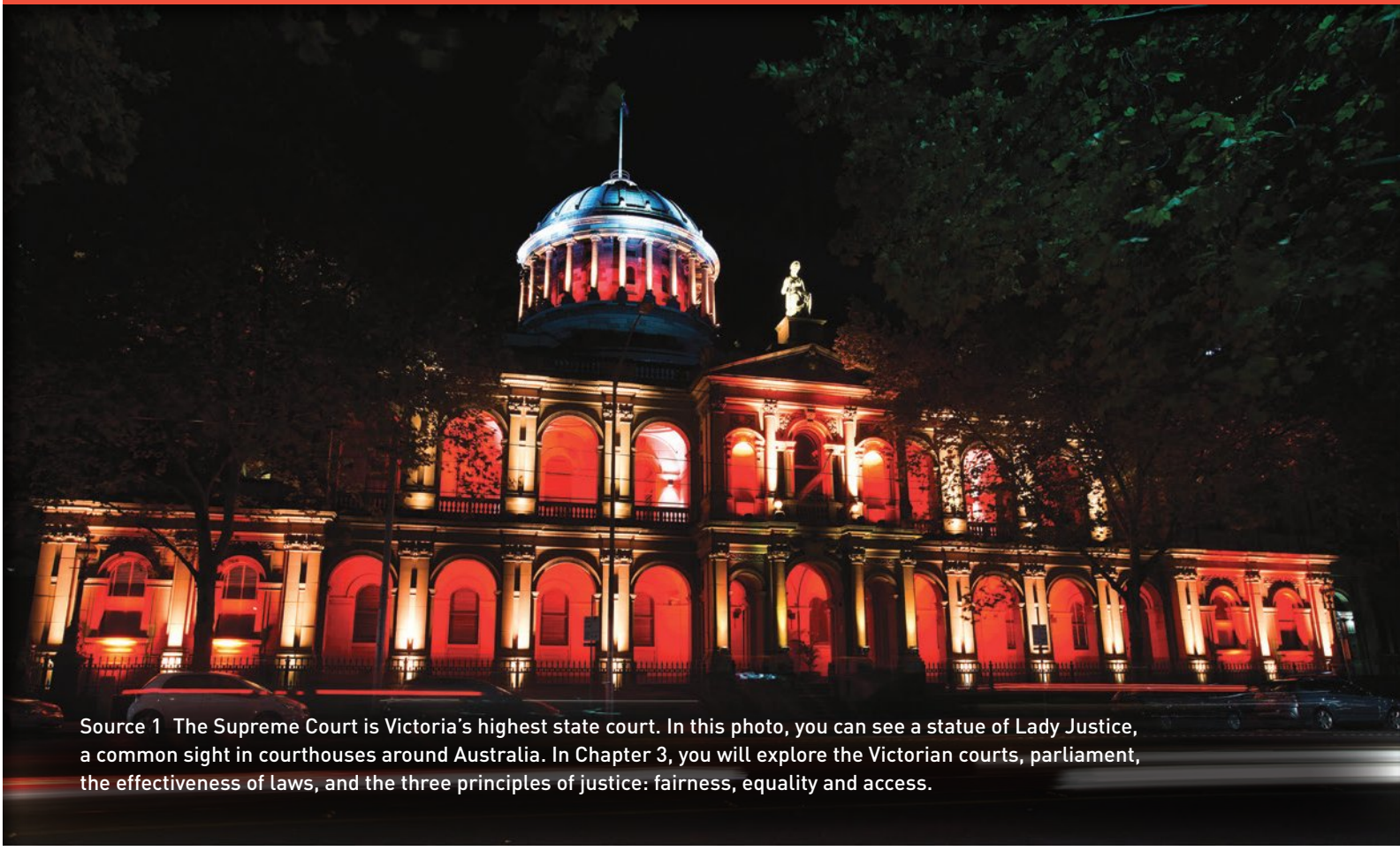
3 Conduct some research and **identify** two countries that do not uphold or recognise the rule of law. Share your findings with the class and discuss some of the impacts that this has on the country's citizens.
4 Conduct some more research about Iran, including about the following events or people:
   a the 2022 FIFA World Cup in Qatar and the national football team of Iran
   b the alleged mass poisoning of university students
   c Bahá'í citizens in Iran
   d Nika Shakarami.

   Discuss as a class what you learnt. In your discussion, refer to the rule of law.
5 Access the Rule of Law Institute of Australia website (a link is provided on your obook pro). Browse through the website and watch one of the videos about the rule of law. Discuss with the class one new thing that you learnt about the rule of law after watching the video.

Chapter

3

Legal foundations



Source 1 The Supreme Court is Victoria's highest state court. In this photo, you can see a statue of Lady Justice, a common sight in courthouses around Australia. In Chapter 3, you will explore the Victorian courts, parliament, the effectiveness of laws, and the three principles of justice: fairness, equality and access.

Outcome

By the end of **Unit 1 – Area of Study 1** (i.e. Chapter 3), you should be able to describe the main sources and types of law, and evaluate the effectiveness of laws.

Key knowledge

In this chapter, you will learn about:

- the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals
- the principles of justice: fairness, equality and access
- characteristics of an effective law, such as reflecting society's values; is enforceable; is known; is clear and understood; and is stable
- an overview of the roles of the parliament and the courts and their relationship in law-making
- sources of law such as common law and statute law
- an overview of, and reasons for, the Victorian court hierarchy
- types of law such as criminal law and civil law
- the distinction and relationship between criminal law and civil law.

Key skills

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

- define key legal terminology
- research and analyse relevant information about the sources and types of laws
- classify a law according to its source and type
- explain the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals
- explain the role of and relationship between parliament and the courts
- justify the existence of the Victorian court hierarchy
- discuss the principles of justice
- evaluate the effectiveness of laws.

Key legal terms

access one of the principles of justice; in VCE Legal Studies, access means that all people should be able to engage with the justice system and its processes on an informed basis

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)

crime an act (i.e. undertaking an action) or omission (i.e. failing to undertake an action) that is against an existing law, harmful both to an individual and to society, and punishable by law (by the state)

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

equality one of the principles of justice; in VCE Legal Studies, equality means people should be treated in the same way, but if the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage

fairness one of the principles of justice; in VCE Legal Studies, fairness means all people can participate in the justice system and its processes should be impartial and open

parliament a formal assembly of representatives of the people that is elected by the people and gathers 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

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

Key legal cases

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

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Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

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

Warm up!
Check what you know about legal foundations before you start.

Quizlet
Test your knowledge of the key legal terms in this chapter by working individually or in teams.

3.1 Social cohesion and rights

Key knowledge

In this topic, you will learn about:

- **the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals.**

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 functioning and productive society is one in which there is **social cohesion**, and the rights of individuals are protected.

There are many definitions of social cohesion. One definition, by Canadian researcher Dick Stanley, is 'the willingness of members of a society to cooperate with each other in order to survive and prosper'. Another definition, by Europe's leading human rights organisation, the Council of Europe, is 'the capacity of a society to ensure the wellbeing of all its members, minimising disparities and avoiding marginalisation'. This means that individuals are free to make choices in society, feel like they belong, are not discriminated against, and cooperate with other members of society so that they live in harmony.

Did you know?

According to the 2021 national census, 29.1% of the Australian population was born overseas.

A society that is socially cohesive has several benefits. Its members are unified and are provided with opportunities in work, in education and in their social lives. People feel a sense of belonging, and individuals work together to challenge disharmony and to promote their and others' wellbeing.



Source 1 Laws aim to ensure social cohesion. For example, laws that prohibit violent or destructive behaviour may be used to charge people and ensure cohesion at events such as major football games.

One of the organisations that seeks to promote and enhance social cohesion is the Scanlon Foundation, which conducts research through its own institute, called the Scanlon Foundation Research Institute. Each year, the Research Institute tracks the state of social cohesion in Australia through the Scanlon-Monash Index of Social Cohesion, using five core areas of social cohesion:

- a sense of belonging
- a sense of worth
- social justice and equity
- political participation
- acceptance (or rejection).

The area in which Australia generally scores lowest each year is acceptance (or rejection); this is a measure of how much people feel accepted within society. Some reasons why people may feel a sense of rejection is when they have been discriminated against, when they have felt a negative perception because of who they are, or when they have felt their own customs and traditions have not been welcomed.

In addition to achieving social cohesion, a functioning society ensures that individual rights are protected. Individual rights include rights to freedom of speech and freedom of religion, the right to vote and the right to silence. Individual rights are fundamental to a cohesive society. Without them, individuals may be manipulated or taken advantage of, and would have no ability to seek justice.

In this topic you will explore the role of laws, individuals and the legal system in achieving social cohesion and protecting the rights of individuals.

The role of laws

Laws provide guidelines on what behaviour is acceptable and what behaviour is not acceptable. They set expectations about the way individuals should behave. For example, laws in Australia make murder a crime. If there were no such laws, some members of society might believe that killing another person is acceptable.

Laws are fundamental to achieving social cohesion. They establish a framework in which people live, set boundaries for behaviour, and allow individuals to make choices about how they live. For example, some laws specify what we must do (e.g. pay for goods or services, respect others) and some specify what we must not do (e.g. steal, interfere with a person's goods). Laws apply to everybody, regardless of their position in society. The idea that laws apply to all upholds the **rule of law**, which is a central part of Australia's legal and political systems.



Source 2 Laws set out the rules to follow when resolving disputes to ensure they are resolved peacefully and consistently. For example, in Australia, authorised officers help to ensure that people do not commit offences on public transport.

Laws also protect the rights of individuals. A number of laws establish individual rights and say what happens if those rights are infringed. For example, some laws in Australia state that people must not discriminate against others based on a personal attribute such as age, race, religion, gender identity or pregnancy. Consequences can occur if a person's actions are contrary to (inconsistent with) those laws.

In all societies, conflicts are inevitable. Laws also set out how disputes are resolved, so that they are resolved peacefully. The compensation awarded in cases helps to prevent future conflict, as people are aware of the consequences if they engage in unacceptable behaviour.

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 role of individuals

Once laws are in place that enable social cohesion and protect the rights of individuals, it is the responsibility of individuals to ensure that they are aware of the laws and abide by them.

While no one person will know about every law in Australia, or the source of those laws, it is the responsibility of every person to obey the law. Before taking any important action, a person needs to find out what the relevant law is. For example, a person who decides to open a business is expected to familiarise themselves with laws about businesses, such as those that govern registering a business name, paying taxes, and the minimum wages and work conditions that should be given to their employees.

Further, individuals are expected to respect human rights. They should not act in a way that is contrary to those rights, as this may lead to disharmony, and ultimately to a fractured society.

Individuals can also help to achieve social cohesion and protect individual rights by assisting the police with their investigations, by reporting crime, and by using the legal system to resolve their disputes when their rights have been infringed. All these acts help to maintain a society that is cohesive, and in which rights are upheld.

The role of the legal system

The legal system is a set of methods and institutions that makes, administers (implements) and enforces laws. The legal system includes courts, tribunals and enforcement bodies (e.g. Victoria Police). The legal system aims to deal fairly and justly with individuals who have broken the law or breached someone else's rights.

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

Society is constantly changing, and it is the role of the legal system, particularly the **parliaments**, to update laws so that social cohesion is maintained and rights are protected. For example, since the 2010s, an increasing threat to society and to individual rights is that of cyber-hacking or cyber-terrorism (the use of computers and other devices to steal data or commit crimes). This can extend to the stealing of a person's identity, or stalking someone online. The role of the legal system in this case is to update our laws to ensure that they address these new threats.

Applying the law and enforcing it are two of the roles of the legal system that help to achieve social cohesion and protect the rights of individuals when a dispute arises. For example, a law in Victoria states that a person who sells goods to another person guarantees that those goods are of an acceptable quality. If, for example, a vendor sells a television that is defective and does not work, but then refuses to refund the purchaser or replace the television, a dispute will arise that will need to be resolved.

There are a number of dispute resolution bodies, such as courts and tribunals. The role of these bodies is to help people settle disputes in a way that avoids further conflict or disruption to society.

If a system of laws existed without being applied and enforced, there would be no consequences when an individual breached a law. Therefore, having a legal system to help enforce the law ensures that rights are upheld and that society functions effectively.

3.1 Check your learning

Remember and understand

1 **Explain** what is meant by social cohesion. **Identify** two benefits of a society that is socially cohesive.

2 **What** role do you play in ensuring that our society is socially cohesive?

3 Do courts have a role to play in protecting the rights of individuals? **Explain** your answer.

Examine and apply

4 Look at Source 1 on page 42.
   - **a** Make a list of the laws that could apply to the picture.
   - **b** **Explain** how each of the laws on your list helps to achieve social cohesion. **What** individual right is each law protecting?
   - **c** Do you think that each of these laws would be accepted in the community? **Explain** your answer.
   - **d** **Describe** one possible consequence of a breach of each of the laws on your list. **Justify** why you have chosen that consequence.

5 The television series *The Last of Us* is about a world that has been overrun by zombies. There are no formal governments, laws or legal systems.
   - **a** **List** the five most critical laws that you think need to be established by the people who survived the zombie attack. They can be new laws or old laws.
   - **b** **How** would you seek to establish the new laws?
   - **c** If the laws were infringed, **what** would be the consequences in each case?

Reflect and evaluate

6 Consider the following statements. Write down whether you agree or disagree with each statement.
   - **a** If there were no laws in society, then individuals would still aim to achieve social cohesion.
   - **b** If there were no laws in society, then most people's possessions would still be safe.
   - **c** If there were no legal system, then people would be able to work out their conflicts between themselves.
   - **d** The human race is basically 'good' by nature, so there is no need for laws.
   - **e** If there were no laws in society, then humans would use their animal instincts to survive.
   - **f** If there were no laws in society, then I would be fearful most of the time.
   - **g** If there were no laws in society, then there would be no respect for individual rights.

   Choose one of these statements and find someone in the class who has written down the opposite answer. Engage in a debate with them about the statement.

3.2 The principles of justice

Key knowledge

In this topic, you will learn about:

- **the principles of justice: fairness, equality and access.**

The word 'justice' is often used when people discuss laws and the legal system. People recognise that laws should be fair, and that there should be justice when a law is broken. But what does justice mean?

Justice is a difficult concept to define, and its definition can vary from person to person, and from society to society. For example, if a person who is charged with committing a serious offence cannot speak any English, some people may believe that no adjustments should be made to the trial process, on the basis that everyone – including those who have been charged with offences – should be treated the same. Others may see justice differently, and believe that adjustments should be made so that the person has an opportunity to defend themselves.

When thinking about justice when a law has been broken or when a case needs to be resolved, rather than applying a single definition, you should consider the following three principles:

- fairness
- equality
- access.

These three principles are known as the principles of justice and are used in VCE Legal Studies to determine whether justice has been achieved in a criminal case or **civil dispute**.



Source 1 Lady Justice is often depicted blindfolded, and holding scales and a sword. Each of these is a symbol of justice.

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

fairness
one of the principles of justice; in VCE Legal Studies, fairness means all people can participate in the justice system and its processes should be impartial and open

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

Weblink
Human Rights Charter (Victoria)

Fairness

Fairness is the first principle of justice. In the *VCE Legal Studies Study Design*, fairness means that 'all people can participate in the justice system, and its processes should be impartial and open'.

The right to a fair trial is a right protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the '**Human Rights Charter**'), which is a law that promotes and protects human rights in Victoria. A link to the Human Rights Charter is provided on your obook pro. A right to a fair trial has been described by Australia's highest court, the High Court, as a fundamental right.

However, fairness does not just apply to a final trial or hearing – it applies to all aspects of our legal system, including our interaction with police officers and our right to understand allegations made against us.

There are three main features of fairness: impartial processes, open processes and participation.

Impartial processes

The first feature of fairness is that all the personnel involved in the legal system – including judges, magistrates, **jury** members and court personnel – must be impartial and independent. They should not show **bias** towards or against any party, and the case must be decided based on facts and law, and not on what a person thinks about a party in a case.

The requirement to be impartial extends to the need to ensure that there is no perception or suspicion that a person may be biased. This is known as **apprehended bias**. For example, if a jury member deciding a fraud case has themselves been a victim of fraud, there may be a perception or suspicion that the jury member will be unable to bring an impartial mind to the case. In that event, the jury member may have to be removed from involvement in the case.

jury
an independent group of people chosen at random to determine questions of fact in a trial and reach a decision (i.e. a verdict)

bias
a prejudice or lack of objectivity in relation to one person or group

apprehended bias
a situation in which a fair-minded lay observer might reasonably believe that the person hearing or deciding a case (e.g. a judge or magistrate) might not bring an impartial mind to the case

Open processes

The second feature of fairness is that there must be open processes. This is central to fairness as it ensures transparency in processes, and it allows those processes to be scrutinised by the community and reported in the media. There are some circumstances, though, where a court may need to be 'closed', or a dispute decided in private. For example, in a criminal case, sometimes the courtroom is closed to the public to protect young witnesses such as children.

Participation

The final feature of fairness is that all people should be able to participate in a case. Some of the ways in which participation can be achieved are as follows:

- the person who is defending a case must have the opportunity to know the facts that are raised against them. This means that the other party must disclose all relevant **evidence** to the person defending the case (even if that evidence is detrimental to the other party's own case)
- the person defending the case must have the time and facilities to prepare a defence, and should have the opportunity to present their defence in court if they choose to do so
- people should have the opportunity to engage a lawyer to enable them to participate
- people should be able to engage and use an interpreter if they are not able to understand or communicate in English
- the case should be heard in a timely manner and without unreasonable delay.

evidence
information, documents and other material used to prove the facts in a legal case

equality
one of the principles of justice; in VCE Legal Studies, equality means people should be treated in the same way, but if the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage

disparity
a situation in which two or more things or people are not equal, and the inequality causes unfairness

Equality

Equality is the second principle of justice. In the *VCE Legal Studies Study Design*, equality means that 'all people engaging with the justice system and its processes should be treated in the same way; if the same treatment creates **disparity** or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage'.

This means that all people should be treated the same in the justice system regardless of who they are or their characteristics, such as their race, sexuality, gender identity or religion. That is, people should not suffer any disadvantage or discrimination, and should be given the same opportunities and the same treatment. This is known as formal equality.

However, as noted in the definition of equality, sometimes treating people the same can actually cause disparity or disadvantage. Therefore, it is sometimes necessary to treat someone differently to ensure that there is equality. This is known as substantive equality. For example, a party to a case who has a mental impairment, and who does not understand the legal system as well as the other party, may need more assistance than the other party to understand court processes. In this situation, courts have recognised that they have a duty to assist a vulnerable party to ensure that there is equality. If everybody was always treated the same, then the outcome may not necessarily result in justice. So sometimes measures need to be put in place to ensure that people are treated equally and without discrimination. This is further explained in the hypothetical scenario below.

Hypothetical scenario

Fire at a shopping centre

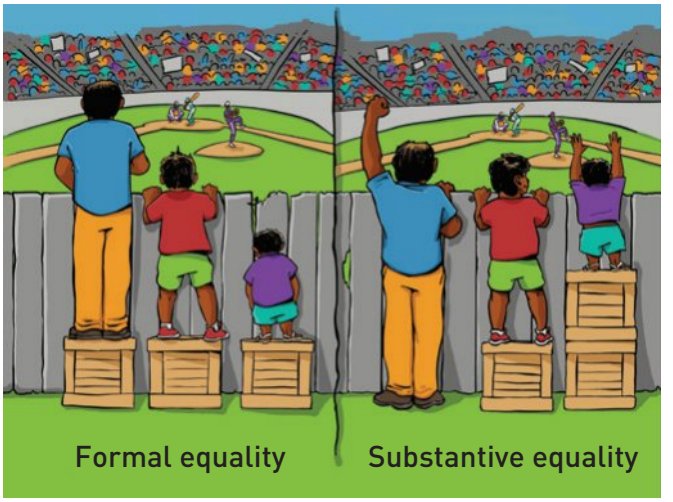
There was a major fire at a local shopping centre and 40 people were injured. The people's injuries ranged from severe to minor.

A paramedic handed out gauze and bandages to the injured people. He had exactly 40 pieces of gauze and 40 bandages. He wanted to treat everybody equally, so he gave one piece of gauze and one bandage to each injured person.

A second paramedic disagreed with this distribution of gauze and bandages. She thought the distribution of one piece of gauze and one bandage to each injured person did not achieve equality even though it was treating people the *same*. The second officer believed that to achieve equality, they should hand out the gauze and bandages according to need, depending on the severity of a person's injuries. The first paramedic did not like this. He thought that it would create inequality.

There are many measures that can be put in place to make sure that a person is treated equally and without discrimination. Some of them are as follows:

- a person who is self-represented (i.e. who does not have a lawyer) may need more assistance from the judge or magistrate to understand processes or understand their rights
- a person who does not understand or communicate in English may need an interpreter
- certain people who do not understand processes or language may need to be spoken to or communicated with in a different way. These can include children and young people, elderly people, and people who are from culturally and linguistically diverse backgrounds
- for some people, they may need more breaks during the trial. This includes people who are unwell, people with disabilities or a mental health issue, or children
- there may be a need to change court processes for some people. For example, it has been recognised that some First Nations people may have different ways of giving evidence. Measures may need to be put in place to ensure that First Nations people are not disadvantaged because of this.



Source 2 Sometimes to achieve equality, you need to treat people differently.

Access

access
one of the principles of justice; in VCE Legal Studies, access means that all people should be able to engage with the justice system and its processes on an informed basis

Access is the third principle of justice. A dictionary definition of 'access' is 'the ability to approach or make use of something'. In the *VCE Legal Studies Study Design,* access means that 'all people should be able to engage with the justice system and its processes on an informed basis'; that is, they should have the means and ability to be able to use and participate in that system.

The laws and the legal system should make it possible for people to use the legal procedures, methods and institutions that help to resolve civil disputes and determine criminal cases. This includes being able to access the institutions that make decisions about cases, as well as being able to have contact with bodies and institutions that provide legal advice, education, information and assistance, and being able to be informed about cases. This may include not only physical access, but also technological access. Furthermore, it extends to people being able to afford to use the legal system.



Source 3 Access sometimes requires providing people with information about the legal system in their own language, such as this help card in Vietnamese provided by VLA.

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

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)

Access also means that people should be able to engage on an informed basis. This means that people should be educated about – and have access to information about – their rights and court processes. This includes information from the courts and tribunals, and from bodies such as **Victoria Legal Aid (VLA)** and community legal centres, which provide free legal information and assistance to the community.

One of the most effective ways that a person can become informed is by having legal representation, as a **lawyer** can inform a person about their rights and about legal processes. However, as you will learn later on in this unit, not everyone can afford legal representation.

3.2 Check your learning

Remember and understand

1 **Identify** and **explain** the three principles of justice.
2 **Identify** five attributes that a person may be discriminated for.
3 **Describe** what is meant by the term 'access' in VCE Legal Studies.
4 Is fairness limited to having a fair hearing? **Explain** your answer.

Examine and apply

5 Read the hypothetical scenario 'Fire at a shopping centre'. Create another scenario where there is a need to treat some people differently. **Provide** a solution that achieves equality.
6 Conduct some research about Lady Justice.
   a **Who** is Lady Justice?
   b **What** are the three symbols usually associated with Lady Justice?
   c **What** do each of these symbols mean?

Reflect and evaluate

7 When hearing cases, judges sometimes assist parties who do not have a lawyer to understand court processes and legal jargon. Do you think that this achieves fairness? Be prepared to share your opinions with the class.

3.3 Characteristics of an effective law

Key knowledge

In this topic, you will learn about:

- **characteristics of an effective law, such as reflecting society's values; is enforceable; is known; is clear and understood; and is stable.**

For society to function properly and for there to be social cohesion, laws must be effective. To be effective, laws must have the five characteristics shown in Source 1.

An effective law must ...				
reflect society's values	be enforceable	be known	be clear and understood	be stable

Source 1 The characteristics of an effective law

If one of these characteristics is missing, then it is possible that the law is not as effective as it could be.

Study tip

In Unit 1 – Area of Study 1, you are expected to be able to evaluate the effectiveness of laws. When you are asked about whether a particular law is effective, address each of the five characteristics of an effective law.

Did you know?

In South Australia, a person who intentionally disturbs a wedding is guilty of an offence. The maximum penalty is $10 000 or two years' imprisonment.

Laws must reflect society's values

For a law to be effective, it must reflect society's values. If a law is in line with society's current values, then members of society are more inclined to follow that law, rather than disregard (ignore) it. This means that laws need to change when society's values change.

For example, in 2021, legislation was passed in Victoria to establish rules about when a person's criminal history becomes 'spent' (i.e. when a person's criminal history no longer appears on their record, and does not need to be disclosed or revealed). Many people advocated for the change, suggesting that a person's previous criminal history can become an unfair barrier for many Victorians who had previously committed an offence, but had since reformed.



Source 2 Wakka Wakka woman Naomi Murphy was one of the campaigners who recognised the need to change the laws regarding spent convictions and prior criminal history in Victoria.

In addition, for a law to be effective, the police or other bodies must be willing to enforce it. The following scenario is about the enforceability of a law in relation to the banning of plastic straws and cups.

Actual scenario

Plastic straws banned from next week, but no fines issued for plastic bags

Nell Geraets, *The Age*, 27 January 2023

A ban on plastic straws and cups that begins next week will be useless unless it is actively policed, environment groups say, after a similar move on single-use plastic bags has failed to result in one fine or prosecution.

All single-use plastic straws, plates, cutlery, polystyrene food and drink containers, drink stirrers and cotton buds will be banned from sale and supply in Victoria from February 1, under the Andrews government's attempt to divert 80 per cent of waste from landfill by 2030.

The ban, which was first announced in 2021, will be enforced by the state's Environment Protection Authority.

Businesses caught using those items can be fined $1849 and individuals face a fine of $370 however the government says only those who repeatedly flout the rules will be penalised.

The maximum penalty a business could face is $54 000, but that would be issued only in rare circumstances, such as if a business knowingly sold single-use plastics but passed them off as reusable items.

Single-use plastic bags were banned in Victoria in 2019, but the EPA confirmed on Friday that no businesses or individuals have been fined for flouting the law.

'Mindful of the effect of the pandemic on businesses, EPA has made use of advice and warning letters rather than issuing fines as a first resort,' a spokesman said.

But Jeff Angel, director of the Boomerang Alliance, said the EPA needed to take a more hardline approach because too many businesses were finding loopholes in the ban.

'In general, there has been a clear reduction in the use of single lightweight plastic bags,' Angel said.

'The problem that emerged is that slightly thicker bags that evade the legal definition of lightweight [thinner than 35 microns] are still available, often with the claim to be reusable.'



Source 3 There has been a phasing-out of single-use plastics in Victoria, such as plastic bags, forks, cups and straws.

Laws must be enforceable

An effective law must be enforceable. That is, if people break the law, it must be possible to catch and punish them, or **sue** them. If this is not possible, people may be less inclined to follow the law.

Imagine if there was a law that made it an offence to dream of going on holiday. Such a law would be ineffective, because the police would not be able to find out who was breaking this law.

On the other hand, it is an offence in Victoria to cause damage to public property. This type of law is more likely to be effective because it requires the behaviour to occur in public; therefore, the behaviour is more likely to be visible to police officers and members of society, and the police will be able to enforce the law.

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)

Laws must be known

For a law to be effective, the public must know about it. If people do not know about a law, they cannot follow it.

It is the responsibility of individuals to find out what the law is on a matter that affects them. If someone breaks a law, then saying 'I didn't know I was breaking the law' is not an acceptable response. This principle is commonly expressed as 'ignorance of the law is no excuse'.

However, law-makers also need to keep the public informed of any new laws that are passed by parliament. Major changes in the law, or new laws, are usually reported in the media, and many laws are debated in the media and in society before they are introduced.

For example, in 2021, laws were introduced in Victoria setting minimum standards that properties must meet if they are to be rented out. These include standards for features such as locks, toilets, bathrooms, kitchens, and connections to hot and cold water. In addition, since 29 March 2023 all rental properties were required to meet a new electrical safety rental minimum standard, which includes electrical safety switches and modern switchboards. To ensure that people were aware of these new laws, the minimum standards were widely publicised on social media sites such as Twitter and Facebook. Wide reporting of the changes also occurred in major newspapers and on websites used to search for rental properties.

Laws must be clear and understood

It is important for a law to be written in a way that people can understand it, so the intent of the law is clear. If a law is ambiguous, unclear, or written in language or jargon that people do not understand, it is possible that people will not follow it and the law will therefore be ineffective.

For example, in Victoria there have recently been calls to change the laws about neighbourhood tree disputes. There are a number of relevant laws and regulations, and these can be complex and confusing for ordinary people to understand. Neighbourhood tree disputes might arise regarding issues such as overhanging branches, leaf litter, and tree roots that encroach onto another's property and cause damage. Such disputes can be difficult to resolve and can interrupt social cohesion.

Laws must be stable

For a law to be effective, it must be stable. If a law is constantly changing, people may be uncertain as to what the law actually is, and it may therefore not be as effective as a law that has remained constant for some time.

For example, imagine that the law regarding employment conditions – such as how much sick leave employees are entitled to – changed every year. Employers may find it difficult to work out how much sick leave each employee is entitled to because they have not been able to keep up to date with the changing law. Therefore, employers may be breaking the law without intending to do so, and without even knowing they are doing so. This may mean that the law is ineffective, as it is changing so often that people are unable to follow it.

3.3 Check your learning

Remember and understand

1 **Identify** and **describe** three characteristics of an effective law.
2 **Describe** two ways that new laws can be made known to Victorians.
3 **Identify** one law in Victoria that you think reflects society's current values. Give reasons for your answer.

Examine and apply

4 **Identify** one law in Australia that you consider to be unclear or ambiguous (or that you don't understand). **What** is it about the law that you don't understand, or that you think is unclear or ambiguous?
5 Do you think a law that makes it an offence to smoke in private homes would be easy to enforce? **Justify** your answer.
6 On the Parliament of Victoria's website, access the 'Bills and Legislation' webpage. A link is provided on your obook pro. Find a law that has been passed this year. Prepare a short report or PowerPoint presentation on **why** you think this law will be effective, addressing each of the five characteristics of an effective law.

Reflect and evaluate

7 Read the scenario 'Plastic straws banned from next week, but no fines issued for plastic bags'.
   a **What** is a single-use plastic?
   b **Describe** the new laws and the consequences if the new laws are broken.
   c Referring to three characteristics of an effective law, **evaluate** the effectiveness of a new law banning single-use plastics.
8 Read the statements below and write down whether you think each statement is fact or fiction. Then access the *Summary Offences Act 1966* (Vic) to find out whether you were correct. A link is provided on your obook pro (Hint: use the search button to find particular words in the Act.)
   a It is illegal to sing an obscene song within earshot of someone.
   b It is illegal to roll a drum in a public place in all circumstances.
   c It is an offence to drive a dog or goat harnessed to a vehicle in a public place.
   d It is illegal to burn rubbish shavings in a private house.
   e It is illegal to fly a kite in a public place to the annoyance of another person.

   For the statements that are incorrect, find a law in the *Summary Offences Act* that is similar. Be prepared to discuss with the class whether you think that each of the laws is effective.

Weblink
Parliament of Victoria: Bills and Legislation

Summary Offences Act 1966 (Vic)

3.4 Parliament

Key knowledge

In this topic, you will learn about:

- an overview of the roles of the parliament
- sources of law such as statute law.

As you explored in Topic 2.2, there are nine parliaments in Australia:

- one federal parliament
- six state parliaments
- two territory parliaments.

The main role of parliaments is to make law. Each parliament is a supreme law-making body within its area of law-making power. This means that each parliament can make or change laws within its area of law-making power, subject to any restrictions on that power.

In this chapter, you will explore both the Commonwealth Parliament and the Victorian Parliament, and how they make law. Law made by parliaments is known as **statute law**.

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

bicameral parliament
a parliament with two houses (also called chambers). In the Commonwealth Parliament, the two houses are the Senate (upper house) and the House of Representatives (lower house). In the Victorian Parliament, the two houses are the Legislative Council (upper house) and the Legislative Assembly (lower house)

Governor-General
the King's representative at the Commonwealth level

House of Representatives
the lower house of the Commonwealth Parliament

Senate
the upper house of the Commonwealth Parliament

election
the process whereby eligible people vote to choose a person to hold a position in a body or organisation (e.g. a member of a house of parliament)

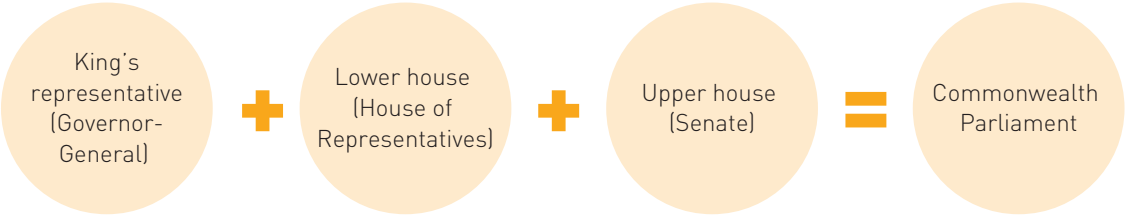
Commonwealth Parliament

The Commonwealth Parliament – also called the Parliament of Australia or the Federal Parliament – is a **bicameral parliament**. It consists of:

- the King (often referred to as the Crown), represented by the **Governor-General**
- the **House of Representatives** (the lower house)
- the **Senate** (the upper house).

The idea of 'two houses' is that there are two 'groups' of people who form parliament and who decide whether a law should be made. This avoids having only one group of people with the power to make laws.

The role of the Commonwealth Parliament is to pass laws for the good government of Australia in its area of law-making powers. These include laws in areas such as migration, defence, currency and taxes.



Source 1 The structure of the Commonwealth Parliament

House of Representatives

The House of Representatives is the lower house of the Commonwealth Parliament. Each state and territory in Australia is divided into geographical areas known as electoral divisions. Each division has approximately the same number of electors. The voters in each division elect their representative, who takes a seat in the House of Representatives. As of 2023, there were 151 electoral divisions in Australia and, therefore, 151 members of the House of Representatives. All members of the House of Representatives are elected for a period of up to three years. That means there is a federal **election** to choose the members of the House of Representatives approximately every three years. Voting in elections is compulsory in 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

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

The main roles of the House of Representatives are to:

- form **government**. The **political party** with the majority of members in the lower house forms government, while the next largest party forms the **opposition**. The leader of the political party that forms government will become the Prime Minister. Sometimes, a political party will join with another political party to form government. This is known as a **coalition**. For example, historically at a federal level, the Liberal Party and the National Party have joined to form government
- represent the people in its roles, including when debating matters and making laws. Members of the lower house are elected to represent the people and therefore any proposed laws should reflect the views and values of the majority of the community
- introduce and pass proposed laws, which are called **bills**. The vast majority of laws are introduced by the government in the lower house, although any member of parliament can introduce a bill. A bill must go through specific stages to become law. You will learn more about law-making later in this topic
- review any bills passed by the Senate. Although most bills are introduced in the House of Representatives, the Senate can also introduce bills, in which case the House of Representatives will become the 'second house' to review the bill.





Source 2 Top: The Senate is the upper house of the Commonwealth Parliament. Bottom: The House of Representatives is the lower house of the Commonwealth Parliament. Members of the government sit on one side of each house and members of the opposition sit on the other side.

Senate

The Senate is the upper house of the Commonwealth Parliament, and it consists of 76 elected members, known as senators. Each of the six states in Australia is represented in the Senate by 12 senators, and each of the two mainland territories (the Northern Territory and the Australian Capital Territory) is represented by two senators. All senators are elected for six years (except for the territory senators, who are elected for three years). A half-Senate election is held every three years (in which only half the senators stand for election).

The main roles of the Senate are to:

- review bills that have been introduced in and passed by the House of Representatives. As noted above, the vast majority of bills are introduced in the House of Representatives, and the Senate plays an important role in 'checking' bills – scrutinising and debating them, and either rejecting or agreeing to pass them. Because of the Senate's role in reviewing bills, it is often called the house of review

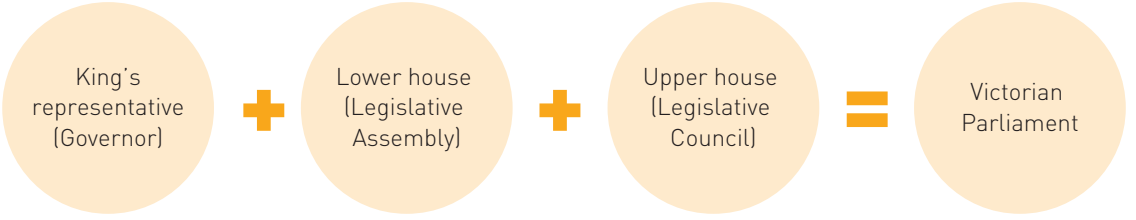
- ensure equal representation of the states in the Senate. Because each state has the same number of senators, the Senate can represent the interests of all states equally, regardless of their population size. This is why the Senate is sometimes referred to as the states' house
- introduce and pass bills. Although it is the House of Representative that introduces most bills, the Senate is also able to do so; but it may not introduce bills that generate revenue (such as through taxes) or spend money.

Victorian Parliament

The Parliament of Victoria (also known as the Victorian Parliament) consists of:

- the King, represented by the **governor** of Victoria
- the **Legislative Assembly** (the lower house)
- the **Legislative Council** (the upper house).

The role of the Victorian Parliament is to pass laws for the good government of Victoria in its area of law-making powers. This includes in areas such as health, education, roads and transport, and criminal law.



Source 3 The structure of the Victorian Parliament

Legislative Assembly

The Legislative Assembly is the lower house of the Victorian Parliament. For the purposes of electing the members of the Legislative Assembly, Victoria is divided into 88 electoral districts. Each member of the Legislative Assembly represents one electoral district in Victoria; therefore, there are 88 members of the Legislative Assembly. Each member of the Legislative Assembly holds their seat in parliament for a fixed term of four years.

The main roles of the Legislative Assembly are to:

- form government. As in the Commonwealth Parliament, the political party with the majority of members forms government. The leader of the political party that forms government will become the Premier of Victoria
- represent the people in its roles, including when debating matters and in law-making. Members of the lower house should represent the interests of the people in their district. If they do not, they risk being voted out at the next election
- introduce and pass bills. As with the lower house at federal level, the vast majority of laws are introduced by the government in the Legislative Assembly
- review any bills passed by the Legislative Council. The Legislative Assembly acts as a house of review if a bill is introduced in and passed by the Legislative Council.

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 the government to account

coalition
an alliance or joining together of two or more political parties, usually to form government

bill
a proposed law that has been presented to parliament to become law. A bill becomes an Act of Parliament once it has passed through all the formal stages of law-making (including royal assent)

governor
the King's representative at the state level

Legislative Assembly
the lower house of the Victorian Parliament

Legislative Council
the upper house of the Victorian Parliament

Study tip

Students often confuse the names of the lower house and the upper house of the Victorian Parliament. One way to remember is to consider that as 'A' comes before 'C' in the alphabet, the Legislative **A**ssembly is the first or lower house, and the Legislative **C**ouncil is the second or upper house.




Source 4 Left: The Legislative Council is the upper house of the Victorian Parliament. Right: The Legislative Assembly is the lower house of the Victorian Parliament. Members of the government sit on one side of each house and members of the opposition sit on the other side.

Legislative Council

The Legislative Council is the upper house of the Victorian Parliament. For the purposes of appointing members to the Legislative Council, the state of Victoria is divided into eight regions, each consisting of 11 districts. Five members are elected from each region. Therefore, there are 40 members of the Legislative Council. Members of the Legislative Council hold their seats for four years.

The main roles of the Legislative Council are to:

- review bills that have been introduced in and passed by the Legislative Assembly. As noted above, the vast majority of bills are introduced in the Legislative Assembly, and the Legislative Council plays an important role in 'checking' them – scrutinising and debating them, and either rejecting or agreeing to pass them
- introduce and pass bills. Bills can be introduced in the Legislative Council, but it is less common.

Government and opposition

minister
a member of parliament who is a member of the party in government and who is in charge of a particular area of government (such as education)

Cabinet
the group of senior ministers in a government made up of the Prime Minister (or the Premier at a state level) and senior government ministers who are in charge of a range of portfolios. Cabinet decides which bills or legislation should be presented to parliament

As noted above, the political party with the majority of members elected to seats in the lower house of each parliament forms government. Once government has been formed, the Prime Minister and the Premier of Victoria choose senior members of their party who have been elected to parliament (referred to as **ministers**) to be responsible for different areas of government, known as 'portfolios', such as education and health. This senior group of members is known as the **Cabinet**. The Cabinet decides the government's policy program and what bills should be presented to the parliament.

At federal level, the Cabinet is made up of the Prime Minister and senior ministers. At state level, the Cabinet is made up of the Premier of Victoria and senior ministers.

The next largest political party forms the opposition. The role of the opposition is to challenge and question the government on policy matters. The opposition also appoints some of its parliamentarians as 'shadow ministers' in various areas. These shadow ministers hold the government ministers accountable for decisions they make in their relevant portfolios.

Government and parliament are not the same thing. The government is formed by the political party (or coalition of parties) that has the majority of seats in the lower house. Parliament, on the other hand, consists of all elected members of both the upper house and lower house, together with the King's representative. The main role of parliament is to make the law, whereas the main roles of the government are to develop policy, decide what bills should be introduced, and put existing laws into action.

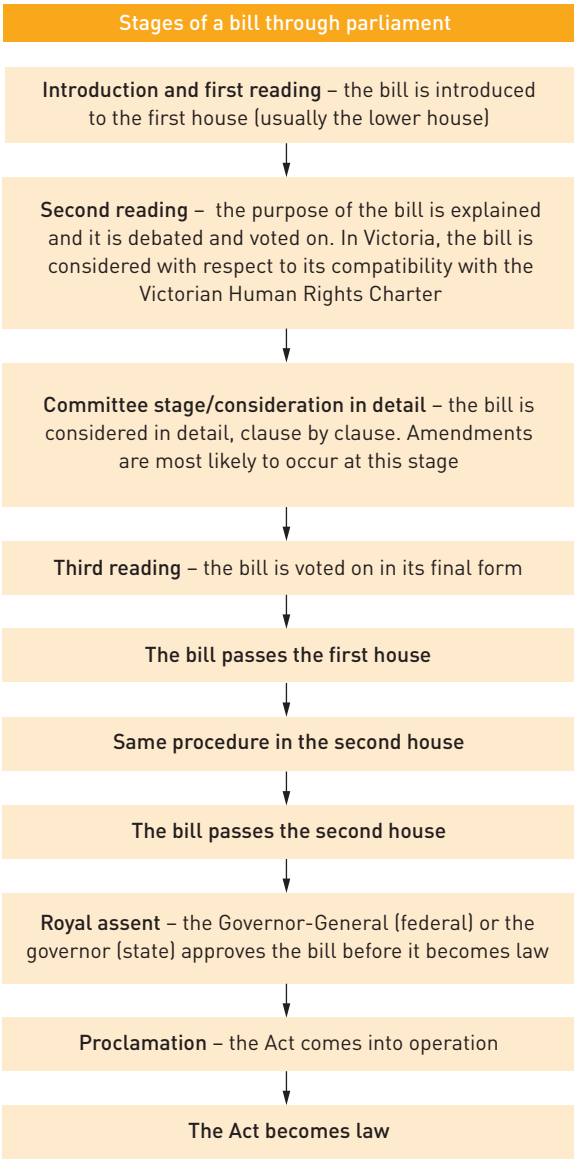
Statute law

As noted above, the main role of parliament is to make law. Law made by parliament is called statute law, **Acts of Parliament** or legislation. Australia's parliamentary system is based on the concept of the **supremacy of parliament**. This means that parliaments are able to override laws made by other bodies, including the courts, and that the final law-making power rests with parliament.

The government generally decides what laws should be made. However, the whole of parliament is responsible for passing the law. If the government decides a law is needed, a bill is drawn up and presented to parliament. Before a bill can become law, it must pass through both houses of parliament. It will go through a number of stages in each of the houses, and must receive a majority vote from the members of each house.

As described above, most bills are introduced into the lower house first, because most bills are introduced by government ministers, and most government ministers are members of the lower house. Bills (other than bills raising taxes or allocating funds) can also be introduced into the upper house and then proceed to the lower house.

Once a bill has been passed by both houses, it must be presented to the King's representative to receive **royal assent**. Following royal assent, the bill becomes law.



Source 5 The stages of the legislative (law-making) process

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)

supremacy of parliament
the concept that the final law-making power rests with parliament, which can repeal and amend its own statutes and pass legislation to override common law (also known as 'sovereignty of parliament')

royal assent
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or the governor (at state level), after which the bill becomes an Act of Parliament (also known as a statute)

Individual members of parliament who are not members of the government may also introduce bills in the hope that they will be passed by parliament and become law. However, it is unlikely that non-government proposals (or bills that do not have the support of the government) will pass both houses because the government has the majority of votes in the lower house, and will therefore likely vote against the bill. A bill introduced by a member of parliament who is not a member of the government is referred to as a **private member's bill**.

private member's bill a bill introduced into parliament by a member of parliament who is not a government minister

Subordinate authorities

Although parliament is the main or supreme law-maker, it does not have the resources or time to make all the laws necessary to maintain order and ensure social cohesion. Therefore, the state and Commonwealth parliaments can delegate their law-making powers to subordinate authorities. These authorities can make minor laws in their areas of expertise. For example, local councils make local laws about matters such as pet ownership, rubbish removal and parking. VicRoads makes laws about roads and traffic. The laws made by subordinate authorities are known as **secondary legislation** or delegated legislation.

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 parliament (also called delegated legislation)

3.4 Check your learning

Remember and understand

1 **Distinguish** between parliament and government.
2 **Define** the term 'statute law'. **State** two other names for a statute.
3 **What** is meant by the term 'royal assent'? At what stage of the legislative process does royal assent occur?
4 Create a visual diagram or table that shows:
   - **a** the number of members of each of the houses of the Commonwealth Parliament and the Victorian Parliament
   - **b** the names of each house
   - **c** the name of the King's representative in each of the parliaments.

Examine and apply

5 **Explain** why most bills are introduced in the lower house.
6 Conduct some research about the current composition of the House of Representatives and the Senate.
   - **a** Does the political party that forms government have the majority of seats in the Senate? **Justify** your answer.
   - **b** **How** does this impact on the ability of the government to make laws? Discuss as a class.

Reflect and evaluate

7 **Describe** two strengths and two weaknesses of parliament as a law-making body.

3.5 Courts

Key knowledge

In this topic, you will learn about:

- an overview of the roles of the courts
- sources of law such as common law
- an overview of, and reasons for, the Victorian court hierarchy.

The law provides individuals in society with guidelines for acceptable behaviour. Most people grow up with an understanding that for people to live in harmony, they must obey the law. However, in any society, there are people who break the law and infringe other people's rights.

The court system provides a means of resolving disputes and enforcing the law peacefully and without resorting to violence. The court system includes a variety of courts that have different areas of expertise and are suitable for different types of cases.

In this topic, you will explore the court system in Victoria, including the reasons for the Victorian court hierarchy and how courts make laws.

The Victorian court hierarchy

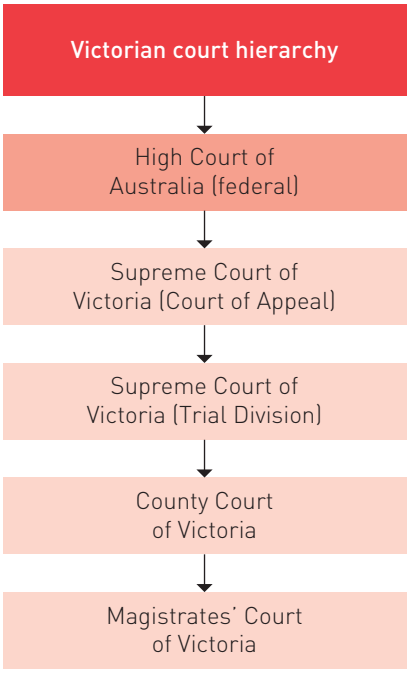
As you have learnt in Chapter 2, the main Victorian courts are:

- the Magistrates' Court
- the County Court
- the Supreme Court, which is divided into two divisions – the Trial Division and the Court of Appeal.

There are also two specialist courts in Victoria:

- the Coroners Court (which investigates suspicious deaths and fires)
- the Children's Court (which deals with criminal and family matters involving children).

In addition, there are specialist divisions within the main courts, such as the Koori Court – a sentencing court that sits in the Magistrates' Court and the County Court (as well as in the Children's Court). The Koori Court sentences Koori offenders, and one of its purposes is to seek to address the disadvantage and inequality that First Nations Victorians experience when dealing with the courts. It adopts a less formal sentencing process and allows the First Nations offender to be heard in their own words (rather than through a lawyer) in a culturally safe space, and have the support of Elders. You will learn more about the Koori Court in Chapter 7.



Source 1 The Victorian court hierarchy, which includes the High Court of Australia (a federal court)

court hierarchy the ranking of courts from lowest to highest according to the seriousness and complexity of the matters they deal with

The Victorian courts are ranked in a **court hierarchy** – the higher courts hear the more serious and complicated cases, and the lower courts deal with less serious matters. The Victorian court hierarchy extends from the Magistrates' Court (the lowest state court) to the Supreme Court (the highest state court). The High Court is a federal court, but it can hear appeals from the Supreme Court (Court of Appeal). In fact, the High Court can hear appeals from courts in every Australian state and territory.

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

Each of the courts has its own **jurisdiction**, which is the right or power of a court to hear or deal with particular cases. Most of the courts in Victoria have the jurisdiction to hear both criminal cases and civil disputes (these different types of cases are discussed in Topic 3.7). For example, the Magistrates' Court can hear minor criminal offences (e.g. minor theft and minor assault), and the Supreme Court can hear serious criminal offences (e.g. murder and attempted murder). Some courts have the power to hear appeals. You will learn more about the jurisdiction of courts in Chapters 7 and 12.

Reasons for a court hierarchy

There are four main reasons for having a court hierarchy:

- First, the court hierarchy allows for *specialisation and expertise*. Different courts specialise in different types of cases, and develop expertise in dealing with such cases. For example, the Magistrates' Court hears cases involving minor offences (e.g. drink-driving), and so has developed expertise in these less serious offences. The Supreme Court hears cases involving serious offences (e.g. murder), and so has developed expertise around the principles relating to such offences. The County Court is an intermediary court that hears a range of criminal offences and civil disputes, but specialises in serious offences (e.g. sexual offences, drug offences and theft), and so has developed expertise in these areas.

appeal
an application to have a higher court review a ruling (decision)

- Second, the court hierarchy enables the parties to a court case to lodge an **appeal** with a higher court if they are not satisfied with a lower court's decision. This means that a person who believes that an error has been made in a lower court can appeal the case to a higher court for the higher court to review the decision.

doctrine of precedent
the rule that 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

- Third, the court hierarchy allows for *administrative convenience*. Because the courts have different jurisdictions to hear different matters, this allows smaller and minor cases (of which there are more) to be heard in the Magistrates' Court (of which there are a number in the state), and more complex and larger cases to be heard in the County Court and the Supreme Court. This allows for some efficiency and convenience with the way that cases are heard.
- Finally, the court hierarchy is a necessary part of the **doctrine of precedent** because the process of law-making through the courts depends on a decision being made in a higher court that is binding on lower courts. This enables individuals and lawyers to predict the likely outcome of a case. Judges and magistrates in the lower courts can be guided by the wisdom of the more experienced judges in the higher courts. You will learn more about the doctrine of precedent later in this topic.



Source 2 The High Court is the highest court in Australia. It is known as the 'last court of appeal' for parties who wish to appeal the decision made by a lower court.

Roles of the courts

The primary role of the courts is to resolve cases. To do this, the court will ordinarily apply existing laws to the facts in cases brought before it and decide the cases based on those laws. In a criminal case, this may result in a finding of guilt. In a civil dispute, it may result in a person being found responsible for the harm caused to another person. (See Topic 3.7 for a discussion of criminal and civil law.)

The secondary role of the courts is to make law as part of their determination of cases. Court-made law is also known as **common law**, case law or judge-made law.

A court can make law in two situations or circumstances:

- by interpreting the meaning of the words in a statute (an Act of Parliament) when applying the statute to a case the court is hearing (this is known as **statutory interpretation**)
- by deciding on a new issue that is brought before the court in a case where there is no legislation in the area, or when a previous principle of law requires expanding to apply to a new situation (this is known as setting a precedent).

In each type of situation, the judge will make a decision and provide reasons for that decision. Common law is created through the reasons given by judges for the decisions they make, which are then followed by courts in future cases where the facts are similar.

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)

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 a case before the court

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

Statutory interpretation

A **statute** is often written in general terms to apply to all types of situations. Sometimes, an unusual situation arises and a court has to interpret words within a statute. This process, where a judge clarifies or interprets the laws written by parliament, is known as statutory interpretation. This interpretation then forms part of the law and can become binding on other courts as part of the doctrine of precedent (see further below). For example, imagine if a statute stated that it was an offence to 'disturb' a funeral, but there was no definition for 'disturb' in the statute. What does 'disturb' mean? Is whistling a 'disturbance'? A court may therefore need to interpret the statute to determine what it means to 'disturb'.

Sometimes, in a criminal case, the interpretation supports the prosecution's case. At other times, the interpretation helps the accused person, as in the scenario below.

Actual scenario

Is a studded belt a weapon?

In this well-known case of statutory interpretation, a 20-year-old man pleaded not guilty to possessing a 'regulated weapon' under the *Control of Weapons Act 1990* (Vic). The weapon was alleged to be a black leather belt with raised silver studs, which the man used to hold up his pants. The magistrate found the man guilty of the crime. The man appealed against the finding of guilt and the confiscation of his belt.



The appeal was heard by the Supreme Court, which had to decide what a regulated weapon was, in the context of the *Control of Weapons Act* and the regulations made under the Act, to determine whether a studded belt used to hold up pants was in fact a regulated weapon.

The regulations contained a list of regulated weapons that included 'any article fitted with raised pointed studs, which is designed to be worn as an article of clothing'. However, Justice Beach decided that the studded belt was not a regulated weapon, as a regulated weapon should be defined as 'anything that is not in common use for any other purpose but that of a weapon'.

The decision of the Magistrates' Court was overturned and the confiscated belt was returned because the man could not be found guilty of carrying 'a regulated weapon' when the article he was carrying was not a weapon.

The definition of a regulated weapon has now been removed from the *Control of Weapons Act*.

Deing v Tarola [1993] 2 VR 163

Precedent

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

When a court decides a case that is the first of its kind – and in doing so establishes or creates a legal principle – the court is said to be setting a **precedent**. Precedents can also be established when a court interprets a statute in a way in which it has not been interpreted before. A precedent may be followed in similar cases that come before the courts in the future. These precedents become part of the law.

For example, imagine there was a class rule stating that students should ensure other students are safe. Imagine you were leaning back in your chair. Your class teacher decides that this is against the class rule because it was done deliberately and is unsafe. The most important aspect of the teacher's decision is the reason given for the decision – that intentionally leaning back in your chair does not ensure the safety of others. The teacher should, to be consistent, also find that other students who do the same thing have also broken the class rule.

However, imagine a future situation in which a student trips another student in class. While tripping another student is different to leaning back on the chair, the teacher may decide that this behaviour is also against class rules because it is behaviour that was done deliberately and is unsafe. In such a case, the teacher is deciding that the material facts between this case and the previous case are similar. The precedent created in the past should be a guide to teachers in similar situations.

Precedent does not apply to a sanction (i.e. the sentence in a criminal case) or to a remedy (i.e. compensation in a civil dispute) handed down by a court (sanctions and remedies are discussed in Topic 3.7). The precedent is the reason given for the decision. Using the example above, a teacher may set a precedent by deciding that deliberate unsafe behaviour is unacceptable when a student is leaning back on a chair, but students may be given different penalties (sanctions), depending on the circumstances of the case (e.g. one student may lean back in a much more deliberate and dangerous way than another, and therefore may be given a harsher penalty).

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

Similarly, legal precedents are established through court decisions. The most important part of a judgment is the reason for the decision. This is known as the ***ratio decidendi***.

The operation of precedent means that lower courts in the same court hierarchy will follow the *ratio decidendi* in similar cases. This is known as ***stare decisis***, meaning to stand by what has been decided. This ensures that there is consistency in the way that similar cases are decided.

An example of how a precedent can develop law is described in the famous 'snail in the bottle case' in the scenario below.

Actual scenario

Snail in the bottle

One of the most famous precedents in common law is the British case of *Donoghue v Stevenson*. It is commonly known as the 'snail in the bottle case'.

May Donoghue, the plaintiff, went to a cafe where she was given a ginger beer. The bottle of beer was bought by a friend and poured into a glass for her. After Donoghue had drunk half the contents of the bottle, a decomposed snail was poured out into her glass. The snail could not be seen before the ginger beer had been consumed because the bottle was opaque. Donoghue became ill as a result and later suffered from severe gastroenteritis.

Donoghue did not have a contract with the cafe or the manufacturer because she did not buy the bottle of ginger beer herself. This meant she could not sue for breach of contract. Instead, Donoghue claimed the manufacturer of the ginger beer, David Stevenson, had been negligent in the washing of the bottles before



Source 3 The snail could not be seen in the bottle because it was opaque, and so the customer could not see inside.

filling them with ginger beer. She sued Stevenson, alleging he had failed in two ways:

- It was the duty of the manufacturer to provide a system that would stop snails from getting into his ginger beer bottles.
- It was the duty of the manufacturer to inspect the bottles before filling them with ginger beer and selling them to customers.

Donoghue's initial case failed. However, she was granted leave to appeal, where it was found that she had a valid negligence claim against Stevenson. In particular, Lord Atkin found that a person must take reasonable care to avoid acts or omissions which the person can reasonably foresee would be likely to injure their neighbour, being those persons who are closely and directly affected by the person's acts or omissions. In establishing this legal principle, the court held that a manufacturer of a product consumed by another person can be found negligent.

This case was one of a series of cases that established various legal principles around when one person may be negligent towards another person, and in particular when one person may owe a duty of care to another person.

These various legal principles, developed through common law, also continue to be relevant in Australia.

Donoghue v Stevenson [1932] All ER 1

Binding precedent

A **binding precedent** is one that must be followed by courts that are lower in the same court hierarchy.

A precedent is considered to be binding on a new case when:

- the material facts of the precedent are similar to the material facts of the new case
- the precedent was set in a higher court that is in the same court hierarchy as the court hearing the new case.

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

Persuasive precedent

A **persuasive precedent** is one that does not have to be followed. That is, a court is not bound by this precedent and can choose to follow it (be persuaded by it). In Victorian courts, a precedent is persuasive (rather than binding) in the following circumstances:

- where a court in another state or country set the precedent (as this court is not in the same court hierarchy)
- where a lower court set the precedent; therefore, the High Court (which is the highest court in Australia) does not have to follow a precedent set in any other court in Australia
- where the same court set the precedent; therefore, the Supreme Court is persuaded by previous decisions made by that court.

Sometimes, a judge will make a statement that is not part of the reason for their decision, but is an important statement relating to the main issue of the case. This statement, known as an ***obiter dictum*** – a statement made 'by the way', or in passing – can influence decisions in the future. An *obiter dictum* is only ever persuasive, regardless of which court the judge made the statement in, as it does not form part of the reason for a decision.

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 (and therefore used as a source of influence or followed) even though it is not binding (see binding precedent)

obiter dictum a Latin term meaning 'by the way'; comments made by the judge in a particular case that may be persuasive in future cases (even though they do not form a part of the reason for the decision and are not binding)

Developing or avoiding earlier precedents

There are four main ways in which courts can develop or avoid earlier precedents:

- distinguishing a previous precedent – if the material facts of a case are sufficiently different from the material facts in a binding precedent, a lower court may not have to follow the precedent. Instead it may distinguish the material facts in the present case from those in the previous case and make a different decision. For example, a person found in the front seat of a car, over the legal alcohol limit, with his keys in his hands was found guilty of being in control of a car while over the legal alcohol limit. The accused appeared to be about to drive the car. This case was distinguished from a previous case, where the accused was found asleep in the car with the engine running, as he was trying to keep warm. He did not appear to be about to drive the car

- overruling a previous precedent – a precedent can be overruled by a higher court in a *different case*. For example, the High Court may overrule a decision of an earlier case decided in the Court of Appeal (which is lower than the High Court). When a precedent is overruled, it no longer applies
- reversing a previous precedent – a precedent can be reversed when the same case is taken to a higher court on appeal. For example, a case may have been decided in the Supreme Court (Trial Division) and then appealed to the Court of Appeal (which is higher than the Trial Division), where the decision is changed. When a precedent is reversed, it no longer applies
- disapproving a previous precedent – in some instances, a court is bound by a precedent but expresses its disagreement with the precedent. This is known as disapproving. This does not change a precedent, but a higher court, when deciding a later case, may choose to agree with the court that disapproved of the precedent and decide to overrule it.

3.5 Check your learning

Remember and understand

1 **Define** the term 'common law'. Give two other names for common law.
2 **Explain** what is meant by the term 'statutory interpretation'.
3 **What** is a precedent?
4 **Distinguish** between statute law and common law.

Evaluate and apply

5 Read the scenario 'Is a studded belt a weapon?'.
   a **Outline** the key facts of the case.
   b **What** was the issue that needed to be decided in this case?
   c **Identify** the statute that needed to be interpreted, and the word or phrase in that statute that needed to be interpreted.
   d **What** was the decision of the Magistrates' Court?
   e **Why** was the case heard again in the Supreme Court? **Who** heard the case in the Supreme Court?
   f **What** was the Supreme Court's ruling on the issue, and **what** reasons did it give for the decision?
6 Read the scenario 'Snail in the bottle'.
   a **What** incident occurred in this case and where did it occur?
   b **Why** could Donoghue not sue the cafe?
   c **What** was the *ratio decidendi* in this case and **why** is it still important today?
   d Devise a modern-day scenario where something like this happens, which might give rise to a civil dispute between you and a manufacturer.
7 **Classify** each of the laws below based on their source. For the statutes, **identify** the parliament that passed them.
   a The *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023* (Cth) extends paid parental leave from 18 weeks to 20 weeks.
   b The maximum term of imprisonment for committing the common law offence of kidnapping is 25 years.
   c The *Puffing Billy Railway Act 2022* (Vic) makes laws in relation to the Puffing Billy Railway.
   d The Burial and Cremation (Interment Rights) Amendment Bill 2023 (SA) was passed in 2023.
8 For each of the scenarios below, **explain** why you think the court hierarchy is important.
   a Samantha's civil dispute was heard in the Magistrates' Court, and she was found liable to pay $60 000. She does not agree with the magistrate's decision.
   b Hanna has been charged with murder. She wants to make sure she gets a judge who knows what they are doing.
   c Josiah is suing Jessica for $20 000. He knows that it is a small claim, and does not want to wait for years to have his case heard.
   d Harriet is suing her employer. She has been told by her lawyers that her case is strong because of past decisions that are similar to her case.

Reflect and evaluate

9 'The court hierarchy system is too confusing. They should just create one court for all cases.' **Discuss** the extent to which you agree with this statement.

3.6 Relationship between parliament and the courts

Key knowledge

In this topic, you will learn about:

- **an overview of the relationship between parliament and courts in law-making.**

The parliament and the courts have a complementary relationship. While the main role of parliament is to make laws, and the main role of courts is to resolve disputes, parliament and the courts need to work together to ensure that laws are workable and enforceable.

There are four main features of the relationship between parliament and courts:

- the interpretation of statutes by courts (statutory interpretation)
- the codification of common law
- the abrogation of common law
- the ability of courts to influence parliament.

Each of these is explored below.

Statutory interpretation

For legislation to be effective, courts must apply the statutes to the cases before them. To do this, it is sometimes necessary for a court to interpret the meaning of the words in a statute or in secondary legislation (which is made by bodies that have been given their law-making power through an Act of Parliament).

Decisions by courts about the meaning of the words in statutes form precedents that become part of the law to be followed in the future, as illustrated in the scenario below.

Actual scenario

Is a smart phone a computer or data storage device?

In this case, the Full Court of the Federal Court (which is where appeals from the Federal Court are first heard) had to decide whether a smart phone is a 'computer or data storage device'.

The *Crimes Act 1914* (Cth) allows a police officer to obtain a court order requiring a person to provide any information or assistance to allow a police officer to access data held in, or accessible from, *a computer or data storage device* seized as part of a search warrant.

The police had obtained a warrant and had conducted a search on a man. They seized, among other things, a Samsung smart phone. When a police officer asked the man whether a password was needed for the phone, the man said 'no comment'. The police therefore obtained a court order requiring the man to hand over his password for the phone. The man challenged the order, arguing that a smart phone is not a 'computer or data storage device'. The Court therefore had to interpret the statute to decide whether, in fact, a smart phone is a computer, or a data storage device, or both.

Justice Besanko held that a smart phone is a computer, finding that it has the 'functionality' of a personal computer; in particular, because it can perform mathematical computations electronically, like a computer. The judge also found that the word 'computer' could cover a range of different devices that do what a computer does, and that a device can have multiple uses, including being able to be used as a communication device and as a computer.

Commissioner of the Australian Federal Police v Luppino [2021] FCAFC 43 (25 March 2021)

Codification of common law

codify (codification) to collect all law on one topic together into a single statute

Being the supreme law-making body, parliament can make laws that confirm precedents. To **codify** a precedent, parliament passes an Act of Parliament that reinforces a principle established by a court. This is known as codification of common law, because the common law is codified or put into a statute, as in the scenario below.

Actual scenario

Codification of self-defence

Over time, the rules and principles regarding when a person is considered to have acted in self-defence (i.e. to protect themselves in response to a situation) – and can therefore raise this as a defence to a criminal charge – have been established by common law. In 2005, the law relating to self-defence in Victoria was codified. This means that the relevant rules and principles are now contained in statute law – the *Crimes Act 1958* (Vic) – rather than common law, as the statute includes a complete 'code' about the rules of self-defence.

Abrogation of common law

abrogate (abrogation) to abolish or cancel a law (e.g. the cancellation of common law by passing an Act of Parliament)

Parliament, as the supreme law-making body, can change or override (i.e. **abrogate**) common law. Parliament abrogates common law by passing an Act of Parliament that specifically abolishes the particular common law principle.

Parliament may decide to abrogate a common law for various reasons. On occasion, a court may interpret the words in a statute in a way that does not reflect the current meaning of the Act or the intention of parliament. Courts may also develop a precedent that parliament does not agree with.

The following scenario further explains the abrogation of common law, where the common law was not sufficient to address certain behaviour that was grossly offensive.

Actual scenario

Abrogation of common law offence of outraging public decency

In 2020, a horrific crash occurred on the Eastern Freeway in Melbourne, which left four police officers dead. At the time, a person took and sent graphic and offensive photos of the crash. Their conduct was considered to be highly offensive and contrary to community standards of behaviour.

The incident identified a gap in the legislation that contained offences relating to grossly offensive conduct. An old common law offence called 'outraging public decency' was seen to be archaic and unclear in scope, and did not contain a clear maximum penalty. Therefore, it could not be used to charge the person for their behaviour.

In response, the Victorian Parliament passed the *Crimes Legislation Amendment Act 2022* (Vic), which abolished the common law offence of outraging public decency. The Act also established a new offence – 'grossly offensive public conduct' – which it inserted into the *Crimes Act 1958* (Vic). This offence seeks to capture conduct that grossly offends community standards of acceptable behaviour. The maximum penalty is five years in prison.

Ability of courts to influence parliament

Courts can influence changes in the laws made by parliament through the comments judges make during court cases. For example, they may indicate in a judgment that they think a law should be changed by parliament.

Courts might want to do this for a number of reasons. They may be reluctant to change the law themselves. This could be because a judge thinks that parliament is in a better position to look at a wider area of law. Parliament can carry out investigations that courts cannot. Even so, a statement made by a judge within a court decision may influence parliament to change a law.

This occurred in the scenario below.

Actual scenario

High Court reluctant to change old common law

Mr and Mrs Trigwell were injured when a vehicle collided with their car after it hit two sheep. They sued the driver of the other car and the sheep's owner for damages. The High Court followed an old common law principle that stated a landowner did not owe a duty of care if their stock strayed from their land onto a highway. This followed a British common law principle that allowed animals to roam free. Justice Mason said:

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency.

State Government Insurance Commission (SA) v Trigwell (1979) 142 CLR 617



Source 1 A statement made by a judge within a court decision may influence parliament to change a law, as it did in the case of Mr and Mrs Trigwell, who were injured after sheep strayed onto the road.

3.6 Check your learning

Remember and understand

1 **Describe** two ways that courts and parliament work together in law-making.

2 **How** might courts fill in the gaps in legislation left by parliament?

3 Copy the following table in your notebook and fill in the blanks.

Relationship between parliament and the courts			
Feature	**Description**	**When might this happen?**	**Example**
Statutory interpretation			
		If parliament agrees with the common law	
			The common law offence of outraging public decency was abolished in 2022.
	Courts can highlight the need for parliament to change the law.		

Examine and apply

4 'The main role of the courts is to make laws.' Is this statement correct? **Justify** your answer.

5 Create a mind map starting with the word 'courts' as the central word. In your mind map, cover each of the four features of the relationship between courts and parliament in law-making.

6 Read the scenario 'Is a smart phone a computer or data storage device?'

- **a** **What** was the main issue in this case?
- **b** **Describe** the outcome that the police would have wanted in this case. **Describe** the outcome that the man with the phone would have wanted.
- **c** **How** does this case show the relationship between parliament and the courts?
- **d** **How** could parliament potentially change the law so that the law would work in favour of police in the future?
- **e** As a class, discuss all the other possible devices that are not necessarily computers or data storage devices, but may be interpreted to be.

7 Read the scenario 'High Court reluctant to change old common law'.

- **a** **What** was the common law principle?
- **b** Do you think this is an appropriate law for 100 years ago? What about now? Give reasons for your answer.
- **c** Read the quote from the judge. Reword the quote so that it can be explained to a Year 7 student who does not know anything about parliament or courts.

Reflect and evaluate

8 Conduct some research on the common law offence of embracery.

- **a** **What** is the nature of this offence?
- **b** Do you think that this offence should be codified or abrogated? **Justify** your answer.

3.7 Criminal law and civil law

Key knowledge

In this topic, you will learn about:

- types of law such as criminal law and civil law
- the distinction and relationship between criminal law and civil law.

As well as being classified by their source (i.e. common law and statute law), laws can also be classified by the behaviour they are trying to regulate and by the possible consequences of breaking them.

There are two main types of law in Australia that regulate behaviour: criminal law and civil law.

Criminal law

Criminal law is a body of law that protects the community by establishing **crimes** (offences) and establishing maximum penalties or **sanctions** for people who commit crimes. A crime is an act or omission that breaks an existing law, is harmful to an individual or to society as a whole, and is punishable by law. Examples of crimes include murder, theft and assault.

One of the distinct features of criminal law is the consequences of committing a crime. If a crime is committed, and a person is found guilty, a sanction may be imposed on that person. Sanctions can be minor (e.g. paying a small fine) or they can be severe (e.g. **imprisonment**).

In a case involving criminal law, there are two parties: the **prosecution** (representing the state or the Crown), which brings the action against the person alleged to have committed the crime, and the **accused**. The term 'accused' is used to refer to someone who is accused of committing a crime, but has not been found guilty. The term '**offender**' is used to refer to someone who is found guilty or has pleaded guilty. The scenario below provides an example of a criminal case.

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

crime
an act (i.e. undertaking an action) or omission (i.e. failing to undertake an action) that is against an existing law, harmful both to an individual and to society, and punishable by law (by the state)

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

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

prosecution
the party that institutes criminal proceedings against an accused on behalf of the state. The prosecution team includes the prosecutor

accused
a person charged with a criminal offence but who has not been found guilty or pleaded guilty

offender
a person who has been found guilty of a criminal offence by a court

Actual scenario

Long imprisonment term imposed

In this case, the offender, aged 53, was charged with killing his 78-year-old mother. The offender was an only child, and from an early age had a troubled relationship with his mother.

As he grew older, the offender's mental health began to decline, and his long-held feelings towards his mother grew in intensity. A series of events occurred that resulted in his mother being concerned for her safety. These included a situation where, one night, the offender went to his mother's home and turned off the power. On another day, he kicked in and smashed one of her windows.

One night in May 2021, the offender entered his mother's home and attacked her, ultimately killing her. She was found with significant injuries that showed she had suffered a ferocious attack. The offender was charged with murder and pleaded not guilty. His mother owned and used a Fitbit watch that was linked to a fitness tracking app on her mobile phone. Data captured from the application showed that the mother was sleeping at 4:47 am and that her sleep ended with a sharp burst of activity for a short period of time, after which point the app stopped receiving data.

The offender was found guilty by a jury, which took very little time to return a guilty verdict. When sentencing the offender, the Supreme Court judge noted that the offender showed a continuing lack of remorse, and that he had shown no shame or sadness whatsoever in relation to what he had done. The Court found that the actions of the offender were shocking and callous, and that he had sought to argue that a family friend had killed his mother. The Court sentenced the offender to 29 years in prison.

DPP v *Bednar* [2023] VSC 67 (21 February 2023)

Examples of crimes	Words commonly used in criminal cases
• **crimes against the person** – assault, manslaughter, murder • **crimes against property** – theft, property damage, robbery, deception • **drug offences** – drug and trafficking, drug use, drug possession • **public order and security offences** – disorderly and offensive conduct, public nuisance offences • **justice procedure offences** – breaches of court orders	• **prosecutor, prosecution** – the party bringing the case on behalf of the state or the Crown • **accused** – the person who has been charged with an offence • **offender** – the person who is found guilty or has pleaded guilty • **suspect** – the person who is suspected of having committed a crime • **guilty or not guilty** – the outcome of a criminal case • **charge** – when the police formally allege that a person has committed a crime • **sanction** – the penalty handed down by the court • **conviction** – a guilty verdict; when an offender has been found guilty, the court records a conviction, although in some instances a court may decide not to record a conviction, so the offender will not have a criminal record

Source 1 Examples of crimes and words commonly used in criminal cases

Civil law

Civil law is an area of law that regulates disputes between individuals and groups, and seeks to enforce rights where harm has occurred. Civil disputes are private disputes, and do not involve the police or the state (unless the state or the Commonwealth is a party to a civil dispute, which can be the case). The two parties to a civil dispute are the **plaintiff** (the party who makes a claim) and the **defendant** (who the plaintiff alleges has infringed the plaintiff's rights). Examples of areas of civil law include **tort** law (negligence, defamation, trespass and nuisance) and **contract law**.

The main aim of civil law is to rectify a civil wrong by returning the person whose rights have been infringed to their original position. This is done through civil **remedies**. The most common civil remedy is **damages**, which is a sum of money awarded to the person who has suffered harm.

The following scenario is a well-known case where the plaintiff (Australian actor Rebel Wilson) sued a magazine publisher for defamation, which is a type of civil law that aims to protect people's reputation and character from false statements.

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 a civil case) a party who makes a legal claim against another party (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

tort
a term that literally means 'wrong'; a wrong that interferes with a person's legally protected interests

contract law
an area of civil law governing the validity and enforceability of agreements made between two or more parties

remedy
any order made by a court or tribunal that is 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

damages
an amount of money that one party is ordered to pay to another party for loss or harm suffered. It is most common remedy in a civil claim

Actual scenario

Jury finds Rebel Wilson defamed

Rebel Wilson, an Australian actor who has starred in films such as *Pitch Perfect, Cats* and *JoJo Rabbit*, had a legal victory in the Supreme Court of Victoria in June 2017.

In 2015, Bauer Media, which at the time produced well-known magazines such as *Woman's Day*, *The Australian Women's Weekly* and *Harper's Bazaar*, published articles about Wilson, which she claimed contained false statements about her.

Wilson sued Bauer Media for defamation. She claimed that as a result of the articles, she had lost the opportunity to earn income by acting in feature films during a period after their publication. Bauer Media denied the claim and the case went to trial before a jury. The trial lasted three weeks.

In June 2017, a jury found in favour of Wilson, deciding that she had been defamed in the articles. In September 2017, Justice Dixon awarded over $4.5 million in damages to Wilson. Bauer Media appealed, and the damages were reduced to $600 000 on appeal. Wilson tried to appeal the case in the High Court, but was unsuccessful.

Wilson v Bauer Media Pty Ltd [2017] VSC 521 (13 September2017)



Source 2 Rebel Wilson successfully sued Bauer Media after it published articles about her that negatively affected her reputation. She was awarded a record payment of over $4.5 million in damages, but the amount was reduced on appeal.

Examples of civil law	Words commonly used in civil disputes
• **tort law** – negligence, trespass, nuisance, defamation • **industrial and workplace laws** – occupational health and safety, working conditions, work contracts, workplace agreements, union disputes • **consumer law** – tenancy agreements, sale of goods and services, advertising laws • **property law** – wills, planning laws, real estate purchases	• **plaintiff** – the person bringing the civil dispute • **defendant** – the person defending the civil dispute • **sue** – to take civil action against another • **compensation** – what the plaintiff seeks • **damages** – a civil remedy in the form of a sum of money awarded to the person who has suffered harm • **injunction** – a civil remedy in the form of a court order requiring the defendant to do something or not to do something • **tort** – a civil wrong • **defamation** – a civil law under which a person claims their reputation has been damaged • **negligence** – a civil law (also a criminal law) under which a person claims that they have been injured as a result of someone acting negligently towards them

Source 3 Examples of civil law and words commonly used in civil disputes

The distinction between criminal law and civil law

There are a number of differences between criminal law and civil law. The main differences are:

- the aim of each area of law
- the consequences if a law is not followed.

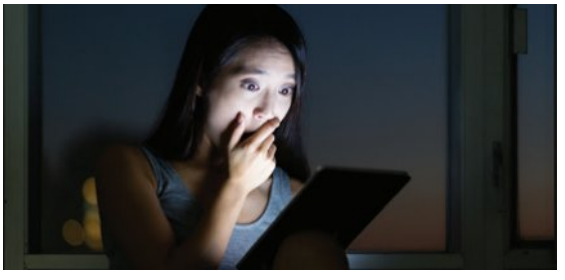
The main aims of criminal law are to protect society and to sanction offenders who have committed a crime. On the other hand, the aims of civil law are to regulate the conduct between parties to a dispute, and to remedy a wrong that has occurred.

In a criminal case, if an accused is found guilty of committing a crime, then the consequence is a sanction (e.g. a fine or imprisonment). In a civil dispute, if a defendant is found liable, then the consequence is a remedy (e.g. damages).

Source 4 sets out the main differences between criminal law and civil law.

	Criminal law	Civil law
Aim of the law	To protect society and to sanction offenders	To regulate the conduct between parties to a dispute, and to remedy a wrong that has occurred
Examples of crimes and laws	• Crimes against the person: homicide offences, assault, sexual offences • Crimes against property: theft, arson, fraud • Crimes against the state: treason, sedition • Crimes against the legal system: perjury, contempt	• Tort law: negligence, defamation, nuisance, trespass • Contract law • Consumer law
Possible consequences	Sanction (e.g. fine, imprisonment)	Remedy (e.g. damages, injunction)
Person bringing an action under the law	Prosecution, on behalf of the state or the Crown	Plaintiff
Person who has the responsibility (burden) of proving the case	Prosecution	Plaintiff
Person defending the action	Accused	Defendant
Police involvement in an action	Yes	No
Common words used in cases	accused, prosecution, prosecutor, crime, victim, arrest, police, bail, remand, guilty, innocent, sentence, punishment	sue, plaintiff, compensation, damages, dispute, negligence, remedy, litigation

Source 4 The main differences between criminal law and civil law



Source 5 The tort of defamation – for example, defaming someone via social media – is an example of civil law.



Source 6 Arson (deliberately setting a property on fire) is a crime against property.

The relationship between criminal law and civil law

The same behaviour can give rise to both a criminal case and a civil dispute. For example, a person who hits another person can be charged by the police with the crime of assault. If the accused is found guilty by a court, they will probably be sanctioned. The victim of the assault (as the plaintiff) may also sue the person who hit them (the defendant). If the plaintiff is successful, the defendant may have to pay damages to compensate the plaintiff for any injury suffered as a result of the assault.

In other circumstances, a victim may sue someone else who they believe is responsible for their loss, even though that person themselves did not commit a crime, as in the scenario below.

Hypothetical scenario

Man sues nightclub

Leonardo was waiting in line to get into a nightclub in Melbourne one evening. A fight broke out inside the nightclub. The people who were involved in the fight were removed from the nightclub by security and by workers at the nightclub, who then went back inside and left the fighters on the street.

Leonardo was outside watching. The fight continued outside, close to the line of people waiting to get into the nightclub. One of the men involved in the fight threw a punch. It struck Leonardo in the head and he fell down. One of the other men thought that Leonardo was involved, and started kicking and punching him. Leonardo suffered a significant number of injuries, including a broken jaw, neck injury, broken teeth, bruising and scarring. He was taken to hospital and spent a week there before he was able to go home. Leonardo is now afraid to go out and has panic attacks. He cannot sleep and has not been able to work.

Various people were charged with assault as a result of the fight. Leonardo, however, sued the nightclub owner, claiming that they owed a duty of care to him and the other attendees who were waiting in line. He claimed that the owner breached their duty of care by throwing the fighters out in the street, while failing to move them away from the line or preventing them from fighting in front of the nightclub. Leonardo has also sued the security company, claiming that the security guards did not do enough to protect him.



Source 7 A person who hits another person can be charged by the police with the crime of assault, and may also be sued by the victim.

Study tip

'Distinguishing' between two things means you are showing how they are different. To do this, you should use words such as 'whereas', 'on the other hand', 'in contrast' or 'this is different to' when pointing out their differences.

3.7 Check your learning

Remember and understand

1 **Distinguish** between criminal law and civil law.

2 **Name** the parties in a criminal case and in a civil case.

3 **Provide** two examples of crimes, and two examples of civil law.

4 Could the police be involved in a civil dispute? **Explain** your answer.

Examine and apply

5 Read the scenario 'Long imprisonment term imposed'.
   - **a** **Identify** the key words that indicate this is a criminal case.
   - **b** **Describe** the key facts of the case.
   - **c** Do you agree with the sentence given in this case? Give reasons for your answer.

6 Read the scenario 'Jury finds Rebel Wilson defamed'.
   - **a** **Who** was the plaintiff in this case, and **who** was the defendant?
   - **b** **What** was the main issue in dispute in this case?
   - **c** **How** was this dispute resolved?
   - **d** **What** was the outcome in this case, and who decided the outcome?
   - **e** Conduct some research to find out why it was the judge and not the jury who awarded damages in this case.
   - **f** Do you agree with the outcome of the case? Give reasons for your answer.

7 Collect four articles about criminal cases or civil disputes. For each article, highlight the key terms that identify the case as a criminal or civil matter. Then prepare a short summary of each article.

8 Create two scenarios that might give rise to both a criminal case and a civil dispute.

Reflect and evaluate

9 Find a criminal judgment from the County Court of Victoria that has been published on the AustLII website this year. A link is provided on your obook pro.
   - **a** **How** do you know this is a criminal case?
   - **b** **Who** are the parties in this case?
   - **c** **What** were the charges? Did the accused plead guilty?
   - **d** **Describe** the facts that gave rise to the charges.
   - **e** **What** factors did the judge take into account when sentencing the accused?
   - **f** **What** sentence was imposed on the accused?
   - **g** Do you agree with the sentence? If not, why not? What sentence would you have imposed?

Weblink
Australasian Legal Information Institute (AustLII)

Chapter

3

Review

Top assessment tips from Chapter 3

1 There are five characteristics of an effective law. You need to know all five of them, and it is a good idea to have examples of laws that demonstrate each characteristic.

2 You are expected to be able to *discuss* the principles of justice. A discussion is a multifaceted response that requires you to go beyond an explanation, and consider the limitations, downsides or weaknesses of our legal system in achieving the principles of justice. Use words such as 'however', 'on the other hand' and 'although' to show the reader you are discussing, instead of just explaining.

3 You are expected to be able to *evaluate* the effectiveness of laws. An evaluation in Legal Studies requires you to look at strengths and weaknesses, and provide an overall conclusion. Make sure you signpost your strengths, weaknesses and conclusion, using sentence starters such as 'One strength', 'One downside' and 'To conclude'.

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 assessment tasks are composed of a variety of questions. A great way to identify the difficulty of the question is to look at the command term (or terms) used in the question and the mark allocation. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 Classify each of the following laws according to its source and type.
   - **a** The *Crimes Act 1958* (Vic) makes dangerous driving causing death an offence.
   - **b** The sanction for common law kidnapping is set out in the *Crimes Act 1958* (Vic).
   - **c** Vince is required to pay $50 000 after being found liable under the common law tort of negligence.
   - **d** In Victoria, the law regarding intentional murder is not defined in the *Crimes Act 1958* (Vic) but by case law.

(4 marks)

Difficulty: medium

2 Explain how the use of a court hierarchy achieves the principle of fairness.

(4 marks)

Difficulty: high

3 In an attempt to address the increasing risk of passive smoking (i.e. inhaling the cigarette or cigar smoke of another person), a new law has been established in Victoria that makes it an offence for a person to smoke anywhere, including in private houses and in their cars. It was suggested that this law is consistent with people's values and views, and that it would help protect the community. The law is contained within an amending statute that is not easily found online.

After a backlash from the community, the Victorian Parliament changed the law six months later so that it only applies to people's homes where children reside. The law was changed without much media attention.

Evaluate the effectiveness of the new law relating to smoking.

(8 marks)

Practice assessment task

Before attempting this practice assessment task, re-read the information at the beginning of this chapter about the learning outcome, key knowledge and key skills.

Practice assessment task questions

Part 1 (25 marks)

1 Collect two newspaper articles. One of the articles must relate to a criminal case, and one of the articles must relate to a civil dispute.

For each of the articles:

a Identify and define the legal terms used in the newspaper article.

(5 marks)

b Identify the crime that is alleged to have been committed, or the area of civil law that is alleged to have been breached. Explain how making that act or omission a crime, or how that area of civil law, aims to achieve social cohesion.

(8 marks)

c In relation to the article about a criminal case, explain how the crime could also give rise to a civil dispute.

(4 marks)

d Discuss the ability of the court to achieve the principle of fairness in one or both of the cases.

(8 marks)

Part 2 (25 marks)

2 You have been asked to write an article that is to be published in a newsletter for Year 6 students. The purpose of the article is to provide information about parliament and the courts, and their relationship. Write the newspaper article. You can use a variety of multimedia tools if you wish. You will need to use appropriate language for Year 6 students. Your article needs to include information about:

a the role of parliament and the courts

(5 marks)

b the main sources of law

(2 marks)

c the Victorian court hierarchy, and one reason for having a hierarchy of courts

(4 marks)

d **two** features of the relationship between parliament and courts, using examples

(6 marks)

e how a person could evaluate whether a law is effective. At least **two** examples must be included.

(8 marks)

Total: 50 marks



Chapter checklist

Now that you have completed this chapter, reflect on your ability to understand the key knowledge from the Study Design. If you feel you need some more practice, use the revision links to revisit the key knowledge.

Remember that you will also need to be able to draw on and understand the key skills outlined in the Study Design.

Key knowledge	I understand this	I need some more practice to understand this	Revision link
• The role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals	☐	☐	Go back to Topic 3.1.
• The principles of justice: fairness, equality and access	☐	☐	Go back to Topic 3.2.
• Characteristics of an effective law, such as reflecting society's values; is enforceable; is known; is clear and understood; and is stable	☐	☐	Go back to Topic 3.3.
• An overview of the roles of the parliament	☐	☐	Go back to Topic 3.4.
• Sources of law such as statute law	☐	☐	Go back to Topic 3.4.
• An overview of the roles of the courts	☐	☐	Go back to Topic 3.5.
• Sources of law such as common law	☐	☐	Go back to Topic 3.5.
• An overview of, and reasons for, the Victorian court hierarchy	☐	☐	Go back to Topic 3.5.
• An overview of the relationship between parliament and the courts in law-making	☐	☐	Go back to Topic 3.6.
• Types of law such as criminal law and civil law	☐	☐	Go back to Topic 3.7.
• The distinction and relationship between criminal law and civil law	☐	☐	Go back to Topic 3.7.

Check your Student obook pro for these additional resources and more:

- **Chapter 3** Chapter review quiz
- **Revision notes** Chapter 3
- **Chapter summary** Chapter 3
- **Quizlet** Revise key legal terms from this chapter.

Chapter

4

Proving guilt



Source 1 The presumption of innocence is a fundamental legal principle in our criminal justice system. This principle means that an accused is entitled to be treated as not guilty until proven otherwise. This chapter explores the presumption of innocence and other key concepts of criminal law.

Outcome

By the end of **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6), you should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.

Key knowledge

In the chapter, you will learn about:

- the purposes of criminal law
- the presumption of innocence
- key concepts of criminal law, including:
  - the elements of a crime: *actus reus* and *mens rea*
  - strict liability
  - the age of criminal responsibility
  - the burden of proof
  - the standard of proof
- types of crime, such as crimes against the person and crimes against property
- the distinction between summary offences and indictable offences
- possible participants in a crime such as principal offenders and accessories.

Key skills

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

- define and use legal terminology
- research and analyse relevant information about criminal law and offences
- distinguish between types of crime, and summary and indictable offences, using examples
- explain the purposes and key concepts of criminal law.

Key legal terms

accessory a person who does an act to help another person who has committed a serious indictable offence (called the principal offender) to avoid being apprehended, prosecuted, convicted or punished

accused a person charged with a criminal offence but who has not been found guilty or pleaded guilty

actus reus a Latin term meaning 'a guilty act': the physical element of a crime (i.e. the act itself). See also *mens rea*

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)

crime an act (i.e. undertaking an action) or omission (i.e. failing to undertake an action) that is against an existing law, harmful both to an individual and to society, and punishable by law (by the state)

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

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

mens rea a Latin term meaning 'a guilty mind': the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

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

principal offender a person who has carried out the *actus reus* (guilty act) and has therefore directly committed the offence

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

strict liability where culpability or responsibility for committing a crime can be established without having to prove there was *mens rea* (i.e. a guilty mind)

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

Key legal cases

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

Extracts from the *VCE Legal Studies Study Design* (2024–2028) reproduced by permission, © VCAA

Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

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



Warm up!
Check what you know about proving guilt before you start.

Quizlet
Test your knowledge of key legal terms in this chapter by working individually or in teams.

4.1 Criminal law

Key knowledge

In this topic, you will learn about:

- the purposes of criminal law.

Laws help people live together in a harmonious way by establishing boundaries of acceptable behaviour. In other words, laws help achieve social cohesion. Laws also establish individual rights, and protect society and our safety. **Criminal law** specifically helps to achieve social cohesion and protect the community because it defines and prohibits the types of behaviours and conduct that are unacceptable (referred to as **crimes**) and outlines penalties (referred to as **sanctions**) for people who undertake these prohibited behaviours.

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

crime
an act (i.e. undertaking an action) or omission (i.e. failing to undertake an action) that is against an existing law, harmful both to an individual and to society, and punishable by law (by the state)

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

victimless crime
an offence that only involves the offender(s) and where no direct harm is suffered by a victim. The offence also goes against what society considers to be acceptable and can indirectly harm individuals and the wider community

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

What is a crime?

Before looking at the purposes of criminal law, it is useful to know what a crime is. A crime is an act (i.e. undertaking an action) or omission (i.e. failing to undertake an action) that is against an existing law, harmful to an individual or to society, and punishable by law (by the state).

Against an existing law

For a person to commit a crime, they must undertake an action (or fail to undertake an action) that is prohibited (i.e. not allowed) by a current law. The parliament and the courts establish laws that define which actions (or inactions) are prohibited and are considered to be crimes. For example, in 2020, the Victorian Parliament passed the *Wage Theft Act 2020* (Vic) to establish the crime of wage theft. From July 2021, it became a crime for an employer in Victoria to underpay workers (or employees) deliberately and dishonestly. An individual employer who is found guilty of wage theft may be ordered to pay a fine of up to $230 000 or spend up to 10 years in jail.

Harmful to an individual and to society

A criminal act or omission has an impact on both the victim and the wider community. Crimes can impact a victim by causing physical, financial or psychological harm (or a combination of these). Crimes can also negatively impact the whole of society by decreasing the community's sense of wellbeing and safety, and increasing the need for expensive resources such as the police, courts, prisons and hospitals.

A **victimless crime** is also harmful to society, even though the offender perceives their actions to only cause harm to themselves. For example, while consuming illegal (or unlawful) drugs might be considered a victimless crime, it impacts other individuals such as the offender's family and friends. Consuming illegal drugs can also impact the broader community by leading to an escalation in theft and violent crimes, and by leading to an assumption in the community that this behaviour is acceptable.

Punishable by law

Crimes are punishable by the state. This means that a person who is guilty of committing a crime can have a penalty (i.e. sanction) imposed on them. In Victoria, penalties for criminal offences are typically imposed by the courts, but they can also be imposed by other authorities that are given the power to do so (e.g. local councils, and VicRoads and Victoria Police for traffic offences). Examples of sanctions include a **fine** or **imprisonment**.

Purposes of criminal law

Criminal law has several purposes. These include:

- Protecting individuals – Criminal law aims to protect individuals by establishing crimes and processes to deal with people who commit these crimes. For example, laws that make murder, theft, rape, arson and robberies crimes are aimed at protecting individuals from these types of behaviours.
- Protecting property – Criminal law aims to protect privately owned and public property. This includes protecting land and the environment, and personal goods. For example, it is an offence to trespass on, or take without permission (i.e. steal), another person's property.
- Protecting society – Criminal law aims to protect the community as a whole by setting standards and making it clear what behaviour is not tolerated by the community and the legal system. This helps to maintain public order and community safety. For example, laws prohibiting drug offences and terrorism offences help to protect society.
- Protecting justice – Criminal law aims to promote justice by providing processes to deal with offenders and to enforce the law. Having the state enforce criminal law helps prevent victims of a crime, and their family and friends, from taking the law into their own hands and imposing their own punishment on an offender.





Source 1 The purpose of the law is to maintain a peaceful society. Through agencies such as the police and the courts, criminal law aims to protect individuals and their property, safeguard individuals' rights, and maintain order.

4.1 Check your learning

Remember and understand

1 **Define** the term 'crime'.

2 **Describe** three purposes of criminal law.

Examine and apply

3 Conduct some research about the following actions. Discuss with your class whether each of them is a crime under Victorian law.

- **a** Keeping a wallet found in the street containing $10.
- **b** Using your mobile phone in a Year 12 VCAA exam.
- **c** Not using a designated crossing when walking across the road.
- **d** Having an alcoholic drink at a licensed restaurant, aged 17, in the company of your parents.
- **e** Posting a nasty or cruel comment about another person on social media.

4 **Explain** why the state (and not the victim) is responsible for imposing a penalty (sanction) on a person who commits a crime.

Reflect and evaluate

5 Conduct research online to help you complete the following questions.

- **a** **Provide** two examples of an act or omission that is a crime in one Australian state or territory but not in another. **Suggest** reasons for the difference.
- **b** **Provide** one example of an act or omission that is a crime in another country but not in Australia. **Suggest** reasons for the difference. **Discuss** whether you agree with the other country's approach.

4.2 The presumption of innocence

Key knowledge

In this topic, you will learn about:

- the presumption of innocence.



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

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

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

prosecution
the party that institutes criminal proceedings against an accused on behalf of the state. The prosecution team includes the prosecutor

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)

prosecutor
the representative of the prosecution who is responsible for conducting the criminal case and appearing in court

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

The **presumption of innocence** is one of the most important principles on which the criminal justice system and the rule of law are based. It is a guarantee by the state to its citizens that if they are accused of a crime they will be considered, and treated (as far as possible), as being not guilty until the charge has been proved **beyond reasonable doubt**. This is why a person is called an accused until they are proven guilty.

Beyond reasonable doubt is the **standard of proof** (i.e. the level of proof) required for the **prosecution** (i.e. the party that institutes criminal proceedings on behalf of the state) to succeed in a case. In a criminal case, the prosecution is required to prove that the accused is guilty beyond reasonable doubt, rather than the accused being required to prove their innocence. (Note that the term 'accused' is used to refer to someone who is accused of committing a crime, but has not been found guilty. The term 'offender' is used to refer to someone who is found guilty or has pleaded guilty.)

It is the responsibility of the magistrate (for minor crimes) and the jury (for serious crimes) to impartially consider the strength of the evidence presented to the court and to decide whether an accused is guilty beyond reasonable doubt.

The presumption of innocence is protected as a human right in the *International Covenant on Civil and Political Rights* (1966), an international treaty that Australia has signed. It is also protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), a Victorian statute that protects fundamental human rights (this statute is also referred to as the 'Human Rights Charter' or the 'Victorian Charter of Human Rights').

How is the presumption of innocence protected?

The presumption of innocence is protected and upheld by a number of criminal principles and processes. These are listed below.

- The **burden of proof** in a criminal case is on the prosecution – this means the prosecution must present evidence to the court to prove the guilt of the accused, rather than the accused being required to prove their innocence.
- The standard of proof in a criminal case must be met – to succeed in a criminal case, the **prosecutor** is required to present sufficient evidence to the court to prove that the accused is guilty beyond reasonable doubt. This is a high standard of proof compared to that in civil disputes, where the party making the allegations (i.e. the plaintiff) is only required to prove that the defendant is most likely (or on the balance of probabilities) responsible for the harm suffered.
- Police officers are required to reasonably believe a person has committed a crime before arresting them – in essence, this means that the police must have a good reason to arrest a person.
- A person who has been arrested and charged has the right to apply for and be granted **bail** – unless there are good reasons why they should be denied their freedom and be held in custody while waiting for their court hearing.
- An accused has the right to legal representation in court – in some situations, where an accused has been charged with a serious offence, the court can adjourn the trial until the accused has obtained legal representation.

- An accused has the right to silence – this means an accused does not need to answer any questions, and is not required to give evidence in court, and this 'silence' is not to be interpreted as a sign of their guilt.
- As a general rule, the accused's previous convictions cannot be revealed in court until the sentencing process begins (i.e. after they have been found guilty). This is so that the person is not 'presumed' guilty because of things they have done in the past.
- A person who has been convicted, or found guilty, of a crime has the right to appeal.

While the presumption of innocence is a key feature of Australia's criminal justice system, in some circumstances, the application of the principle is limited. For example, in situations where an accused has committed a serious and violent offence, their right to be treated as innocent until proven otherwise may be limited to protect the community. The scenario below examines one way the law limits the presumption of innocence in cases involving suspected terrorists.

Actual scenario

Counter-terrorism laws and the presumption of innocence

From 2013 onwards, the Commonwealth Parliament introduced a number of counter-terrorism laws to improve national security. However, these laws have been criticised for reversing the burden of proof and limiting the presumption of innocence.

For example, 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 who have been previously charged with or convicted of a terrorism offence (e.g. being a terrorist or supporting terrorist organisations) to be granted bail when charged with another terrorism offence.

Under the 2019 law, any person who has previously been charged with or convicted of a terrorism offence and who is charged with a new terrorism offence does not have the right to apply for bail. This means that once such a person has been charged with a new terrorism offence, they are automatically held in custody until their court hearing, unless they can prove they are not a threat to the community. In effect, this reverses the burden of proof and, to some extent, arguably treats the accused as being guilty until they can prove their innocence.

4.2 Check your learning

Remember and understand

1 **Define** the 'presumption of innocence'.
2 **Describe** three ways in which the presumption of innocence is upheld in Australia's criminal justice system.

Examine and apply

3 Read the scenario 'Counter-terrorism laws and the presumption of innocence'.
   a **Explain** how the *Counter-Terrorism Legislation Amendment (2019 Measures No.1) Act 2019* (Cth) limits the presumption of innocence.
   b As a class, discuss whether you believe the limit placed on the presumption of innocence by this Act is justified.

Reflect and evaluate

4 **Explain** whether you think the presumption of innocence should be a key feature of the criminal justice system. In your answer, consider the point of view of society, the accused and the victim(s).

4.3 Key concepts of criminal law

Key knowledge

In this topic, you will learn about:

- **key concepts of criminal law, including the elements of a crime: *actus reus* and *mens rea*, strict liability, the age of criminal responsibility, the burden of proof and the standard of proof.**

Study tip

In assessment tasks, when you are asked questions about the key concepts of criminal law, make sure you use the correct legal terminology, such as *mens rea*, *actus reus* and strict liability.

There are a number of key concepts in criminal law. These concepts include:

- the elements of a crime: *actus reus* and *mens rea*
- strict liability
- the age of criminal responsibility
- the burden of proof
- the standard of proof.

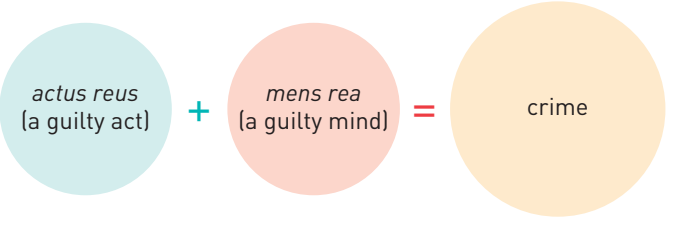
The elements of a crime: *actus reus* and *mens rea*

Generally, for a crime to have been committed, the following two elements of a crime need to exist at the same time:

- ***actus reus*** – a Latin term meaning 'guilty act': the physical element of a crime. For a person to be found guilty of committing a crime, the prosecution must prove the person physically did the wrongful action (or inaction). For example, for a person to commit the offence of stalking, they must have physically done something, such as contacted or followed the victim against their wishes, and caused the victim to feel fear or be distressed. This may include stalking the victim on social media
- ***mens rea*** – a Latin term meaning 'guilty mind': the mental element of a crime. For a person to be found guilty of committing a crime, the prosecution must also prove that the person knowingly or intentionally committed the wrongful action (or inaction). Therefore, *mens rea* refers to the state of mind of the accused at the time of the offending. For example, for a person to be convicted of importing illegal drugs into Australia, the prosecution must prove the person knowingly or intentionally brought the drugs into Australia. Other types of *mens rea*, in addition to 'knowingly' and 'intentionally,' include maliciously, recklessly, negligently and wilfully.

actus reus
a Latin term meaning 'a guilty act': the physical element of a crime (i.e. the act itself). See also *mens rea*

mens rea
a Latin term meaning 'a guilty mind': the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*



Source 1 There are two elements of a crime: *actus reus* and *mens rea*.

Did you know?

An accused does not need to be a human being. Companies can also be charged with crimes, such as taxation fraud, wage theft or failing to maintain a safe workplace. This is because companies are considered to be 'entities' that are separate to the directors and the people who manage the company.

The following scenario demonstrates the elements of *actus reus* and *mens rea*, and how they need to exist at the same time for a crime to be committed.

Hypothetical scenario

Houli, a 21-year-old university student, took a laptop belonging to another student, Dee, without Dee's knowledge.

Under section 72 of the *Crimes Act 1958* (Vic), for a person to be found guilty of theft, they must dishonestly appropriate (i.e. take) property belonging to another with

the intention of permanently depriving the other of it. This means that for Houli to be found guilty of theft, he must have appropriated (taken) Dee's property (*actus reus*), and done so dishonestly, with the intention of permanently depriving Dee of the laptop (*mens rea*).

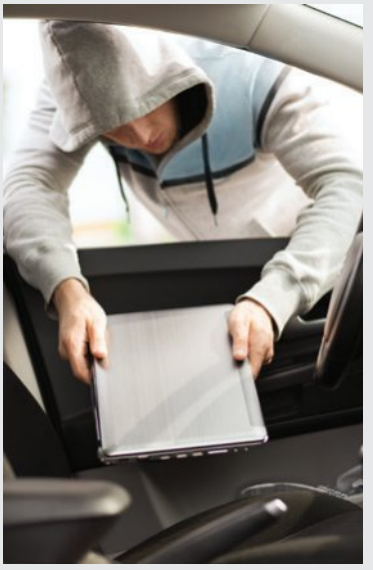
Houli could not be found guilty of theft if he had taken Dee's laptop (*actus reus*) but had no intention, at the time of taking it, to deprive Dee of the laptop permanently (*mens rea*). That is, if Houli borrowed the laptop with the intention of returning it to Dee, he cannot be found guilty of theft. In this instance, Houli committed the guilty act of keeping someone's property, but did not have the necessary guilty mind at the time to be found guilty of theft.

To summarise, there are two elements of the crime of theft. Below, the *mens rea* (guilty mind: the mental element) for the crime is highlighted in orange to distinguish it from the *actus reus* (guilty act: the physical element), which is highlighted in blue.

Definition of theft:
A person ... dishonestly appropriates property belonging to another with the intention to permanently deprive the other of it.

That is, a person ...

- dishonestly *(mens rea)*
- appropriates property *(actus reus)*
- belonging to another
- with the intention to permanently deprive the other of it *(mens rea)*.



Source 2 There are two elements of the crime of theft.

Many defences raised by accused persons are made on the basis that they were incapable of forming the intention to commit a crime (i.e. no guilty mind or *mens rea* existed) at the time of committing the wrongful action (or inaction). For example, an accused who was suffering from a mental impairment or was having an epileptic seizure while undertaking an unlawful action is not guilty of a crime because there is no *mens rea*. That is, the person was likely acting involuntarily, or had little understanding of the nature of their actions, at the time they committed the act.

Strict liability

While generally, for a crime to have been committed, the two elements of a crime – *actus reus* and *mens rea* – must both be present, this does not apply to crimes of **strict liability**.

strict liability where culpability or responsibility for committing a crime can be established without having to prove there was *mens rea* (i.e. a guilty mind)

Crimes of strict liability are offences that do not have a mental element. That is, they do not have the requirement of *mens rea* (a guilty mind). This means that for strict liability crimes, the prosecution is not required to prove that the accused had the intention to commit the crime. To establish that the accused is guilty, the prosecution is only required to prove that the accused committed the wrongful action (or inaction) (i.e. the *actus reus*).

Many strict liability crimes are summary offences (see Topic 4.4). Strict liability crimes include consuming intoxicating liquor (alcohol) while driving, fare evasion on public transport, and failing to display 'P plates' when driving on a probationary driver licence.

For some strict liability crimes, the accused may argue, in their defence, that the crime was committed due to a reasonable or honest mistake of fact.

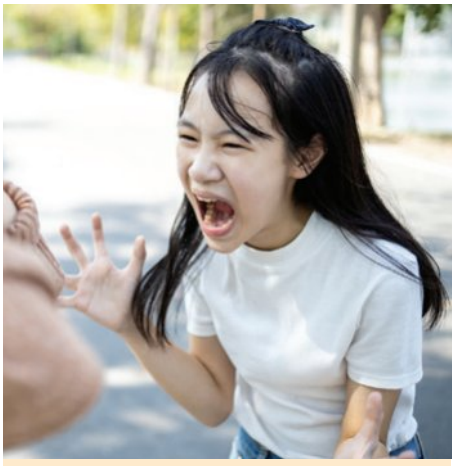
The age of criminal responsibility

The age of criminal responsibility is the minimum age a person must be to be charged with committing a crime.

Some people may not be held responsible for committing a crime because they are considered to be too young to form the intention (*mens rea*) to commit a crime. Whether a person can be charged with committing an offence depends on their age:

- A person under 10 years of age cannot be charged with a crime.
- A person aged between 10 and 13 years can be charged with a crime if the prosecution can prove that the child knew, at the time of the crime, that their actions were wrong. This is known as rebutting the legal principle of ***doli incapax***. Whether a child is *doli incapax* (i.e. considered incapable of committing an action with criminal intent) depends on factors such as the child's age, upbringing, maturity, prior criminal history, and what the child said and did before, during and after committing the crime. Medical and psychological assessments can be undertaken to help determine whether a child has the intellectual or moral capacity to know their actions are criminally wrong.
- A person aged 14 years or older is considered to be criminally liable for their actions and can be charged with committing a crime.

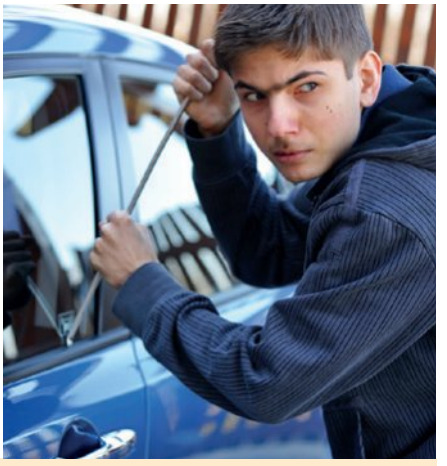
doli incapax
a Latin term meaning 'incapable of evil'. Refers to the principle in Victoria that a child aged between 10 and 13 years is presumed to be incapable of forming *mens rea* (a guilty mind) because they do not have the intellectual or moral capacity to know the difference between right and wrong



A child under 10 years of age
- cannot be charged with a crime.



A child 10 to 13 years of age
- can be charged with a crime if the prosecution proves the child knew their actions were wrong at the time of the crime.



A child 14 years of age or older
- can be charged with a crime.

Source 3 The age of criminal responsibility

The legal principle of *doli incapax* is examined in the scenario below.

Actual scenario

High Court *doli incapax* ruling

In 2014, a man in his early twenties referred to as RP (a pseudonym) was found guilty in the New South Wales District Court of three sexual assault-related offences committed when he was 11 years old. The victim was his younger brother and the attacks occurred when the boys were not supervised by an adult. RP was sentenced to two years and five months in prison, with a non-**parole** period of 10 months.

On appeal to the New South Wales Court of Criminal Appeal, RP's lawyer argued that RP was *doli incapax* when he committed the offences. In its ruling, while the Court agreed

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

that RP was *doli incapax* at the time of one of the offences, it upheld the convictions for the two other sexual assault charges. RP's lawyer appealed to the High Court.

The High Court summarised the concept of *doli incapax* as 'the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea*'.

The prosecution argued that RP's actions showed he knew that what he was doing was wrong. They argued that RP stopped a sexual act when he heard an adult nearby, held his brother so he could not draw attention to the situation, and then warned him not to tell. The High Court also heard other evidence about RP's 'very low intelligence', poor educational pathways, and dysfunctional upbringing. Also, RP was possibly a victim of sexual assault and had previously been exposed to violence.

The High Court allowed the appeal. In its judgment, the Court noted that the prosecution provided little evidence, other than the circumstances of the offence, to disprove *doli incapax*. There was no evidence of RP's moral development or that the boy understood his actions were wrong. It was not enough to show that RP knew the behaviour was rude or naughty. The High Court said it could not be assumed that the boy understood that hurting his younger brother was a serious moral wrong. The High Court acquitted RP of the crimes.

RP v The Queen [2016] HCA 53 (21 December 2016)

Over recent years, the Commonwealth, state and territory governments have faced increasing pressure from a range of legal and human rights organisations to raise the age of criminal responsibility from 10 to 14 years. Although the criminal age of responsibility in Australia is 10 years old, the scenario below demonstrates that not all Australians are happy with that age and would like it to be raised.

Did you know?

According to research conducted by the Australian Institute of Criminology, on an average night (between 1 April and 30 June 2022), 44 young people aged between 10 and 13 years were held in youth detention in Australia. In July 2022, more than 211 000 people, including over 65 700 Victorians, signed an online petition (called *#raisetheage*) to show their support for increasing the age of criminal responsibility from 10 to at least 14 years of age.

Actual scenario

Raise the age pressures

In November 2018, a working group (consisting of policy officers from the Commonwealth Government and each of the state and territory governments) was established to examine whether the age of criminal responsibility should be increased from 10 years of age in Australia. As part of its investigations, the working group examined the criminal justice systems in each Australian state and territory. It also considered more than 90 submissions from interested parties, including legal, human rights and community organisations.

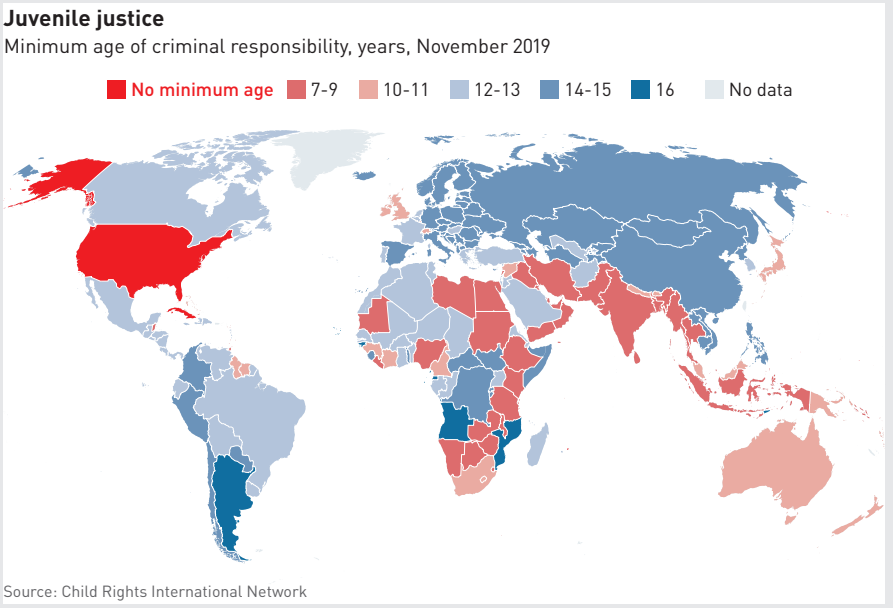
In December 2022, a draft report (which had been written in 2020) was made public. The report, although not final and not endorsed, recommended that the Commonwealth, state and territory governments raise the minimum age of criminal responsibility to 14 years of age, without exception. In short, the report acknowledged evidence relating to the brain development of children that shows young people aged under 14 years are unlikely to understand the impact of their actions, or to have the maturity to be considered criminally responsible for their actions.

In late 2022, the Northern Territory Government passed a law to raise the minimum age of criminal responsibility to 12 years. Other state governments, including the Tasmanian and Australian Capital Territory Governments, announced they would introduce legislation to raise the age of criminal responsibility from 10 to 14 years over the coming years.

In April 2023, the Victorian Premier, Daniel Andrews, announced that the Victorian Government would increase the age of criminal responsibility in Victoria from 10 to 12 years in 2024, with a further increase from 12 to 14 years in 2027 (with exceptions for certain

serious offences). This decision reflects the view that rather than criminalising the actions of children aged under 14 years, it is more appropriate to address the reasons why some children have dealings with the criminal justice system, and put systems in place to help children understand the consequences of their behaviours.

While many individuals and organisations support 'raising the age', others do not. Some point to the requirement for the prosecution to show that a child aged between 10 and 13 years does have the intellectual and mental capacity to understand their actions were criminally wrong before they can be found guilty of a crime, and argue that this protects both child offenders and victims of crime. Some suggest that rather than raising the age, the government should aim to ensure that no young people aged under 14 years are held in detention for their actions.



Source 4 The minimum age of criminal responsibility around the world

The burden of proof

The burden of proof (also known as the onus of proof) is the responsibility to prove the allegations made in a case. In general, the burden of proof is held by the person or party who initiates the case or brings it to court. This means, in a criminal case, that the burden of proof is held by the prosecution. That is, the prosecution must present sufficient evidence to prove the guilt of the accused (beyond reasonable doubt).

As described in Topic 4.2, the burden of proof upholds the presumption of innocence because it requires the prosecution to prove the guilt of the accused, rather than the accused being required to prove their innocence.

In some circumstances in criminal cases, the burden of proof can be reversed. This means the accused has the responsibility of proving something in the case. For example, in cases where drugs have been found on the accused's property, the accused is assumed to be guilty of drug possession unless they can prove that the drugs were not in their possession. Likewise, in cases where the accused is pleading a certain defence (e.g. that they had a mental impairment at the time of committing the offence) the accused has the responsibility to prove that defence.

The standard of proof

The standard of proof is the strength of evidence needed to prove a legal case. In criminal law, the prosecution must prove the case beyond reasonable doubt.

A reasonable doubt must be sensible and realistic, and not one that is imaginary or fanciful or an unrealistic possibility. It is not enough that the accused is probably guilty or very likely to be guilty.

4.3 Check your learning

Remember and understand

1 **Identify** and **explain** the two elements of a crime.
2 **Distinguish** between the burden of proof and the standard of proof in a criminal case.

Examine and apply

3 'The offence of supplying alcohol to young people aged under 18 years on licensed premises is a strict liability offence.' **Explain** what this statement means.
4 Do you think that parliament should be allowed to create crimes of strict liability? **Justify** your response.
5 Read the scenario 'High Court *doli incapax* ruling'.
   a **What** did the prosecution need to prove for RP to be found guilty?
   b **How** did the High Court summarise the criminal law principle of *doli incapax*?
   c **Why** was RP acquitted of the crimes?

Reflect and evaluate

6 Read the scenario 'Raise the age pressures'.
   a **Describe** the age of criminal responsibility in Victoria.
   b **Suggest** two reasons why the age of criminal responsibility is being raised in Victoria.
   c Form small groups and discuss whether or not the age of criminal responsibility should be raised in Victoria. Prepare a summary of your discussions.



Source 5 For a person to be found guilty of committing a crime, the prosecution must prove the person physically undertook the wrongful action.

4.4 Types of crime

Key knowledge

In this topic, you will learn about:

- **types of crime such as crimes against the person and crimes against property.**

There are many different types of crime. Crimes can be classified according to:

- the social purpose (or nature) of the offence
- the type of offender or victim
- the seriousness of the offence.

The social purpose (or nature) of the offence

Classifying a crime according to its social purpose (or nature) means categorising the crime according to whether it involved a wrongful action (or inaction) against a person, property, the wellbeing of society as a whole, or even the criminal justice system itself.

This type of classification is popular with law enforcement agencies (e.g. Victoria Police), government departments (e.g. the Australian Bureau of Statistics) and independent organisations that track the level of crime in our community. One independent organisation that classifies crimes according to their social purpose (or nature) is the Crime Statistics Agency, which is responsible for processing, analysing and publishing Victorian **crime statistics**. This agency classifies crimes into six broad divisions or categories. These divisions, together with some examples of the types of crimes included in each one, are listed in Source 1.

Weblink
Crime Statistics Agency

crime statistics information (i.e. data) collected by authorities (e.g. the police) and analysed to track the level of crime or offending in the community. Crime statistics also track the types and levels of sentences given to convicted offenders

Divisions of crime	Examples of the types of crimes included in this division
Division A: Crimes against the person (i.e. protecting individuals)	Homicide (e.g. murder and manslaughter), assault, sexual offences, dangerous and negligent acts endangering people, stalking, harassment and threatening behaviour
Division B: Property and deception offences (i.e. protecting property)	Arson, property damage, burglary or breaking and entering, theft, deception and bribery
Division C: Drug offences (i.e. protecting society)	Dealing and trafficking drugs, manufacturing drugs, drug use and drug possession
Division D: Public order and security offences (i.e. maintaining public order and security)	Weapons and explosives offences, public security offences (e.g. terrorism offences), and disorderly and offensive conduct
Division E: Justice procedures offences (i.e. protecting justice and the rule of law)	Perjury (i.e. giving false evidence under oath) and contempt of court
Division F: Other offences (i.e. protecting rights and cultures, and improving society)	Regulatory driving offences (e.g. drink-driving, dangerous driving and driving under the influence of drugs or alcohol) and transport regulation offences (e.g. travelling without a valid ticket)

Source 1 The divisions of crime, as classified by the Crime Statistics Agency



Source 2 Aggravated carjacking (i.e. carjacking involving a weapon or that results in a person's injury) is classified as a crime against the person.



Source 3 Arson is classified as a crime against property, or property offence.



Source 4 Drink-driving is classified as a regulatory driving offence.

The type of offender or victim

When criminal offences are committed by, or impact, a specific social group, these offences gain the attention of the media, law enforcement agencies, government and the general community. As a result, the illegal behaviour is often labelled as a specific category of crime that needs to be monitored and addressed. Some classifications of crime according to the type of offender or victim include:

- cyber-crime
- prejudice motivated crime
- organised crime
- juvenile crime
- white-collar crime.

Cyber-crime

Cyber-crimes (also known as e-crimes) are criminal offences that are committed using computers or other electronic systems and devices. Common examples of cyber-crime include online fraud, the creation of malicious software (e.g. malware and viruses), and 'computer hacking' to dishonestly gain personal financial data.

cyber-crime a criminal offence in which the use of computers or information communication technologies (ICT) is an essential and central part of the offending



Source 5 Cyber-crimes are criminal offences that are committed using computers or similar devices.

Prejudice motivated crime

prejudice motivated crime
a criminal offence motivated by prejudice, intolerance and bias towards the victim (e.g. because of their race, religion, sex, age, or sexual or gender identity)

Prejudice motivated crimes (sometimes referred to as hate crimes) are criminal offences motivated by prejudice, intolerance and bias towards another person or group based on a personal characteristic (e.g. a person's race, religion, sex, age, or sexual or gender identity). Prejudice motivated crimes, including racial and religious vilification, can not only have a devastating impact on individual victims, but can also increase feelings of insecurity and fear within the wider community.

The following scenario, in which a man was sentenced for public nuisance, discusses prejudice motivated crime.

Actual scenario

Victorian man sentenced for 'vile' behaviour

In August 2022, a 29-year-old Victorian man pleaded guilty to the charge of public nuisance after he and another man stuck more than 50 Nazi 'swastika' stickers throughout the Melbourne suburb of Caulfield, which has a large Jewish community. The offender was sentenced to an 18-month **community correction order** (requiring him to undertake 200 hours of community service and not reoffend). During sentencing, the presiding magistrate commented that the offending was 'one of the most disgusting, vile, repugnant acts of anti-Semitism and racial behaviour' that he had ever seen and, had it not been for the offender's **guilty plea**, he would have been sentenced to imprisonment.

The offender was charged one day after the Victorian Government introduced a **bill** (i.e. a proposed law) into the Victorian Parliament to ban the general public display of symbols of Nazi ideology, such as the Nazi 'swastika' (more correctly called the *Hakenkreuz*). These are commonly accepted as being highly offensive and harmful symbols of racism and hatred. Under the new law, which was passed by the Victorian Parliament in June 2022, a person found guilty of displaying symbols of Nazi ideology can be fined up to approximately $23 000 and/or sentenced to a maximum 12 months' imprisonment.

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

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

bill
a proposed law that has been presented to parliament to become law. A bill becomes an Act of Parliament once it has passed through all the formal stages of law-making (including royal assent)

Organised crime

Organised crime refers to criminal offences undertaken in a planned and ongoing manner by organised criminal syndicates or gangs. Organised crime often involves illegal activities such as drug manufacturing and trafficking, money laundering, the sale of illegal firearms, and illegal prostitution and gambling, as illustrated in the scenario below. These criminal syndicates have their own rules, leadership structures and members, and may operate within a specific neighbourhood or country, or internationally.

organised crime
a criminal offence undertaken in a planned and ongoing manner by organised syndicates or gangs

Actual scenario

Drugs imported by criminal gang members

Two farmers from Griffith in New South Wales, Pasquale ('Pat') Barbaro and Saverio Zirilli, were convicted of attempting to import 4.4 tonnes of ecstasy (approximately 15 million pills) in cans of Italian peeled tomatoes in 2008. Barbaro and Zirilli pleaded guilty to three drug offences in the Supreme Court of Victoria. The two conspired to import the drugs, from Italy into Melbourne, with at least six other men. The estimated street value of the drugs was $122 million. At the time, it was the largest amount of ecstasy ever seized in Australia.



Source 6 In 2008, ecstasy was discovered in what appeared to be cans of peeled tomatoes from Italy.

The Court heard that Barbaro was the head of a criminal gang and Zirilli was his 'right-hand man'. The Supreme Court judge commented that the money used to pay for the drug deal indicated that the gang had connections to an international crime organisation. Barbaro was sentenced to life imprisonment with a non-parole period of 30 years and Zirilli was sentenced to 26 years' imprisonment with a non-parole period of 18 years. Their co-offenders were convicted in separate trials, and are also serving lengthy prison sentences.

Both Barbaro and Zirilli unsuccessfully appealed the severity of their sentences to the Victorian Court of Appeal and then the High Court of Australia.

In 2019, evidence was presented to a special government inquiry (the **Royal Commission** into the Management of Police Informants) that suggested Victoria Police used information secretly provided to them by a police informant (criminal defence **barrister** Nicola Gobbo, also known as 'Lawyer X') to assist their investigation and prosecution of Barbaro and Zirilli. As a result, Barbaro, Zirilli and their co-offenders lodged applications to appeal against their convictions on the basis that they did not receive fair trials because their lawyer (Gobbo) provided crucial information to the police, without their knowledge or permission, which assisted their prosecution. In 2021 and 2022, the Victorian Court of Appeal made decisions on legal issues related to Barbaro and Zirilli's applications, but as of July 2023, the appeal process was still in progress and the two men remain in prison.

DPP (Cth) v Barbaro & Zirilli [2012] VSC 47 (23 February 2012)

Juvenile crime

Juvenile crimes are criminal offences undertaken by young people aged between 10 and 18 years. Common juvenile crimes include fare evasion, assault, property damage (e.g. graffiti, vandalism) and theft (e.g. shoplifting, theft of a bicycle, or theft of a motor vehicle).

White-collar crime

White-collar crimes are criminal offences undertaken by people who work in government, in businesses or in the corporate world. These people, who are often well paid and hold trusted positions of employment, use their position and/or influence to gain financial advantage. Common white-collar crimes include theft, fraud, tax evasion and investment scams.

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

barrister
an independent lawyer with specialist skills in dispute resolution and advocacy who is engaged on behalf of a party (usually by the solicitor). In Victoria, the legal profession is divided into two branches: solicitors and barristers

juvenile crime
a criminal offence undertaken by a young person aged between 10 and 18 years

white-collar crime
a criminal offence undertaken by people who work in government, in businesses or in the corporate world

The seriousness of the offence

Crimes can also be classified according to the seriousness of the offence. Crimes are either:

- **indictable offences** – serious crimes generally heard and determined in the higher courts (i.e. the County Court and Supreme Court) before a judge and jury, or
- **summary offences** – minor crimes heard and determined in the Magistrates' Court by a magistrate.

More information about summary and indictable offences is provided in Topic 4.5.

The following scenario provides an example of a person who was charged with both summary and indictable offences.

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

Actual scenario

Anti-lockdown protester jailed

In June 2022, a County Court judge sentenced a 42-year-old man to 26 months and 14 days in prison (with a minimum non-parole period of 20 months) after he pleaded guilty to one charge of assaulting an emergency worker on duty, one charge of knowingly possessing an explosive substance for unlawful object (or means) and one charge of recklessly causing injury. Under the *Crimes Act 1958* (Vic), each of these three indictable offences has a maximum penalty of five years' imprisonment. The offender also pleaded guilty to nine summary offences, including one charge of cruelty to an animal and four charges of possessing a prohibited weapon, and gave consent for these charges to be dealt with by the County Court.

The charges arose following the offender's attendance at two anti-lockdown protests in Melbourne during the 2020–2021 COVID-19 pandemic: one in October 2020 and the other in July 2021.

During the October 2020 protest, the offender and approximately 2000 other protesters breached Victorian Government lockdown restrictions (which banned people from gathering together in groups of more than 10 people and required social distancing



Source 7 A number of people were arrested at anti-lockdown protests that took place in Melbourne during the 2020–21 COVID-19 pandemic.

of 1.5 metres). The offender pushed through a roadblock that had been established by the police to prevent the protesters' movements, and became involved in a struggle with a police officer. During the struggle, the offender yelled obscene language at the police officer and pulled the officer's cap from his head. Moments later the offender used a flagpole to strike a police horse. The incidents were captured on police body cameras.

Approximately three weeks after the protest, police investigators arrested the offender and searched his home. Various items were seized, including an extendable baton, two flick-knives, cans of capsicum spray and a number of firecrackers.

During the second protest in July 2021, which was attended by approximately 3000 protesters, the offender injured one police officer, and endangered the safety of others, by throwing an orange bollard into the air.

During the plea hearing (which is a hearing where the judge or magistrate hears from the parties about the relevant factors that should be considered when sentencing the offender), the Court heard that while the offender had a number of previous convictions, and had served time in prison, he also had a solid employment history, and lived with – and assisted with the care of – his brother. The offender had also undertaken voluntary work within the community for a number of years.

DPP v Basic [2022] VCC 920 (21 June 2022)

4.4 Check your learning

Remember and understand

1 **Describe** the role of the Crime Statistics Agency.

2 **Classify** the following crimes according to the social purpose (or nature) of the offence:
   - **a** murder
   - **b** drug trafficking
   - **c** home invasion
   - **d** possessing a prohibited weapon
   - **e** fare evasion
   - **f** swearing in public.

Examine and apply

3 Read the scenario 'Victorian man sentenced for "vile" behaviour'.
   - **a** **Classify** the crime committed by the offender in this case according to its social purpose (or nature).
   - **b** **Classify** the criminal offence of intentionally displaying a symbol of Nazi ideology according to the type of offender or victim and the seriousness of the offence.
   - **c** In early 2023, the Victorian Government said it would seek to ban people from using the Nazi salute. In a small group, discuss whether you think the government should do this. In your discussions, consider the characteristics of an effective law (see Topic 3.3).

4 Read the scenario 'Drugs imported by criminal gang members'.
   - **a** **What** aspects of this case indicate that Barbaro and Zirilli's actions are examples of organised crime?
   - **b** **Classify** the offences committed in this case according to their social purpose (or nature), the type of offender or victim, and the seriousness of the offence.

5 Read the scenario 'Anti-lockdown protester jailed'.
   - **a** The offender was charged with nine offences. **Identify** five of these offences and **classify** each offence according to its social purpose (or nature) and the seriousness of the offence. **Justify** your choices.
   - **b** With reference to the case, **distinguish** between the two elements of a crime.
   - **c** **Suggest** one way the presumption of innocence may have been upheld in this case.
   - **d** Based on the facts provided, **discuss** whether you agree with the sentence imposed on the offender.

6 Research a recent legal case and **classify** the type of crime committed according to its social purpose (or nature) (according to the divisions used by the Crime Statistics Agency), the type of offender or victim, and the seriousness of the offence. **Justify** your selections.

4.5 Summary offences and indictable offences

Key knowledge

In this topic, you will learn about:

- the distinction between summary offences and indictable offences.

Study tip

You are required to distinguish between summary offences and indictable offences using examples. 'Distinguish' means to identify differences between concepts, features and processes. To distinguish between these two types of offences, use words and phrases such as 'on the other hand', 'whereas', 'in contrast' and 'this is different from'.

As you have already explored in this chapter, there are two types of offences: summary offences and indictable offences. The criminal justice system uses different procedures when it deals with summary offences (minor crimes) as opposed to indictable offences (serious crimes).

Summary offences

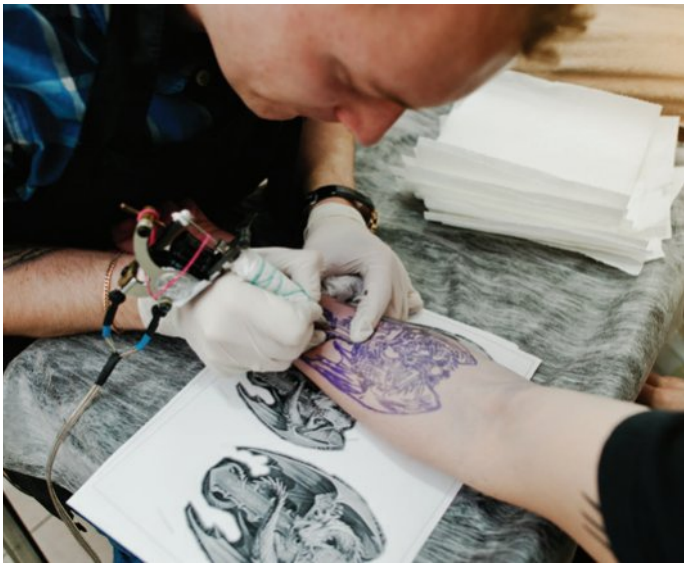
Summary offences are minor criminal offences generally heard in the Magistrates' Court. They are less serious types of crime. Summary offences include drink-driving, disorderly conduct, and minor assaults.

Many summary offences are contained in the *Summary Offences Act 1966* (Vic), but there are many other summary offences listed in various other Victorian statutes and regulations. Most crimes committed in Victoria are summary offences.

To hear a case summarily means to hear it without a jury. Therefore, summary offences are determined by a magistrate. The court procedures used for summary offences are less complex than those used for indictable offences.

Indictable offences

Indictable offences are serious criminal offences generally heard by a judge (and a jury if the accused pleads not guilty) in the County Court or the Supreme Court of Victoria. Indictable offences include homicide offences (murder and manslaughter), culpable driving causing death, and rape. As a general rule, an offence in the *Crimes Act 1958* (Vic) is an indictable offence unless the Act states it is a summary offence.



Source 1 Tattooing a person aged under 18 years is a summary offence.



Source 2 Carjacking is an indictable offence.

Indictable offences heard summarily

The law allows some **indictable offences to be heard and determined summarily**. This means some indictable offences can be heard and determined as if they are minor offences in the Magistrates' Court by a magistrate, instead of in the County Court or the Supreme Court of Victoria by a judge and jury.

indictable offence heard and determined summarily
a serious offence that is dealt with as a summary offence if the court and the accused agree

penalty unit
a measurement used to calculate the amount of a fine. The government can change the value of a penalty unit to increase the amount of a fine

An indictable offence cannot be heard summarily in the Magistrates' Court:

- if it is punishable by more than 10 years' imprisonment or a fine greater than 1200 **penalty units** (which is approximately $230 000), and
- without the consent of the accused.

An accused may choose to have their charges heard summarily because a summary hearing is often quicker and cheaper than a trial. In addition, an accused may receive a lesser punishment because the maximum term of imprisonment a magistrate can impose is capped at no more than two years for a single offence and five years for multiple offences.

The indictable offences that can be heard and determined summarily are listed in the *Criminal Procedure Act 2009* (Vic). Examples of these types of crimes include less serious assaults, causing criminal damage worth less than $100 000, theft of less than $100 000, and computer offences such as unauthorised access.



Source 3 Causing criminal damage worth less than $100 000 is an indictable offence that can be heard summarily.

The distinction between summary offences, indictable offences, and indictable offences heard summarily is outlined in Source 4.

Type of offence	Distinguishing features
Summary offences	• Minor crimes • Generally heard in the Magistrates' Court • The final hearing, at which both parties put their case before the court, is known as a hearing • A magistrate determines whether the person charged with a crime is guilty
Indictable offences	• Serious crimes • Tried in the County Court or Supreme Court • The final hearing, at which both parties put their case before the court, is known as a trial • When an accused pleads not guilty, a jury determines the verdict (i.e. whether or not the accused is guilty beyond reasonable doubt)
Indictable offences heard summarily	• Serious crimes that may be heard summarily (i.e. without a jury) • Heard in the Magistrates' Court if the court determines it is appropriate and the accused consents • A magistrate determines whether the person charged with a crime is guilty

Source 4 The distinction between summary offences, indictable offences, and indictable offences heard summarily

4.5 Check your learning

Remember and understand

1 **Describe** three differences between summary offences and indictable offences.

2 **a** Using an example, **explain** what is meant by the term 'indictable offence heard summarily'.

b **Identify** two conditions that must be satisfied before an indictable offence can be heard summarily.

Examine and apply

3 **Classify** the following crimes as a summary offence, an indictable offence, or an indictable offence heard summarily, You will need to access the *Crimes Act 1958* (Vic), including Schedule 2 of that Act:

a criminal damage of property worth $80 000

b sexual exposure

c using offensive language in public

d growing a commercial quantity of marijuana

e using a firearm to resist arrest

f drink-driving

g home invasion.

4 Indicate whether the following statements are correct. **Justify** your choice.

a The County Court generally hears all offences.

b The Magistrates' Court can only hear summary offences.

c All indictable offences heard in the County Court are determined by a judge alone.

Reflect and evaluate

5 **Explain** whether you think it is appropriate that some indictable offences can be heard as if they were summary offences. Consider the perspectives of the accused, the prosecution and the victim, as well as issues such as court resources.

Weblink
Crimes Act 1958 (Vic)



Source 5 Murder is an indictable offence, which means it is a serious offence tried in the Supreme Court.

4.6 Possible participants in a crime

Key knowledge

In this topic, you will learn about:

- possible participants in a crime such as principal offenders and accessories.

A crime can involve more than one offender. For example, one person may plan and organise a theft while another person may carry out the unlawful act of taking the goods. Both people are involved in the crime in different ways. The two main participants in a crime, which are explored below, are the principal offender and the accessory.

Principal offender

principal offender
a person who has carried out the *actus reus* (guilty act) and has therefore directly committed the offence

A **principal offender** is a person who commits an offence and has carried out the *actus reus* (the act or omission that constitutes a crime).

Any person who is involved in a crime is also considered to be a principal offender. This includes any person who intentionally assists, encourages or directs another person to commit a crime. What it means to be 'involved in a crime' – as defined in section 323 of the *Crimes Act 1958* (Vic) – is outlined in Source 1.

Participants in a crime A person is 'involved in' a crime when they ...	
intentionally assist, encourage or direct another person to commit a crime	make an agreement with another person to commit a crime together
intentionally assist, encourage or direct another person to commit a crime knowing it is highly likely that anothercrime may be the result	make an agreement with another person to commit a crime together knowing it is highly likely that another crime may be the result

Source 1 Participants involved in a crime are treated as principal offenders.

In simple terms, a person will be involved in a crime if they assist with the planning of a crime or encourage another person to commit a crime. A person involved in a crime can be found guilty whether or not other participants (including the principal offender who undertook the wrongful action) have also been prosecuted or convicted.

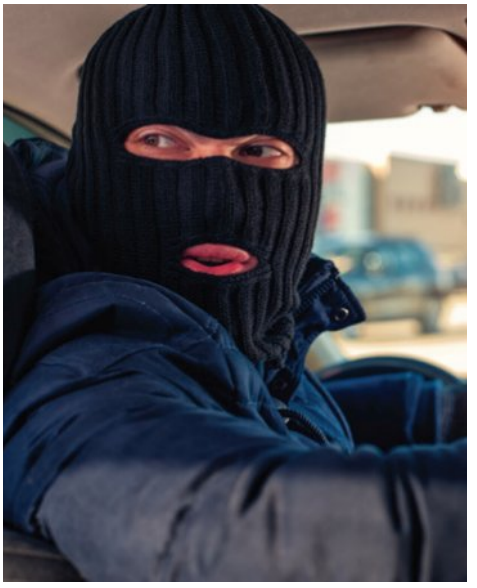
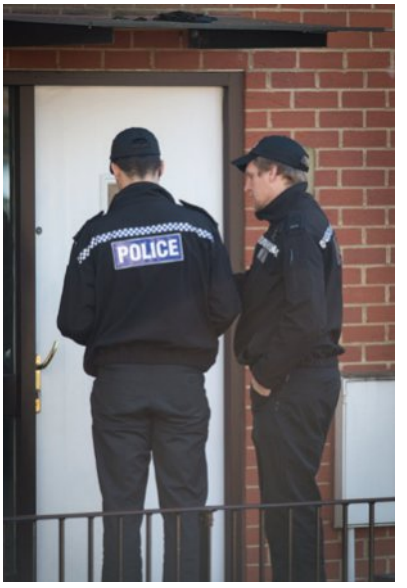
Accessory

accessory
a person who does an act to help another person who has committed a serious indictable offence (called the principal offender) to avoid being apprehended, prosecuted, convicted or punished

An **accessory** is a person who, without lawful excuse, assists a principal offender after a crime has been committed. This assistance includes helping the principal offender avoid being arrested, prosecuted, convicted or punished for the crime.

To be an accessory, a person must believe or know that the offender has committed a serious indictable offence (i.e. an indictable offence punishable by five years or more in prison). An accessory can be found guilty of an offence regardless of whether the principal offender is found guilty.

Source 2 illustrates the different participants in a crime. The man who is robbing the store owner is a principal offender. His friend, who has helped organise the robbery and is driving the getaway car, is also considered to be a principal offender. The friend who owns the house where the principal offenders are hiding and who is intentionally helping the principal offenders avoid being arrested by the police is an accessory.

Source 2 Types of participants in a crime

4.6 Check your learning

Remember and understand

1 With reference to the participants in a crime, **distinguish** between a 'principal offender' and an 'accessory.'

Examine and apply

2 For each of the following scenarios, **identify** the principal offenders and accessories. Assume each person is over 18 years of age.

- **a** Lochie goes into a jewellery store and commits an armed robbery. Conner keeps a lookout and waits for Lochie in a getaway car. Liam knows nothing about the crime until his friends ask him to hide the jewellery. He agrees and buries it in his backyard.
- **b** Alex kills a man. They panic and call their mate Walter. Walter agrees to help Alex dispose of the body.
- **c** Eleanor and her sister, Michaela, agree to go 'shopping' so they can steal clothing. Eleanor is present when Michaela stuffs a shirt into her bag. Eleanor does not discourage Michaela but she does not personally steal anything.
- **d** Cornell, the leader of a drug-trafficking gang, orders Jack (who owes him money) to kidnap and injure Gemma. Tony, who knew nothing about the kidnapping until Jack arrived at his house one day later, agrees to lend Jack his car so he can drive to another state.
- **e** Minami works in an electrical appliance warehouse. She cuts the wires to the burglar alarm and deliberately leaves a fire door unlocked so Toshi can steal items from the warehouse that night.

Chapter

4

Review

Top assessment tips from Chapter 4

1 You should to be able to classify crimes in the three ways described in this chapter. Remember that different organisations (e.g. the police, the courts, the Crime Statistics Agency and the media) classify crimes in different ways.

2 'Distinguishing' between crimes means to show the differences between them. When distinguishing between different types of crime you should provide examples to support your response. This includes examples of indictable and summary offences.

3 The presumption of innocence, burden of proof and standard of proof are key concepts within our criminal justice system. These concepts are examined in both Unit 1 and Unit 3 of the Legal Studies course, so it is a good idea to start identifying these key concepts in scenarios now.

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 assessment tasks are composed of a variety of questions. A great way to identify the difficulty of the question is to look at the command term (or terms) used in the question and the mark allocation. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 Distinguish between the following concepts:
   - **a** burden of proof and standard of proof
   - **b** *mens rea* and *actus reus*
   - **c** summary offence and indictable offence.

(6 marks)

Difficulty: medium

2 Explain why the following statements are incorrect.
   - **a** The only purpose of criminal law is to compensate victims for their loss as a result of crimes.
   - **b** A person who assists in planning and organising a crime but does not directly commit the crime is known as an accessory.
   - **c** A person aged under 14 years old cannot be charged or convicted of a criminal offence in Victoria.

(9 marks)

Difficulty: high

3 Describe **two** processes that uphold the presumption of innocence in a criminal case. Discuss the extent to which these processes achieve fairness for the accused, for victims, and for society as a whole.

(10 marks)



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Practice assessment task

Before attempting this practice assessment task, re-read the information at the beginning of this chapter about the learning outcome, key knowledge and key skills.

Use the stimulus material to answer the questions below. It is not intended that this material will provide you with all the information to fully answer the questions.

Evelyn caught in police blitz

Evelyn, 16, was caught during a police blitz at a licensed venue, using a proof-of-age card that suggested she was 18. Evelyn had used the proof-of-age card to gain entry to the venue.

Evelyn has been charged under section 83A(1) of the *Crimes Act 1958* (Vic). This section states that 'a person must not make a false document with the intention that he or she, or another person, shall use it to induce another person to accept it as genuine, and by reason of so accepting it do or not do some act to that other person's, or to another person's prejudice'. It is punishable by a maximum term of 10 years in prison.

The prosecution is seeking to rely on evidence that Evelyn used her friend's birth certificate and healthcare card to create the proof-of-age card.

Practice assessment task questions

1 Who has the burden of proof in this case? To what standard does it need to be proved?

(2 marks)

2 How would this crime be classified in terms of the nature of the behaviour? In your answer, refer to the Crime Statistics Agency's classifications of crime.

(4 marks)

3 Evelyn believes that she is an accessory to a crime. Explain to Evelyn why she is incorrect.

(4 marks)

4 Has Evelyn been charged with a summary offence or an indictable offence? In your answer, provide **two** differences between summary offences and indictable offences.

(5 marks)

5 Define the term 'presumption of innocence.' Outline **two** ways that it will be protected in this case.

(5 marks)

6 Describe the elements of the crime that need to be proven before Evelyn can be found guilty of the crime of making a false document. Explain whether you think that each of the elements will be proved.

(10 marks)

Total: 30 marks

Chapter checklist

Now that you have completed this chapter, reflect on your ability to understand the key knowledge from the Study Design. If you feel you need some more practice, use the revision links to revisit the key knowledge.

Remember that you will also need to be able to draw on and understand the key skills outlined in the Study Design.

Key knowledge	I understand this	I need some more practice to understand this	Revision link
• The purposes of criminal law	☐	☐	Go back to Topic 4.1.
• The presumption of innocence	☐	☐	Go back to Topic 4.2.
• Key concepts of criminal law, including the elements of a crime: *actus reus* and *mens rea*, strict liability, the age of criminal responsibility, the burden of proof and the standard of proof	☐	☐	Go back to Topic 4.3.
• Types of crime, such as crimes against the person and crimes against property	☐	☐	Go back to Topic 4.4.
• The distinction between summary offences and indictable offences	☐	☐	Go back to Topic 4.5.
• Possible participants in a crime such as principal offenders and accessories	☐	☐	Go back to Topic 4.6.

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

Chapter 4
Chapter review quiz

Revision notes
Chapter 4

Chapter summary
Chapter 4

Quizlet
Revise key legal terms from this chapter.

Chapter

5

Indictable offences



Source 1 In Victoria, murder is an indictable offence. In this chapter, you may choose to study one or two indictable offences. Options include murder, culpable driving causing death and arson.

Outcome

By the end of **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6), you should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.

Key knowledge

In this chapter, you have the option of choosing two indictable offences. For each criminal offence, you will learn about:

- the elements of the offence
- possible defences
- possible sanctions
- trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
- the possible impact of the offence on individuals and society.

Key skills

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

- define and use legal terminology
- research and analyse relevant information about criminal law and offences
- use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to two actual and/or hypothetical scenarios
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two criminal offences.

Key legal terms

arson the intentional and unlawful use of fire to destroy or damage another person's property

culpable driving causing death the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner, or while under the influence of drugs or alcohol

defence to a crime a justification or lawful 'reason' given by an accused person as to why they are not guilty of a criminal offence

homicide the killing of another person without legal justification. Murder, manslaughter, infanticide (i.e. killing a baby), child homicide, and culpable driving causing death are homicide offences

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 determine questions of fact in a trial and reach a decision (i.e. a verdict)

murder the unlawful and intentional killing of a human being by a person who acted voluntarily and without any lawful justification. Murder is the most serious homicide offence

Key legal cases

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

Advice to teachers and students

In **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6) you are required to study **two criminal offences** in detail.

You may choose to study	Offences	Page
• TWO indictable offences (from Chapter 5)	5.2 Murder	111
	5.3 Culpable driving causing death	122
	5.4 Arson	133

OR

You may choose to study	Offences	Page
• TWO summary offences (from Chapter 6)	6.2 Assault	154
	6.3 Minor theft	167
	6.4 Offensive behaviour	182

OR

You may choose to study	Offences	Page
• ONE indictable offence (from Chapter 5) • ONE summary offence (from Chapter 6)	See above	See above

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Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

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



Warm up!
Check what you know about indictable offences before you start.

Quizlet
Test your knowledge of the key legal terms in this chapter by working individually or in teams.

5.1 General defences to crime

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

defence to a crime
a justification or lawful 'reason' given by an accused person as to why they are not guilty of a criminal offence

murder
the unlawful and intentional killing of a human being by a person who acted voluntarily and without any lawful justification. Murder is the most serious homicide offence

In Unit 1 – Area of Study 2, you are required to examine two criminal offences in detail. As discussed in Chapter 4, criminal offences can be classified as either **indictable offences** or **summary offences**. Indictable offences are serious crimes that are generally heard in the County Court or Supreme Court. If a person accused of an indictable offence pleads not guilty, the case is heard before a judge and jury. In contrast, summary offences are minor crimes that are generally heard in the Magistrates' Court before a magistrate.

As part of your examination of these offences, you must consider possible **defences to a crime** that an accused can raise in response to a charge. A defence is a justification or lawful 'reason' for a crime. If successfully argued, a defence may lead to an accused being found not guilty of the crime with which they have been charged, or found guilty of a lesser offence.

Some of these defences, known as 'general defences', can be used to contest a variety of different charges under the criminal law. For example, 'self-defence' is a general defence that can be used to defend a number of criminal offences, such as **murder**, manslaughter and assault. However, self-defence cannot be used to defend offences such as theft.

In contrast, other defences can only be used to defend a specific offence. For example, the defence of 'right of claim' – where a person honestly believes they are the rightful owner of property – can only be used in relation to property offences such as theft.

In this topic, you will examine the main general defences available to a person who has been accused of a crime. Then, in Topics 5.2 to 5.4, you will consider which of these general defences apply to the specific crimes of murder, culpable driving causing death and arson, as well as any other defences that are specific to the crimes.

Defences to crime

In Victoria, the common (or general) defences to crime include:

- self-defence
- mental impairment
- duress
- sudden or extraordinary emergency
- automatism
- intoxication
- accident.

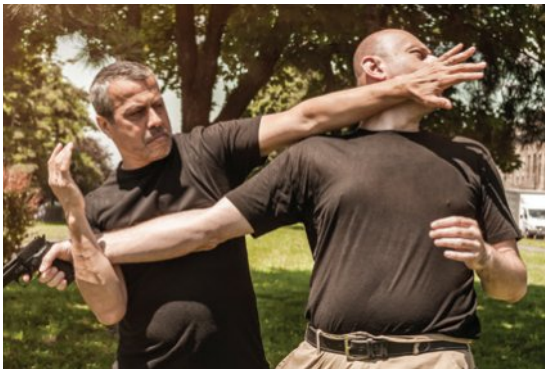
Each of these defences is examined in more detail below.

Defence 1 – Self-defence

Generally, an accused may use self-defence as a defence to a crime if they:

- believed that their actions were necessary to protect or defend themselves, and
- perceived their actions to be a reasonable response in the circumstances.

Once an accused raises self-defence (i.e. presents evidence that suggests there was a reasonable possibility that they acted in self-defence when committing the alleged crime),



Source 1 The law allows people to take reasonable action (based on the circumstances) to protect themselves.

the burden of proof falls on the prosecution to prove, beyond reasonable doubt, that the accused did not act in self-defence.

Defence 2 – Mental impairment

An accused may use the defence of **mental impairment** if, at the time of the offence, they were suffering from a mental illness and, as a result, they:

- did not know what they were doing because they had little understanding of the nature and quality of their actions, and
- did not know their conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

mental impairment a condition of the mind that impacts on a person's ability to know the nature and quality of their conduct, or that the conduct was wrong

One important feature of the defence of mental impairment is that an accused is presumed to *not* be suffering a mental impairment (i.e. is presumed to be sane) unless it can be proven otherwise. This means that, given mental impairment may be raised by either the prosecution or the defence at any time during a trial, the burden of proving the existence of mental impairment falls on the party who raises it. In most cases, the accused raises the defence of mental impairment and therefore the burden of proof is reversed, meaning the accused must prove this defence.

When mental impairment is successfully argued, it does not result in the accused being immediately released from custody. That is, the verdict is not an ordinary 'not guilty' verdict. Instead, it is a special verdict of 'not guilty by reason of mental impairment'. In such cases, the court may impose a **secure treatment order** that allows the accused to be compulsorily detained, and receive treatment, at a mental health service (e.g. a forensic mental health hospital).

secure treatment order a sanction that requires the offender to be compulsorily detained, and receive treatment, at a mental health service

In the scenario below, a woman was found not guilty of attempting to kill her ex-husband due to mental impairment.

Actual scenario

Woman attempts to kill her ex-husband

In 2018, a 44-year-old woman, referred to in court as Jane Brook (not her real name), was charged with attempting to murder her ex-husband. Brook had attempted to burn down the room in which he was sleeping. She was also charged with endangering the life of her 11-year-old son, who was in the house at the time of the offending.

After being arrested, Brook admitted to spreading a flammable liquid and starting the fire, but claimed she did so in an attempt to not only kill her ex-husband and her son, but also to kill herself. After her ex-husband awoke and ran from the room, Brook attempted to put out the fire with water and rang triple-0 (emergency) to request that an ambulance and the fire brigade attend the scene.

Subsequent investigations revealed that Brook had suffered increasing anxiety, stress and chronic depression since being diagnosed with severe breast cancer in 2017.

In April 2019, a hearing was held in the Supreme Court of Victoria to determine whether Brook was suffering a mental impairment at the time of the offending. Interestingly, in accordance with Victorian law, the case was heard and determined by a judge alone, rather than by a judge and jury, because both the prosecution and defence agreed with expert evidence that Brook was suffering from a 'severe major depressive episode' at the time of the offence.

Ultimately, the Supreme Court judge directed that Brook be found not guilty by reason of mental impairment. While she was not sentenced to a term of imprisonment, Brook was placed on a non-custodial supervision order. This order required her, among other conditions, to live in a place approved by an authorised psychiatrist and to undertake psychiatric treatment.

DPP v Brook (a Pseudonym) [2019] VSC 566 (22 August 2019)

Defence 3 – Duress

duress
strong mental pressure on someone to overcome their independent will and force them to do something

reasonable belief
an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity), and in similar circumstances, to be sensible or correct

An accused may use **duress** as a defence to any criminal offence if, at the time of the offence, they had a **reasonable belief** that:

- a threat of harm existed
- the threat would have been carried out unless the offence was committed
- committing the offence was the only reasonable way to avoid the threatened harm, and
- their conduct was a reasonable response to the threat.

In cases involving family violence, evidence of family violence may be relevant in determining whether an accused committed an act under duress. For example, in a case where a person who has been the victim of family violence intentionally caused injury to their partner in the belief that their actions were the only reasonable way to avoid the threat of harm, evidence of the family violence may be relevant in determining whether the person has acted under duress.

Once the defence raises the issue of duress (i.e. presents evidence that suggests there was a reasonable possibility the accused acted under duress), the prosecution holds the burden of proving, beyond reasonable doubt, that the accused did not act under duress.

Defence 4 – Sudden or extraordinary emergency

An accused may use sudden or extraordinary emergency as a defence to any criminal offence if, at the time of the offence, they had a reasonable belief that:

- there was a sudden or extraordinary emergency
- their actions were the only reasonable way of dealing with the situation, and
- their actions were a reasonable response to the situation.

Once an accused raises the defence of sudden or extraordinary emergency (i.e. presents evidence that suggests there was a reasonable possibility their action arose due to a sudden or extraordinary emergency), the burden of proof falls on the prosecution to prove, beyond reasonable doubt, that the accused did not act in the circumstances of a sudden or extraordinary emergency.

Hypothetical scenario

A case of sudden and extraordinary emergency

Jordan was charged with culpable driving causing death (see Topic 5.3) after the car he was driving collided with and killed a cyclist. The incident occurred after Jordan noticed a car, without a driver, rolling down the road towards a crowded tram stop. Thinking quickly, he ran to the car, opened its door and jumped into the driver's seat. While he was able to steer the car away from the tram stop, it hit the cyclist, who later died in hospital. After being charged, Jordan indicated he would raise the defence of sudden and extraordinary emergency.



Source 2 Jordan intends to raise the defence of sudden and extraordinary emergency following the tragic death of a cyclist.

Defence 5 – Automatism

An accused may use **automatism** as a defence to any criminal offence if they committed the offence involuntarily due to having, at the time of the offence, a total loss of control over their bodily movements (i.e. the accused was not conscious or aware of what they are doing) and so could not form an intention to commit a crime (***mens rea***).

The defence of automatism may be raised in a case where an accused commits an offence:

- while sleeping or sleepwalking
- while suffering concussion
- during an epileptic seizure, or
- as a result of a medical condition or because of a side effect of the proper use of medication.

Automatism is a defence that is extremely rare and difficult to prove. While the burden of proof varies according to the cause of the automatism, in general the prosecution must prove, beyond reasonable doubt, that the accused acted voluntarily (i.e. was aware of their actions when committing the offence).



Source 3 The defence of automatism may be raised in a case where the accused commits an offence while sleepwalking.

automatism
a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

mens rea
a Latin term meaning 'a guilty mind'; the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

The defence of automatism was used in the case discussed in the scenario below. This case is the primary example of the use of the defence of automatism in Australia.

Actual scenario

History of violent abuse, sudden shock

In 1990, a Western Australian woman was convicted of murdering her husband after enduring 30 years of violent abuse at his hands. During the trial, the accused claimed that there was a complete blank in her memory until she woke up with a gun and with her deceased husband next to her.

After being convicted, the accused appealed on a point of law. The High Court held that if there was evidence of an external psychological factor (i.e. severe trauma and abuse), the accused could have acted in a dissociative state. This meant that although she was sane (i.e. not mentally ill), it was possible that her actions were not under her conscious control. A new trial was ordered.

R v Falconer (1990) 171 CLR 30

Defence 6 – Intoxication

An accused may use intoxication as a defence to a criminal offence if, at the time of the offence, they acted involuntarily or without intent due to being in an intoxicated state as a result of consuming alcohol, taking drugs, or ingesting some other substance. However, in general, under the *Crimes Act 1958* (Vic), to successfully argue intoxication, the accused must prove that their state of intoxication was not self-induced. For example, they must prove that their intoxication was involuntary or due to fraud, a reasonable mistake, force, or the effects of the proper use of prescription or non-prescription medication.

Study tip

The Supreme Court of Victoria publishes an award-winning podcast called 'Gertie's Law', which provides insights into the Court's role, including in deciding criminal cases and in sentencing. It is an excellent way to hear directly from judges and other people such as barristers about their roles.

Defence 7 – Accident

As examined in Chapter 4, with the exception of strict liability offences, for an accused to be found guilty of a crime, they must have committed the crime with intention (i.e. a guilty mind – *mens rea* – must have existed at the time of the offence). This means that the prosecution must prove, beyond reasonable doubt, that the actions of the accused were deliberate and intentional.

The accused may raise the defence that the actions were an accident. This would apply if the actions the accused took to commit the offence were involuntary, unintentional or reasonably unforeseeable by an ordinary person.

Unfit to stand trial

In addition to defences to crime, a person cannot be tried for a criminal offence if they are deemed to be 'unfit to stand trial'. A person may be considered unfit to stand trial if they are unable to undertake a number of tasks at the time of their trial, including being unable to:

- understand the nature of the charges laid against them
- enter a plea
- follow the course of the trial, and
- instruct their lawyer.

Being unfit to stand trial is different to the defence of mental impairment because it refers to the condition of the accused *at the time of the trial*, whereas the defence of mental impairment refers to the condition of the accused *when they committed the offence*.

In Victoria, in cases where there is a valid question about the fitness of an accused to stand trial, an investigation will be held before the court where a jury will determine, on the balance of probabilities, whether the accused is most likely unfit to stand trial.

5.1 Check your learning

Remember and understand

1 Using an example, **define** the term 'defence'.

2 **Identify** two defences to murder.

3 **Describe** two possible circumstances that may enable an accused to raise the defence of automatism.

Examine and apply

4 **Describe** the difference between the defences of self-defence and duress. Refer to two hypothetical scenarios to illustrate your response.

5 Read the scenario 'History of violent abuse, sudden shock'.
   - **a** **What** crime was the accused convicted of committing?
   - **b** **Identify** and **explain** the defences the accused could have raised in her High Court appeal.

6 Read the scenario 'Woman attempts to kill her ex-husband'.
   - **a** **State** the crime the accused was charged with committing.
   - **b** **Describe** the accused's defence.
   - **c** **Explain** why this case was heard and determined by judge alone rather than by a jury.
   - **d** **Outline** the outcome of this case.
   - **e** After this case concluded, the Supreme Court ordered that no person was permitted to publish any information that might enable the identification of the accused, her ex-husband or their son for two years. **Suggest** a possible reason for this court order.

Reflect and evaluate

7
   - **a** **Explain** what is meant by an accused being 'unfit to stand trial'.
   - **b** There have been suggestions that the law should be changed so that a judge, not a jury, makes the decision about whether an accused is fit to stand trial. **Discuss** whether the issue of fitness to stand trial should be decided by a judge or by a jury.

5.2 Murder

Key knowledge

In this topic, you will learn about:

- the criminal offence of murder, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society.

Murder is the unlawful and intentional killing of a human being by a person who acted voluntarily and without any lawful justification. It is part of a group of crimes known as **homicide**, which are all crimes that involve the killing of another person without legal justification. Examples of other types of homicide include:

- **manslaughter** – the unintentional killing of a person due to a reckless, dangerous act or negligent behaviour
- **infanticide** – the killing by a mother of a child under two years of age while suffering a mental condition caused by the effects of that child's birth
- **child homicide** – the killing of a child under six years of age in circumstances that would normally be manslaughter
- **culpable driving causing death** – the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or under the influence of drugs or alcohol
- **homicide by firearm** – the killing of a person by discharging a firearm (gun) in circumstances that would normally be manslaughter (e.g. unintentionally killing a person by recklessly or negligently firing a gun).



Source 1 Murder is the most serious of the homicide offences.

Murder is the most serious of the homicide offences. On the scale of seriousness, murder is a 'category 1' offence, which means the offender must be sentenced to imprisonment (i.e. spend time in prison), unless a very narrow set of exceptional circumstances exist. The maximum penalty for murder is life imprisonment.

homicide
the killing of another person without legal justification. Murder, manslaughter, infanticide (i.e. killing a baby), child homicide and culpable driving causing death are homicide offences

manslaughter
the unlawful killing of a person due to a reckless, dangerous act or negligent behaviour

infanticide
the killing by a mother of a child under two years of age while suffering a mental condition caused by the effects of that child's birth

child homicide
the killing of a child under six years of age in circumstances that would normally be manslaughter

culpable driving causing death
the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner, or while under the influence of drugs or alcohol

homicide by firearm
the killing of a person by discharging a firearm (gun) in circumstances that would normally be manslaughter (e.g. unintentionally killing a person by recklessly or negligently firing a gun)

Elements of murder

For a person to be found guilty of murder, the prosecution must prove each of the following four elements beyond reasonable doubt:

- the killing was unlawful
- the accused's acts were voluntary
- the accused committed acts that caused the victim's death
- the accused acted with intent to kill or cause serious harm.

These four elements of murder are further discussed on the following pages.

Element 1 – The killing was unlawful

The prosecution must prove the accused did not have a legal justification (or lawful reason) for causing the other person's death. Examples of a legal justification for killing another person include a soldier killing an enemy in battle, police acting in the course of their duties, and a person acting in reasonable self-defence or under duress.

Element 2 – The accused's acts were voluntary

The prosecution must prove the accused committed the acts when they were awake, aware and in control of their bodily actions. For example, the accused must not have committed the acts while sleepwalking or during an epileptic seizure. The accused's action must have also been deliberate and not the result of an unintentional accident (e.g. the result of the accused unintentionally falling over).

Element 3 – The accused committed acts that caused the victim's death

causation
the direct relationship between one event (Event 1) and another event (Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

The prosecution must prove the accused committed acts that contributed significantly and substantially to the victim's death. That is, the prosecution must prove that the acts were committed (such as the shooting of a gun), and must also prove **causation**, meaning it must be proven that there was a direct and unbroken causal link between the accused's actions (e.g. the shooting of a gun) and the death of the victim (e.g. dying because of a bullet wound). If the death would not have occurred, when it did, without the accused's actions, it is likely the accused caused the victim's death. By contrast, if something intervenes to break the causal link between the accused's actions and the death, then the accused may not be guilty of murder.

The victim must be a living person who has been born. That is, the victim must be in a living state, and not, for example, be an unborn baby or an animal. If the victim is not a living person, it may still be a crime but a different type of crime.

The scenario below demonstrates a break in the causal link.

Hypothetical scenario

A break in the causal link

Stefan and Damon had a disagreement and Stefan punched Damon. Stefan left Damon under a tree. Damon decided to stay under the tree for a little while, even though he was fine to get up. Minutes later, a bolt of lightning struck the tree. A tree branch fell and killed Damon.

In this example, the lightning breaks the causal link between Stefan's actions and Damon's death. It is likely that the cause of Stefan's death was not the punch, but rather the lightning.



Source 2 A lightning strike broke the causal link. As a result, there was no longer a direct connection between Stefan punching Damon, and Damon's death.

Element 4 – The accused acted with intent to kill or cause serious harm

The prosecution must prove the accused acted with a 'guilty mind' (i.e. that the mental element of a crime, *mens rea*, existed at the time of the killing). In particular, the prosecution must prove that when the accused committed the acts, they either:

- intended to kill someone or cause them really serious injury, or
- knew that it was probable that death or really serious injury would be a result of their actions.

Defences to murder

For a person to be found guilty of murder, the prosecution must prove each of the four elements of murder beyond reasonable doubt. If the prosecution fails to prove each of these elements, it will result in the accused being found not guilty of murder. The accused may therefore try to argue that one, or more, of the elements is missing. For example, the accused may argue that:

- they did not intend to kill or seriously harm the person
- there was a break in causation, and their actions did not significantly and substantially cause the victim's death
- their actions were not unlawful.

In some cases where one of the elements of murder is missing, the accused may be charged with and found guilty of an alternative offence (provided that elements for the alternative offence are proven). For example, if all the elements of murder can be proven in a case, except intention (i.e. *mens rea*), the accused may be charged with manslaughter, which is the unintentional killing of a person due to a reckless, dangerous act or negligent behaviour.

Other than defending the charge of murder on the basis that one or more of the elements of murder have not been satisfied, the accused can also rely on a defence. Several defences to a charge of murder are available. These defences generally show that the accused did not or could not form the intention to commit the offence.

General defences to murder

The general defences to murder are listed below (see Topic 5.1 for more details on each of these):

- self-defence – in murder cases, the accused must believe their actions were necessary to protect themselves or another person from death or significant serious injury
- mental impairment
- duress – in murder cases, the threat of harm placing the accused under duress must be a threat to inflict death or significant serious injury. Evidence of family violence may be used to prove a person acted under duress. Duress cannot be raised if the threat of harm comes from a person with whom the accused voluntarily associated to commit an act of violence
- sudden or extraordinary emergency – in murder cases, the sudden or extraordinary emergency must involve risk of death or serious injury
- automatism
- intoxication
- accident.

Study tip

A question in an assessment task may require you to determine whether a crime has been committed. To maximise your chances of being awarded full marks, check whether each of the elements of the crime exist. For example, all the elements of murder must be proved for an accused to be found guilty of murder.

In the scenario below, the lawyers for the accused argued that the accused acted in self-defence.

Actual scenario

Chef stabs drunk customer

In 2018, a 51-year-old chef was found guilty of murder after fatally stabbing a customer. The incident occurred when the chef and the customer became involved in an argument.



Just prior to the argument, the customer – who was significantly intoxicated after consuming a large amount of alcohol that he had brought to the restaurant – approached a counter near the kitchen to order more food. Upon hearing the request, the accused told the customer that he had consumed too much alcohol. The customer lost his temper and began to verbally abuse the accused.

At first, the accused did not respond to the verbal abuse, believing the customer was too drunk to harm him. However, after the abuse continued, the two men began to get more aggressive and pushed one another. Ultimately, the accused lost his temper and stabbed the customer several times with a kitchen knife.

During the trial in the Supreme Court, the accused told the Court he acted spontaneously in fear the customer might attack him with a knife. However, at no stage during the incident did the customer have a knife – or any other kind of weapon – in his possession, or look like he was going to obtain one.

The jury unanimously found the accused guilty of murder. He was sentenced to 23 years' imprisonment with a minimum non-**parole** period of 17 years.

R v Dhakal [2018] VSC 295 (1 June 2018)

Possible sanctions

In accordance with section 3 of the *Crimes Act 1958* (Vic), the maximum penalty for murder is life imprisonment, although this does not necessarily mean the offender will spend the rest of their life in prison. This is because when sentencing offenders to life imprisonment, the court generally sets a non-parole period, which is the minimum time the offender must be held in prison. After the non-parole period has been served, the offender can apply to be released from prison back into the community under supervision and strict conditions. Life imprisonment, therefore, means the offender will serve a sentence (either in prison or in the community under supervision) for the rest of their life.

In circumstances where the court considers it appropriate (e.g. where releasing the offender from prison would pose an unacceptable risk to the community), the judge can impose a life sentence with no parole, meaning the offender will never be released from prison.

While the courts must sentence people who are guilty of murder to a term of imprisonment unless certain narrow, special circumstances exist, only the most serious offenders are sentenced be held in prison for the rest of their life (i.e. sentenced to life imprisonment with no parole).

When determining the term of imprisonment, the court considers the **standard sentence** as outlined in the *Sentencing Act 1991* (Vic). Standard sentences are guidelines, established by the Victorian Parliament, that must be considered by judges when determining sentences for 13 serious indictable offences. These include murder, culpable driving causing death and trafficking large quantities of unlawful drugs. A standard sentence for a specific offence represents the sentence that should be imposed for 'middle of the range of seriousness' offending, before the judge takes into account other relevant sentencing factors (such as the offender's personal circumstances or guilty plea).

The standard sentence for murder is 25 years' imprisonment, or 30 years' imprisonment if the victim was an emergency worker (e.g. a police officer, paramedic, firefighter, or doctor or nurse delivering emergency care) or a custodial officer (e.g. a prison officer) on duty.

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

standard sentence
the sentence that should be imposed for 'middle of the range of seriousness' offending, before the judge takes into account any other relevant sentencing factors (such as the offender's personal circumstances or guilty plea). Standard sentences exist for 13 serious indictable offences (such as murder, culpable driving causing death and trafficking large quantities of unlawful drugs)



In addition to the standard sentence, the court considers a range of other factors when determining the sentence, including the following. These factors may increase or lessen the seriousness of the offending, resulting in the offender receiving a higher or lower sentence than the standard sentence for murder:

- the nature and gravity of the offending – factors relating to the nature and gravity of the offending that may result in the offender receiving a higher sentence than the standard sentence for murder include the use of a weapon (with the type of weapon and the manner in which it was used both being relevant) or the commission of the attack in a public space (particularly in front of children)
- the vulnerability of the victim – an attack on a victim who is considered to be particularly vulnerable or relatively defenceless (such as a young person aged under 18 years, an elderly person, a person with a physical disability, or a person with significantly impaired intelligence or a mental disorder) is likely to increase the seriousness of the offending
- the offender's conduct after committing the offence – an offender may increase the seriousness of their offending by acting in a cruel or heartless way after the offending. For example, the way an offender disposes of (or conceals) the body of a murder victim may increase the seriousness of the offending. On the other hand, calling an ambulance, cooperating with the police and demonstrating genuine remorse (or sorrow and regret) for their offending can be considered to lessen the seriousness of the offending
- the offender's personal circumstances – the personal circumstances of the offender (including their mental health, personal history, good or poor character and previous convictions) may increase or lessen the seriousness of the offending
- whether the murder was planned or 'premeditated' – if the offender planned the murder (as opposed to a situation where the offender acted spontaneously or without thinking), it is likely that they will receive a more severe sentence
- guilty plea – if the offender pleads guilty to the murder, the judge must impose a less severe sentence than they would otherwise have imposed. The time or stage at which the guilty plea is entered is also a relevant factor. An early guilty plea in a murder case can have benefits for the victim's family and friends, as they are spared the stress and trauma of a trial. It also saves the prosecution, and the wider community, the time and cost of running a lengthy trial.

The scenario below provides an example of how the Supreme Court considered the age and ill health of the offender when sentencing.

Actual scenario

Elderly offender likely to die in prison

In June 2022, a Supreme Court judge sentenced an elderly man to 24 years' imprisonment with a minimum non-parole period of 17 years after he pleaded guilty to the murder of his former partner. The murder took place in 2021, when the offender was 76 years old. He killed the 48-year-old victim months after she ended their year-long relationship and started seeing another man. The victim died instantly when the offender intentionally shot her in the neck, twice, at close range. After the shooting, the offender returned to his home, leaving the victim to be found by her daughter (aged in her twenties). Approximately an hour later, the offender drove to the local police station, where he confessed to killing his former partner and fully cooperated with the police.

During the sentencing hearing, the Court heard evidence that prior to the murder, the offender, who had no previous convictions, was a man of good character who had lived a productive life. He also suffered a number of health issues, including terminal cancer. When imposing the sentence, the Supreme Court judge commented that while she realised it was 'highly likely, if not certain, [the offender would] die in prison', the seriousness of the offending could not go unpunished simply due to the offender's age and ill health.

Had the offender not pleaded guilty, the Court would have imposed a 29-year term of imprisonment with a non-parole period of 23 years.

DPP v Gonzalez [2022] VSC 331 (9 June 2022)



Source 3 Victoria

Trends and statistics

Victoria

According to data from the Victorian **Sentencing Advisory Council**, while the number of people sentenced for murder varies from year to year in Victoria, over the past few years the general trend has slightly declined (as indicated in Source 4).

During the five-year period between 2017–2018 and 2021–2022, 97 people were sentenced for the offence of murder in the Supreme Court of Victoria. This represented approximately 2.8 per cent of all cases sentenced in Victoria's higher courts (i.e. the County Court and the Supreme Court).

Of the 12 offenders sentenced for murder in the year ending 30 June 2022, all received an immediate term of imprisonment, with the average length of imprisonment imposed (excluding life) being 20 years and six months.

Year	Number of offenders sentenced for murder (Victoria)
2017–2018	27
2018–2019	25
2019–2020	24
2020–2021	9
2021–2022	12

Source 4 The number of people sentenced for murder in Victoria from the year ending 30 June 2018 to the year ending 30 June 2022, according to Sentencing Advisory Council statistics

The Sentencing Advisory Council reported that, between 1 July 2016 and 30 June 2021:

- approximately 91 per cent of those convicted for murder were male
- approximately 73 per cent of offenders were aged between 25 and 54 years.

In more general terms, statistics compiled by the Victorian Crime Statistics Agency indicate that recorded murder offences per 100 000 members of population have remained stable, at less than one murder per 100 000 people between 2018 and 2022.

Year	Number of recorded murder offences (Victoria)	Number of recorded murder offences per 100 000 people (Victoria)
2018	53	0.8
2019	59	0.9
2020	62	0.9
2021	52	0.8
2022	51	0.8

Source 5 The number of recorded murder offences and the number of recorded murder offences per 100 000 population 2018 to 2022 (for the year ending December), according to the Victorian Crime Statistics Agency

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

There are many reasons why the number of recorded murder offences is higher than the number of offenders sentenced for murder, including that some offenders may be given the opportunity to plead guilty to a lesser offence (e.g. manslaughter, homicide by firearm, or child homicide) prior to trial, or be found guilty of a lesser offence by the jury.

Northern Territory

Comparing crime statistics between the Australian states and territories is difficult due to the differences in legal and reporting practices. For example, there may be differences in the ways the states and territories define and categorise offences for the purpose of reporting statistics, and differences in the time periods for which the statistics are gathered. For example, the Northern Territory crime statistics, prepared by the Department of the Attorney-General and Justice using data recorded by the Northern Territory Police Force, contains crime data for the 12 months ending in January. In contrast, the Victorian Crime Statistics Agency publishes crime data for the 12 months ending in December. Despite these differences, however, broad comparisons can be made.



Source 6 The Northern Territory

The murder rate (i.e. the number of murder offences per 100 000 members of the population) in the Northern Territory is approximately three times higher than the murder rate in Victoria, and is the highest in Australia. According to Northern Territory crime statistics, while there were only six murder offences in the Northern Territory in the year ending January 2023, this equates to 2.4 murder offences per 100 000 population (see Source 7). In contrast, the murder rate in Victoria was less than one murder offence per 100 000 population for a similar period (see Source 5).

Year	Number of recorded murder offences (Northern Territory)	Number of recorded murder offences per 100 000 people (Northern Territory)
2019	4	1.6
2020	4	1.6
2021	5	2.0
2022	5	2.0
2023	6	2.4

Source 7 The number of recorded murder offences and the number of recorded murder offences per 100 000 members of the population for the years ending January 2019 to January 2023, according to Northern Territory crime statistics

The Northern Territory murder rate has also trended upwards over the past five years. For example, it increased from 1.6 in the year ending January 2019 to 2.4 in the year ending January 2023 (see Source 7).

While the relatively low number of murder offences in the Northern Territory (e.g. six murder offences occurred in the year ending January 2023) makes it difficult to precisely explain why the murder rate has increased in recent years, some experts suggest that the 'homicide and related offences' rate (which includes murder, attempted murder, manslaughter and 'driving causing death' offence) has increased due to increasing social disadvantage and financial hardship – which causes higher levels of alcohol and drug consumption, family dysfunction and mental health conditions. The number of 'homicide and related offences' per 100 000 people in the Northern Territory increased from 4.4 in the year ending January 2021 to 8.0 in year ending January 2023.

Possible impacts of murder

All crime has impacts on individuals and society. Being the most serious of crimes, murder significantly impacts:

- the victim (and their family and friends)
- the community
- the offender.

Impacts on the victim (and their family and friends)

The most obvious impact of murder is the loss of a life. In addition, murder has a devastating and lasting impact on the victim's family and friends. It can result in shock, fear, grief, confusion, anger and emotional trauma. This trauma may be made worse when family members witness the attack, discover the body, or learn specific details about the physical circumstances of the death.

The emotional trauma suffered by the family and friends of a murder victim is also likely to be long-lasting, particularly in cases that take many years to be resolved through the legal system or remain unresolved. Family members will also most likely feel stress long after the legal system has dealt with the case, especially on significant dates such as the anniversary of the victim's death and their birthday.

To compound the stress and anxiety associated with the murder of a loved one, family members may also feel they have few rights when dealing with the legal system, although all victims of crime (including family members of a murder victim) are entitled to be treated with respect and dignity. For example, in Victoria, the *Victims' Charter Act 2006* (Vic) sets out the basic principles in relation to the treatment of victims of crime. These include ensuring that victims:

- are treated with respect, courtesy and dignity
- are informed about the investigation, the prosecution of the accused, and the trial and sentencing process
- have an opportunity to provide a **victim impact statement** to the court so the sentencing judge can understand how the crime has affected them and take this into consideration when sentencing
- have the opportunity to seek financial compensation for their loss.

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

The family and friends of a victim of crime may also be subject to unwanted media scrutiny, which can make their private lives public. Media reports, published images of the victim and speculation about the family member's death can cause great distress to a victim's family and friends.

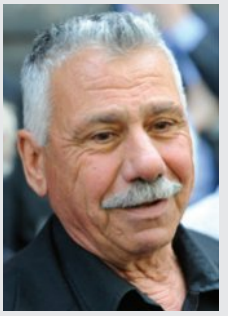
One victim of crime, George Halvagis, has dedicated his life 'to [making] sure no one can feel my pain and [protecting] the innocent from criminals'. Mr Halvagis' story is outlined in the following scenario.

Actual scenario

Victim of crime awarded Australia Day honours

On Australia Day in 2020, George Halvagis, aged 81 years, was awarded one of Australia's highest honours, the Order of Australia Medal, in recognition of his devotion to supporting victims of crime and their families and friends.

Mr Halvagis became an advocate for victims of crime after his beloved daughter, Mersina, aged 25 years, was murdered while visiting her grandmother's grave at the Fawkner Cemetery in Melbourne in 1997. Mr Halvagis and his wife had great sympathy and compassion for other victims of crime, as not only did the couple suffer the loss of their daughter, but they also had to endure two trials after the man who murdered their daughter lodged a successful appeal against his first jury conviction and was granted a re-trial. Ultimately, in 2009, the accused was found guilty and sentenced to life imprisonment with no parole. At the time of sentencing he was already in prison serving two life sentences for the murder of two other women in the 1990s. He will never be released from prison.



Source 8 In 2020, George Halvagis was awarded the Order of Australia Medal for his services to victims of crime and their families and friends.

Since the death of his daughter, Mr Halvagis has spent more than 20 years supporting victims of crime and their families. He has worked tirelessly to promote and raise funds for victim support groups and Crime Stoppers Victoria, and has actively campaigned to achieve law reform to improve victims' rights. Over the years, he has also regularly voluntarily attended the Supreme Court of Victoria to offer support to victims of crime, and their families and friends, during the trial process.

Impacts on the community

Murder also impacts on the community as a whole by eroding (destroying) public confidence in the ability of the police and the criminal justice system to protect the public. People who live in close proximity to where a murder occurred may no longer feel safe. People in the broader community may also feel vulnerable and become cautious about where they go and with whom they interact. Sometimes, a particularly cruel or brutal murder spurs the community into action.

The scenario below provides examples of two brutal murders that shocked the community and prompted an outpouring of grief.

Actual scenario

Brutal murders shock the nation

In January 2019, a 21-year-old woman was murdered on her way home from an evening out in Melbourne. The brutal attack devastated her loving family and shocked the Victorian community and the nation.

Within hours of the attack, many Melburnians had laid floral tributes at the site where the young woman was killed. A few days later, hundreds gathered on the steps of Parliament House, Melbourne, to pay tribute to the young victim, to seek comfort, and to display their willingness to stand together in the fight against violence. The then Prime Minister, Scott Morrison, also visited the site of the murder to pay his respects.



Source 9 In recent years, vigils have taken place throughout Melbourne to mourn the death of young women killed in brutal attacks.

In October 2019, the offender, aged 20, was sentenced to 36 years' imprisonment (with a non-parole period of 30 years) for the rape and murder of this young woman.

Sadly, her death occurred just months after 10 000 people had gathered at Princes Park in Carlton to mourn the death of another young woman who was the victim of a similar crime as she returned home from an evening out.

In November 2018, the 19-year-old offender in this case pleaded guilty to the charges laid against him and was later sentenced to life imprisonment with a minimum non-parole period of 35 years. Had it not been for the offender's guilty plea, he would have been sentenced to life imprisonment with a non-parole period of 43 years. In 2020, his application for leave to appeal against the sentence was refused.

Impacts on the offender

A person who is convicted of murder will suffer a number of negative impacts. Most obviously, offenders will generally be sentenced to a lengthy period of imprisonment, with the maximum sentence for murder being life imprisonment with no parole.



Source 10 Offenders may suffer shame and a sense of remorse.

In addition, offenders may suffer shame and a sense of remorse. The offender's family and friends may also experience great anxiety and stress, feelings of shame and guilt, and social isolation. The offender may incur significant legal costs, and their family may suffer financial hardship, especially in situations where the offender is the main income earner.

Upon release from prison, offenders may find it difficult to re-establish connections with their family and friends, and to find employment and housing. The experience of being imprisoned may also have a direct impact on their emotional wellbeing.

Source 11 summarises some of the possible impacts that murder can have on the victim and their family, on the community, and on the offender.

Impacts on the victim and their family	Impacts on the community	Impacts on the offender
• Loss of life • Disruption to family life • Trauma, grief and loss, and related medical issues (both in the immediate and longer term) • Funeral costs • Loss of household income • Loss of trust in law and order, and community values	• Cost of publicly funded medical treatment (if death was not immediate) • Need for coronial services • Increased need for police, fire and emergency services • Trauma to emergency services workers responding to incident • Loss of workplace productivity • Potential loss of confidence in the legal system and community values	• Guilt or shame in causing a death • Legal costs • Custodial sentence • Loss of household income if the offender is imprisoned • Diminishment of the family's social standing and wellbeing • Negative influences as a result of exposure to prison

Source 11 A summary of the impacts of murder

5.2 Check your learning

Remember and understand

1 **Distinguish** between murder, manslaughter and homicide.

2 **Describe** two defences to murder.

3 With reference to the elements of murder, **explain** what is meant by a causal link and how it can be broken.

Examine and apply

4 Read the scenarios below and **identify** whether the relevant intention exists and, if so, the type of intention. **Justify** your answers.
   - **a** The parents of a two-year-old child punish the child by refusing to give the child food for long periods of time. The child dies.
   - **b** Poyser was intoxicated from taking the drug methamphetamine (known as 'ice'). He got into an argument with his friend Woody and struck him on the head. Woody died as a result of the head injury.
   - **c** Hendo was cleaning his rifle and the firearm discharged. Corrie, who was standing close by, was shot in the chest and died.

5 Consider the following scenarios. Prepare an argument for either the prosecution or the defence for each situation.
   - **a** Clarkson and Russell were fighting on a deserted beach. Both men struck each other several times. Russell's final punch caused Clarkson to fall unconscious onto the sand. After Russell left Clarkson unconscious on the beach, the tide came in and Clarkson drowned.
   - **b** Tom was at a party with his friend Georgio. Georgio and Tom started playfully fighting, but the fighting turned violent after Georgio said something about Tom's girlfriend. The fight ended up in the kitchen. Spontaneously, Tom grabbed a kitchen knife and stabbed Georgio in the stomach. Georgio died after he lost too much blood.

6 Read the scenario 'Chef stabs drunk customer'.
   - **a** Briefly **describe** the facts of the case.
   - **b** **Explain** whether the facts of the case meet each of the elements of murder.
   - **c** Imagine you are the legal counsel for the accused. **Outline** the arguments you would make in defence of your client (i.e. the arguments as to why the offence was not murder).
   - **d** **State** the sanction imposed on the accused. Based on the limited facts provided, do you think the sentence was fair? **Justify** your decision.

7 Read the scenario 'Elderly offender likely to die in prison'.
   - **a** **Outline** the key facts of the case.
   - **b** **Explain** what is meant by the term 'non-parole period'.
   - **c** **Identify** the factors the judge would have most likely considered when determining the non-parole period in this case. **State** whether each factor most likely increased or decreased the severity of the sentence.
   - **d** Do you think offenders who intentionally and knowingly commit murder should receive a lesser sentence than they otherwise would, because they plead guilty? **Justify** your answer.

8 Conduct some research to find three murder statistics relating to murder in Victoria and murder in one other Australian state or territory.
   - **a** Which state or territory has the fewest number of murders? **Suggest** at least one reason for this difference.
   - **b** As a class, discuss why males predominantly commit the crime of murder. Where possible, undertake further research to support your views.

Reflect and evaluate

9 Read the scenarios 'Victim of crime awarded Australia Day honours' and 'Brutal murders shock the nation'.
   - **a** **Suggest** how murder can impact a victim's family, friends and the wider community. Support your response with reference to the two scenarios.
   - **b** In your view, does a random and unprovoked crime have more or less impact on society than a crime where the victim knows their attacker? Discuss as a class.

10 **Discuss** the ability of courts to address the impacts that murder has on society when sentencing an offender.

5.3 Culpable driving causing death

Key knowledge

In this topic, you will learn about:

- the criminal offence of culpable driving causing death, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society.

culpable driving causing death
the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or while under the influence of drugs or alcohol

dangerous driving causing death
the act of causing the death of another person while driving a motor vehicle at a speed or in a way that is dangerous to the public, having regard to all the circumstances of the case

dangerous driving causing serious injury
the act of causing serious injury (i.e. life-threatening injury or substantial and long-lasting injury) to another person while driving a motor vehicle at a speed or in way that is dangerous to the public, having regard to all the circumstances of the case

The crime of **culpable driving causing death** is an example of a homicide offence (i.e. the killing of another person without legal justification). Culpable driving causing death occurs when a person causes the death of another person by driving their motor vehicle in a negligent or reckless manner or while under the influence of drugs or alcohol.

Culpable driving causing death is one of a number of indictable (serious) driving offences (with others including **dangerous driving causing death** and **dangerous driving causing serious injury**), and the most serious. On the scale of seriousness, it is a 'category 2' offence, which means the offender, if aged over 18 years, must be sentenced to imprisonment (i.e. spend time in prison), unless they have impaired mental functioning or they assisted the authorities (i.e. the police). The maximum penalty for culpable driving causing death is 20 years' imprisonment and/or a fine of 2400 penalty units (approximately $460 000).

Elements of culpable driving causing death

For a person to be found guilty of culpable driving causing death, the prosecution must prove the following elements existed beyond reasonable doubt:

- the accused was the driver of a motor vehicle
- the accused's driving was culpable
- the accused's culpable driving caused the death of another person.

These elements of culpable driving causing death are further discussed below.

Element 1 – The accused was the driver of a motor vehicle

To be found to be the driver of the motor vehicle, the accused must have had substantial control over the movement and direction of the motor vehicle. Whether or not the accused was 'driving' may be an issue if, for example, the vehicle was not working, the vehicle was not moving, or even if the vehicle was being pushed or towed by something else.

Motor vehicles are generally motorised vehicles intended to be driven on a highway (e.g. cars, trucks, buses or motorbikes).



Source 1 Section 318 of the *Crimes Act 1958* (Vic) states that a person can be found guilty of culpable driving causing death if they were responsible for the death of another person while driving a motor vehicle in a negligent or reckless manner, or while being under the influence of drugs or alcohol.

Did you know?

Using a mobile phone while driving is enough to justify charging a driver with culpable driving causing death if they cause a collision and someone dies as a result.

Vehicles that are not motor vehicles include those intended to be used on a railway or tramway, and motorised wheelchairs that cannot go at a speed of more than 10 kilometres per hour and are used to carry an injured or disabled person.



Source 2 Culpable driving causing death includes driving under the influence of alcohol or a drug to the extent of being incapable of properly controlling the vehicle.

Element 2 – The accused's driving was culpable

'Culpability' refers to the responsibility for a fault or wrongful action (or inaction). In relation to driving, it means that the accused must have been driving the motor vehicle in one of the following ways:

- driving negligently – that is, driving in a way that fails (to an unacceptable degree) to observe a reasonable standard of care that a reasonable person would have observed in similar circumstances, and that others in the community have a right to expect (e.g. driving while fatigued to such an extent that the driver ought to have known that there was a risk of falling asleep)
- driving recklessly – that is, driving in a way that consciously and unjustifiably disregards a substantial risk that another person could die or be seriously injured (e.g. driving at high speeds in bad weather)
- driving under the influence of alcohol or a drug – that is, driving in a condition where the consumption of alcohol or drugs makes the accused incapable of properly controlling the vehicle.

Element 3 – The accused's culpable driving caused the death of another person

To have 'caused' the death of another person, the accused's culpable driving must have 'contributed significantly' to the death. However, the meaning of 'contributed significantly' varies, depending on the type of driving involved in the charge. For example, if the accused is charged with driving in a negligent or reckless way, the prosecution must prove that the accused realised that death or grievous (serious) bodily harm could be a consequence of their driving, and it was the disregard of this risk that caused the victim's death. On the other hand, if the accused is charged with driving under the influence of alcohol or drugs, the prosecution is only required to prove the accused was so intoxicated that they were incapable of having proper control of the vehicle – and not that the accused realised the risk associated with their driving.

The prosecution must also prove the accused caused the death of another person. Under the law, an unborn child is not considered a 'person'.

In the following scenario, the offender caused his motor vehicle to crash into a tree after he fell asleep while driving. His four-year-old daughter tragically died as a result of the accident. He pleaded guilty to culpable driving causing death.

Actual scenario

Driver falls asleep with tragic consequences

On 23 April 2016, a 24-year-old man was driving to his mother's house with his four-year-old daughter in the back of the car. The man fell asleep, causing the car to swerve off the road and collide with a large tree. While the man survived the collision, his daughter did not.

During the investigation into the accident, the police became aware that the accused had not had much sleep for three nights prior to the incident because he was caring for his other daughter who was waking up throughout the evening with 'night terrors'.

While it was also revealed that the accused had a small amount of the drug methamphetamine (or 'ice') in his system at the time of the incident, there was no way of confirming that this contributed to the incident. In fact, both the prosecution and defence agreed that the accident was caused solely by the accused's lack of sleep.

The accused pleaded guilty to one count of culpable driving causing death because he was so distressed and overwhelmed with grief that he did not want the matter to proceed to trial.

When sentencing the offender, Judge Gaynor in the County Court commented that the circumstances of the man's offending fell within the offence of *dangerous* driving causing death (which has a maximum penalty of 10 years' imprisonment), rather than the offence of *culpable* driving causing death (which has a maximum penalty of 20 years' imprisonment).

During the sentencing hearing, the County Court also heard that the accused, who was a devoted and loving father, had suffered post-traumatic stress disorder and severe anxiety since the incident. Since details of the accident were published in the media, the accused had also been the victim of intense and, in Judge Gaynor's view, 'extraordinarily cruel' abuse from members of the community, both in person and via social media.

In October 2018, the accused was sentenced to five years' imprisonment, with a minimum non-parole period of 12 months. When handing down the sentence, Judge Gaynor commented that had it not been for his guilty plea, the accused would have been sentenced to seven years' imprisonment with a non-parole period of five years. The accused's driver licence was also cancelled, and he was disqualified from driving for two-and-a-half years.

DPP v Huby [2018] VCC 1621 (3 October 2018)



Source 3 Culpable driving causing death includes driving negligently by being fatigued to such an extent that the driver ought to have known that there was a risk of falling asleep.

Defences to culpable driving causing death

For a person to be found guilty of culpable driving causing death, the prosecution must prove the three elements of culpable driving causing death beyond reasonable doubt. The accused may try to argue that one of these elements is missing. For example, the accused may argue that:

- they were not driving the vehicle
- their driving was not culpable (e.g. the motor vehicle collision and resulting death were not caused by their negligence, recklessness, or the influence of alcohol or drugs, but by unexpected and unpredictable mechanical failure, or poor environmental or road conditions).

In the following scenario, the accused may argue that he was not the driver of the vehicle.

Hypothetical scenario

The accused was not driving the vehicle

A car carrying two men crashed at high speed and flipped over. Both men were ejected (i.e. thrown) from the car. One man suffered a brain injury, and the other died in the crash. The surviving man was charged with culpable driving causing death. He said he could not remember who was driving at the time of the incident.

An expert who was called in to advise on the case said there was a 75 per cent chance that the accused was ejected from the driver's side of the car, making him the driver. However, a text message the accused sent to a friend just before the collision indicated that he was not driving at the time of the crash.

As discussed in Topic 5.2, in cases where one of the elements of a crime is missing, the accused may be charged with and found guilty of an alternative offence (provided that the elements of the alternative offence are proven).

In the following scenario, the accused was charged with four counts of *culpable* driving causing death after her failure to brake caused the death of four women. In the original trial, the jury found the accused not guilty of four counts of *culpable* driving causing death. However, the jury was unable to return either a **unanimous** or **majority verdict** in relation to the charges of *dangerous* driving causing death.

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 agree

Actual scenario

Four women killed in a tragic collision

In May 2018, a 64-year-old woman was charged with four counts of culpable driving causing death after she failed to brake at an intersection in Navarre, in western Victoria. This caused a collision in which four women, travelling in another car, were killed. The deceased women, all aged between 64 and 74 years, were returning from a line-dancing function. The accused's vehicle collided with the women's vehicle at an approximate speed of 88 kilometres per hour in an 80 kilometres per hour speed zone.

The accused claimed she thought she had applied her brakes when approaching the intersection but must have inadvertently accelerated. While the prosecution argued the accused was negligent in her failure to brake, her defence counsel argued her actions were

not sufficiently negligent for the jury to find her guilty of culpable driving causing death. For example, the accused was not driving while fatigued, under the influence of drugs or alcohol, or using her mobile phone at the time of the incident. The accused was also of exemplary good character who was genuinely distraught about, and sorry for, the consequences of her actions.

In October 2019, the County Court jury found the accused not guilty of four counts of *culpable* driving causing death. The jury was discharged after being unable to reach a majority verdict (i.e. a verdict on which 11 out of 12 jurors agreed) on four counts of *dangerous* driving causing death. The case was adjourned. A re-trial, with the accused facing four counts of dangerous driving causing death, was scheduled for June 2020.

However, in February 2020, the accused pleaded guilty to four counts of *dangerous* driving causing death after being informed by the trial judge that, if she pleaded guilty, she would most likely not receive a term of imprisonment due to the exceptional circumstances of the case.

The accused received a four-year **community correction order** with the requirement that she undertake 500 hours of unpaid community service. Her driver licence was also cancelled for eight years.

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

Other than defending the charge for culpable driving causing death on the basis that one or more of the elements has not been satisfied, the accused can rely on a general defence. These defences generally show that the accused did not or could not form the intention (*mens rea*) to commit the offence.

General defences to culpable driving causing death

The general defences to culpable driving causing death are listed below (see Topic 5.1 for more details on each of these):

- duress
- sudden and extraordinary emergency
- automatism.

The scenario below explores how the defence of duress can be used to defend a charge of culpable driving causing death.

Hypothetical scenario

Duress as a defence in culpable driving causing death

After filling her car with petrol, Alexis was about to drive away when Arnaud, who had just stolen cash from the petrol station, banged on her car window and shouted, 'Get me out of here or I'll shoot!' Arnaud was armed with a gun. Terrified, and in fear of being shot, Alexis sped off and killed a pedestrian who was lawfully crossing an intersection.

If Alexis is charged with culpable driving causing death, she could raise the defence of duress.

Possible sanctions

In accordance with section 318 of the *Crimes Act 1958* (Vic), the maximum penalty for culpable driving causing death is 20 years' imprisonment and/or a fine of 2400 penalty units (approximately $460 000). Since this is a 'category 2' offence on the scale of seriousness, offenders aged over 18 years must be sentenced to imprisonment (i.e. spend time in prison), unless they have impaired mental functioning or assisted the authorities (i.e. the police).

When determining the minimum length of imprisonment that must be served in prison (i.e. the non-parole period), the court considers a number of factors, including the **standard sentence** as outlined in the *Sentencing Act 1991* (Vic). Standard sentences are guidelines, established by the Victorian Parliament, that must be considered by judges when determining sentences for 13 serious indictable offences. These include murder, culpable driving causing death and trafficking large quantities of unlawful drugs. A standard sentence for a specific offence represents the sentence that should be imposed for `middle of the range of seriousness' offending, before the judge takes into account other relevant sentencing factors (such as the offender's personal circumstances or guilty plea). The standard sentence for culpable driving causing death is eight years' imprisonment.

standard sentence
the sentence that should be imposed for 'middle of the range of seriousness' offending, before the judge takes into account any other relevant sentencing factors (such as the offender's personal circumstances or guilty plea). Standard sentences exist for 13 serious indictable offences (such as murder, culpable driving causing death and trafficking large quantities of unlawful drugs)

In addition to the maximum penalty and the standard sentence, some other factors a judge may consider when determining the length (or period) of imprisonment to be imposed on an offender who is guilty of culpable driving causing death include the following. These factors may increase or lessen the seriousness of the offending, resulting in the offender receiving a higher or lower sentence than the standard sentence for culpable driving causing death:

- the nature and gravity of the offence – factors relating to the nature and gravity of the offending that may result in the offender receiving a higher sentence than the standard sentence for culpable driving causing death include the recklessness of the offender's driving (e.g. driving at an excessively high speed or while fatigued), the amount of alcohol or drugs consumed by the offender, or any clear disregard of warnings to not drive or obvious risks (e.g. poor road conditions or heavy traffic)
- the offender's conduct after committing the offence – an offender may increase the seriousness of their offending by acting in a cruel or heartless way after committing the offence. For example, the offender may fail to stop their vehicle or may flee from the scene without offering any assistance to the victim. On the other hand, calling an ambulance, cooperating with the police and demonstrating genuine remorse (or sorrow and regret) for their offending is likely to lessen the seriousness of the offending
- the impact of the victim's death – as in all cases, when sentencing the offender in a culpable driving causing death case, the court will consider the impact of the offending on any victims, such as the deceased person's family and friends. Victims have the opportunity to file a **victim impact statement** with the court that outlines the details of the injury, loss or damage they have suffered as a result of the offending. This statement may be read aloud in court by the victim or by another person, if requested by the victim
- the offender's personal circumstances – the personal circumstances of the offender (including their mental health, personal history, good or poor character and previous convictions) may increase or lessen the seriousness of the offending
- guilty plea – if the offender pleads guilty to culpable driving causing death, the judge must impose a less severe sentence than they would otherwise have imposed. The time or stage at which the guilty plea is entered is also a relevant factor (the earlier the guilty plea, the more likely it is to reduce the sentence).

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

In the following scenario, the impact of the victim's death was one of many factors considered in sentencing.

Actual scenario

Drug-affected driver kills pedestrian

In June 2022, a County Court judge sentenced a 32-year-old man to 15 years' imprisonment with a minimum non-parole period of 11 years after he pleaded guilty to one charge of culpable driving causing death and seven other charges related to conduct endangering life and serious injury. The man was charged after he drove his car at high speed in the wrong direction on a main highway, ultimately striking and killing a 16-year-old pedestrian who was walking with his girlfriend on the footpath.

In addition to reaching a speed of approximately 134 kilometres per hour (in an 80 kilometre per hour speed zone) at the time of the incident, the offender was driving under the influence of drugs and did not hold a Victorian driver licence.

At the plea hearing, the Court heard about the devastating impact the victim's death has had on his family and friends, including his girlfriend who was with him at the time of his death. The victim, a motivated student who had just commenced his VCE studies, was killed on his birthday. The Court heard details of the offender's personal history, including his battle with drug addiction, periods of homelessness and previous criminal offending, including having had his licence suspended five times while living interstate. The sentencing judge noted that, other than relying on the guilty plea, the Court did not receive any evidence, such as a letter of apology, to indicate the offender was remorseful for his actions.

Had the offender not pleaded guilty, the judge would have sentenced him to 17 years and six months in prison, with a non-parole period of 13 years and six months.

DPP v Hennessy [2022] VCC 1600 (19 September 2022)

Trends and statistics



Source 4 Victoria

Victoria

In Victoria, the number of people sentenced for culpable driving causing death fluctuates from year to year with no significant trend of increase or decrease. For example, statistics compiled by the Victorian Sentencing Advisory Council indicate that 13 people were sentenced for culpable driving causing death in the year ending in June 2022 (see Source 5).

Year	Number of people sentenced for culpable driving causing death (Victoria)
2017–2018	14
2018–2019	19
2019–2020	12
2020–2021	15
2021–2022	13

Source 5 The number of people sentenced for culpable driving causing death in Victoria from 2017–2018 to 2021–2022, according to the Sentencing Advisory Council

Over the five-year period from 2017–2018 to 2021–2022, all of the total 73 offenders sentenced for culpable driving causing death (i.e. 100 per cent of offenders) received an immediate custodial sentence (i.e. a term of immediate imprisonment or detainment in a youth justice centre). In 2021–2022, the

average length of imprisonment imposed upon offenders was seven years and ten months, compared to an average length of imprisonment in 2019–2020 of seven years and nine months.

From 1 July 2016 to 30 June 2021, the Sentencing Advisory Council reported that in relation to culpable driving causing death:

- approximately 87 per cent of offenders were male
- approximately 37 per cent of offenders were aged under 25 years
- 56 per cent of offenders were aged between 25 and 54 years
- approximately 7 per cent of offenders were aged 55 years or more.

In more general terms, the trend in the number of 'driving causing death' offences reported (which includes culpable and dangerous driving causing death) has varied over the past five years. For example, statistics compiled by the Crime Statistics Agency indicate that reported driving causing death offences have ranged from 98 in 2018 to 83 in 2022, with the highest number of reported offences, 102, being reported in 2020.

Despite a number of campaigns designed to reduce deaths on Victorian roads, the number of reported driving causing deaths offences per 100 000 people has not been lower than one since 2013.

The Victorian Government has cited a number of likely other causes for this increase, including driving at an excessive speed, driving while under the influence of alcohol or drugs, and driving while fatigued or distracted (particularly by mobile phones).

Study tip

The Sentencing Advisory Council is a useful source of information and provides statistics about crime and sentencing in Victoria. If you are researching an offence in depth, you will find good material on the Council's website.

Year	Number of recorded driving causing death offences (Victoria)	Number of recorded driving causing death offences per 100 000 population (Victoria)
2018	98	1.5
2019	82	1.3
2020	102	1.5
2021	80	1.2
2022	83	1.3

Source 6 The number of people reported as driving causing death in Victoria per 100 000 population 2018 to 2022 (for the year ending December), according to the Crime Statistics Agency

Northern Territory

It is difficult to compare 'culpable driving causing death' statistics between the Australian states and territories due to differences in the definition, classification and recording of serious driving offences. For example, Northern Territory crime statistics, prepared by the Department of the Attorney-General and Justice using data recorded by the Northern Territory Police Force, on 'driving causing death' only report 'hit and run' offences causing death (i.e. offences where the driver has caused the death of a person, by driving dangerously, and failed to stop at the scene of the accident). Other traffic-related deaths are categorised as 'dangerous or negligent acts endangering persons'. In contrast, the category 'driving causing death', as recorded by the Victorian Crimes Statistics Agency, includes culpable and dangerous driving causing death offences. This difference in definitions is likely to understate the level of 'driving causing death' offences in the Northern Territory compared to Victoria. Similarly, the Northern Territory crime statistics contains crime data for the 12 months ending in January, whereas the Victorian Crime Statistics Agency publishes crime data for the 12 months ending December.

Irrespective of these differences, the Northern Territory has the highest road fatalities rate (i.e. number of road deaths per 100 000 members of the population) in Australia. According to Northern Territory crime statistics, 52 people died from road accidents in the Northern Territory in 2022.



Source 7 The Northern Territory

This equates to approximately 20.7 deaths resulting from road accidents per 100 000 people. This is a high rate compared to Victoria and Australia, which in the same period had approximately 3.6 and 4.5 deaths resulting from road accidents per 100 000 people respectively.

The Northern Territory also has the highest rate of 'driving causing death' offences in Australia. For example, according to Northern Territory crime statistics, there were eight 'driving causing death' offences in the Northern Territory in the year ending in January 2023, which equates to 3.2 driving causing death offences per 100 000 population (see Source 8). This rate is approximately three times higher than the Victorian 'driving causing death' rate for a similar period.

Year	Number of recorded 'driving causing death' offences (Northern Territory)	Number of recorded 'driving causing death' offences per 100 000 people (Northern Territory)
2019	5	2.0
2020	1	0.4
2021	1	0.4
2022	7	2.8
2023	8	3.2

Source 8 The number of recorded 'driving causing death' offences and the number of 'driving causing death' offences per 100 000 members of the population for the years ending January 2019 to January 2023, according to the Northern Territory Crime Statistics

As illustrated in Source 8, with the exception of 2020 and 2021, the number of 'driving causing death' offences per 100 000 population in the Northern Territory has remained relatively high and has trended upwards. For example, the 'driving causing death' offences rate has increased from 2.0 per cent in the year ending January 2019 to 3.2 per cent in the year ending January 2023.

Despite a number of campaigns, such as the 'Towards Zero' campaign that aims to increase road safety awareness in the Northern Territory (a campaign that has also been conducted in Victoria), the number of road deaths and the number of 'driving causing death' offences per 100 000 people remains relatively high in the Northern Territory compared to other Australian states and territories. Various members of parliament and community groups have cited a number



Source 9 Excessive speed, driver fatigue and poor-quality roads in remote areas are some of the causes of the high rate of road deaths in the Northern Territory.

of likely other causes for this, including driving while fatigued, driving at an excessive speed, and poor-quality roads in some remote areas. For example, in addition to having a high proportion of people living in remote areas and needing to travel long distances on poorly maintained roads, some roads (e.g. areas of the Stuart Highway) have no speed limits while others have a maximum speed limit of 130 kilometres per hour.

Other factors that have contributed to the high road fatality rate in the Northern Territory include drivers or passengers not wearing seatbelts, driving while distracted (particularly by mobile phones) or driving under the influence of drugs and alcohol. In 2022, 30 per cent of road deaths involved at least one person not wearing a seatbelt.

Possible impacts of culpable driving causing death

All crime impacts individuals and society. Being a serious homicide offence, culpable driving causing death significantly impacts:

- the victim (and their family and friends)
- the community
- the offender.

Source 11 summarises some of the possible impacts that culpable driving causing death, and other major indictable driving offences, can have on the victim and their family, on the community, and on the offender.



Source 10 The Victorian Government's 'Towards Zero' advertising campaign was part of the state's larger Road Safety Strategy to reduce the number of deaths and serious injuries on Victorian roads.

Impacts on the victim and their family	Impacts on the community	Impacts on the offender
• Loss of life • Disruption to family life • Trauma, grief and loss, and related medical issues • Funeral costs • Lost labour and income in the household • Continuing psychological issues • Loss of trust in law and order, and community values	• Cost of publicly funded medical treatment • Need for coronial services • Increased need for police, fire and emergency services • Trauma to emergency services workers responding to fatal collision • Increased insurance premiums for motor vehicles • Loss of workplace productivity • Damage to community property • Loss of trust in law and order, and community values	• Medical treatment and costs (if injured) • Guilt or shame in causing a death • Legal costs • Likelihood of a custodial sentence • Lost labour and income in the household • Impact on their family's social standing, finances, and health and wellbeing • Damage to, replacement or impounding of vehicle

Source 11 A summary of the impacts of culpable driving causing death and other indictable driving offences

5.3 Check your learning

Remember and understand

1 **Describe** the elements of the offence of culpable driving causing death.

2 **Explain** two possible defences for culpable driving causing death.

Examine and apply

3 Create your own hypothetical scenario where a sudden or extreme emergency could be used as a defence to a charge of culpable driving causing death.

4 Read the scenario 'Driver falls asleep with tragic consequences'.
   - **a** **Describe** the facts of this case.
   - **b** **Distinguish** between the offences of *culpable* driving causing death and *dangerous* driving causing death.
   - **c** **Suggest** why the judge commented that the circumstances of the offending fell within the offence of dangerous driving causing death rather than culpable driving causing death.
   - **d** **Describe** the impact of this crime on the accused.
   - **e** Based on the limited facts provided, do you think the sentence imposed was appropriate? Give reasons for your response.

5 Read the scenario 'Four women killed in a tragic collision'.
   - **a** **Describe** the elements of culpable driving causing death in relation to this case.
   - **b** Imagine you are the defence counsel in this case. **What** arguments could you make to cast doubt on the prosecution's case?
   - **c** **Describe** two possible impacts of this crime on the accused, the victims' families and the community.
   - **d** Do you agree with the sentence imposed on the accused in this case? Give reasons for your response.

6 For each of the following scenarios, argue the case for either the prosecution or the defence.
   - **a** It was a drizzly, wet day. It was estimated that Bleize was riding his motorbike at 95 kilometres per hour (in a 60 kilometres per hour zone) when he hit a pothole and lost control of his motorbike. The bike slid sideways into people standing at a tram stop. One person died.
   - **b** Petrea was found in pyjamas, dazed and hurt on the side of the road at 3 am. They had driven through a red light and collided with another vehicle. The other driver was dead. When questioned, Petrea said they did not know what happened. It was later found that Petrea had taken new sleeping tablets after consuming two glasses of wine. Users of this medication are warned that it may cause 'potentially dangerous and complex sleep-related behaviours'.

7 Read the scenario 'Drug-affected driver kills pedestrian'.
   - **a** **State** the maximum penalty and the standard sentence for culpable driving causing death in Victoria.
   - **b** Imagine you were the judge in this case. **Identify** the factors that you believe would contribute to the offender receiving a term of imprisonment above the standard sentence.
   - **c** **List** any factors that you consider might decrease the severity of the sentence you would impose.
   - **d** **What** is a victim impact statement? **Explain** how it may have affected the sentence imposed by the judge in this case.
   - **e** Do you agree with the sentence imposed by the judge in this case? **Justify** your answer.

8 Create an infographic that gives an overview of current trends for the offence of culpable driving causing death. A video to help you create an infographic is provided on your obook pro.



Video tutorial
How to create an infographic

9 Search online for a newspaper article about a case of culpable driving causing death.
   - **a** Briefly **describe** the facts of the case.
   - **b** **Explain** whether the facts of the case meet each element of the offence of culpable driving causing death.
   - **c** **Suggest** any possible defences that might be relevant to the case.
   - **d** If the case has concluded, **state** the verdict and any sentence imposed. Do you think the sentence fits the crime? **Justify** your response.

Reflect and evaluate

10 **What** do you consider to be the major causes of culpable driving causing death and other indictable driving offences (e.g. dangerous driving causing serious injury)? **Discuss** the extent to which you believe the Victorian Government has adequately responded to the incidence of these offences.

11 In your view, should the offence of culpable driving causing death be abolished as a crime and people charged with murder instead? Discuss as a class.

5.4 Arson

Key knowledge

In this topic, you will learn about:

- the criminal offence of arson, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society.

arson
the intentional and unlawful use of fire to destroy or damage another person's property

The offence of **arson** is defined as the intentional and unlawful use of fire to destroy or damage another person's property. This includes using fire to destroy or damage property with the intention to endanger life or with the intent to gain. The offence of arson carries a maximum penalty of 15 years' imprisonment and/or a fine of 1800 penalty units (approximately $346 000).

A number of other arson-related offences exist, including arson causing death and intentionally or recklessly causing a bushfire:

arson causing death
the intentional and unlawful use of fire which causes the death of another person

- The offence of **arson causing death** is the intentional and unlawful use of fire which causes the death of another person. Arson causing death is a 'category 2' offence, which means the offender, if aged over 18 years, must be sentenced to imprisonment (i.e. spend time in prison), unless they have impaired mental functioning or assisted the authorities (i.e. the police). The maximum penalty for arson causing death is 25 years' imprisonment and/or a fine of 3000 penalty units (approximately $576 000).

intentionally or recklessly causing a bushfire
intentionally or recklessly causing a fire that spreads to vegetation on property belonging to another person

- The offence of **intentionally or recklessly causing a bushfire** is the intentional or reckless causing of a fire that spreads to vegetation on property belonging to another person. The maximum penalty for intentionally or recklessly causing a bushfire is 15 years' imprisonment and/or a fine of 1800 penalty units (approximately $346 000).



Source 1 Section 201A of the *Crimes Act 1958* (Vic) states that a person found guilty of intentionally or recklessly starting a bushfire can receive a maximum penalty of 15 years' imprisonment.

Elements of arson

For a person to be found guilty of arson, the prosecution must prove the following four elements beyond reasonable doubt:

- the accused damaged or destroyed the property by fire
- the property belonged to another person
- the accused purposely (intentionally) damaged or destroyed the property by fire, or knew or believed that the damage or destruction by fire was the likely result of their actions
- the accused had no lawful excuse for damaging or destroying the property.

These four elements of arson are further discussed below.

Element 1 – The accused damaged or destroyed the property by fire

The prosecution must prove that the accused used fire to destroy or cause some change to the physical integrity of the property. 'Property' includes not only buildings such as houses, sheds and city buildings, but also money, animals or other physical possessions.



Source 2 The prosecution must prove the four elements of arson for an accused to be found guilty of this offence.

Element 2 – The property belonged to another person

The prosecution must prove that the property was not the accused's property, and instead 'belonged' to another person. Property 'belongs' to a person if they own or control it, or if they have some sort of right or interest in it.

Element 3 – The accused purposely damaged or destroyed the property by fire, or knew or believed that the damage or destruction by fire was the likely result of their actions

The prosecution must present evidence to prove that the accused caused the fire with the intention to destroy or damage the property, or knew or believed that their conduct was more likely than not to result in the destruction of or damage to the property. It is not sufficient for the prosecution to merely establish that the accused thought about the possibility of damage or destruction.

Element 4 – The accused had no lawful excuse for damaging or destroying the property

Finally, the prosecution must prove that there was no justification or lawful excuse for the accused's actions. A lawful excuse for damaging or destroying the property may be the honest belief that the owner had consented to the damage or destruction of the property, or where the accused honestly believed that it was necessary to protect their property or property belonging to someone else.

Elements of arson causing death

For a person to be found guilty of arson causing death, the prosecution must prove the following five elements beyond reasonable doubt:

- the accused damaged or destroyed property by fire (see above)
- the property belonged to another person (see above)

- the accused purposely (intentionally) damaged or destroyed the property by fire, or knew or believed that damage or destruction by fire was the likely result of their actions (see above)
- the accused's action caused the death of another person
- the accused had no lawful excuse for damaging or destroying the property (see above).

Elements of intentionally or recklessly causing a bushfire

For a person to be found guilty of intentionally or recklessly causing a bushfire, the prosecution must prove the following three elements beyond reasonable doubt:

- the accused caused a fire
- the accused caused the fire intentionally or recklessly
- the accused was reckless as to the spread of the fire to vegetation on the property belonging to another person.

These three elements of intentionally or recklessly causing a bushfire are further discussed below.

Element 1 – The accused caused a fire

Under the *Crimes Act 1958* (Vic), a person causes a fire when they light a fire, maintain a fire, fail to control a fire lit by themselves, or fail to control a fire within their control.

Element 2 – The accused caused the fire intentionally or recklessly

To prove this element, the prosecution must present evidence to prove the accused was aware that their actions would probably cause a fire. It is not enough for the accused to have known that it was possible that their actions would cause a fire.

Element 3 – The accused was reckless as to the spread of the fire to vegetation on the property belonging to another person

To prove this element, the prosecution must present evidence to prove that at the time of lighting the fire, the accused actually knew of the probability of the fire spreading to vegetation on property belonging to another person, and that they would be unable to stop it. It is not enough for the accused to have recognised that it was likely the fire might spread to vegetation on property belonging to another person.

In the scenario below, the offender successfully appealed his sentence after being found guilty of five counts of arson (i.e. destroying and damaging property by use of fire).

Actual scenario

Arsonist has sentence reduced on appeal

In 2017, a 38-year-old man was sentenced to 14 years and six months' imprisonment – with a non-parole period of 12 years and three months – after being found guilty of five counts of arson. The accused had deliberately set fire to a police station, two churches, a cafe and a childcare centre over a two-week period in 2011. While no one was killed as a result of the offences, the accused caused significant damage and

affected the lives of those who owned, worked at and visited the destroyed properties.

During the County Court trial, the jury heard that the accused – who had committed more than 40 offences since he was 18 years old – had posted videos on the internet indicating his 'hatred for society'. In one post, the accused claimed that 'arsonists are not evil, they actually have every right to attack society'.

The accused filed an appeal against his conviction and sentence in the Court of Appeal. The appeal was based on a number of grounds, including that the trial judge had imposed an excessive sentence, particularly given the accused had an autism spectrum disorder that, his legal counsel argued, reduced his culpability for the crime.

The appeal judges accepted that the accused's moral culpability for his actions was reduced to a moderate degree by his cognitive condition. However, the appeal judges found the accused was fully aware of his actions at the time of committing the offences and knew they were unlawful.

The judges found the accused's actions were premeditated and intentional, and were designed to destroy various institutions that the accused considered symbolised the 'wrongs that society had done to him'.

While maintaining his conviction, the Court of Appeal slightly reduced his sentence to 12 years and three months' imprisonment with a minimum non-parole period of 10 years and three months.

Davies v The Queen [2019] VSCA 66 (28 March 2019)

The scenario below is about a case in which the offender was found guilty of 10 counts of arson causing death after he deliberately started two bushfires on Black Saturday in 2009.

Actual scenario

Black Saturday arsonist found guilty of arson causing death

In March 2012, a Supreme Court jury found a 42-year-old man guilty of 10 counts of arson causing death. The offender had deliberately started two bushfires in Churchill in Victoria, which resulted in the deaths of 11 people, including 10 as a direct result of the fire. The offender – who had volunteered as a firefighter for the Country Fire Authority in the late 1980s – started the fires on a total fire ban day, when extremely strong winds raged and temperatures soared to over 43°C.

In his defence, the offender's legal counsel told the Supreme Court that their client – who suffered from autism and had a mild intellectual disability – was unaware at the time of his offending that his actions would cause a fire. While the offender admitted throwing cigarette ash out of his car window while



Source 3 On 7 February 2009, known as 'Black Saturday', devastating bushfires travelled through Churchill, Victoria, and surrounding towns, which resulted in the deaths of 11 people, and the destruction of 145 houses and over 25 800 hectares of land and property.

driving through a eucalypt plantation, in a statement given to police he claimed that he thought the ash was 'dead' and 'didn't know it had lit up'.

By contrast, the prosecution claimed the offender's explanation was a 'furphy' (i.e. a lie) because expert evidence indicated the fire was deliberately started at two different locations. The prosecution also argued that the offender had demonstrated he had an intellectual 'level of functioning' that was at the very least 'reasonable' when he lodged an insurance policy claim for his car (which was destroyed in the fire) the morning after the fire. After the incident, the offender also made a report to Crime Stoppers falsely claiming he saw a State Emergency Service firefighter deliberately lighting the fire.

The offender was sentenced to 17 years' imprisonment with a minimum non-parole period of 14 years. During sentencing, Justice Coghlan stated that although he accepted that the offender was remorseful (sorry) for his actions and did not intend to kill anyone, such intention to cause death is not a necessary element for a person to be found guilty of arson causing death.

In June 2023, the offender became eligible for parole after serving 14 years in prison. The prospect of his release and, possible return to his hometown, caused great stress and anxiety for many people who lost loved ones and property in the Churchill fires.

R v Sokaluk [2012] VSC 167 (27 April 2012)

Defences to arson

For a person to be found guilty of arson and arson-related offences (e.g. arson causing death, or intentionally or recklessly causing a bushfire), the prosecution must prove the relevant elements of each offence beyond reasonable doubt. The accused may try to argue that one, or more, of these relevant elements is missing. For example, the accused may argue that:

- the property belonged solely to themselves
- the person who owned the property gave their consent to the damage or destruction of the property, or would have given their consent had they known the circumstances of the damage or destruction.

In some cases where one of the elements of a crime is missing, the accused may be charged with and found guilty of an alternative offence (provided that elements for the alternative offence are proven). This principle applies to arson. For example, if the prosecution cannot prove each of the elements of arson causing death, the accused may still be charged with arson (i.e. damaging and destroying property by use of fire).

Other than defending the charge of arson or arson-related offences on the basis that one or more of the elements has not been satisfied, the accused can rely on a general defence. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

Study tip

Whether someone has committed arson will be determined by checking the offender's actions against each element of the offence, and then considering any defences applicable to the circumstances of the case.

General defences to arson

The general defences to arson are listed below (see Topic 5.1 for more details on each of these):

- mental impairment
- duress
- sudden and extraordinary emergency
- automatism.

The scenario on the next page demonstrates how the defence of automatism can be used to defend a charge of arson.

Hypothetical scenario

Automatism as a defence in arson

Kosta was charged with arson after setting fire to a shed on his neighbour's property. The shed and its contents, including some farming equipment, were destroyed in the fire. While security system footage captured Kosta entering his neighbour's property at 2:15 am, spreading fuel and lighting the fire, Kosta claims he has no memory of his actions and that he must have been sleepwalking at the time of the offending.

Possible sanctions

In accordance with section 197 of the *Crimes Act 1958* (Vic), the maximum penalty for arson (destroying or damaging property by fire) is 15 years' imprisonment and/or a fine of 1800 penalty units (approximately $346 000). Under section 197A of the *Crimes Act*, the maximum penalty for arson causing death is 25 years' imprisonment and/or a fine of 3000 penalty units (approximately $576 000). Being a 'category 2' offence on the scale of seriousness, people found guilty of arson causing death who are aged over 18 years must be sentenced to imprisonment (i.e. spend time in prison), unless they have impaired mental functioning or assisted the authorities (i.e. the police).

In addition to the maximum penalty, some other factors a judge may consider when determining the length (or period) of imprisonment to be imposed on an offender who is guilty of arson include the following. These factors may increase or lessen the seriousness of the offending, resulting in the offender receiving a higher or lower sentence:

- the nature and gravity of the offence – factors relating to the nature and gravity of the offending that may result in the offender receiving a higher sentence include the recklessness of the offender's actions (e.g. lighting the fire in a public space or in a particularly dangerous environment, such as at a petrol station or in hazardous weather conditions) and the method used to start the fire (e.g. the use of fire accelerants)
- the offender's conduct after committing the offence – an offender may increase the seriousness of their offending by acting in a cruel or heartless way after committing the offence. For example, the offender may fail to assist a person who is inadvertently injured by the fire or may make false statements to the police when interviewed. On the other hand, calling an ambulance, cooperating with the police and demonstrating genuine remorse (or sorrow and regret) for their offending is likely to lessen the seriousness of the offending
- the impact of the offending on victims – as in all cases, when sentencing the offender in an arson case, the court will consider the impact of the destruction and damage caused by the fire on any victims. This may include financial loss (e.g. the cost of replacing any destroyed or damaged property and any resulting loss of income), or the emotional harm and stress caused by the offending (e.g. include fear and trauma associated with witnessing an arson attack, and the loss and damage to property, such as a person's home, and personal safety)
- the offender's personal circumstances – the personal circumstances of the offender (including their mental health, personal history, good or poor character and previous convictions) may increase or lessen the seriousness of the offending
- guilty plea – if the offender pleads guilty to arson or arson causing death, the judge must impose a less severe sentence than they would otherwise have imposed. The time or stage at which the guilty plea is entered is also a relevant factor.

Trends and statistics

Victoria



Source 4 Victoria

Despite common perceptions, perhaps in part driven by the media, the trend in arson has generally slightly decreased over recent years. For example, according to statistics compiled by the Victorian Crime Statistics Agency from 2018 to 2022, the number of arson incidents decreased from 3250 to 2165 (as indicated in Source 5).

More specifically, the number of 'damage caused by fire' offences decreased from 39 per 100 000 people in 2018 to 27.2 in 2022 (as indicated in Source 5).

Year	Number of reported arson incidents (Victoria)	Number of reported arson offences per 100 000 people (Victoria)	Number of reported 'damage caused by fire' offences per 100 000 people (Victoria)
2018	3250	50.6	39
2019	3122	46.5	36.2
2020	2519	34.8	28.7
2021	2046	31.5	26.1
2022	2165	31.5	27.2

Source 5 The number of arson and arson-related offences per 100 000 people between 2018 and 2022 (for the year ending December) in Victoria, according to the Crime Statistics Agency

According to data provided by the Sentencing Advisory Council, over the five-year period from 2017–2018 to 2021–2022, 145 people were sentenced in the higher courts (generally the County Court) for arson. Of these people sentenced, 122 (i.e. 84.2 per cent of offenders) received an immediate custodial sentence (i.e. a term of immediate imprisonment while 15 (i.e. 10.3 per cent of offenders) received a community correction order.

In 2021–2022, the average length of imprisonment imposed upon offenders was two years and six months, compared to an average length of imprisonment in 2017–2018 of two years and five months.

From 1 July 2016 to 30 June 2021, the Sentencing Advisory Council reported that in relation to arson (i.e. destroying or damaging property by arson):

- approximately 90 per cent of offenders were male
- approximately 76 per cent of offenders were aged between 25 and 54 years
- approximately 20 per cent of offenders were aged under 25 years.



Source 6 Arson attacks in Victoria and New South Wales have decreased in recent years.



Source 7 New South Wales

New South Wales

While it is difficult to compare arson statistics between the Australian states and territories due to differences in the definition and recording of these offences, New South Wales has a higher number and rate of arson incidents (i.e. number of incidents per 100 000 members of the population) compared to Victoria. For example, according to statistics provided by the NSW Bureau of Crimes Statistics and Research (BOCSAR), there were 3337 incidents of arson in the year ending December 2022, which equates to just under 41 arson incidents per 100 000 people (see Source 8). By contrast, there were 2076 recorded arson offences in Victoria, equating to 31.5 arson offences rate per 100 000 people (see Source 5).

Similar to Victoria, however, the trend in New South Wales arson incidents has decreased over recent years, and to a greater extent. For example, the number of arson incidents in New South Wales reduced by 11.7 per cent between 2018 and 2022.

Year	Number of reported arson incidents (New South Wales)	Number of reported arson incidents per 100 000 people (New South Wales)
2018	5367	67.3
2019	5216	64.5
2020	3940	48.2
2021	3779	46.3
2022	3337	40.9

Source 8 The number of reported arson incidents and the arson incident rate per 100 000 people in New South Wales for the years ending December 2018 to December 2022, according to the BOCSAR

According to statistics provided by BOCSAR, in 2022 the three most common locations for arson offences in New South Wales were: residential premises; park, bushland or gardens; and roads, streets or footpaths. Further, just under one-third of offences were committed by juvenile offenders (i.e. offenders aged between 10 and 17 years).

While little research has been conducted to explain specific reasons why New South Wales has a higher rate of arson incidents per 100 000 people compared to Victoria, research suggests that vandalism and revenge are major causes of arson. Revenge includes people setting fire to property to demonstrate their dissatisfaction with the way they perceive they have been treated by another person or group, or by society in general. Some people also commit arson in an attempt to make a false claim against an insurance company or conceal (hide) a crime. On rare occasions, offenders may be people who are obsessed with lighting fires (referred to as pyromaniacs or serial arsonists).

Possible impacts of arson

All crime has impacts on individuals and society. Arson and arson-related offences – such as arson causing death, and intentionally or recklessly causing a bushfire – are no exception. For example, as demonstrated in the 2009 Black Saturday and 2019–2020 national bushfires, damage and destruction to life, property and vegetation caused by fire can have devastating immediate and long-term consequences, including:

- loss of human life, animals and wildlife
- destruction of property, vegetation, crops, forests and other features of the environment
- economic loss, including loss of businesses and income-earning capacity
- physical and emotional trauma on those individuals affected by the loss of life or property, and those who witness the destruction and damage caused by the fire
- loss of personal wellbeing
- a sense of shame and guilt for the offender and the likelihood of a custodial sentence.

Source 9 summarises some of the possible impacts that arson can have on the victim and their family, on the community, and on the offender.

Impacts on the victim and their family	Impacts on the community	Impacts on the offender
• Loss of life and/or property, livestock and animals • Disruption to family life and work (if homes and businesses are destroyed or damaged) • Lost labour and income in the household and loss of income-earning capacity (if a business is destroyed or damaged) • Cost of rebuilding or re-establishing property • Trauma, grief and loss, and related physical and mental health issues	• Loss of public property and infrastructure (e.g. roads and power) and damage to the environment (including wildlife) • Cost of publicly funded medical treatment • Need for coronial services • Increased need for police, fire and emergency services • Trauma to emergency service workers and first responders • Increased insurance premiums • Loss of workplace productivity • Loss of trust	• Medical treatment and costs (if injured) • Guilt or shame in causing a death • Legal costs • Likelihood of a custodial sentence • Lost labour and income in the household • Impact on their family's social standing, finances, and health and wellbeing

Source 9 A summary of the impacts of arson and arson-related offences

Actual scenario

Dissatisfied customer sets bank on fire

In March 2019, a 24-year-old man was sentenced to 11 years' imprisonment (with a minimum non-parole period of seven years) after pleading guilty to one charge of arson, four charges of causing serious injury recklessly, and 11 charges of causing injury recklessly. The accused had deliberately lit a fire inside the Springvale branch of the Commonwealth Bank in Melbourne in November 2016.

On the day of the incident, the accused visited the bank to withdraw some money and became dissatisfied with the service he received. He left the bank and returned 15 minutes later with petrol he had purchased from a local petrol station and a lighter. He then spread the petrol on the ground inside and outside the entrance to the bank and used his lighter to deliberately start the fire.

Fifteen of the 39 people who were in the bank at the time of the offending were injured by the fire, with four sustaining serious injuries. The accused was also seriously injured and sustained burns to approximately 60 per cent of his body. He spent five months recovering in hospital after the incident, prior to being held in custody pending his sentencing hearing.



Source 10 Emergency service workers responding to an arson attack at the Commonwealth Bank in Springvale in 2017

In addition to causing the victims' physical injuries, the accused's actions had a significant impact on many other people, including bank employees, customers and other people who witnessed the crime, and emergency service workers. Indeed, during the sentencing hearing a number of victims gave statements outlining the effects of the crime on their

mental wellbeing, including suffering from a range of conditions such as post-traumatic stress disorder, depression, emotional stress and anxiety.

The County Court also heard that the damage caused to the bank exceeded $2.6 million. This figure did not include the loss of business while the bank was being repaired.

The accused pleaded guilty to the charges. The judge considered a range of factors when determining the sentence, including the offender's relatively young age at the time of the offending, and the fact that he was living in Australia with no family and spoke very limited English after arriving as a refugee from Myanmar in 2013.

DPP v Islam [2019] VCC 217 (1 March 2019)

5.4 Check your learning

Remember and understand

1 **Describe** the elements of the offence of arson causing death.

Examine and apply

2 Create a hypothetical example of a situation where automatism could be used as a defence to an arson-related offence.

3 Read the scenario 'Arsonist has sentence reduced on appeal'.
   - **a** **State** the offence with which the accused was charged and the maximum penalty that could be imposed by the court.
   - **b** **Describe** the elements of the offence that must have been present for the accused to have been found guilty.
   - **c** **Suggest** one possible defence the accused may have raised during the County Court trial. Give reasons for your response.
   - **d** **Describe** three factors the original trial judge considered when determining the length of the offender's sentence. **State** whether each factor would have increased or decreased the length of the sentence.
   - **e** **To what extent** do you agree with the sentence ultimately imposed on the offender by the Supreme Court of Appeal? **Justify** your view.

4 Read the scenario 'Dissatisfied customer sets bank on fire'.
   - **a** **Describe** the basic facts of this case.
   - **b** **Explain** how the elements of arson applied to this case.
   - **c** **Describe** the possible impacts this crime had on the accused, the victims, the witnesses, the first responders, the bank and the wider community.
   - **d** Given the limited facts provided, do you think the sentenced imposed on the accused was fair? Give reasons for your response.

5 In pairs, create a digital presentation (such as an infographic, PowerPoint, video or animation) that includes the following:
   - **a** a definition of arson
   - **b** an overview of the number and rate of arson incidents in Victoria compared to New South Wales
   - **c** an overview of the number and rate of arson incidents in one other state or territory. You will need to conduct some online research to find these statistics
   - **d** some possible reasons why people commit arson offences.

   Show your digital presentation to the class.

6 Search online for a newspaper article about a case of arson or an arson-related offence.
   - **a** Briefly **explain** the facts of the case.
   - **b** **Explain** whether the facts of the case meet each element of the offence.
   - **c** **Suggest** any possible defences that might be relevant to the case.
   - **d** If the case has concluded, **state** the verdict and any sentence imposed. Do you think the sentence fits the crime? **Justify** your response.

Reflect and evaluate

7 Read the case 'Black Saturday arsonist found guilty of arson causing death'. In your view, should the offence of arson causing death be abolished as a crime and people be charged with murder instead? **Justify** your view with reference to the scenario. Discuss as a class.

Chapter

5

Review

Top assessment tips from Chapter 5

1 A number of different defences to crime exist in criminal law, but some defences are not available for some crimes. This means you must take care when examining possible defences to a particular indictable offence.

2 Examining trends and statistics allows you to practise your analysis and synthesis skills, which are important to master in the VCE Legal Studies course. Try to pull apart the data and make some conclusions as to what it means. For example, might there be particular reasons for a downward or upward trend? Is it an underreported crime?

3 The *VCE Legal Studies Study Design* requires you to use legal reasoning and principles to identify and argue the elements of an offence, possible defences, and culpability for two actual criminal scenarios or hypothetical scenarios. This means it is not enough to memorise the elements of, and defences to, a crime. You must be able to apply your knowledge to relevant cases or hypothetical scenarios. The practice assessment task at the end of this chapter will help you practise this skill.

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 assessment tasks are composed of a variety of questions. A great way to identify the difficulty of the question is to look at the command term (or terms) used in the question and the mark allocation. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 Outline **two** general defences in criminal law.

(4 marks)

Difficulty: medium

2 Describe the elements of **one** indictable offence you have studied. Explain the relevance of the elements in relation to arguments that may be raised by the prosecution and defence at trial.

(4 marks)

Difficulty: high

3 'Crime statistics are confusing and should not be relied on.' Discuss the extent to which you agree with this statement. Support your response with reference to at least **two** recent crime statistics.

(8 marks)

Practice assessment task

Before attempting this practice assessment task, re-read the information at the beginning of this chapter about the learning outcome, key knowledge and key skills.

Use the internet and/or other sources to find two legal cases for **two** of the indictable offences covered in this chapter (i.e. one case for each offence). The information for each case should:

- focus on one of your selected indictable offences rather than lots of different offences
- explain the circumstances of the offending (i.e. what the accused did) in detail
- state whether or not the accused was convicted and punished; and, if so, what sanction they received.

For the two cases you have selected, provide answers to the following questions.

Practice assessment task questions

1 Explain how prevalent this type of crime is in our community. Provide recent statistics and data to support your response.

(5 marks)

2 Identify who holds the burden of proof in the case and the standard of proof required in the case.

(2 marks)

3 Explain how each element of the crime was met (or not met).

(8 marks)

4 Describe any defences that were (or could have been) relied on in the case, and whether they were (or could have been) successful.

(4 marks)

5 Describe the effect this crime has on the victim, the offender and the community.

(6 marks)

Total: 25 marks



Source 1 Members of Victoria Police work at a crime scene in Melbourne.

Chapter checklist

Now that you have completed this chapter, reflect on your ability to understand the key knowledge from the Study Design. If you feel you need some more practice, use the revision links to revisit the key knowledge.

Remember that you will also need to be able to draw on and understand the key skills outlined in the Study Design.

Key knowledge	I understand this	I need some more practice to understand this	Revision link
• The criminal offence of murder, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society	☐	☐	Go back to Topic 5.2.
• The criminal offence of culpable driving causing death, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society	☐	☐	Go back to Topic 5.3.
• The criminal offence of arson, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society	☐	☐	Go back to Topic 5.4.

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

Chapter 5
Chapter review quiz

Revision notes
Chapter 5

Chapter summary
Chapter 5

Quizlet
Revise key legal terms from this chapter.

Chapter

6

Summary offences



Source 1 In this chapter, you may choose to study one or two summary (minor) offences. The options are assault, minor theft and offensive behaviour. These types of offences are common, and cover situations such as shoplifting, brawls and using vulgar and offensive language in public. While these offences are heard and determined in the Magistrates' Court, they can still result in offenders being imprisoned, though more common sanctions for summary offences include fines and a dismissal or discharge.

Outcome

By the end of **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6), you should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.

Key knowledge

In this chapter, you have the option of choosing two summary offences. For each offence, you will learn about:

- the elements of the offence
- possible defences
- possible sanctions
- trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
- the possible impact of the offence on individuals and society.

Key skills

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

- define and use legal terminology
- research and analyse relevant information about criminal law and offences
- use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to two actual and/or hypothetical scenarios
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two criminal offences.

Key legal terms

assault the intentional or reckless use of force or the threat of force against another person without a lawful excuse (also extends to other types of assault-related offences)

automatism a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

defence to a crime a justification or lawful 'reason' given by an accused person as to why they are not guilty of a criminal offence

duress strong mental pressure on someone to overcome their independent will and force them to do something

mental impairment a condition of the mind that impacts on a person's ability to know the nature and quality of their conduct, or that the conduct was wrong

offensive behaviour conduct that is calculated to wound feelings, or arouse anger, resentment, disgust or outrage in the mind of a reasonable person

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

theft the act of dishonestly taking property belonging to another person (without their consent) with the intention of permanently depriving that person of it

Key legal cases

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

Advice to teachers and students

In **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6), you are required to study **two criminal offences** in detail.

You may choose to study	Offences	Page
• TWO indictable offences (from Chapter 5)	5.2 Murder	111
	5.3 Culpable driving causing death	122
	5.4 Arson	133

OR

You may choose to study	Offences	Page
• TWO summary offences (from Chapter 6)	6.2 Assault	154
	6.3 Minor theft	167
	6.4 Offensive behaviour	182

OR

You may choose to study	Offences	Page
• ONE indictable offence (from Chapter 5) • ONE summary offence (from Chapter 6)	See above	See above

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Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

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



Warm up!
Check what you know about summary offences before you start.

Quizlet
Test your knowledge of key legal terms in this chapter by working individually or in teams.

6.1

General defences to crime

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

defence to a crime a justification or lawful 'reason' given by an accused person as to why they are not guilty of a criminal offence

In Unit 1 – Area of Study 2, you are required to examine two criminal offences in detail. As discussed in Chapter 4, criminal offences can be classified as either **indictable offences** or **summary offences**. Indictable offences are serious crimes that are generally heard in the County Court or Supreme Court. If a person accused of an indictable offence pleads not guilty, the case is heard before a judge and jury. In contrast, summary offences, which are explained in this chapter, are minor crimes that are generally heard in the Magistrates' Court before a magistrate.

As part of your examination of these offences, you must consider possible **defences to a crime** that an accused can raise in response to a charge. A defence is a justification or lawful 'reason' for a crime. If successfully argued, a defence may lead to an accused being found not guilty of the crime with which they have been charged, or found guilty of a lesser offence.

Some of these defences, known as 'general defences', can be used to contest a variety of different charges under the criminal law. For example, 'self-defence' is a general defence that can be used to defend a number of crimes, such as murder, manslaughter and assault. However, self-defence cannot be used to defend offences such as theft.

In contrast, other defences can only be used in response to a specific offence. For example, the defence of 'right of claim' – where a person honestly believes they are the rightful owner of property – can only be used in relation to property offences such as theft.

In this topic, you will examine the main general defences available to a person who has been accused of a crime. Then, in Topics 6.2 to 6.4, you will consider which of these general defences apply to the specific crimes of common assault, minor theft and offensive behaviour, as well as any other defences that are specific to the crimes.



Source 1 The law allows people to take reasonable action (based on the circumstances) to protect themselves and/or others.

Defences to crime

In Victoria, the common (or general) defences to crime include:

- self-defence
- mental impairment
- duress
- sudden or extraordinary emergency
- automatism
- intoxication
- accident.

Each of these defences is examined in more detail below.

Study tip

The Supreme Court of Victoria publishes an award-winning podcast called 'Gertie's Law', which provides insights into the Court's role, including in deciding criminal cases and in sentencing. It is an excellent way to hear directly from judges and other people such as barristers about their roles.

Defence 1 – Self-defence

Generally, an accused may use self-defence as a defence to a crime if they:

- believed that their actions were necessary to protect or defend themselves, and
- perceived their actions to be a reasonable response in the circumstances.

Once an accused raises self-defence (i.e. presents evidence that suggests there was a reasonable possibility that they acted in self-defence when committing the alleged crime), the **burden of proof** falls on the prosecution to prove, beyond reasonable doubt, that the accused did not act in self-defence.

In the scenario below, self-defence was claimed by the accused, a police officer, in relation to an incident that happened in a cell.

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)

Actual scenario

Police officer's claims of self-defence

In September 2017, a man was arrested and detained at Moe police station after an argument with his then girlfriend.

While the man was in custody, a police officer (the accused) entered his cell to check on him. CCTV footage from the police station showed the accused entering the cell while the man was lying on a bench inside the cell. The man kicked his legs out towards the accused and struck him in the thigh. In response, the accused dragged the man onto the ground and punched him in the head multiple times.

The accused also claimed that the man spat at him, although CCTV footage and the other police officers present at the time of the incident could not confirm this claim.

A magistrate found the accused guilty of unlawfully assaulting the man while he was in custody. The accused was placed on a 12-month good behaviour bond. He appealed the conviction, claiming self-defence. The appeal was heard in the County Court, which upheld the original conviction, finding that the evidence against the accused was 'overwhelming'. The judge explained that 'it was [the victim] who appeared to perceive the need for self-defence' rather than the accused.

Defence 2 – Mental impairment

An accused may use the defence of **mental impairment** if, at the time of the offence, they were suffering from a mental illness and, as a result, they:

- did not know what they were doing because they had little understanding of the nature and quality of their actions, and
- did not know their conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

mental impairment
a condition of the mind that impacts on a person's ability to know the nature and quality of their conduct, or that the conduct was wrong

One important feature of the defence of mental impairment is that an accused is presumed to *not* be suffering a mental impairment (i.e. is presumed to be sane) unless it can be proven otherwise. This means that, given mental impairment may be raised by either the prosecution or the defence at any time during a trial, the burden of proving the existence of mental impairment falls on the party who raises it. In most cases, the accused raises the defence of mental impairment and therefore the burden of proof is reversed, meaning the accused must prove this defence.

When mental impairment is successfully argued, it does not result in the accused being immediately released from custody. That is, the verdict is not an ordinary 'not guilty' verdict. Instead, it is a special verdict of 'not guilty by reason of mental impairment'. In such cases, the court may impose a **secure treatment order** that allows the accused to be compulsorily detained, and receive treatment, at a mental health service (e.g. a forensic mental health hospital).

secure treatment order
a sanction that requires the offender to be compulsorily detained, and receive treatment, at a mental health service

Defence 3 – Duress

An accused may use **duress** as a defence to any criminal offence if, at the time of the offence, they had a **reasonable belief** that:

- a threat of harm existed
- the threat would have been carried out unless the offence was committed
- committing the offence was the only reasonable way to avoid the threatened harm, and
- their conduct was a reasonable response to the threat.

In cases involving family violence, evidence of family violence may be relevant in determining whether an accused committed an act under duress. For example, in a case where a person who has been the victim of family violence intentionally caused injury to their partner in the belief that their actions were the only reasonable way to avoid the threat of harm, evidence of the family violence may be relevant in determining whether the person has acted under duress.

Once the defence raises the issue of duress (i.e. presents evidence that suggests there was a reasonable possibility the accused acted under duress), the prosecution holds the burden of proving, beyond reasonable doubt, that the accused did not act under duress.

duress
strong mental pressure on someone to overcome their independent will and force them to do something

reasonable belief
an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity), and in similar circumstances, to be sensible or correct

Defence 4 – Sudden or extraordinary emergency

An accused may use sudden or extraordinary emergency as a defence to any criminal offence if, at the time of the offence, they had a reasonable belief that:

- there was a sudden or extraordinary emergency
- their actions were the only reasonable way of dealing with the situation, and
- their actions were a reasonable response to the situation.



Source 2 A natural disaster such as a flood may cause a person to commit a crime to deal with the disaster, such as taking a dinghy to escape rising waters.

Once an accused raises the defence of sudden or extraordinary emergency (i.e. presents evidence that suggests there was a reasonable possibility their action arose due to a sudden or extraordinary emergency), the burden of proof falls on the prosecution to prove, beyond reasonable doubt, that the accused did not act in the circumstances of a sudden or extraordinary emergency.

Defence 5 – Automatism

An accused may use **automatism** as a defence to any criminal offence if they committed the offence involuntarily due to having, at the time of the offence, a total loss of control over their bodily movements (i.e. the accused was not conscious or aware of what they are doing) and so could not form an intention to commit a crime (*mens rea*).

automatism
a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

The defence of automatism may be raised in a case where an accused commits an offence:

- while sleeping or sleepwalking
- while suffering concussion
- during an epileptic seizure, or
- as a result of a medical condition or because of a side effect of the proper use of medication.

Automatism is a defence that is extremely rare and difficult to prove. While the burden of proof varies according to the cause of the automatism, in general the prosecution must prove, beyond reasonable doubt, that the accused acted voluntarily (i.e. was aware of their actions when committing the offence).

The defence of automatism was used by a police officer in the scenario below.

Actual scenario

Police officer found not guilty of assault due to automatism

This case is a rare example of automatism succeeding as a defence. A police officer who assaulted a man after a high-speed car crash in New South Wales was found not guilty by reason of automatism.

The police officer (the accused) had no memory of assaulting the man or of the 10 minutes after the incident. As noted above, prior to the assault, the accused and the victim had been involved in a high-speed car chase. After their vehicles collided in a near-fatal crash, video footage shows the accused assaulting the victim by kicking, punching and stomping on him.

In his evidence, the accused argued that at the time of the incident he was experiencing automatism. Expert evidence was called by both parties. The prosecution's expert could not rule out that the accused was acting with 'sane automatism' at the time. The defence relied on expert reports that suggested that the accused was suffering from post-traumatic amnesia at the time of the assault and was therefore experiencing automatism.

Defence 6 – Intoxication

An accused may use intoxication as a defence to a criminal offence if, at the time of the offence, they acted involuntarily or without intent due to being in an intoxicated state as a result of consuming alcohol, taking drugs, or ingesting some other substance. However, in general, under the *Crimes Act 1958* (Vic), to successfully argue intoxication, the accused must prove that their state of intoxication was not self-induced. For example, they must prove that their intoxication was involuntary or due to fraud, a reasonable mistake, force, or the effects of the proper use of prescription or non-prescription medication.

Defence 7 – Accident

As examined in Chapter 4, with the exception of strict liability offences, for an accused to be found guilty of a crime, they must have committed the crime with intention (i.e. a guilty mind – *mens rea* – must have existed at the time of the offence). This means that the prosecution must prove, beyond reasonable doubt, that the actions of the accused were deliberate and intentional.

The accused may raise the defence that the actions were an accident. This would apply if the actions the accused took to commit the offence were involuntary, unintentional or reasonably unforeseeable by an ordinary person.

Unfit to stand trial

In addition to defences to crime, a person cannot be tried for a criminal offence if they are deemed to be 'unfit to stand trial'. A person may be considered unfit to stand trial if they are unable to undertake a number of tasks at the time of their trial, including being unable to:

- understand the nature of the charges laid against them
- enter a plea
- follow the course of the trial, and
- instruct their lawyer.

Being unfit to stand trial is different to the defence of mental impairment because it refers to the condition of the accused *at the time of the trial*, whereas the defence of mental impairment refers to the condition of the accused *when they committed the offence*.

In Victoria, in cases where there is a valid question about the fitness of an accused to stand trial, an investigation will be held before the court where a jury will determine, on the balance of probabilities, whether the accused is most likely unfit to stand trial.

The scenario below provides three different examples of when accused people have been found unfit to stand trial.

Actual scenario

Unfit to stand trial

In three separate Supreme Court jury trials, three people (Person A, Person B and Person C) were found to be unfit to stand trial. These cases involved the alleged murder of a 36-year-old deaf man, who died after falling 12 metres to his death from an apartment balcony in the Melbourne suburb of Ringwood.

Person A was deemed to be unfit to stand trial. The Supreme Court was told that his IQ was only 59, placing in him in the bottom 0.3 per cent of intellectual ability among adults, and he also had a brain injury as a result of a brain tumour he suffered when he was seven years old. Person A has been profoundly deaf since the age of two. In the hearing, two forensic psychologists gave



Source 3 A 36-year-old man died after falling from a balcony. Persons who were present at the scene were deemed not fit to stand trial over the alleged murder of the man on the basis that they would not be able to comprehend the trial process in the criminal justice system.

evidence that Person A did not understand the Court's process, understand how to give instructions to his lawyers, or follow the trial. One professor told the jury that Person A also suffered from significant issues with his memory. The jury found that Person A was unfit to stand trial.

Person B's intellectual ability was considered borderline. She had been born deaf and suffered from a development disorder. She was found not to have a normal understanding of the world around her. Two experts were of the opinion that she was unable to understand the nature of the charge or the trial and would not be able to follow the trial. She was deemed unfit to stand trial.

Person C was also deemed to be unfit to stand trial. Person C had an IQ of 61, placing him in the intellectually disabled range, and required assistance from two Auslan (Australian Sign Language) interpreters. However, one of the interpreters did not believe that Person C understood Auslan to the extent required to comprehend proceedings. Both the prosecution and the defence arrived at the conclusion that it was not appropriate for Person C to stand trial.

R v Fairest, Fields & Toohey (Rulings – Fitness to be tried) [2016] VSC 329 (1 July 2016)

6.1 Check your learning

Remember and understand

1 **Outline** two circumstances in which the defence of automatism may be raised by an accused.

2 When an accused person argues the defence of intoxication, the intoxication must not be self-induced. **Identify** two ways that intoxication can be deemed to be not self-induced.

Examine and apply

3 **Explain** how the defence of being unfit to stand trial is different to the defence of mental impairment. In your answer, refer to the scenario 'Unfit to stand trial'.

4 Ahmed went to the football at the MCG. After the match, there was a fight between supporters of the competing teams. Punches were thrown between two men, Brendan and Neale. Ahmed was concerned that Neale appeared to be losing consciousness, so he grabbed Brendan in a headlock. Brendan fell to the ground because he was drunk, breaking his wrist in the fall. Ahmed called an ambulance to assist both men. He was later charged with assaulting Brendan.

Imagine you are a lawyer representing Ahmed. **Explain** how you would argue self-defence.

Reflect and evaluate

5 Read the scenario 'Police officer's claims of self-defence'.

- **a** **Outline** the key facts of the case.
- **b** Would a jury have been used in this case? **Justify** your answer.
- **c** **Outline** the original decision made by the magistrate.
- **d** **Explain** why the judge in the County Court appeal rejected the claim of self-defence.

6 Read the scenario 'Police officer found not guilty of assault due to automatism'.

- **a** **Explain** how the defence of automatism can apply to this case.
- **b** In groups, discuss whether you agree with the final outcome of this case.

6.2 Assault

Key knowledge

In this topic, you will learn about:

- the criminal offence of assault, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society.

assault
the intentional or reckless use of force or the threat of force against another person without a lawful excuse (also extends to other types of assault-related offences)

intentional
something deliberate; not an accident

reckless
acting, or not acting, with conscious awareness of the potential harm that is likely to be suffered

penalty unit
a measurement used to calculate the amount of a fine. The government can change the value of a penalty unit to increase the amount of a fine

In legal terms, an **assault** is the **intentional** or **reckless** use of direct or indirect force or the threat of force against another person without a lawful excuse. Depending on the severity of the offence an assault can be either a summary offence or an indictable offence. Where the victim suffers a serious injury (often requiring medical attention and hospitalisation) the assault is more likely to be an indictable offence. Less serious threats or minor assaults are dealt with as summary offences.

In this topic, you will explore common assault (also known as unlawful assault), an offence established by section 23 of the *Summary Offences Act 1966* (Vic). Section 23 makes it unlawful for someone to assault or beat another person. The maximum penalty is 15 **penalty units** or three months' imprisonment. Common assault is a summary offence tried in the Magistrates' Court.

Extract

Summary Offences Act 1966 (Vic) – section 23

Common assault

Any person who unlawfully assaults or beats another person shall be guilty of an offence. Penalty: 15 penalty units or imprisonment for three months.

This offence is different to 'common law assault', which is a more serious type of assault that arises under common law, and which is heard before the County Court. The maximum penalty for common law assault is five years' imprisonment. Other more serious types of assaults include:

- negligently, intentionally or recklessly causing serious injury
- assaulting or threatening to assault a person with intent to resist an arrest
- assaulting or threatening to assault a worker (such as an emergency worker) who is on duty.

Elements of assault

For a person to be found guilty of assault under section 23 of the *Summary Offences Act* (i.e. common assault), the prosecution must prove each of the following three elements beyond reasonable doubt:

- the accused applied force or threatened to apply force
- the application or threat of force was intentional or reckless
- there was no lawful justification or excuse.

These three elements of assault are further discussed on the following pages.

Element 1 – The accused applied force or threatened to apply force

The prosecution must prove that there was either a threat of force against another person, or actual physical force against another person. This force does not need to be violent, as even a slight touch can in some instances be considered assault. In addition, force does not need to be applied directly by the accused. It can be applied by a weapon, or even by other forces such as light or heat.

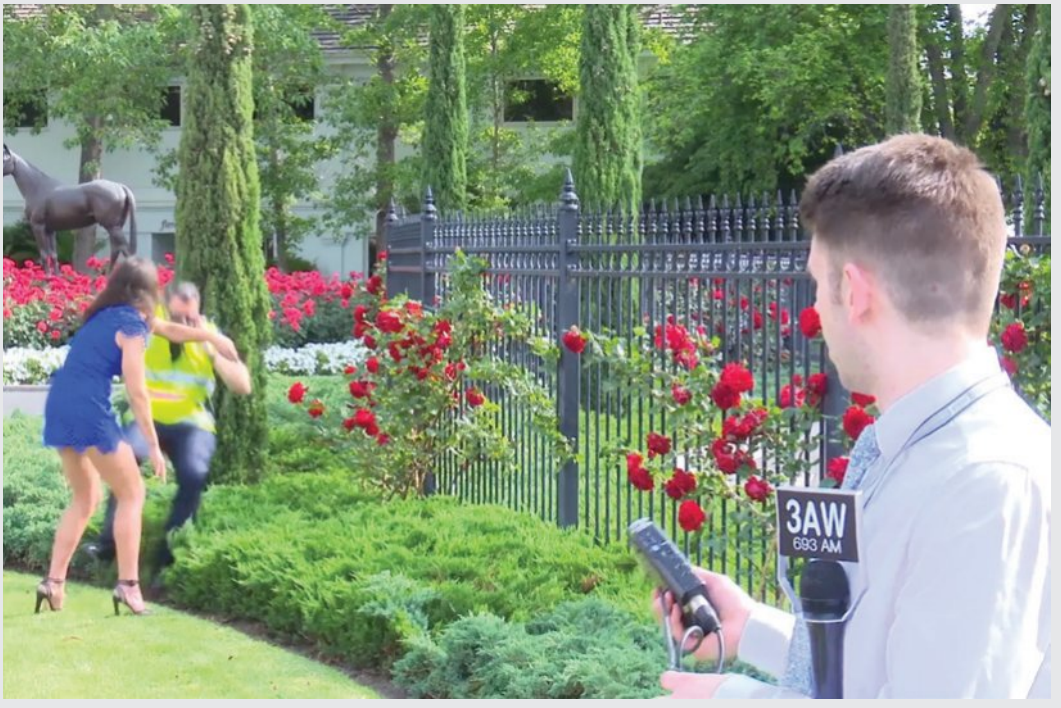
The following scenario demonstrates how the application of force does not need to be violent or cause serious injuries to constitute an assault.

Actual scenario

Racecourse antics land woman in court

On Melbourne Cup Day in 2015, a 25-year-old woman was charged with assaulting a police officer when she recklessly pushed him into bushes at the Flemington Racecourse in Melbourne. At the time of the incident, the police officer was in uniform and was waiting to address the media (see Source 1). He was on his phone when the woman pushed him, in full view of the media's cameras. The woman's motive was to 'get on the news'. She later admitted to being 'tipsy' and apologised for her behaviour.

In the Magistrates' Court, the woman pleaded guilty to assaulting a police officer. She was fined $800 and was ordered to pay an additional $117 in costs and $150 in compensation for the officer's broken glasses.



Source 1 Events such as the Melbourne Cup can involve people drinking to excess. In this situation, assaults may be more likely to occur.

Element 2 – The application or threat of force was intentional or reckless

The prosecution must prove that, at the time of the assault, the accused intended to apply force or threatened to do so, or was reckless as to the fact. While intention means that the person actually meant or aimed to apply force or beat the person, recklessness requires the accused to realise that their conduct would probably result in force being applied, but did it anyway.

Element 3 – There was no lawful justification or excuse

The final element that needs to be proven is that there was no lawful justification or excuse for the force or threat of force. This means that the person who committed the assault did so without any authority, or beyond the level authorised by the law. An example of a lawful assault where a person is legally able to use force is when a police officer arrests somebody, and, when doing so, uses reasonable force. This use of reasonable force may also involve causing harm to another person that is in proportion, given the circumstances.

Defences to assault

To be guilty of assault, the prosecution must prove each of the elements of the offence beyond reasonable doubt. If the prosecution fails to establish these elements, the accused may be found not guilty (acquitted) of the charge. The accused may argue that one or more of the elements do not exist. For example, the accused may argue that:

- the force applied by the accused was so minor or trivial that it was insufficient to warrant a charge of assault
- the contact made with the other person was unintentional
- the accused had lawful justification for their actions.

Other than defending the charge of assault on the basis that the elements have not been satisfied, the accused can also rely on a defence. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

General defences to assault

The general defences to assault are listed below (see Topic 6.1 for more details on each of these):

- self-defence
- mental impairment
- duress
- sudden or extraordinary emergency
- automatism
- intoxication
- accident.

Specific defences to assault

In addition to these general defences, the following defences to assault, or excuses, may be raised by the accused. The prosecution must disprove, beyond reasonable doubt, that these justifications are excuses are not available to the accused.

Consent

A person cannot be convicted of assault if their actions were consensual. Consent is a partial excuse, meaning that it does not completely absolve the accused of an assault charge. Whether the accused can argue consent depends on the circumstances in which the assault was committed and the degree of harm inflicted. In particular, a person cannot generally consent to an unlawful act or to the infliction of a serious injury or grievous bodily harm (serious physical injury).



Source 2 Sports such as Australian rules football involve high-speed collisions between players in competing teams. Sporting contact is an example of when consent may be considered a reasonable excuse, though consent is unlikely to extend to unreasonable applications of force, outside of the rules.

Lawful arrest

A person may not be convicted of assault if they have the authority to carry out an arrest – for example, if they are a police officer – or if they are assisting a person who has this authority. If the arrest is lawful, they can arrest the person using reasonable force. Reasonable force depends on the circumstances. Little force would be required to detain a cooperative or compliant offender, but police may use more force when an offender is resisting arrest.

Lawful correction of a child

A person may be convicted of assault if they smack or discipline a child. However, it is not an assault as long as it is reasonable in all the circumstances and is genuinely intended for correction (not an angry beating). That is, parents (or their representatives) who smack a child as a form of discipline must do so within strict parameters. The physical act must not be unreasonable or excessive, and it must be appropriate to the child's age and physical or mental development.

The following case is an example of where a parent's attempt to discipline her daughter resulted in a guilty plea to common assault. The parent pleaded guilty and did not raise a defence, but the case demonstrates an example of excessive discipline, even though it was a one-off incident.

Actual scenario

Discipline results in criminal charge

In this case, a woman was charged with common assault involving a situation with her daughter.

The daughter, who was around 14 years old, had arranged to go to the movies with a boy. The daughter kept the arrangements secret and told her mother that she was going with a girlfriend. As the daughter and the boy were walking home, the mother's husband appeared in his car and confronted them. The boy ran away, and the husband grabbed the daughter and drove her home. There, her mother began yelling at her for lying, and then grabbed a computer cord and began to repeatedly whip her daughter, causing her intense pain. The situation became known to the police later on in the year when the daughter reported other offences that had been allegedly committed upon her by her mother's husband. The mother ultimately pleaded guilty to common assault.

The mother was sentenced to five months in prison, which was to be wholly suspended for 12 months, meaning it was not required to be served in prison, unless she reoffended during this period. (Suspended sentences are no longer an option in Victoria. **Community correction orders** can now be imposed in cases where imprisonment is not necessary for the purposes of the sanction to be fulfilled.) While the assault arose out of an attempt to discipline the daughter for lying, it was recognised as exceeding appropriate bounds, as the mother had lost her temper.

The mother appealed her sentence. She had no prior convictions and her prospects of rehabilitation were good. The Court of Appeal noted that 'although the manner in which she attempted to discipline her daughter was unjustified, the assault was far from being the most serious example of common assault that the Court has encountered'. The Court ultimately quashed the sentence, having regard to the injuries and the nature of the assault, and instead imposed a fine of $1000.

York (a Pseudonym) v The Queen [2014] VSCA 224 (12 September 2014)

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

Possible sanctions

Pursuant to section 23 of the *Summary Offences Act 1966* (Vic), the offence of common assault can lead to a fine of up to 15 penalty units (approximately $2880) or imprisonment for up to three months.

Penalty units are used to determine the amount that a person can be fined when they commit an offence. The value of a penalty unit is set annually and is updated on 1 July each year by the Victorian Government. Therefore, rather than referring to an actual amount that needs to be paid as a fine, statutes refer to penalty units – thus avoiding having to amend statutes each year to increase the amount that is payable.

The court considers a number of factors when determining a sentence, including the following. These factors may increase or lessen the seriousness of the offending, resulting in the offender receiving a more severe or less severe sentence:

- the nature and gravity of the offence – a more serious or violent assault is likely to increase the seriousness of the offending. As such, this would result in the offender receiving a higher sentence that reflects the nature and gravity of their conduct; while an assault that involves a light touch or push is likely to lessen the seriousness of the offending

- the vulnerability of the victim – if an attack is on a victim who is considered to be particularly vulnerable or relatively defenceless (such as a young person aged under 18 years, an elderly person, a person with a physical disability, or a person with significantly impaired intelligence or a mental disorder), this is likely to increase the seriousness of the offending
- the offender's conduct after committing the offence – an offender may increase the seriousness of their offending by acting in a cruel or heartless way after the offending. On the other hand, calling an ambulance, cooperating with the police and demonstrating genuine remorse (or sorrow and regret) for their offending may lessen the seriousness of the offending
- the offender's personal circumstances – the personal circumstances of the offender (including their mental health, personal history and good or poor character) may increase or lessen the seriousness of the offending
- whether the assault was planned or 'premeditated' – if the offender planned the assault, this may increase the seriousness of the offending
- guilty plea – if the offender pleads guilty, the court may impose a less severe sentence than it would otherwise have imposed. An early guilty plea can have particular benefits for the victim's family and friends, as they are spared the stress and trauma of a hearing. It also saves the prosecution, and the wider community, the time and cost of having the case heard in court
- whether the offender has prior convictions – if the offender has not committed any offences in the past, this is likely to lessen the seriousness of the offending. On the other hand, if they have committed offences in the past, especially those involving violence, this is likely to increase the seriousness of the offending.

Another factor that can influence the total sentence imposed is whether other offences were committed, as well as assault. Related offences could include theft and minor drug possession. More often than not, the offender is charged with and sentenced for multiple offences, including common assault, and may therefore receive a more severe sentence, as described in the following scenario, in which the offender also committed indictable offences.

Actual scenario

Multiple offences result in jail time

This case was heard in the County Court, because the offender had been charged with multiple indictable offences and five related summary offences, including two charges of common assault.

At the time these crimes were committed, the offender was 21 years old. More than 20 months earlier, his relationship with his former partner, CM, had come to an end. CM ultimately obtained a family violence intervention order against him, which prohibited him from committing family violence against her and her infant daughter, or from coming within certain distances of them.

In early October 2020, a series of events resulted in the offender being charged with a number of offences. For example, the offender appeared at the house in which CM and her daughter were living, and he was verbally aggressive, accusing CM of destroying his life. He seized her by the hair and shook her for several minutes (which resulted in a charge of recklessly causing injury – a more serious type of assault). After he released his grip, he slapped her on the left ear with his open palm, which caused barotrauma (damage to body tissues). This slap resulted in the first charge of common assault. At one stage, he charged at her, screamed at her and kicked her in the leg. This resulted in a second charge of common assault.

The offender also threatened to burn CM's house down. While brandishing a box cutter, he cut CM's elbow (which resulted in a charge of recklessly causing injury) and resisted arrest.

The offending was described as brutal and repulsive. CM suffered significant and ongoing emotional and physical impacts. The offender had a significant prior criminal history and was noted as having a disrupted and disadvantaged childhood.

For the two offences of common assault, he was sentenced to three months' imprisonment for each. However, his total effective sentence for all offending was two years and six months in prison.

The offender appealed the sentence to the Supreme Court (Court of Appeal) on the basis that it was manifestly excessive. That appeal was refused.

Edwards-Hayes v The Queen [2022] VSCA 76 (29 April 2022)



Source 3 The Court of Appeal can be involved in a summary offence such as common assault if there is an appeal.

Trends and statistics

Victoria



Source 4 Victoria

According to the Victorian Crime Statistics Agency, between 2020 and 2022 the following numbers of criminal offences were recorded in Victoria:

Year	Number of criminal offences recorded (Victoria)
2020	548 086
2021	477 789
2022	483 441

Source 5 Offences recorded in Victoria, 2020–2022 (for the year ending December), according to the Crime Statistics Agency

As can be seen in Source 5, there was a drop (12.8 per cent) in criminal offences recorded between 2020 and 2021. Many people have suggested that crime rates slowed in 2021 because of restrictions imposed as a result of the COVID-19 pandemic. More particularly, the restrictions on movement as a result of public health and safety orders meant that there was less opportunity for committing criminal offences. Such offences would usually occur in places such as nightclubs and bars, on public transport and on the street.

While there were also restrictions on movement in 2020, the number of recorded offences was also affected by a significant increase in public health and safety offences (such as a breach of lockdown orders). For example, 37 461 people were charged with a public health and safety offence in 2020, as opposed to 406 people in 2019.

As to assault specifically, the Crime Statistics Agency does not distinguish between assault as a summary offence and assault as an indictable offence. Source 6 shows the number of offences reported for all assault and assault-related offences in Victoria each year between 2018 and 2002, as well as the number of assaults recorded for five types of assaults.

Number of recorded assault and assault-related offences (Victoria)					
Assault offence	**2018**	**2019**	**2020**	**2021**	**2022**
Family violence serious assault	7736	7880	7602	7129	6797
Non-family violence serious assault	8502	8148	7357	7806	7952
Family violence common assault	13858	15111	16075	15940	16443
Non-family violence common assault	11078	11474	10934	11484	12836
Assault on police and other officers	3006	2977	3507	3095	2970
Total (all assault and related offences)	**44180**	**45590**	**45475**	**45454**	**46998**

Source 6 Victorian assault statistics from the Crime Statistics Agency for recorded offences, 2018–2022 (for the year ending December)

While the number of offences overall in Victoria dropped in 2021, the data in Source 6 does not show any significant changes in the number of assaults committed. The number of assault cases related to non-family violence remained consistent across the five-year period of data collection, even during 2020 and 2021 when Victoria was under lockdown orders for months and curfews were imposed. However, the number of offences in 2020 suggest that lockdowns and stay-at-home orders may have affected the figures. For example, during this time, hotels and nightclubs were closed, which are often the location of non-family violence assaults, which dropped in 2020. On the other hand, there was an increase in assaults on police and other officers, which could have been attributable to those who breached public health and safety orders or actively protested against the lockdowns.

As to family violence, in 2020 and 2021 many health and justice experts raised concerns about the COVID-19 pandemic and the issues it caused for vulnerable families who faced financial difficulties and employment uncertainty, as well as for family members – particularly women – who may be subjected to family violence. Some noted that the public health orders that required people to stay at home meant that abusers were at home for longer periods than usual, and there was less opportunity for family violence victims to seek help outside their home. It was recognised that the public health orders also meant that victims found it challenging to access support, as their movements were being monitored by perpetrators at home.

Anecdotally, victims and police indicated that family violence incidents increased during 2020 and 2021. While this may not be reflected in Source 6 in relation to serious family violence assaults, it may be that the incidents still occurred, but the offences were not recorded. In particular, it was noted that there was a 75 per cent increase in Google searches at the time for domestic violence support in Australia.

The issue of family violence, particularly against women, and the difficulties with family violence being reported and perpetrators being charged, continue to be significant in Victoria, in Australia and globally. In Victoria, the **Royal Commission** into Family Violence in 2015 made 227 recommendations to the Victorian Government to address family violence (which included recommendations to provide better supports for family violence victims), all of which have been implemented. However, rates of family violence remain high. It is estimated that a woman in Australia is killed by male violence every six days, with some calling family violence a national disaster.

Did you know?

For young people aged between 10 and 16 years, the annual number of common assault allegations in Victorian schools rose from 199 to 275 between 2018 and 2022. In 2022, 56 children allegedly committed weapons and explosives offences while at school.

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

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

According to data from the **Sentencing Advisory Council**, 17 166 people were sentenced in the Magistrates' Court for common assault from 1 July 2018 to 30 June 2021. A small number of people were also sentenced for common assault in the higher courts (as part of a case also involving charges for indictable offences). Of those offenders, 14 599 (85 per cent) were men, and the rest were women. Over 60 per cent of the offenders were aged between 25 and 44 years.

For all offenders sentenced for common assault:

- 29.3 per cent received a term of imprisonment, with most receiving a term of imprisonment of less than six months
- 19.2 per cent received a community correction order
- 20.9 per cent received a fine
- 30.3 per cent received an adjourned undertaking, discharge or dismissal (which meant that they were found guilty or pleaded guilty, but no further penalty was imposed).



Source 7 New South Wales

New South Wales

New South Wales is the most populous of all the states and territories in Australia, with about 8.2 million Australians living in the state. It is, therefore, usual for New South Wales crime statistics to show a higher number of recorded offences each year compared to Victoria because of its higher population (about 1.5 million more than Victoria).

The NSW Bureau of Crime Statistics and Research (BOCSAR) is a statistical and research agency that maintains statistical databases on crime and criminal justice in New South Wales, and seeks to identify factors that affect the frequency of crime and where it is occurring.

Similar to Victoria, New South Wales also has various assault offences, including common assault, which is a less serious form of assault normally dealt with by the Local Court (the lowest court in New South Wales, similar to the Magistrates' Court in Victoria). BOCSAR's statistics on assault include those for assault related to domestic violence and assault related to non-domestic violence, but it does not distinguish between serious and minor assaults. Source 8 shows the number of offences reported for all assault and assault-related offences in New South Wales each year between 2018 and 2022, as well as the number recorded for these two types of assaults.

Number of recorded assault and assault-related offences (New South Wales)					
Assault offence	**2018**	**2019**	**2020**	**2021**	**2022**
Domestic violence related assault	29 718	31 337	32 261	32 125	33 410
Non-domestic violence related assault	31 889	32 398	29 538	28 299	30 667
Total	**61 607**	**63 735**	**61 799**	**60 424**	**64 077**

Source 8 New South Wales assault statistics from BOCSAR for recorded offences, 2018–2022 (for the year ending December)

Data on assaults in New South Wales from the Australian Bureau of Statistics shows that in 2022:

- many assaults occurred at a residential location (56 per cent or 38 980 victims)
- most assaults did not involve the use of a weapon (97 per cent or 67 112 victims)
- over half of the victims (52 per cent) were male (36 379 victims)
- almost a quarter (23 per cent) of victims were aged between 25 and 34 years at the date of report (16 212 victims)
- nearly half (47 per cent) of all assaults were family violence related (32 893 victims).

While the number of assaults related to non-domestic violence remained stable between 2018 and 2022 (with a slight drop in 2021), there was a rise in assaults related to domestic violence over the five-year period. The increase has been described as concerning, with domestic violence identified as being one of the most urgent social problems facing New South Wales and Australia. While there was no evidence of any increase in assaults – related to domestic violence or non-domestic violence – as a result of public health and safety orders related to the COVID-19 pandemic, the prevalence of assaults within New South Wales remains an issue. In particular, it was reported that people in regional New South Wales are more likely to be victims of domestic violence, and that domestic violence was behind about 40 per cent of calls for assistance to police. The New South Wales Government has laid out a plan to eliminate domestic and family violence, but it is recognised that more funding is needed for services, particularly support services for victims.



Source 9 Domestic violence makes up a large proportion of calls to police in New South Wales, with the issue worse in regional areas.

According to data from BOCSAR, 36 359 people were sentenced for common assault between 1 July 2018 and 30 June 2021. While there are no readily available statistics on how many of those offenders were men and how many were women, based on other assault statistics it is estimated that over 70 per cent of offenders are men. No readily available statistics are available for the age of the offender, but the vast majority of offenders in New South Wales are aged between 20 and 39 years.

For all offenders sentenced for common assault in New South Wales between 1 July 2021 and 30 June 2022, about 6 per cent received a term of imprisonment. About 21 per cent received a supervised community sentence, and 19 per cent received a fine. Over 47 per cent received an unsupervised community sentence, meaning the offender was sentenced to a particular order (such as a community-based order) but was not supervised or monitored.

Possible impacts of assault

All crime has impacts on individuals and society. Assault significantly impacts:

- the victim (and their family and friends)
- the community
- the offender.

Impacts on the victim (and their family and friends)

Assault-related crime has a range of impacts on the victim, from physical injuries to psychological effects. An assault may leave the victim with pain and suffering from bruises, tissue damage, cuts or broken bones. These injuries may be short-term or long-lasting. Long-term injuries may significantly alter a person's life and may interfere with their work or study, and social or sporting commitments. This includes the victim lacking confidence to go out in public and to be in crowds, especially if the assault occurred in a public place.

There may also be an impact on the victim's family in terms of assisting the victim in their recovery. This may involve taking care of the victim's daily needs and taking them to medical appointments.

The scenario below highlights the impact on an individual who was assaulted while in a vulnerable situation.

Actual scenario

Tears as cosmetic doctor and Cleo bachelor admits assault on woman

Erin Pearson and Cameron Houston, *The Age,* 30 November 2022

A Melbourne cosmetic surgeon sobbed in court on Wednesday as a magistrate spared him a conviction for assaulting a woman and causing injuries to her face.

Richard George Young, 54, pleaded guilty at Moorabbin Magistrates' Court to an unlawful assault at his Brighton home in late 2021.

Magistrate Jade Bott said it was a serious example of the crime as the woman was trying to leave when she was attacked.

'She's bleeding, distressed at that point with visible signs of injury and you stand over her ... as a medical professional ... and do not offer to assist,' Bott said.

'You respond in the most violent of ways. The effect of the offending on the victim ... is profound.'

Police prosecutor Senior Constable Amara Bostock said the woman was visiting Young's home when an argument took place and she threw a Polaroid camera at a wardrobe, breaking it.

Bostock said when the woman attempted to leave soon after, Young forcefully pushed her into a door frame, causing her to bleed from her forehead and fall to the ground.

A hospital medical report later stated she had also suffered abrasions over her nose, which was mildly swollen and tender. Young was arrested soon after.

On Wednesday, he pleaded guilty to a single charge of assault after the more serious charge of recklessly causing injury was withdrawn by the prosecution.

In a victim impact statement read out in court by the prosecutor, the victim said her most basic and fundamental right to feel safe had been violated. As her statement was read out in court the woman was clearly distressed.

...

Young sobbed in court, holding his head in his hands as he was told no conviction would be imposed.

Bott said she would instead sentence Young to an eight-month community correction order with a no conviction due to his plea of guilty.

She ordered Young also undertake 80 hours of community service and prohibited him from leaving the state of Victoria without the permission of corrections staff while the order is in place.

Any contravention of the order, Bott said, could result in Young being imprisoned.

He declined to comment when contacted.

Impacts on the community

The impacts of violence in a community affect future generations. The use of violence is often learnt behaviour. Young people who witness or experience violence may suffer emotionally and psychologically. They are at risk of resorting to violence when faced with interpersonal issues. They may do so out of frustration, anger or retaliation, but it is more likely that they will resort to violence because they do not know any other way to handle conflict.

There may also be an impact on the community if a significant person such as a paramedic is assaulted, and that person is unable to continue working due to the trauma involved. In this situation, a valuable member of the community who assists in public safety is no longer able to fully engage in public life, at least in the short term.

In addition, assaults, especially domestic violence assaults, have a significant impact on resources, particularly funding. There is a greater need for police, emergency workers and support services, particularly victim support services.



Source 10 Young people who witness violence may suffer emotionally and psychologically.

Impacts on the offender

While the offender deserves punishment for assaulting another person, there are consequences for that person that might exceed the sanction imposed by the criminal justice system. This especially affects people in positions of responsibility, such as teachers who might lose their job and their reputation as the result of an assault on a student. The same loss of public standing could also affect a member of the police force who was disciplined for an assault on a member of the public, where it was found that excessive force was used.

Public figures, such as people in the world of business and sport, can also suffer lost income and even financial ruin if they are convicted of assault. Sporting clubs, workplaces and industry associations often have codes of conduct and can impose their own punishments, which are separate from those that can be imposed by the courts.

Source 11 summarises some of the possible impacts that assault can have on the victim and their family, on the community and on the offender.

Impacts on the victim and their family	Impacts on the community	Impacts on the offender
• Disruption to family life • Trauma, grief, loss and related medical issues • Lost income • The need for family members to take care of the victim as they recover • Continuing psychological issues, including for family members who may have witnessed the assault • Loss of trust in law and order and community values	• Cost of publicly funded medical treatment • Increased need for police and emergency services workers • Loss of workplace productivity • Damage to community resources • Loss of trust in the legal system • Decreased wellbeing, especially among the elderly and those living alone	• Medical treatment and costs (if injured) • Guilt or shame • Legal costs and the financial impact of sanctions (e.g. fines and imprisonment) • Lost income, especially if imprisoned • Impact on the offender's family's social standing, finances, health and wellbeing

Source 11 A summary of the impacts of assault

6.2 Check your learning

Remember and understand

1 **Explain** why assault can be classified as either a summary offence or an indictable offence.

2 **Identify** the elements of the offence of common assault under the *Summary Offences Act 1966* (Vic).

Examine and apply

3 **Outline** two reasons why help sought for family violence might increase during a pandemic or natural disaster.

4 Read the scenario 'Racecourse antics land woman in court'. **Apply** the elements of the crime to **explain** why the woman's actions are an example of common assault.

5 Read the scenario 'Discipline results in criminal charge'.
   - **a** **Outline** the key facts of this case.
   - **b** **Explain** why some disciplining of children will amount to an assault. Refer to this case in your response.
   - **c** **To what extent** does the outcome of this case send a clear message to other parents that corporal punishment is a serious offence? **Explain** your response.
   - **d** Decide whether you agree, disagree, or partially agree with the decision of the Court of Appeal in relation to the ultimate sentence imposed. If you feel comfortable, discuss your views as a class about the final sentence imposed.

6 Consider each of the following scenarios. Argue whether a defence or excuse to assault applies in each circumstance.
   - **a** A paramedic, Eric, is kicked by a patient who is having an epileptic fit.
   - **b** A five-year-old child, Anouk, has a tantrum in a supermarket. The mother smacks the child's bottom twice with an open hand.
   - **c** Emily willingly participates in martial arts and is often hit, punched and kicked by opponents during competitive bouts. All involved are wearing protective gear. She suffers a concussion when one of her opponents one day uses significant brute force, which caused the people watching to gasp with horror.
   - **d** Jim has advanced dementia and lives in an aged-care home. He slaps another resident, Sam.
   - **e** A woman, Casey, is scared of being abducted while she walks at night. One night, while she is walking home, a man, Daniel, touches her on the shoulder from behind. Casey responds by biting and kicking Daniel, who told police that he initially thought Casey was his sister.
   - **f** A woman in Queensland, Margherita, is talking on the phone to her sister, Grace. They argue and Margherita says to Grace, 'I could punch your lights out!' Grace lives in Victoria.

Reflect and evaluate

7 Create an infographic that shows the similarities and differences in assault data from New South Wales and Victoria. In your infographic, make sure you include the latest crime statistics for both states.

8 **Discuss** the impact of domestic violence assaults on the victim, the community and the offender. In your answer, refer to the scenarios 'Multiple offences result in jail time' and 'Tears as cosmetic doctor and Cleo bachelor admits assault on woman'.

6.3 Minor theft

Key knowledge

In this topic, you will learn about:

- **the criminal offence of minor theft, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society.**

theft
the act of dishonestly taking property belonging to another person (without their consent) with the intention of permanently depriving that person of it

According to the *Crimes Act 1958* (Vic), a person is guilty of **theft** if they 'dishonestly appropriate property belonging to another with the intention of permanently depriving the other of it'. In Victoria, the offence of theft is found in section 74 of the *Crimes Act*, which states that it is an indictable offence.

However, Schedule 2 of the *Criminal Procedure Act 2009* (Vic) lists a number of indictable offences that may be heard and determined by a magistrate as a summary offence. One of these offences is theft where the amount or value of the property alleged to have been stolen does not exceed $100 000, or the property alleged to have been stolen is a motor vehicle. If the matter is heard in the Magistrates' Court, the maximum penalty that can be imposed is two years' imprisonment.

Although the offence of theft is found in section 74, the definition of theft is found in section 72 (and expanded on in detail in section 73).

Did you know?

According to Crime Statistics Agency data, more than 13 000 vehicles were stolen in Victoria in 2021–2022. Research by the RACV showed that cars were most likely to be stolen between 6 pm and 9 pm on Fridays. Thieves targeted models such as the Holden Commodore, Ford Falcon, Toyota Corolla and Toyota Hilux.

Extract

Crimes Act 1958 (Vic) – section 72

Basic definition of theft

1 A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

2 A person who steals is guilty of theft; and 'thief' shall be construed accordingly.

Crimes Act 1958 (Vic) – section 74

Theft

1 A person guilty of theft is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

...



Source 1 Constable Kel Mathers demonstrates the fitting of anti-theft number plate screws. Police say there has been a major increase in the number of registration plates being stolen.

Elements of minor theft

To establish that theft occurred, the prosecution must prove each of the following three elements beyond reasonable doubt:

- the accused appropriated (took) property belonging to another
- the accused took the property with the intention of permanently depriving the other of it
- the accused acted dishonestly.

The first element is the *actus reus* of the crime, and the second two elements are the *mens rea* of the crime. These three elements of assault are further discussed below.

Element 1 – The accused appropriated (took) property belonging to another

The prosecution must prove that the accused 'appropriated' someone else's property, meaning that they took and assumed the rights to control and possess this property, or they interfered with the owner's rights in some way. 'Property' is a term defined by legislation. It includes money and physical (tangible) goods such as motor vehicles, jewellery, appliances, mobile phones and furniture, as well as intangible property such as electricity. In the following scenario, the property that was appropriated (taken) was money.

Pursuant to section 71(2) of the *Crimes Act*, property 'belongs' to anyone who has possession or control of it, or who has any other proprietary right or interest in it. The prosecution only needs to establish that someone other than the accused had property rights that were appropriated. There is no requirement that the prosecution prove who actually held those rights.

Actual scenario

'It was a nightmare': Melbourne's 'Tinder swindler' jailed

Emily Woods, *The Age*, 9 September 2022

Within hours of meeting a Melbourne woman on Tinder, Christopher Collins had swindled thousands of dollars off her.

But that was just the beginning of her nightmare. Weeks of manipulation followed, including threats of blackmail. And then, a lengthy legal process.

Collins, 33, pleaded guilty to 24 charges including financial deception offences, fraud and theft and was sentenced to 22 months in prison on Friday.

He stole more than $100 000 from three women he met online from January 2020 to January 2021.

Collins remained silent when he appeared by video link from prison in Melbourne Magistrates' Court on Friday.

The court heard he had just completed an 18-month community work order for similar offending – stealing money off women he met online and using it for gambling – when he began stealing from a woman on January 3, 2020.

The Melbourne woman said Collins had left her physically, mentally, emotionally and financially 'ruined'.

'It was a nightmare,' she said.

She met Collins on Tinder, where he went by the name CJ. They chatted about sport and he said he was a professional gambler. She invited him over to watch some cricket, which was when the scamming began.

Collins encouraged her to put money on a 'sure bet' and convinced her to open new online betting accounts.

Then they went to a Richmond pub, where Collins sat in a dark corner with her phone after she went to the dancefloor. Within 20 minutes he had transferred $96 000 from her bank accounts and moved $72 000 into betting accounts.

After they went home together, he stole her credit card while she was sleeping and used it to pay for a taxi and then drinks at a strip club in Melbourne CBD.

...

Element 2 – The accused took the property with the intention of permanently depriving the other of it

The prosecution must establish that the offender intended to permanently deprive the owner of the property. If the accused only had an intention to *temporarily* deprive the owner of their property, this is unlikely to constitute theft. For example, if an accused person borrowed a pair of shoes, this element will not be met.

However, according to section 73 of the *Crimes Act*, a person may be regarded as having intended to permanently deprive the owner of the property if it was their intention to treat the property as their own to dispose of, regardless of the owner's rights, or if they borrowed or lent the property for a period of time and in circumstances that made it an outright taking or disposal.

If a person takes property and returns that property when it has been fundamentally changed, the accused is considered to have permanently deprived that owner of that property (e.g. if a person took a ticket to a concert at the MCG, and returned the ticket the day after the event had occurred).

Element 3 – The accused acted dishonestly

The prosecution must prove that the accused acted dishonestly. Section 73(2) of the *Crimes Act* states that a person's appropriation is not to be regarded as dishonest if the person believed that:

- they had a legal right to deprive the owner of the property, or
- the owner would have consented to the appropriation if they had known of the appropriation and the circumstances surrounding it, or
- the owner could not be discovered by taking reasonable steps. This applies in circumstances where a person finds property or receives property by mistake. As long as the recipient of the property genuinely believes that the owner could not be identified or located by taking reasonable steps, they are not guilty of theft.

If property has been abandoned, under the law it no longer belongs to the person who has intentionally relinquished all ownership rights. If a person were then to take that property that has been abandoned, then they would not be guilty of theft. However, if the first person has merely lost rather than abandoned the property, they are still regarded as having ownership of it and it cannot be appropriated by someone else.

An example of abandonment of property is demonstrated in the following hypothetical scenario.

Hypothetical scenario

Theft allegation over school formal dress

Anika purchased a dress for $450, which she wore to her school formal. After the event, Anika tried to sell the dress online for $300. Anika had no interest from potential buyers, except from her classmate, Julia, who offered Anika $20 for the dress. Anika did not like Julia, and told her friends that she would prefer to 'give the dress away'. Anika left the dress on the nature strip outside her house among the 'hard rubbish' that the local council collects. Julia was told this by one of her friends, so she went and collected the dress.

Two months later, Anika saw Julia wearing the dress at a party, and accused her of stealing it. Julia explained that she had 'never stolen anything' in her life, and that Anika 'should have accepted my offer of 20 bucks'. Anika went to her local community legal centre where one of the lawyers, Mimi, explained that what Julia did was not really theft because the property had been abandoned.

While theft may sound like a serious criminal offence that most people would never encounter in their daily life, minor theft can occur in public places such as supermarkets. Stealing from a shop is called shoplifting. The issue of shoplifting is explored further in the following scenario.

Actual scenario

Retail theft

Across Australia, crime data suggests that there has been a decline in shoplifting. This could be due to the increased use of surveillance in shops, especially through the use of camera technology, which may deter people from stealing from shops when they know they may be caught.

The National Retail Association estimates that theft-related crime costs Australian businesses up to $9 billion a year. However, it also notes that less than 20 per cent of retail crimes are reported to police, suggesting that this is a substantially underreported crime. One reason for this may be because of the value of goods. Retail store owners may find it inconvenient or a distraction to report stolen goods from their store, particularly if the value of the goods is small.

In addition, it is possible that the shoplifting has happened without anyone noticing. For example, shoplifting at self-service checkouts in supermarkets can occur without notice. People may select different fruit or vegetables on the item touchscreen at the checkout so that they can be charged a lesser price for more expensive products. With the increased use of self-serve checkouts, some people may attempt to not scan some items at all.



Source 2 An emerging form of theft is 'swiping', where shoppers fail to act honestly when processing their items at self-serve checkouts.

Defences to minor theft

For an accused to be found guilty of minor theft the prosecution must prove each of the three elements of theft beyond reasonable doubt. If the prosecution fails to prove each of these elements, the accused will not be found guilty of theft. The accused may therefore try to argue that one, or more, of the elements is missing. For example, the accused may argue that:

- they did not take the property
- the property that they took did not belong to the person making the accusation
- they had no intention of permanently depriving the owner of the property.

Other than defending a minor theft charge on the basis that one or more of the elements of theft has not been satisfied, the accused can rely on a defence. Several defences to a charge of theft are available. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

General defences to minor theft

The general defences to minor theft are listed below (see Topic 6.1 for more details on each of these):

- mental impairment
- duress
- sudden or extraordinary emergency
- automatism
- intoxication.

Specific defences to minor theft

In addition to these general defences, the following defences to theft can be used by an accused.

Subjective belief

This is the main defence in minor theft cases. It is based on the argument that the appropriation of property was not dishonest because the accused believed that they had a legal right to deprive the other person of the property. This defence applies where the accused's belief was based on a genuine mistake of fact or a mistake of law that they had a legal claim of right to the property (see below). This includes the accused's belief that they would have had the owner's consent if the owner knew the person was appropriating the property.

Inability to obtain the permission of the owner

The accused might argue that the owner of the property that was taken cannot be discovered, even though reasonable steps were taken. This might include notifying the police. For example, imagine that a person found a diamond ring on the street and advised the police, who made a record of the item having been found. If the finder of the ring then sold it 10 years later, it could be argued that there was an assumption that the owner's permission could not be obtained, given the time between the finding of the ring and its sale.

Claim of right

This defence can be used when the accused genuinely believes that they have a *bona fide* (authentic) legal right to the property they are accused of stealing from another person. This may occur, for example, where a person mistakenly takes an item owned by another person that is identical in appearance to something that they own. The defence also extends to any person who takes property on behalf of another, or in collaboration with another, if they believe that another person has a genuine claim of right to the property in question.

Possible sanctions

Pursuant to section 74 of the *Crimes Act 1958* (Vic), a person guilty of theft is liable to Level 5 imprisonment, which is imprisonment for a maximum of 10 years.

Levels of imprisonment are outlined in the *Sentencing Act 1991* (Vic). The penalty scale for imprisonment has nine levels, ranging from Level 9 (six months' imprisonment) to Level 1 (life imprisonment). An example of a Level 9 offence is concealing the birth of a baby, while an example of a Level 1 offence is trafficking in a drug of dependence (large commercial quantity).

As noted earlier, however, theft offences can be heard and determined as a summary offence if the amount or value of the property does not exceed $100 000, or the property stolen was a motor vehicle. A theft offence can also only be heard as a summary offence if the court considers it appropriate, and if the accused consents to a summary hearing. The *Sentencing Act* restricts the sentences that magistrates can order in the Magistrates' Court. For a theft offence, the Magistrates' Court can only order an offender to serve a maximum of two years' imprisonment for a single theft offence, or five years' imprisonment for multiple offences. The maximum fine that the Magistrates' Court can impose is up to 500 penalty units for an individual (approximately $96 000).

Penalty units are used to determine the amount that a person can be fined when they commit an offence. The value of a penalty unit is set annually and is updated on 1 July each year by the Victorian Government. Therefore, rather than referring to an actual amount that needs to be paid as a fine, statutes refer to penalty units – thus avoiding having to amend statutes each year to increase the amount that is payable.

The court considers a number of factors when determining a sentence, including the following. These factors may increase or lessen the seriousness of the offending, resulting in the offender receiving a more severe or less severe sentence:

- the nature and gravity of the offending – an act of theft that is more serious in nature is likely to increase the seriousness of the offending and, as such, result in the offender receiving a higher sentence that reflects the nature and gravity of their conduct. For example, if the property stolen was of special interest to the victim, or the act of taking the property was undertaken in a violent or aggressive manner, then this is likely to increase the seriousness of the offending
- the vulnerability of the victim – if a theft is from a victim who is considered to be particularly vulnerable or relatively defenceless (such as a young person aged under 18 years, an elderly person, a person with a physical disability, or a person with significantly impaired intelligence or a mental disorder), this is likely to increase the seriousness of the offending
- the offender's conduct after committing the offence – an offender may increase the seriousness of their offending in the eyes of the court by acting in a calculated way to avoid being detected after the theft. This might include concealing the stolen goods or giving evasive answers when asked about the goods

- the offender's personal circumstances – the personal circumstances of the offender (including their mental health, personal history and good or poor character) may increase or lessen the seriousness of the offending
- guilty plea – if the offender pleads guilty, the court may impose a less severe sentence than it would otherwise have imposed. An early guilty plea can have particular benefits for the victim's family and friends, as they are spared the stress and trauma of a hearing. It also saves the prosecution, and the wider community, the time and cost of having the case heard in court
- whether the offender has prior convictions – if the offender has not committed any offences in the past, this is likely to lessen the seriousness of the offending. On the other hand, if they have committed offences in the past, especially those involving theft, this is likely to increase the seriousness of the offending.

Trends and statistics

Victoria

According to the Victorian Crime Statistics Agency, between 2020 and 2022 the following numbers of offences were recorded in Victoria:



Source 3 Victoria

Year	Number of offences recorded (Victoria)
2020	548 086
2021	477 789
2022	483 441

Source 4 Offences recorded in Victoria, 2020–2022 (for the year ending December), according to the Crime Statistics Agency

As can be seen in Source 4, there was a significant drop (12.8 per cent) in offences recorded between 2020 and 2021. Many people have suggested that crime rates slowed in 2021 because of restrictions imposed as a result of the COVID-19 pandemic. More particularly, the restrictions on movement as a result of public health and safety orders meant that there was less opportunity for committing criminal offences. Such offences would usually occur in places such as nightclubs and bars, on public transport and on the street.

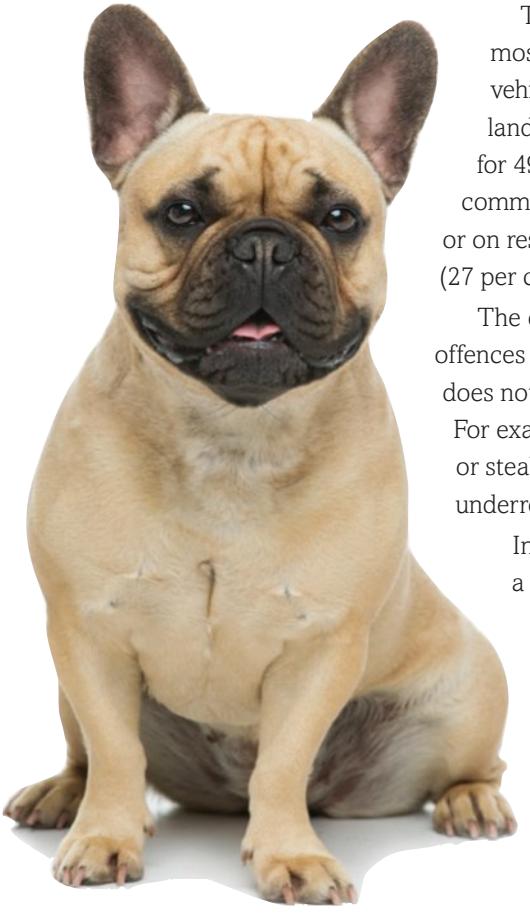
While there were also restrictions on movement in 2020, the number of recorded offences was also affected by a significant increase in public health and safety offences (such as a breach of lockdown orders). For example, 37 461 people were charged with a public health and safety offence in 2020, as opposed to 406 people in 2019.

As to theft offences specifically, these have reduced over time. However, of the 483 441 recorded offences in the year 2022 in Victoria, over half of those (250 270) were property and deception offences. Of those, over 200 000 offences were theft, deception or burglary offences. Therefore, it is more common for a victim to be the subject of a theft offence than it is for them to be the subject of any other form of offence, such as assault.

Source 5 shows the number of offences reported for all minor theft offences in Victoria each year between 2018 and 2022, as well as the number of offences for each of the seven types of theft offences.

Number of recorded theft offences (Victoria)					
Theft offence	2018	2019	2020	2021	2022
Motor vehicle theft	18 392	20 056	17 169	15 353	16 300
Stealing from a motor vehicle	56 065	61 039	52 284	48 927	47 797
Stealing from a retail store	23 353	25 461	19 694	19 149	20 260
Theft of a bicycle	6 592	7 768	7 384	7 470	6 626
Receiving or handling stolen goods	17 853	18 063	18 619	14 225	15 401
Fare evasion	134	52	30	18	29
Other theft	46 985	50 633	42 453	38 516	41 641
Total	**169 374**	**183 072**	**157 633**	**143 658**	**148 054**

Source 5 Victorian theft statistics from the Crime Statistics Agency for recorded offences, 2018–2022 (for the year ending December)



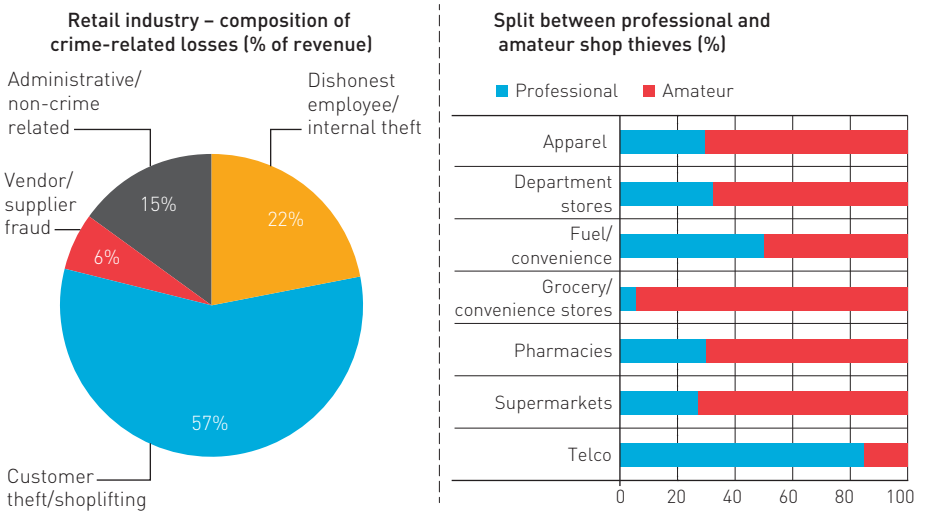
Source 6 Popular dog breeds such as French bulldogs can be the target of thieves.

The Australian Bureau of Statistics reported that the most common locations in Victoria from which a motor vehicle was stolen were in an outbuilding or on residential land (including a driveway, carport or garage), accounting for 49 per cent of motor vehicle thefts. The most common locations for other thefts were in an outbuilding or on residential land (27 per cent) and retail locations (27 per cent).

The data in Source 5 overall shows a steady decline in theft offences in Victoria across the five-year period. However, it does not truly reflect all the minor theft that occurs in Victoria. For example, as noted earlier in this topic, shoplifting, or stealing from retail stores, remains a significantly underreported crime in Victoria.

In addition, fare evasion (using public transport without a valid ticket) is a significant offence, with data showing that more than 60 000 fines are issued each year. However, these are not recorded in the above data, as they are usually dealt with by authorised officers issuing on-the-spot fines to offenders, or issuing official warnings to people.

While some type of thefts, such as motor vehicle thefts, are declining, others are increasing. For example, it was reported that dog theft is on the rise, as well as theft of car number plates.



Source: The Australian and New Zealand Retail Crime Survey

Source 7 This data was published by the *Australian Financial Review* in 2019 and is from the Australia and New Zealand Retail Crime Survey. It highlights the impact of shoplifting on the retail sector and, ultimately, on consumers, who pay higher prices for goods to cover the losses.

Another concerning type of theft in Victoria is stealing from farms. The scenario below explores this issue and how it impacts Victorian farmers.

Actual scenario

Livestock theft leaves sheepish farmers calling for action

Benjamin Preiss, *The Age*, 4 June 2022

In January, farmer Belinda Steers and her partner rounded up a flock of sheep for shearing when they discovered 84 lambs were missing without their mothers. The lambs were still too young to be weaned.

For two days she scoured the paddocks of her Avenel farm, 130 kilometres north of Melbourne, before she reported them as stolen. 'You just want to cry,' she said.

Livestock theft has hit a 10-year high in Victoria, placing a mounting financial and emotional toll on farmers and costing them almost $2.8 million in 2021, up from just under $2 million the year before, according to the Crime Statistics Agency.

Steers estimated her stolen lambs would have been worth at least $11 000, but that did not include money she had already spent on feed and medicines to care for them.

The value of stolen sheep – the vast majority of animals taken – reached $1.9 million across the state last year. But the figures belie the enormity of the problem; both police and farmers admit it is vastly underreported.

Sheep prices generally range between $100 and $300, while prized stud ewes can sell for more than $1000. The vast majority of stolen animals are never recovered. Last year, there were 267 livestock theft offences recorded; 230 of them were unsolved.

Steers said thieves had taken more than 160 sheep from her property over the past five years. She has installed some cameras, but said it would cost $20 000 for a full security system in addition to monthly payments.

Thieves can take dozens of animals at a time from properties and then bypass identification systems designed to trace the transportation of farm animals.

Did you know?

Almost 70 cars were stolen across Queensland every day in December 2022. This was the worst month on record for vehicle thefts in the state.

Steers, a genetic consultant who works with farmers across Australia, said she had been told of many instances in which ewes were taken while their newborn lambs were left behind. 'There's no thought for the animals' welfare when people are stealing them.'



Source 8 Theft of livestock is a major problem in Victoria. Police recommend that farmers should ensure all animals are identifiable at an early age, using ear-tags or microchips; and that animals are photographed and videoed regularly to further assist with identification.

Source 9 provides Sentencing Advisory Council data for the number of people sentenced for various theft offences in the Magistrates' Court for the period 1 July 2018 to 30 June 2021, and the number of those offenders that were men and women.

Number of people sentenced for theft (Victoria)			
Theft offence	Number of people: total	Number of people: men	Number of people: women
Theft from a motor vehicle	1398	1225	173
Theft from a shop	13706	9539	4167
Theft of a bicycle	579	516	63
Theft of a motor vehicle	5496	4558	938
Theft of a trailer	147	128	19
Other theft	14057	11327	2730

Source 9 The number of people sentenced in the Magistrates' Court for certain types of theft from 1 July 2018 to 30 June 2021

Did you know?

In 2019, thieves targeted the reptile room in an outer Melbourne high school, stealing several rare golden/green common tree snakes and three eastern water dragons. The snakes were each worth up to $3000 while the lizards could be sold for around $500 each.

As to the sentence imposed, imprisonment was regularly imposed (e.g. in 66.8 per cent of cases involving a theft of a motor vehicle), with a community correction order also being a common sentence. Fines were less used as a sanction, potentially because the court has to factor in the ability of an offender to be able to pay a fine, and it is possible that some offenders who steal do not have sufficient assets or cash to be able to pay a fine.

New South Wales



Source 10 New South Wales

New South Wales is the most populous of all the states and territories in Australia, with 8.2 million Australians living in the state. It is, therefore, usual for New South Wales crime statistics to show a higher number of recorded offences each year compared to Victoria because of its higher population (about 1.5 million more than Victoria).

The NSW Bureau of Crime Statistics and Research (BOCSAR) is a statistical and research agency that maintains statistical databases on crime and criminal justice in New South Wales, and seeks to identify factors that affect the frequency of crime and where it is occurring.

Source 11 shows the number of theft offences reported in New South Wales each year between 2018 and 2022.

Number of recorded theft offences (New South Wales)					
Theft offence	2018	2019	2020	2021	2022
Motor vehicle theft	13 096	13 428	11 735	10 491	12 274
Stealing from a motor vehicle	38 120	38 187	28 336	27 735	27 139
Stealing from a retail store	24 855	27 061	19 981	17 980	22 240
Stealing from a dwelling	19 234	18 790	16 798	16 435	15 110
Receiving or handling stolen goods	8 030	8 968	8 151	7 588	7 727
Stock theft	426	428	396	321	254
Other theft	27 003	27 347	19 804	17 326	17 962

Source 11 New South Wales theft statistics from BOCSAR for recorded offences, 2018–2022 (for the year ending December)

The most common locations from which a motor vehicle was stolen were an outbuilding or residential land (including a driveway, carport or garage).

The data in Source 11 shows a decline in motor vehicle theft in 2020 and 2021, which may have been as a result of public health and safety orders that required people to stay at home during the COVID-19 pandemic. This may have resulted in less opportunity for people to have their motor vehicles stolen. However, the 2022 figures show an increase in motor vehicle thefts, as well as stealing from retail stores. While there is some suggestion that retail theft relates to cost-of-living pressures, it has been noted that not everyone is motivated by such pressures. One of the most commonly stolen retail items is alcohol, which is not a necessity.

According to data from BOCSAR, the number of people who have been sentenced for theft and theft-related offences (which include motor vehicle theft, theft from a person, and illegal use of property) between 1 July 2018 and 30 June 2021 was 38 742 (about 7500 a year). While there are no readily available statistics on how many of those offenders were men and how many were women, based on other theft statistics it is estimated that over 70 per cent of offenders are men. No readily available statistics are available for the age of the offender, but the vast majority of offenders in New South Wales are aged between 20 and 39 years.

For all offenders sentenced for theft in New South Wales between 1 July 2021 and 30 June 2022, about 14.5 per cent received a term of imprisonment. About 22 per cent received a supervised community sentence, and 37 per cent received a fine. About 16.5 per cent received an unsupervised community sentence, meaning the offender was sentenced to a particular order (such as a community-based order), but was not supervised or monitored.

Did you know?

Between May 2021 and April 2022 in Australia, 3.6 million parcels were lost or stolen. This is estimated to have cost Australian consumers $224.3 million.

Possible impacts of minor theft

All crime has impacts on individuals and society. Minor theft significantly impacts:

- the victim (and their family and friends)
- the community
- the offender.

Impacts on the victim (and their family and friends)

Minor theft involves amounts of up to $100 000 and can have catastrophic effects on the lives of victims. Even thefts of a relatively small amount, such as $5000, can cause great distress. The impact would be greater if a precious item was stolen and destroyed. While its value may not be great, the object might be irreplaceable, such as a family heirloom or a football jumper signed by members of a premiership-winning team. In the following scenarios, the precious items included rare vinyl discs and irreplaceable artworks.

Actual scenario

The theft of precious vinyl

In September 2022, around 1000 rare items – including vinyl discs worth $150 000 by artists such as AC/DC, Jimi Hendrix, Pink Floyd, Jethro Tull and The Rolling Stones – were stolen from a Castlemaine home, together with stereo equipment. Police undertook searches on social media and in music shops, but the records and equipment have not been found. The owner of Bendigo Vinyl, Sam Edmonds, said that the task of collecting such rare vinyl records could take a person years, and there were often stories of people buying rare items and having them autographed by their favourite musicians. Some of the stolen vinyl records were box sets worth $4000 each.



Source 12 A collection of rare, classic vinyl records can be very valuable, and have great personal meaning to the owner.

Actual scenario

The theft of irreplaceable artworks

James, an emerging young artist, lost some of his artworks when they were stolen from his home studio in March 2021. These had taken months to produce and had already been sold to collectors. James also lost expensive tools that are essential to his craft. As a result, he has had to spend a large sum of money to increase security around his studio.



Source 13 James, an emerging young artist, was a victim of theft.

Impacts on the community

Theft also reduces trust in others, especially if the person was the victim of theft by someone that they know, such as a family member or a colleague in the workplace who might have stolen money or other property. Theft by a person's neighbours would have a similar effect. In addition, theft of farm machinery, diesel fuel and livestock could have a serious effect on the livelihood of a small rural community.



Source 14 Neighbourhood Watch Victoria (NWV) provides a feeling of security in local communities, especially where thefts have occurred in the area. NWV uses a phone app to help people secure their homes.

Impacts on the offender

The offender can be exposed to the humiliation of a hearing in the Magistrates' Court. If the accused is a prominent person, the case might be widely reported, bringing further embarrassment to their family and friends. Theft can also expose a person to media commentary that affects their chances of future employment and study, such as in the following scenario, which was reported widely.

Actual scenario

Melbourne airport bag grab

In 2019, a woman avoided going to jail for stealing luggage at Melbourne Airport. The offender pleaded guilty in Broadmeadows Magistrates' Court to stealing more than $2000 worth of luggage at Melbourne Airport. She was ordered to repay the money to Qantas, which had already paid compensation to victims of her theft. She faced 10 charges relating to the theft of luggage at the airport on seven occasions between 7 October 2017 and 5 September 2018.

In evidence presented to the Magistrates' Court, the offender was seen on the airport's CCTV cameras removing luggage from the Qantas, Jetstar and Virgin terminals. The clothing she wore, along with some luggage, was later found at her home.

In sentencing the offender, the magistrate said that her behaviour would have caused distress to members of the public who arrived at Melbourne Airport to find their luggage missing. However, as the offender had pleaded guilty and showed some remorse for her crimes, she avoided a jail term and was placed on a 12-month community correction order. As part of that order, she was required to complete 100 hours of unpaid community work.

Source 15 summarises some of the possible impacts that minor theft can have on the victim and their family, on the community, and on the offender.

Impacts on the victim and their family	Impacts on the community	Impacts on the offender
• The stress of having belongings stolen, which is compounded if the items are not recovered and they were of special significance to the victim, e.g. if the items were precious gifts from a loved one, or rare collectibles such as vinyl records or sporting memorabilia • Increased insurance premiums payable by the victim when items are not recovered and an insurance claim is made	• Increased need for police officers • Loss of income for retailers, which leads to an increase in the price of goods for all consumers • Distress for people who have lost items that cannot be replaced • Loss of trust in law and order and community values	• Guilt or shame on the part of the offender, especially if the offence occurs in a small community, or if the victim was especially vulnerable • Legal costs • Compensation paid to the victim of the theft • If the offender is imprisoned, hardship for the offender and their family

Source 15 A summary of the impacts of minor theft

6.3 Check your learning

Remember and understand

1 **Describe** one purpose of the laws relating to theft.

2 Using examples, **define** the following terms:
   - **a** appropriate
   - **b** permanently deprive
   - **c** subjective belief.

3 Referring to the scenarios 'The theft of precious vinyl' and 'The theft of irreplaceable artworks', **explain** how theft offences impact on a victim and the community.

Examine and apply

4 Read the scenarios 'Retail theft' and 'Livestock theft leaves sheepish farmers calling for action'.
   - **a** **Describe** two ways in which theft can impact on victims.
   - **b** Imagine that you are a policy-maker in government. **Describe** two ways in which you could seek to reduce the incidence of thefts such as these.

5 With reference to the elements of theft, **explain** whether each of the following actions are honest or dishonest.
   - **a** Damien borrowed James' leather jacket. Damien had been allowed to borrow the jacket on an earlier occasion. However, this time, Damien did not ask for James's permission.
   - **b** Lucy went into her local cafe, Matilda's Muffin Hut, where she ordered a cafe latte and a slice of chocolate cake. The price was $8. Lucy handed Matilda a $10 note. At the time of this exchange, Matilda was distracted by a screaming baby. As a result, Lucy received $12 rather than $2 in change. Lucy left the shop, and only realised the next day that she had been overpaid. Lucy did not return the money.
   - **c** Kiera works part time at her local pizza shop, where she usually earns $140 a week. On one occasion, Kiera received $14 000 in her bank account. She immediately went out and bought a car. The next day, the owner of the shop, Florence, called Kiera and asked for the money to be returned. Kiera said, 'Sorry, I bought a car. I thought you had paid me a bonus this week!'
   - **d** Jessica decided to make some baklava for her friends. She went to the self-serve nut section at her local supermarket. She scooped a kilogram of pistachios, which were $50 per kilogram, into a bag and placed the bag on the scales. She entered the product code for peanuts rather than pistachios and attached the price label to the plastic bag containing the nuts. Peanuts are only $12 per kilogram. Jessica then went through the self-service checkout.

Reflect and evaluate

6 Create an infographic that shows the similarities and differences in theft data from New South Wales and Victoria. In your infographic, make sure you include the latest crime statistics for both states.

7 Read the scenario 'Melbourne airport bag grab'.
   - **a** Referring to each of the elements of the law of theft, **explain** why the offender was guilty of theft
   - **b** **Outline** the ways in which the circumstances of this case make the offence especially serious.
   - **c** In your opinion, was the offender punished sufficiently for committing these offences? Discuss as a class.

6.4 Offensive behaviour

Key knowledge

In this topic, you will learn about:

- **the criminal offence of offensive behaviour, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society.**

In Victoria, there are laws prohibiting anti-social behaviour. Although this behaviour might be considered minor and inconsequential in nature, it can be contrary to community expectations about how people should behave in public and it can result in a lack of social cohesion.

offensive behaviour conduct that is calculated to wound feelings, or arouse anger, resentment, disgust or outrage in the mind of a reasonable person

In Victoria, **offensive behaviour** is a summary offence and includes conduct that is intended to hurt feelings or arouse anger, resentment, disgust or outrage in another person. The offence is established by section 17 of the *Summary Offences Act 1966* (Vic), which makes it an offence for persons to engage in certain offensive behaviour. The maximum penalty is 10 penalty units or imprisonment for two months. In this topic, you will explore all of the types of conduct that are prohibited by section 17.

Extract

Summary Offences Act 1966 (Vic) – section 17

Obscene, indecent, threatening language and behaviour, etc. in public

1 Any person who in or near a public place or within the view or hearing of any person being or passing therein or thereon –

- **a** sings an obscene song or ballad;
- **b** writes or draws exhibits or displays an indecent or obscene word figure or representation;
- **c** uses profane indecent or obscene language or threatening abusive or insulting words; or
- **d** behaves in a riotous indecent offensive or insulting manner –

shall be guilty of an offence.

1A For the purposes of subsection (1)(d), behaviour that is indecent, offensive or insulting includes behaviour that involves a person exposing (to any extent) the person's anal or genital region.

Elements of offensive behaviour

For a person to be convicted under section 17 of the *Summary Offences Act*, the prosecution must prove the following two elements:

- the accused's conduct was prohibited by section 17
- the accused's conduct occurred in a public place.

Element 1 – The accused's conduct was prohibited by section 17

The prosecution must establish that the accused's behaviour fell within one of the behaviours prohibited by section 17. Section 17 of the *Summary Offences Act* provides that the following behaviours constitute an offence:

- singing an obscene song or ballad
- writing or drawing, exhibiting or displaying an indecent or obscene word or image

- using profane, indecent or obscene language
- using threatening, abusive or insulting words
- behaving in a riotous, indecent, offensive or insulting manner.

However, what is 'indecent', 'obscene', 'profane', 'abusive' or 'insulting' is left to the courts to decide and depends on the circumstances, including community standards. An example of what would constitute offensive or insulting behaviour is included in the scenario below.

Actual scenario

Urinating on Spiderbait fan's leg

In February 2016, the rock band Spiderbait played at a popular live music venue in Melbourne. During the performance, a 25-year-old man from New Gisborne in Victoria urinated on a fellow concertgoer.

In August 2016, police released CCTV footage of the incident and asked the public to help find the man. They were able to identify the offender, and in November 2016, he was charged with common assault, offensive behaviour, and behaving in a disorderly manner in a public place. Members of Spiderbait described the act as 'awful and disgusting'.

The offender appeared in the Melbourne Magistrates' Court on 18 April 2017, where he denied the charges, saying he was drunk at the time of the offence. He was convicted, fined $800, and placed on a 12-month good behaviour bond.



Source 1 The members of Spiderbait were disgusted that one of their fans was urinated on during one of their concerts.

Did you know?

To discourage people from urinating in public, the German city of Hamburg uses a special paint on its walls. The hi-tech paint splashes back liquid applied at velocity with almost the same force. Walls are marked with signs that say; 'Don't pee here. We pee back.'

Element 2 – The accused's conduct occurred in a public place

Offensive behaviour is committed if the accused's conduct took place *in* or *near* a public place or *can be seen or heard by people passing in* a public place. Therefore, a person can be on private property and still commit this offence if what they are saying or doing can be heard or seen by people who are in a public place.



Source 2 'Public place' includes sporting grounds.

The extract below defines 'public place'. It includes places such as the street, sporting grounds, shopping centres, railway stations and government schools. The definition also includes any place that is open to the public.

Extract

Summary Offences Act 1966 (Vic) – section 3

Definitions

. . . 'public place' includes and applies to –

- **a** any public highway road street bridge footway footpath court alley passage or thoroughfare notwithstanding that it may be formed on private property;
- **b** any park garden reserve or other place of public recreation or resort;
- **c** any railway station platform or carriage;
- **d** any wharf pier or jetty;
- **e** any passenger ship or boat plying for hire;
- **f** any public vehicle plying for hire;
- **g** any church or chapel open to the public or any other building where divine service is being publicly held;
- **h** any Government school or the land or premises in connexion therewith;
- **i** any public hall theatre or room while members of the public are in attendance at, or are assembling for or departing from, a public entertainment or meeting therein;

j any market;

k any auction room or mart or place while a sale by auction is there proceeding

l any licensed premises or authorised premises within the meaning of the *Liquor Control Reform Act 1998* [Vic];

m any race-course cricket ground football ground or other such place while members of the public are present or are permitted to have access thereto whether with or without payment for admission;

n any place of public resort;

o any open place to which the public whether upon or without payment for admittance have or are permitted to have access; or

p any public place within the meaning of the words 'public place' whether by virtue of this Act or otherwise ...

The following scenario describes a case where a judge ruled the signs displayed in public by a man as cheeky, but not criminally offensive.

Actual scenario

'Unnecessary and very heavy-handed': judge criticises police over Danny Lim sign arrest

Australian Associated Press, 30 August 2019

Sydney sandwich-board wearer Danny Lim's signs displaying 'CVN'T' may be cheeky but they are not criminally offensive, a Sydney magistrate has ruled.

Lim, aged in his mid-70s, challenged a $500 fine for offensive behaviour after he was arrested in January in Barangaroo while wearing a sign saying 'SMILE CVN'T! WHY CVN'T?'

Police handcuffed the pensioner in front of a shocked crowd in Barangaroo after a single phone complaint. The court heard the arrest was sparked after someone called police to say she was offended 'as a woman'.

But magistrate Jacqueline Milledge, who was highly critical of the arresting officers' behaviour, said the law was concerned with what would offend the 'hypothetical reasonable person'.

'It's not someone who is thin-skinned, who is easily offended,' she said in Downing Centre local court on Friday.

'... [The sign is] provocative and cheeky but it is not offensive.'

Milledge said she did not like some signs and ads that played on the c-word or f-word.

But she said the 'overwhelming opinion' of people in the public square at the time of Lim's arrest said he meant no harm and was not harmful or offensive.

She said the sign could easily be read as to-and-fro conversation: 'Smile! Can't. Why? Can't.'

... [Lim had earlier] told the court the sign was intended to make people smile and think.

...

Under cross-examination, he said he was aware some people found his signs offensive.

'Everyone thinks differently; it's only a few of them compared to thousands of them [not taking offence],' he said.

...

Defences to offensive behaviour

To be found guilty of offensive behaviour, the prosecutor must prove the two elements of offensive behaviour beyond reasonable doubt. Failure to prove both elements results in the accused being found not guilty of the crime. Therefore, the accused may try to argue that one of the elements is missing. For example, the accused may argue that:

- their behaviour was not contrary to section 17 of the *Summary Offences Act*
- their behaviour did not occur in a public place.

Otherwise, there are a number of defences available to an offensive behaviour charge.

General defences to offensive behaviour

The general defences to offensive behaviour are listed below (see Topic 6.1 for more details on each of these):

- mental impairment – for example, individuals with acquired brain injuries, who have suffered strokes or who are experiencing dementia, may experience coprolalia (compulsive swearing), which means they may be verbally aggressive without meaning to be
- sudden or extraordinary emergency – for example, a person may swear loudly from stress in the event of an emergency, such as an accident on a tram
- automatism – for example, the person may act in a robotic manner that results in them acting obscenely.

Specific defences to offensive behaviour

In addition to these general defences, the following defences to offensive behaviour can be used by an accused.

The behaviour was an exercise of a political or human right

A person is not guilty of offensive behaviour if their behaviour can be considered to be an exercise of a political or human right. In democratic countries, behaviour is not ordinarily seen as offensive if it is a peaceful and appropriate expression of a human right or a political right. Conversely, a person's freedom of expression may be restricted if the manner of expression disturbs public decency and order.

One area in which this defence has been used in Victoria is in relation to protests outside abortion clinics, as explored further in the scenario below.

Actual scenario

Something 'offensive or disgusting' can be 'obscene'

On 5 August 2014, MF protested outside a Melbourne fertility clinic. She displayed posters of aborted foetuses while standing on a public footpath.

Police officers attended the scene following complaints from patients at the clinic. MF was charged with displaying an obscene figure in a public place. She was later convicted in the Magistrates' Court and fined $600.

MF appealed her conviction in the County Court of Victoria on the grounds that the images were not obscene and they did not contravene current community standards. MF also argued that being charged with displaying an obscene figure in a public place was contrary to her human rights because she was exercising her right to political protest at the time of the alleged offence.

In dismissing the appeal, the County Court judge said that the word 'obscene' may relate to 'offensive or disgusting' representations and is not confined to images of a sexual nature. The judge did not consider MF's protest to be political as it targeted

patients and workers at the clinic rather than government representatives.

In this case, MF's actions were not considered to be an exercise of her political rights and were deemed to be offensive. Where the conduct is obviously 'political', the 'reasonable person test' applies (i.e. what would a reasonable person in the same position think of the behaviour?).

Fraser v Walker [2015] VCC 1911 (19 November 2015)

Honest and reasonable mistake

A person will not be guilty of offensive behaviour if they can prove that they made both an honest and a reasonable mistake of fact (not law). This could apply if a person charged with the offence genuinely believed they were not acting in a way that was offensive. The belief must also be reasonable. That is, would an ordinary person in similar circumstances have held the same belief? It is important to show that if the facts (as the accused believed them to be) were true, then the accused would not have committed an offence.

Possible sanctions

Pursuant to section 17 of the *Summary Offences Act*, a person found guilty of offensive behaviour can receive a maximum penalty of 10 penalty units or imprisonment for three months. The maximum penalty increases if there is a second, or third or subsequent offence. The maximum penalty for a second offence is 15 penalty units (approximately $2900) or imprisonment for three months, and for a third or subsequent offence it is 25 penalty units (approximately $4800) or imprisonment for six months.

Penalty units are used to determine the amount that a person can be fined when they commit an offence. The value of a penalty unit is set annually and is updated on 1 July each year by the Victorian Government. Therefore, rather than referring to an actual amount that needs to be paid as a fine, statutes refer to penalty units – thus avoiding having to amend statutes each year to increase the amount that is payable.

The court considers a number of factors when determining a sentence, including the following. These factors may increase or lessen the seriousness of the offending, resulting in the offender receiving a more severe or less severe sentence:

- the nature and gravity of the offending – a highly confronting form of offensive behaviour is likely to increase the seriousness of the offending and, as such, result in the offender receiving a more severe sentence. This is especially the case where the behaviour is of a sexual, racist or homophobic nature
- the vulnerability of the victim – where a victim of offensive behaviour is considered to be particularly vulnerable or relatively defenceless (such as a young person aged under 18 years, an elderly person, a person with a physical disability, or a person with significantly impaired intelligence or a mental disorder), this is likely to increase the seriousness of the offending
- the offender's personal circumstances – the personal circumstances of the offender (including their mental health, personal history and good or poor character) may increase or lessen the seriousness of the offending
- guilty plea – if the offender pleads guilty, the court may impose a less severe sentence than it would otherwise have imposed. An early guilty plea can have particular benefits for the victim's family and friends, as they are spared the stress and trauma of a hearing. It also saves the prosecution, and the wider community, the time and cost of have the case heard in court
- whether the offender has prior convictions – if the offender has not committed any offences in the past, this is likely to lessen the seriousness of the offending. On the other hand, if they have committed offences in the past, especially those involving offensive behaviour, this is likely to increase the seriousness of the offending.

Did you know?

Under section 21 of the *Summary Offences Act 1966* (Vic) it is an offence to wilfully and unlawfully disturb a place of religious worship. The maximum penalty is three months' imprisonment.

Trends and statistics



Source 3 Victoria

Victoria

According to the Victorian Crime Statistics Agency, between 2020 and 2022 the following numbers of offences were recorded in Victoria:

Year	Number of offences recorded (Victoria)
2020	548 086
2021	477 789
2022	483 441

Source 4 Offences recorded in Victoria, 2020–2022 (for the year ending December), according to the Crime Statistics Agency

As can be seen in Source 4, there was a drop (12.8 per cent) in offences recorded between 2020 and 2021. Many people have suggested that crime rates slowed in 2021 because of restrictions imposed as a result of the COVID-19 pandemic. More particularly, the restrictions on movement as a result of public health and safety orders meant that there was less opportunity for committing criminal offences. Such offences would usually occur in places such as nightclubs and bars, on public transport and on the street.

While there were also restrictions on movement in 2020, the number of recorded offences was also affected by a significant increase in public health and safety offences (such as a breach of lockdown orders). For example, 37 461 people were charged with a public health and safety offence in 2020, as opposed to 406 people in 2019.

As to offensive behaviour offences specifically, the Crime Statistics Agency categorises these as 'public order and security offences'. Public order offences also include obscene exposure, rioting, drunk and disorderly conduct, and disorderly conduct.

Source 5 shows the number of offences reported for all offensive conduct and offensive language in Victoria each year since 2018.

Number of recorded offensive behaviour offences (Victoria)					
Offensive behaviour offence	2018	2019	2020	2021	2022
Offensive conduct	4134	4076	4616	5427	5437
Offensive language	944	955	1156	1299	1224
Total	**5078**	**5031**	**5772**	**6726**	**6661**

Source 5 Victorian offensive behaviour offences statistics from the Crime Statistics Agency for recorded offences, 2018–2022 (for the year ending December)

The data in Source 5 shows that there was an increase of over 30 per cent in the total number of offences recorded between 2018 and 2022. While it is difficult to know the reason for this increase, there have been reports that crime among young people has surged, and many young people are often charged with offences such as swearing and offensive conduct. Alternatively, it may be that police are charging more people for the offence, as opposed to previous years when there may have been a greater tolerance and uncertainty around whether particular conduct or language was 'offensive'.

The issue of what constitutes offensive behaviour is explored in the following article.

Actual scenario

How pop culture is changing legal views on swearing

Elyse Methven, *The Age*, 13 April 2017

Warning: The following article contains explicit language.

The Wolf of Wall Street, one of the swooriest movies of all time, contains 506 'f-bombs'. This year's Triple J Hottest 100 countdown featured the word 'f–' 82 times in 32 songs. And a bedtime storybook urges children to 'Go the F– to Sleep!'.

So, should uttering the f-word in public be a crime? And what about the c-word?

In Australia, swearing is ubiquitous. Yet each year, thousands of Australians incur fines or criminal convictions for swearing. The use of offensive, indecent or obscene language in public is punishable in all Australian states and territories. Police typically punish people for saying the words 'f–' and/or 'c–' in their presence.

...

It is up to the individual police officer (when issuing an infringement notice) or magistrate (when hearing an offensive language charge) to determine community standards on offensive language. In doing so, decision-makers draw on their 'common sense' and everyday experience. Unsurprisingly, judicial opinions differ when assessing community standards.

In 2007, for instance, a Western Australian Supreme Court judge said that language which challenges police authority is likely to be criminally offensive. More recently, magistrates have held that the word 'prick' used to describe a police officer, and the expression 'f– Fred Nile' exclaimed at an anti-marriage equality rally, were not criminally offensive.

Is pop culture having an impact on attitudes to swearing in the courtroom? The answer is yes. In the 2003 New South Wales Local Court case, *Police v Butler*, Magistrate Heilpern referred to the prevalence of the f-word word on Triple J and its frequent occurrence on television shows *The Sopranos* and *Sex and the City*. He found the defendant not guilty of using offensive language, stating, 'The word f– is extremely commonplace now and has lost much of its punch.' Although only a Local Court judgment (therefore of limited precedential value), the magistrate's assessment of community standards *has* influenced the criminal law on offensive language.

...



Source 6 Leonardo DiCaprio stars in *The Wolf of Wall Street*, which contains 506 'f words' in just three hours. This is the equivalent of a swear word almost every 20 seconds.

Source 7 provides Sentencing Advisory Council data for the number of people sentenced for offensive language and offensive behaviour in the Magistrates' Court for the period 1 July 2018 to 30 June 2021, and the number of those that were men and women. Interestingly, there were no sentences given for a person singing an obscene song or ballad, or for writing or drawing indecent or obscene words, figures or representation.

Number of people sentenced for offensive behaviour (Victoria)			
Offensive behaviour offence	Number of people: total	Number of people: men	Number of people: women
Offensive language	1162	973	189
Offensive behaviour	1157	969	188
Total	**2319**	**1942**	**377**

Source 7 The number of people sentenced in the Magistrates' Court for offensive language or offensive behaviour from 1 July 2018 to 30 June 2021

Although the offence is a summary offence, Sentencing Advisory Council data shows that:

- over 28 per cent of offenders received a term of imprisonment for using offensive language
- over 32 per cent received a term of imprisonment for engaging in offensive behaviour
- 16 per cent received a community correction order
- 32 per cent received a fine for using offensive language
- 28 per cent received a fine for engaging in offensive behaviour
- about 23 per cent received an adjourned undertaking, discharge or dismissal (which meant that they were found guilty or pleaded guilty, but they were freed without incurring any further penalty, such as having to pay a fine).

New South Wales



Source 8 New South Wales

New South Wales is the most populous of all the states and territories in Australia, with 8.2 million Australians living in the state. It is, therefore, usual for New South Wales crime statistics to show a higher number of recorded offences each year compared to Victoria because of its higher population (about 1.5 million more than Victoria).

The NSW Bureau of Crime Statistics and Research (BOCSAR) is a statistical and research agency that maintains statistical databases on crime and criminal justice in New South Wales, and seeks to identify factors that affect the frequency of crime and where it is occurring.

Source 9 shows the number of offences reported for offensive conduct (i.e. offensive behaviour) and offensive language in New South Wales each year since 2018.

Number of recorded offensive behaviour offences (New South Wales)					
Type of offensive behaviour offence	2018	2019	2020	2021	2022
Offensive language	2 735	2 334	2 125	1 920	1 597
Offensive conduct	4 709	4 567	3 905	3 746	3 582
Total	**7 444**	**6 901**	**6 030**	**5 666**	**5 179**

Source 9 New South Wales offensive language and offensive conduct statistics from BOCSAR for recorded offences, 2018–2022 (for the year ending December)

The data in Source 9 clearly shows a downward trend of offensive behaviour in New South Wales over the five years, with offensive conduct down 6.6 per cent and offensive language down 12.6 per cent. However, recorded rates do not necessarily reflect accurate rates, as it depends on the extent to which people are prepared to report the crime, and the extent to which the crime is detected by police.

According to data from BOCSAR, between 400 and 685 people have been sentenced for either offensive language or offensive behaviour each year between 2018 and 2022. The total number of people who were sentenced for offensive language or offensive behaviour between 1 July 2018 to 30 June 2021 was 2691.

For all offenders sentenced in New South Wales for these crimes between 1 July 2021 and 30 June 2022, nearly 60 per cent received a fine. Only six people out of 625 offenders sentenced during this time received a term of imprisonment. This shows a marked difference to sentencing in Victoria, which appears to adopt a tougher approach to sentencing. In New South Wales, 147 of the 625 offenders (about 23 per cent) received a community sentence.



Source 10 Offensive behaviour laws are in place to discourage anti-social behaviour and use of offensive language in public places.

Possible impacts of offensive behaviour

The main aim of offensive behaviour laws is to maintain public order. These laws seek to discourage anti-social, violent and abusive behaviour, and maintain a sense of public decorum. Most people in the community believe they should be able to be in public places without having to put up with unruly behaviour from others.

It is clear that there is a variety of impacts from this category of offending. There is the effect on victims who can be exposed to the trauma of the event. There is also the broader loss of feelings of safety in local communities where people are exposed to offensive conduct. Of course, the offender also must face the consequences of their actions, which can include loss of reputation in their community as well as the stress of a prosecution against them before a court.

Being punished for swearing or urinating in public has the potential to cause public shame and embarrassment. A high incidence of anti-social behaviour in a community can ultimately impact on people's perception of others. They may think that their neighbourhood is unsafe or that this anti-social behaviour adversely impacts on their quality of life. Prospective employers also tend to favour people who are of good character and conform to social norms, which means that engaging in anti-social behaviour may impact on a person's job prospects.

Source 11 summarises some of the possible impacts that offensive behaviour can have on the victim and their family, on the community, and on the offender.

Impacts on the victim and their family	Impacts on the community	Impacts on the offender
• Disruption to family life • Trauma, grief or fear • Psychological issues, especially if the victim felt physically or emotionally threatened	• Loss of trust in law and order, and community values • Decreased levels of community wellbeing, especially if the offensive behaviour is racist or homophobic	• Loss of reputation and employment prospects • Guilt or shame • Legal costs and the financial impact of sanctions • Lost income, especially if imprisoned

Source 11 A summary of the impacts of offensive behaviour

6.4 Check your learning

Remember and understand

1 **Identify** three actions or types of behaviour that are considered to be offensive under section 17 of the *Summary Offences Act 1966* (Vic).

2 **Describe** two possible reasons why the data in relation to offensive behaviour may not reflect actual offending.

3 Where is 'public place' defined? In your answer, **identify** two places that are considered to be public.

4 **Describe** three possible impacts of offensive behaviour on the community.

Examine and apply

5 Read the scenario 'Something "offensive or disgusting" can be "obscene"'. **Apply** the elements of the crime to **explain** why this is a case of offensive behaviour.

6 For each of the following scenarios, **identify** whether the prosecutor is likely to succeed in establishing a charge under section 17 of the *Summary Offences Act*. To support your answers, you can refer to any cases you have learnt about.

- **a** Megan parked at the front of a pharmacy to buy a heat pack because she had injured her ankle while dancing the previous night. While in the shop, Megan left her car radio on and a Lizzo song was blasting loudly across the street.
- **b** Bridget was protesting outside a supermarket, arguing in favour of stricter laws regarding drunken behaviour at sporting events. Bridget is an emotional person and she used abusive language when talking to a bystander, Andrew, who challenged her.
- **c** Catherine and Rebecca are sisters. They began fighting one day in the front room of their house while the windows and doors were open. Catherine started abusing Rebecca and then drew an offensive picture of her. Their neighbour, Lee, was walking past the house and he could see the image from the street.
- **d** Irena was swearing on her way home on the train one night. However, everyone on the train enjoyed her 'lively banter' and gave evidence that they were not offended.
- **e** Chris yelled loudly at her children to 'get back here you little devils'. An elderly woman, Annie, reported Chris to the police.

7 Using the trends and statistics in this topic, drawn from the Sentencing Advisory Council's website, the Victorian Crime Statistics Agency's website and the NSW Bureau of Crime Statistics and Research's website, create a visual diagram (e.g. a graph) that shows the trends and statistics in Victoria and New South Wales in relation to offensive behaviour. Links to the websites are provided on your obook pro.

- **a** You may wish to split up this task across the class. Come together as a class and analyse the statistics.
- **b** Discuss the extent to which the statistics demonstrate a reduction in the number of incidents of offensive behaviour or language in the community.

Reflect and evaluate

8 **Discuss** the extent to which section 17 of the *Summary Offences Act* infringes on the rights of an individual to freely express themselves.

Weblink
Sentencing Advisory Council: Offensive behaviour

Weblink
Victorian Crime Statistics Agency

Weblink
NSW BOCSAR

Chapter

6

Review

Top assessment tips from Chapter 6

1 When you are given a scenario and asked to analyse whether the accused has committed an offence, work carefully through each element, and then address any defences that may apply. Use headings for each element, and apply the facts of the scenario to each element and any relevant defences.

2 Get into the habit of reading case studies in both the media and online legal platforms. Make notes on cases that are of interest to you. Where there is an appeal in a case, make sure that you follow the eventual outcome. This is an excellent way to become familiar with the language used in cases.

3 Look carefully at trends and statistics, and think about other factors that may impact on the data. For example, could it be an underreported crime? Could it be a crime that is not a priority for police?

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 assessment tasks are composed of a variety of questions. A great way to identify the difficulty of the question is to look at the command term (or terms) used in the question and the mark allocation. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 Select **one** summary offence and outline the elements that need to be established by the prosecution in relation to that offence.

(6 marks)

Difficulty: medium

2 Explain **one** defence that can be used where the accused is charged with a summary offence. To illustrate the elements of the defence, write a brief scenario where the defence may be relevant.

(5 marks)

Difficulty: high

3 Select **one** summary offence. Describe the possible impacts of that offence on the community. In your answer, discuss the extent to which the legal system could reduce the impact of that offence on individuals and on society.

(8 marks)

Practice assessment task

Before attempting this practice assessment task, re-read the information at the beginning of this chapter about the learning outcome, key knowledge and key skills.

Use the internet and/or other sources to find two legal cases or news articles involving **two** of the summary offences covered in this chapter (i.e. one case for each offence). Each case or article should:

- focus on one summary offence rather than lots of different offences
- explain in detail the behaviour of the offender that led to them being charged
- state whether the offender was (or was not) punished; and, if so, what sanction they received.

For these two cases, provide answers to the following questions.

Practice assessment task questions

1 Explain how each element of the offence was met (or not met) by the prosecution.
(8 marks)

2 Describe any defences that were relied on in this case, and whether they were or could be successful.
(5 marks)

3 Describe the sanction that was imposed, and any factors relevant to why that sanction was imposed.
(5 marks)

4 How prevalent is this type of crime in Victoria and in New South Wales? Give reasons for your answer.
(6 marks)

5 Describe the effect this crime has on the victim, on the offender, and on the community.
(6 marks)

Total: 30 marks



Source 1 Bicycle theft is a common form of minor theft in Victoria.

Chapter checklist

Now that you have completed this chapter, reflect on your ability to understand the key knowledge from the Study Design. If you feel you need some more practice, use the revision links to revisit the key knowledge.

Remember that you will also need to be able to draw on and understand the key skills outlined in the Study Design.

Key knowledge	I understand this	I need more practice to understand this	Revision link
• The criminal offence of assault, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society	☐	☐	Go back to Topic 6.2.
• The criminal offence of minor theft, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society	☐	☐	Go back to Topic 6.3.
• The criminal offence of offensive behaviour, including the elements of the offence, possible defences, possible sanctions, trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction, and the possible impact of the offence on individuals and society	☐	☐	Go back to Topic 6.4.

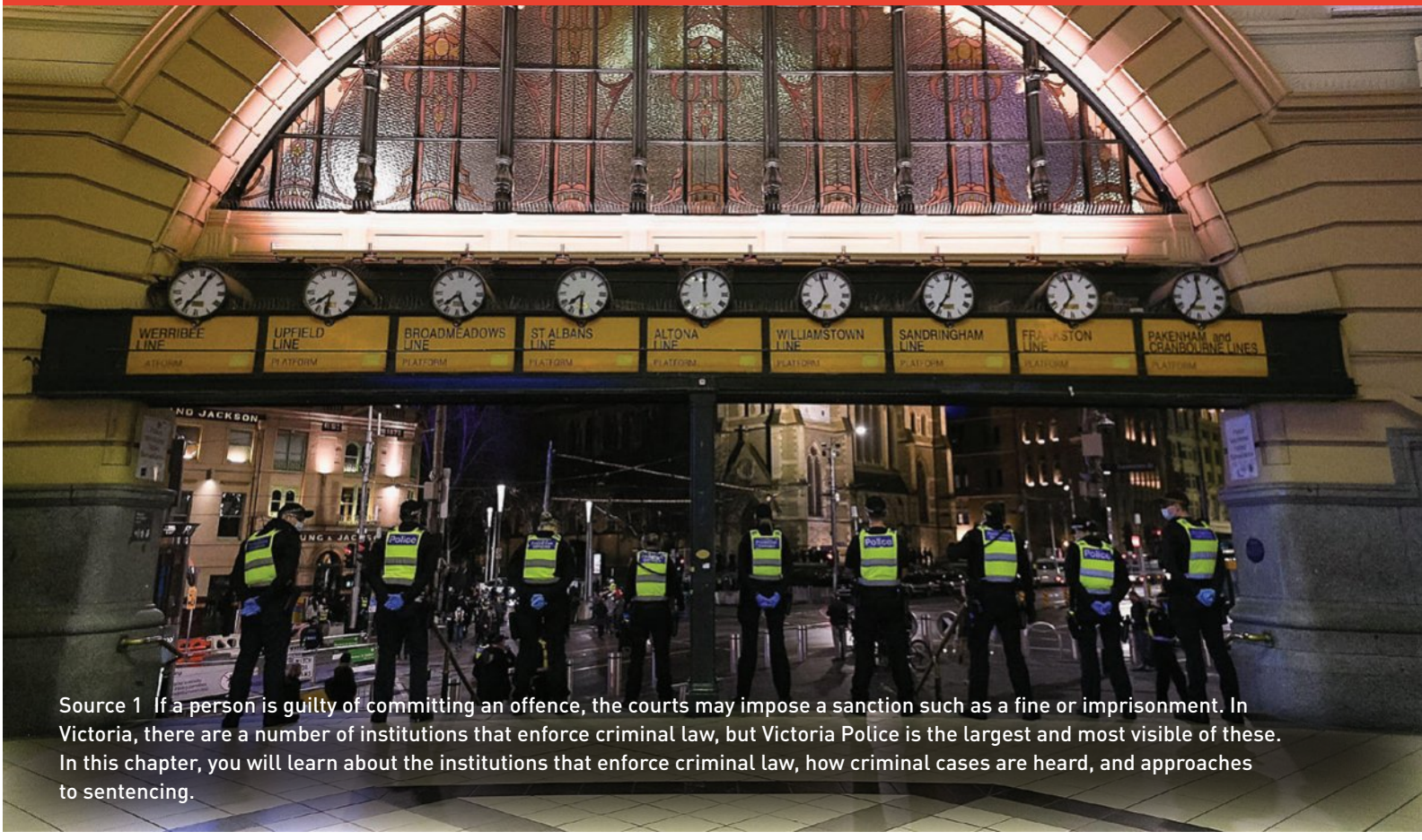
Check your Student obook pro for these additional resources and more:

- **Chapter 6** Chapter review quiz
- **Revision notes** Chapter 6
- **Chapter summary** Chapter 6
- **Quizlet** Revise key legal terms from this chapter.

Chapter

7

Sanctions



Source 1 If a person is guilty of committing an offence, the courts may impose a sanction such as a fine or imprisonment. In Victoria, there are a number of institutions that enforce criminal law, but Victoria Police is the largest and most visible of these. In this chapter, you will learn about the institutions that enforce criminal law, how criminal cases are heard, and approaches to sentencing.

Outcome

By the end of **Unit 1 – Area of Study 3** (i.e. Chapter 7), you should be able to explain the key concepts in the determination of a criminal case, discuss the principles of justice in relation to experiences of the criminal justice system, and discuss the ability of sanctions to achieve their purposes.

Key knowledge

In this chapter, you will learn about:

The principles of justice and experiences of the Victorian criminal justice system

- the principles of justice: fairness, equality and access
- institutions that enforce criminal law, such as the police and delegated bodies
- the balance between institutional powers and individual rights
- an overview of the role and criminal jurisdictions of the Victorian courts
- the role of the jury in a criminal trial
- the difficulties faced by different groups in the criminal justice system, such as First Nations people, young people, culturally and linguistically diverse people, people with mental health issues, and people with disabilities

Sentencing

- the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation
- types of sanctions such as fines, community correction orders and imprisonment
- factors considered in sentencing
- alternative approaches to sentencing, such as the use of the Drug Court, Koori Courts and diversion programs
- sentencing practices in one other Australian jurisdiction.

Key skills

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

- define and use legal terminology
- research and analyse relevant information about criminal law and recent criminal cases
- describe the institutions that enforce criminal law
- explain the role of the Victorian courts and juries in criminal cases
- compare approaches to sentencing in Victoria to those in one other Australian jurisdiction
- discuss the principles of justice in relation to experiences of the criminal law system
- discuss the ability of sanctions to achieve their purposes
- discuss alternative approaches to sentencing
- synthesise and apply legal information to actual and/or hypothetical scenarios.

Key legal terms

access one of the principles of justice; in VCE Legal Studies, access means that all people should be able to engage with the justice system and its processes on an informed basis

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

diversion program a method used in the Magistrates' Court and Children's Court to 'redirect' offenders away from the court and avoid a criminal record by placing them on a plan

Drug Court a specialist court that is able to impose a drug treatment order on an offender where drugs or alcohol contributed to the commission of the offence

equality one of the principles of justice; in VCE Legal Studies, equality means people should be treated in the same way, but if the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage

fairness one of the principles of justice; in VCE Legal Studies, fairness means all people can participate in the justice system and its processes should be impartial and open

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

Koori Court a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for First Nations people

Key legal cases

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

Extracts from the *VCE Legal Studies Study Design* (2024–2028) reproduced by permission, © VCAA

Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

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

Warm up!
Check what you know about sanctions before you start.

Quizlet
Test your knowledge of the legal terms in this chapter by working individually or in teams.

7.1 Introduction to sanctions

Criminal law aims to protect the community by defining what a crime is and determining appropriate penalties for people who commit crimes. Even though various laws are in place that establish that certain acts or omissions are a crime, sometimes people still do the wrong thing, and a court needs to decide whether the person is guilty of the offence and, if so, impose a penalty on that person.

Criminal cases are initiated by the prosecution, which pursues or undertakes the case on behalf of the state. In Victoria, the **Director of Public Prosecutions (DPP)**, along with the **Office of Public Prosecutions (OPP)**, prosecutes indictable offences. For summary offences, sometimes a Victoria Police officer prosecutes the case, though this depends on the body that is enforcing the law. Indictable offences and summary offences are dealt with differently by the courts because of their seriousness. In this chapter, you will explore the ways in which indictable offences and summary offences are dealt with.

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

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

An accused can be a human being, a company or an association. That is, in some situations an organisation can be charged with a crime; for example, tax fraud and workplace health and safety offences. It is not possible for a company to go to jail, but a director of a company can go to jail if they were involved in the crime.

An example of a company charged with a crime and where a sanction was imposed is provided in the scenario below.

Actual scenario

Victorian racecourse club fined

Companies and individuals have various health and safety obligations under Victorian law. For example, companies and individuals who operate or manage a workplace have an obligation to keep workplaces free from harm. A failure to comply with those obligations could result in a criminal prosecution. WorkSafe Victoria, which you will learn about later in this chapter (see Topic 7.3), is a Victorian body that has power to ensure that workplaces are free from harm, and that companies and individuals are complying with their legal obligations.

In August 2019, a 22-year-old apprentice jockey and her training partner were riding their horses on a bush trail in dark conditions when the horses became spooked and stopped suddenly. The horses' actions caused the riders to fall, and the apprentice jockey died at the scene.

The bush trail was operated by a turf club. An investigation by WorkSafe found that the trail included features that could spook a horse in the dark, such as encroaching tree branches, pooled water, and other wildlife. WorkSafe's investigation found that the turf club could have reduced the health and safety risks,



Source 1 A young apprentice jockey tragically passed away after a fall from a horse. An award has been created in her name to recognise leading female apprentice jockeys.

such as limiting access to the trail to daylight hours and installing floodlights to improve visibility.

In February 2023, the turf club was convicted and sentenced in the County Court in Melbourne after it pleaded guilty to breaching health and safety laws. The turf club was ordered to pay a fine of $250 000 and was required to issue an 'adverse publicity order', meaning that it had to advertise the outcome of the case so that people were aware of it.

When a crime has been committed, people expect that justice will be achieved. In this chapter, you will consider the principles of justice in relation to criminal cases. You will look at the ways that criminal law can be enforced, the role of the courts and juries in determining (i.e. ruling on) criminal cases, and sentencing practices. In particular, you will explore:

- institutions that enforce criminal law
- the balance between institutional powers and individual rights
- the role and jurisdiction of the Victorian courts when determining criminal cases
- the role of the jury in a criminal trial
- sentencing (including the purposes and types of sanctions, and alternative approaches to sentencing and sentencing practices in the Northern Territory).

These topics are designed to help you develop an appreciation for how criminal law is enforced and how criminal cases are resolved.

Unlike civil disputes (which can be heard by bodies other than the courts), criminal cases are heard by the courts. The courts decide a person's guilt and hand down a sanction.

7.1 Check your learning

Remember and understand

1 **Identify** the two parties in a criminal case.
2 **Outline** two aims of criminal law.
3 **Describe** two types of crimes that a company may commit.

Examine and apply

4 Read the scenario 'Victorian racecourse club fined'.
   a **Describe** the nature of the crime that was committed in this case.
   b **Identify** the body that investigates crimes such as these.
   c **Describe** the sanction that was imposed in this case.
   d Conduct some research, and **identify** two types of cases involving workplace health and safety offences. Come together as a class to discuss the impacts of these offences on victims, family members and the community.

Reflect and evaluate

5 Imagine that a new Prime Minister has been elected in Australia who has radical ideas about the law. They believe there should be a new law that if a company commits a crime, then the sanction should be automatically imposed on the head of the company, such as the Chief Executive Officer (CEO) or Managing Director. The Prime Minister believes that this should happen in all situations, without exception, even if the business is a small business, or a not-for-profit.

   Conduct a class debate arguing for and against this new law.

6 'Summary offences have more of an effect on the community than indictable offences, because they occur more often, and they often lead to more serious offences at a later time. Therefore, the DPP should prosecute all summary offences.'

   Discuss the extent to which you agree with this statement.

7.2 The principles of justice

Key knowledge

In this topic, you will learn about:

- the principles of justice: fairness, equality and access.

Study tip

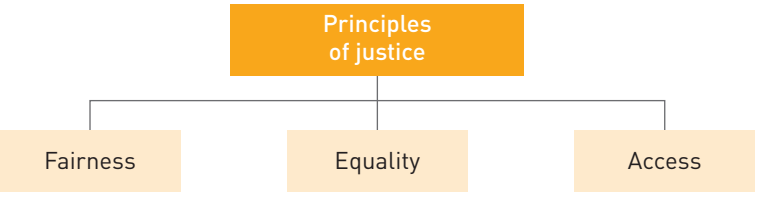
Keep the three principles of justice in mind when exploring the topics in Units 1 and 2. In the margin of your notes, make a comment when you see one of these principles touched on. The more you are able to apply each of these three principles to actual cases, the more you will be able to understand what they mean. This will help you to develop a good basis for Unit 3.

As you learnt in Chapter 3, it is difficult for people to agree on whether justice has been achieved in a criminal justice system, as there are multiple views and perspectives about a criminal case. If a random group of people were asked to assess whether justice has been achieved in a particular case, there would be a range of responses. Some people may believe that justice was served because the person was sent to jail; others may believe it was not served because the prison sentence was not long enough, or because the victims had to endure a long and traumatising trial. Others may believe that justice was served because proper processes were in place, and the judge considered the appropriate factors to decide on a penalty that fit the crime.

When thinking about whether justice has been achieved in the criminal justice system, the three principles of justice can be used:

- fairness
- equality
- access.

If an objective and reasonable person, after considering all the factors in the case, and the various aspects of the criminal justice system, believes that each of the three principles of justice has on the whole been achieved, then it is likely that justice has been attained.



Source 1 The principles of justice are fairness, equality and access.

A brief summary of the principles of justice and how they relate to the criminal justice system is provided below.

Fairness

fairness
one of the principles of justice; in Legal Studies, fairness means all people can participate in the justice system and its processes should be impartial and open

In VCE Legal Studies, **fairness** means that 'all people can participate in the justice system and its processes should be impartial and open'.

We expect processes to be fair. For example, in a criminal case, we expect that the accused, even if they are notorious or considered to be 'evil', will be given the opportunity to defend their case and present their own version of events. The right to a fair trial is a right largely upheld in Australia – but not in some other countries, where often people are imprisoned without due process (e.g. they do not get an opportunity to defend the charges).

There are three main features of fairness in the above definition: impartial processes, open processes, and the ability to participate.

Impartial processes

The first feature of fairness is that all personnel involved in the criminal justice system and in a criminal case – including judges, magistrates, jury members and court personnel – must be independent and impartial. They should not be **biased** towards or against any party, and the case must be decided based on facts and law, rather than opinion and prejudice. This feature also extends to police officers and others who have the power to enforce criminal law.

bias
a prejudice or lack of objectivity in relation to one person or group

Sometimes, while people may not be outwardly or obviously biased, they may have some 'unconscious' bias in that they have learnt assumptions, beliefs or attitudes about a particular person or group of people based on their attributes. These sorts of biases can influence a person's opinion and result in a lack of impartiality, because the person who is biased may make a decision based on what they think or feel, rather than one objectively based on facts.

As explored in Chapter 3, the need for impartiality also means that there should be no suspicion that a person may be biased. This is known as **apprehended bias**. For example, if a magistrate has a longstanding and close friendship with the **prosecutor**, there may be a perception or suspicion that the magistrate cannot bring an impartial mind to the case. In that case, it may be better for a different magistrate to hear the case.

apprehended bias
a situation in which a fair-minded lay observer might reasonably believe that the person hearing or deciding a case (e.g. a judge or magistrate) might not bring an impartial mind to the case

prosecutor
the representative of the prosecution who is responsible for conducting the criminal case and appearing in court

Open processes

The second feature of fairness is that there must be open processes. This generally means that cases are heard and decided in public, so that the community and the media can see justice being done. This allows the media to report on the outcome of a case and the final judgment of the court. Sentencing judgments may also be available online.

In Victoria, the *Open Courts Act 2013* (Vic) recognises and promotes the principle that open processes are a fundamental aspect of our legal system. Open processes strengthen public confidence in justice and allow the integrity of the courts to be maintained.

There are some circumstances, though, where a court may need to be closed to the public, and the court can make an order suppressing information or withholding it from the community. For example, in many sexual offence cases, the courtroom is closed to protect witnesses, and there may even be an order preventing the media from publicising certain issues arising from a case. In addition, not all judgments are reported and published. For example, the Magistrates' Court hears tens of thousands of cases a year, many of which are very minor. It would not be possible to have a written published judgment for each of these cases.

Participation

People must be able to participate in the criminal justice system. Traditionally, this final feature of fairness has related to the parties to a case: the accused and the prosecution. However, it can also extend in a limited way to other people, such as victims. Although victims are not parties to the case, they should have opportunities to participate in some circumstances (such as being able to attend hearings to observe, give **evidence**, and provide a **victim impact statement**).

evidence
information, documents and other material used to prove the facts in a legal case

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

Some of the ways that participation can be and should be achieved are the following:

- *the opportunity to know the case put against the parties* – the parties (particularly the accused) should know the case that is put against them, well before trial. That means that the prosecution and the accused should disclose to each other the evidence they are seeking to rely on. This obligation is particularly important for the prosecution, because the accused is presumed to be innocent, and the prosecution has the burden of proving the case and must produce evidence and documents to discharge this burden. The accused can choose to say and do nothing, and so may not be seeking to rely on any evidence or documents. However, if they do, the prosecution should be made aware of that fact and given the opportunity to respond

- *the opportunity to prepare a defence* – the accused must have adequate time and facilities to prepare a defence, and should have the opportunity to present that case in court. This includes the opportunity to call their own witnesses in support of their case, if they wish to do so. However, as noted above, accused persons do not have any burden of proof (unless they are relying on a particular defence), so their defence may be limited to making submissions about the deficiencies in the prosecution's case
- *the opportunity to examine witnesses* – both parties should have the opportunity to examine witnesses called by the other side. Examination includes examination-in-chief (where a party asks their own witness questions), **cross-examination** (where a party asks questions of the other party's witness), and re-examination (where a party clarifies any answers of their own witness following cross-examination)

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

- *the use of a lawyer* – the accused is entitled to engage a lawyer, and can choose their own lawyer. If they cannot afford a lawyer, they may be able to seek free legal advice or representation through a body such as **Victoria Legal Aid (VLA)**. The High Court has held that a lack of legal representation for an accused charged with committing a serious indictable offence could result in the accused receiving an unfair trial. Victoria now has provisions that allow a court to stay (stop) a proceeding until the accused obtains free legal representation if there is a risk that they will not otherwise receive a fair trial. This is because, generally, it is accepted that accused people do not have the skills, experience or objectivity to be able to run their own case
- *the use of an interpreter* – an accused person should have access to the free assistance of an interpreter if they cannot understand or speak English. An interpreter will then be able to inform the accused of what is happening, so that the accused can fully participate in the case
- *a trial without unreasonable delay* – a criminal case should be held without unreasonable delay. There have been issues with this in the past, where the courts have been suffering delays – including in relation to a backlog of cases as a result of the COVID-19 pandemic and the distancing measures put in place.

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

As noted above, victims are not parties to the case, and therefore they are not actively 'participating' in the case. However, there are some situations where a victim will play a role in the case, and fairness demands that they be able to do so. Some examples are as follows:

- *allowing victims to attend court and be informed* – the *Victims' Charter Act 2006* (Vic) sets out legal principles on how the criminal justice system should respond to and treat victims of crime. The *Victims' Charter Act* requires investigatory and prosecution agencies (such as the police) to provide victims with information, such as information about the progress of the case, and when a hearing will be held. This will then allow the victim to participate by being able to attend hearings and keep informed of outcomes
- *allowing some victims to give evidence in a different way* – victims in some criminal cases should be allowed to give evidence in a different way. That is, the courts have recognised that some victims are vulnerable, and at risk of trauma from having to relive what happened to them, particularly in cases involving family violence or sexual assault. In these types of situations, the court may order that the witnesses give evidence using **alternative arrangements**, such as having a support person present, or giving evidence by video link
- *the use of victim impact statements* – when a court is required to sentence an offender, the victim has an opportunity to tell the court what happened to them and the impact of the crime on them through a victim impact statement. This is an important way in which the victim can express in their own terms the difficulties they have suffered as a result of offending

alternative arrangements measures that can be put in place for witnesses in certain criminal cases (e.g. sexual offence cases) to give evidence in a different way (e.g. via video link)

- *providing an opportunity to give their views* – victims may have the opportunity to give their views to the prosecution about certain matters, such as **plea negotiations**. This is where the prosecution and the accused may reach an agreement about the case, such as the accused agreeing to plead guilty to some charges, on the basis that the prosecution withdraws other charges. While the victims' views may not be determinative in whether there is a plea negotiation or what agreement is reached, it is an important way for their voice to be heard.

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)

An example of a case where there was a clear lack of participation, and therefore fairness, is in the scenario below. While this is an overseas case, it demonstrates that significant injustice can occur where there are limited opportunities to participate in a proceeding.

Actual scenario

Two women sentenced to prison in Iran

Iran, or the Islamic Republic of Iran, is headed by a Supreme Leader, who is appointed for life. The legal code in Iran is based on Islamic law or sharia. Its courts are based on an inquisitorial system, meaning that the judge investigates the case and decides on the verdict.

The Bahá'í faith is a religion founded in the nineteenth century.
Its followers, estimated to be around 8 million people, are known as Bahá'ís. Bahá'ís are Iran's largest non-Muslim religious minority. They are routinely arrested, detained and imprisoned. They are prohibited from holding government jobs and from practising their religion, and young Bahá'ís are not allowed to attend university. This persecution has received widespread condemnation, including from the United Nations Human Rights Council.

In November 2022, just four months after their arrest, two Bahá'í women were sentenced to a second 10-year prison term for 'disturbing national security' after they had already served a 10-year sentence for charges that the international community believed had been improperly made in the first place (including 'corruption on Earth'). The trial lasted for one hour, during which time it was reported that the judge largely insulted and humiliated the women. The judge noted that the women had 'not learnt their lesson' from the previous imprisonment. It was reported that no new evidence was presented at the latest trial to support the charges. Serious concerns are held about the safety of the women, who are highly regarded within their community. It has been reported that Bahá'ís are often detained on false charges, tried without due processes and mistreated during questioning.



Source 2 Two Bahá'í women, including Mahvash Sabet (pictured), have been sentenced to a second term of imprisonment.

In this chapter, you will consider whether the criminal justice system achieves fairness. When considering the issue of fairness, you should look at the above features and characteristics to determine whether fairness was achieved.

Equality

equality
one of the principles of justice; in VCE Legal Studies, equality means people should be treated in the same way, but if the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage

Equality is the second principle of justice. In VCE Legal Studies, equality means that 'all people engaging with the justice system and its processes should be treated in the same way. If the same treatment creates **disparity** or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage.'

While fairness is about processes, equality is about how a person is treated. In the above definition, equality can be achieved by either treating people the same, or, if that results in disadvantage, by treating people differently.

Same treatment

Traditionally, equality was seen to be achieved by treating people the same; that is, without having regard to their attributes or characteristics. This is referred to as 'formal equality' – everyone is given the same opportunities, treatment and support regardless of their characteristics such as race, religion, gender identity, or age.

disparity
a situation in which two or more things or people are not equal, and the inequality causes unfairness

For example, if we adopted formal equality in every case, and the accused person was a young child, no adjustments would be made for them. This would mean the judge would use the same language with the child as they did with the prosecution; the child would be handcuffed and sit in the dock, just like an adult accused person; and the child would not have any support persons. If the child filled out a form incorrectly, the court would not accept the form. There would be no flexibility in the way that processes are managed.

In some circumstances, such as these, formal equality may actually result in disadvantage or disparity. Given that the court system is an adult-oriented environment, the child would suffer significant disadvantage because they were treated like any other person. It may increase their stress and nervousness, and they may be found guilty not because they are guilty, but because they were not able to properly participate in the justice system because they did not know what was going on.

As another example, consider an accused person who has learning difficulties. Is it appropriate for the accused to be treated exactly the same as the prosecutor, who may have no learning difficulties and will most likely have significant experience in criminal law and processes?

In these situations, for equality to be achieved, a party may need to be treated differently.

Different treatment

If treating people in the same way could in fact cause disparity or disadvantage, as in the situations above, then measures should be put in place to allow people to participate in the justice system without disparity or disadvantage. This is often called 'substantive equality' – it recognises that sometimes the 'one size fits all' approach does not work, and special measures need to be put in place so that people do not suffer disadvantage simply because of who they are.

appeal
an application to have a higher court review a ruling (decision)

The courts now widely recognise that their processes and systems may sometimes need to be adjusted. In fact, if they are not adjusted, this can give rise to an **appeal**. Therefore, the courts will generally take care to ensure that they have made appropriate adjustments or changes to ensure that no person is disadvantaged.

While there is no comprehensive list of the different types of adjustments or measures that can be put in place, some of them are as follows:

- interpreters – accused people who cannot understand or communicate in English, including recently arrived migrants and some First Nations people, may need an interpreter to help them participate and understand what is happening

- providing information in a different way – there may be a need for information to be communicated in a different way. For example, information should be available in languages other than English, the court personnel may need to simplify their language so that they are speak more slowly or with less legal terminology, and sentences may be deliberately shortened or simplified. This can apply to people with intellectual disabilities, young people, people who do not have sufficient understanding of the English language, and victims who may be struggling to process information because of a trauma
- changes to court processes – in some circumstances, it may be necessary to change court processes or even change the courtroom. For example, a different, smaller courtroom may be used for young people, as they may be overwhelmed by a larger courtroom. More breaks or adjournments may be required where people are involved who who have mental health issues or who are pregnant
- different form of oath – people who do not practise a Christian religion may require the use of a different **oath**. The appropriate holy book should also be available if the person wishes to use it to give an oath
- changes for the purposes of cultural differences – adjustments may need to be made for cultural reasons. This can include changes to physical layouts, or even an increase in cultural training for court personnel. For example, some First Nations people may like to explain what happened through storytelling and in a narrative form rather than through direct questioning, and may find examination confronting. Cultural training for court personnel may assist with that
- flexibility – flexibility may be required for certain people during court processes or when filling out forms. For example, an accused person who is not represented by a lawyer is not expected to know how to cross-examine a witness or how to fill out a particular form correctly. The judge or magistrate may therefore adjust court processes or accept incorrectly filled out forms, acknowledging the difficulties an accused person is faced with.

oath
a solemn declaration by which a person swears the truth on a religious or spiritual belief. Without the religious or spiritual belief, it is called an affirmation



Source 3 The Children's Koori Court (see Topic 7.11) is a sentencing court for young First Nations people. The Children's Koori Court seeks to address the disadvantage that may be suffered by young First Nations people in mainstream courts, by focusing its processes and layout on cultural needs.

In this chapter, you will learn more about the ways in which the criminal justice system tries to achieve equality. Try to look for when the same treatment (formal equality) is sufficient to achieve equality, or when different treatment (substantive equality) is required to avoid any disparity or disadvantage caused by formal equality.

The scenario below explains how a self-represented accused person can suffer disadvantage if appropriate measures are not put in place.

Actual scenario

Lack of different treatment results in disadvantage

In this case, the Supreme Court recognised that insufficient measures had been put in place to ensure that a mother (B) and daughter (M), who had been charged with various offences, were able to properly participate in Magistrates' Court and County Court proceedings.

B and M were charged by a local council for failing to secure and demolish their home after it burned down. They did not have a lawyer at the Magistrates' Court hearing, and were fined. They appealed to the County Court, but failed to appear at the hearing. They then sought an order from the County Court to reinstate their appeals.

Both B and M had characteristics that meant they were at a disadvantage. B was a pensioner with a learning disability. M, whose first language was not English, was her carer. At the hearings, they were not able to explain their case.

At the County Court hearing, B and M again did not have a lawyer. They struggled to explain themselves to the judge, and were given limited assistance. The judge did not explain the procedure to them, nor the legal test that would be applied. B and M did not understand what was happening. During the hearing, the judge did not pause to speak with B and M in the same way that he did with the lawyer for the prosecution. At one stage, the judge interrupted B while she was speaking. It was clear that B and M were confused about the application, and that they had limited capacity to speak English. The hearing was conducted quickly, and the judge dismissed their application.

In considering his review of the decision, Justice Bell said:

> It can be seen from [M] and [B]'s participation in the hearing before his Honour [in the County Court] and this court that English is not their first language. I would describe [M]'s level of English as simple and [B]'s as functional. I am not suggesting that the hearing before his Honour should have been adjourned until an interpreter was obtained. But his Honour did not appear to take [M] and [B]'s capacity to speak English into account. In consequence, the hearing was conducted too quickly for their level of English, which compounded the disadvantage that they experienced. In particular, I think they were struggling to understand what the real issue was, especially given the time taken up with clarifying the confusion surrounding the various hearings and applications.

Justice Bell also noted that a judge has obligations in relation to self-represented parties:

> Effective participation in a hearing by self-represented parties requires (among other things) a basic understanding by them of the procedures to be followed. In this regard, the position of [M] and [B] was fundamentally unequal to that of the Council, for its legal representatives knew what procedure would be followed while [M] and [B] did not. The judge made no attempt to equalise the position by explaining the procedure to them . . .

The Supreme Court ultimately made orders requiring B and M's appeals to be reheard and determined by a different judge.

Matsoukatidou v Yarra Ranges Council [2017] VSC 61 (28 February 2017)

Access

Access is the third principle of justice. In VCE Legal Studies, access means that 'all people should be able to engage with the justice system and its processes on an informed basis'.

access
one of the principles of justice; in VCE Legal Studies, access means that all people should be able to engage with the justice system and its processes on an informed basis

Access extends beyond the accused. It requires all parties, including victims, to be able to obtain the information they need for a criminal case. For the accused, this includes information about legal rights and processes. For a victim, it is more limited to information about their own rights, what protections and compensation may be available to them, and how the justice system works.

The above definition makes clear that people should be able to engage with the justice system, and that people should be able to be engaged on an informed basis.

Engagement

Engagement not only means actively or physically engaging, but also being able to use and participate in the justice system. If people cannot use or participate in the justice system, then they cannot 'access' it. Access therefore extends to:

- physical access – people should be able to physically attend the courts, appropriate services and/or lawyers' offices. This may be more difficult for people in rural or remote areas, or for people who have disabilities. For example, it is recognised that people in rural or remote areas are physically distant from courts and legal service providers such as VLA, and that this may prohibit them from engaging with the justice system, or at least make it more difficult for them
- technological access – if virtual or online methods are used to provide services or even conduct court hearings, then people should be able to use them. Some people may not be able to do this. For example, a person may not have access to technology or to the internet, or they may have a learning disability or special needs that prohibit them from doing so. People who are in jail and are accused of committing a further crime may also be at a disadvantage
- financial access – people should be able to defend themselves, particularly given the High Court has recognised that fairness can be inhibited if a person does not have access to legal representation. Australia's legal system is often criticised for failing to provide adequate access to justice to many groups within our society. One of the biggest reasons for this is because the legal system is considered too expensive, and only accessible to those who can afford it.



Source 4 People who cannot afford to pay for legal representation may have less access to the justice system.

Informed basis

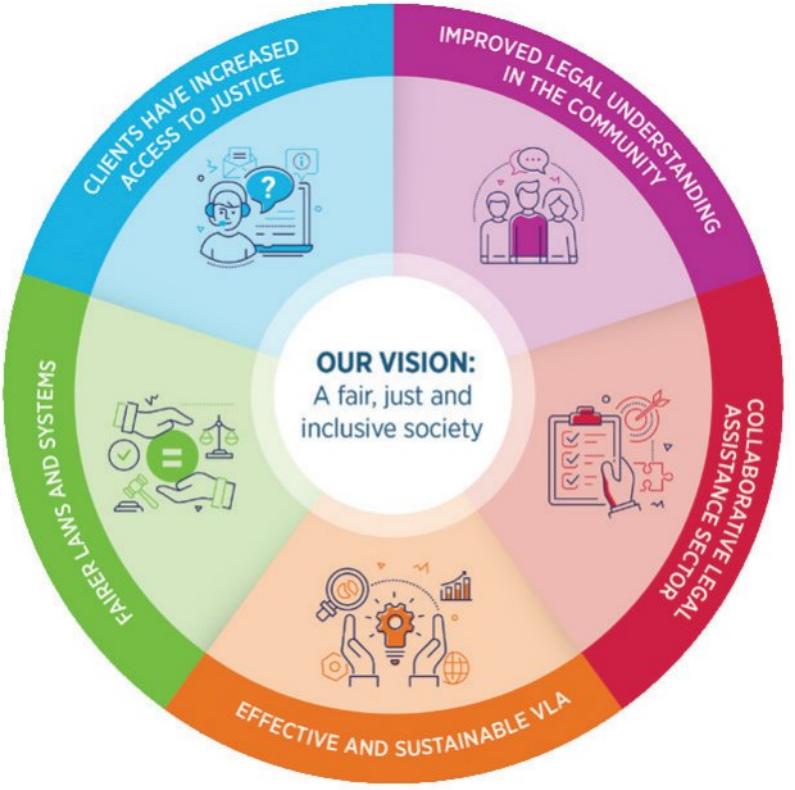
People should be able to engage with the justice system on an 'informed' basis. Just because a person is able to physically attend a court, or access a website, does not mean that they can actually access the justice system. They also need to have a level of information or understanding about the system, the processes and their rights to be able to engage and make decisions (such as whether they are going to plead guilty, call witnesses, or negotiate an agreement with the prosecution).

Many people are at a disadvantage because their personal characteristics mean they may not have a sufficient level of information to be able to fully engage with the justice system. This includes people with low literacy levels, people with intellectual disabilities, young people, and people who do not understand English. Some ways that the criminal justice system may need to enable a person to be informed are as follows:

- education – people who have completed higher levels of education, or who have particular knowledge of the criminal justice system or their rights, may be better informed than others. However, 'education' does not necessarily mean formal education. Legal services bodies such as **community legal centres (CLCs)** run educational programs to give the community a better understanding of the justice system
- information – people should have access to information about their rights and about legal principles and processes. This can be in the form of fact sheets, brochures, handbooks and websites. The courts, VLA and CLCs all provide information online and in person
- legal and support services – free access to legal and support services can help people be more informed about their rights and about legal principles and processes. Such services may include services for accused people and victims
- legal representation – being represented by a lawyer is an effective way to be informed. Lawyers are skilled in navigating the justice system, and can explain to an accused person or a victim what is happening or what they recommend the person should do. As noted above, however, one of the greatest issues with the Australian justice system is that it is designed so that people need to have lawyers, but lawyers are too expensive for a large proportion of the community.

community legal centre (CLC) an independent community 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

In this chapter, you will consider parts of the criminal justice system such as courts and juries. In doing so, you should consider the extent to which access can or will be achieved.



Source 5 VLA's *Outcomes Framework 2022–30* is designed to increase access to justice and improve legal understanding in the community.

7.2 Check your learning

Remember and understand

1 **Identify** and **define** the three principles of justice.

2 **Describe** one of the principles of justice. **Explain** how it could be achieved in a criminal case.

3 **Distinguish** between formal equality and substantive equality. In your answer, provide an example of when formal equality may result in disparity.

4 **Outline** the three main features of fairness.

Examine and apply

5 **Identify** the principle of justice that you think each of the following is most closely aligned with:

- **a** the use of an unbiased and independent judge
- **b** free legal information given to the accused
- **c** an information session about knowing your legal rights
- **d** the prosecution telling the accused the names of the witnesses who will give evidence during the trial
- **e** the use of a randomly selected jury
- **f** both parties given the opportunity to make opening submissions to the court
- **g** the victim being told by the police about the progress of the case
- **h** the accused being assisted by the judge with procedural matters in court
- **i** the jury not being told about the accused's prior convictions during a trial

6 For each of the following issues or situations, **explain** how it is relevant to fairness, equality and access. Try to do this as a class, and create a mind map together. The idea of this activity is to demonstrate the connectedness and overlap between the three principles.

- **a** An accused person does not have access to enough funds to engage a lawyer.
- **b** An accused person does not understand any English.
- **c** An accused person has an acquired brain injury due to drug abuse.

Reflect and evaluate

7 Read the scenario 'Two women sentenced to prison in Iran'. **Identify** all the parts of the scenario that relate to fairness, equality and access. Discuss as a class what should have happened to achieve each of those principles.

8 'Individuals in society who are the most disadvantaged are ignored by the legal system.'

Discuss the above statement. In your answer, refer to the scenario 'Lack of different treatment results in disadvantage'.



7.3 Institutions that enforce criminal law

Key knowledge

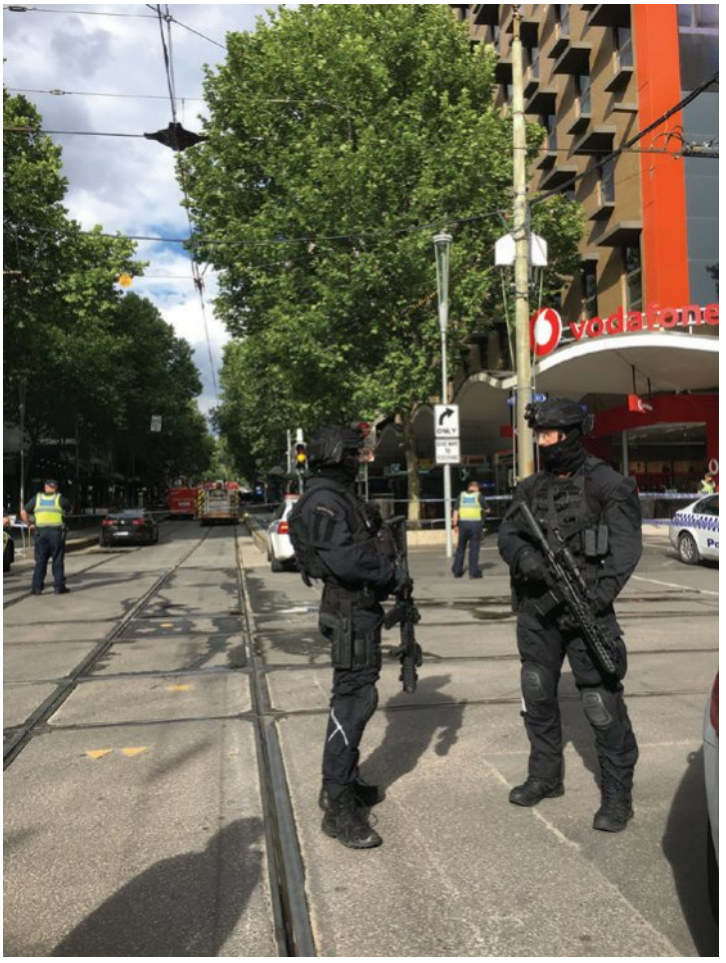
In this topic, you will learn about:

- institutions that enforce criminal law, such as the police and delegated bodies.

If an individual or company has broken the law by committing a crime, the law must be enforced so that the individual or company is brought to justice.

In Victoria, the following institutions have the power to enforce certain types of criminal laws:

- the police, including Victoria Police and the Australian Federal Police
- other bodies, including WorkSafe Victoria and local councils, who are delegated (given) powers to enforce the law.



Source 1 The Special Operations Group (SOG) is the branch of Victoria Police that is called out in cases of extreme emergency, including sieges and bomb threats. Its officers are highly trained in anti-terrorism tactics, entering buildings, and conducting high-risk searches.

The police

The role of the police is to serve the community and the law, and to enforce criminal law. The police preserve the peace, protect life and property, prevent crime, detect and apprehend offenders, and assist victims of crime and other people in times of emergency.

If a crime is committed in Victoria, depending on the nature of the crime, Victoria Police or the Australian Federal Police, or even both, may be involved. These two bodies are explored further below.

Victoria Police

Victoria Police was established in 1853, not long after the colony of Victoria was established. The police force is governed by the *Victoria Police Act 2013* (Vic). As at 18 June 2022, there were 21398 employees of Victoria Police, including the Chief Commissioner, deputy commissioners, assistant commissioners and various ranking police officers such as constables, sergeants and senior sergeants.

The role of Victoria Police is to serve the Victorian community and to uphold the law to promote a safe, secure and orderly society.

Victoria Police is the main institution that enforces criminal law relating to indictable offences and most summary offences in Victoria. In the year 2021–2022, Victoria Police recorded 469506 offences. More than half of these offences were property and deception offences (such as theft).

The role of Victoria Police in enforcing criminal law includes to:

- talk to victims or witnesses about what happened
- question possible suspects
- examine the scene(s) of the crime
- look for and gather physical or forensic evidence
- conduct searches of people or property
- arrest accused persons
- charge people with the offences that most fit the crime.

Victoria Police also has forensic experts to assist with investigations, who can analyse evidence such as drugs, paint, fibres and biological material (e.g. hair and blood).

For summary offences, the police have the power to prosecute these cases in court. Normally, police prosecutors who specialise in conducting such cases prosecute summary offences in court. For indictable offences, police officers undertake the investigations, gather the evidence, and charge the accused persons. The information gathered is then given to the Office of Public Prosecutions (OPP), which is responsible for the prosecution at trial.

To allow Victoria Police to enforce the law, various statutes provide this institution with a number of powers. For example:

- Section 458 of the *Crimes Act 1958* (Vic) provides a Victoria Police officer with the power to arrest a person without a warrant (i.e. a document issued by a court that allows a person such as a police officer to undertake an action such as arrest) in some circumstances; for example, when a person is found committing an offence and their arrest is necessary to preserve public order.
- The *Crimes Act* enables a Victoria Police officer to take fingerprints of suspects in certain circumstances; for example, if a person is believed on reasonable grounds to have committed certain crimes.
- The *Victoria Police Act* gives a wide range of powers to police officers, including the power to enter and search premises if the officer believes on reasonable grounds that a person has committed an offence and the occupier of the premises consents.

Did you know?

In 1924, women were allowed to be sworn members of Victoria Police. However, it was not until 1972 that married women were allowed to join the force.

Australian Federal Police

The Australian Federal Police (AFP) was established by the *Australian Federal Police Act 1979* (Cth). The AFP consists of a Commissioner of Police, deputy commissioners, AFP employees, special members, and special protective service officers. As of 30 June 2022, the AFP had 7462 staff members.

One of the key roles of the AFP is to investigate offences that have a federal aspect. These include offences that are against the law of the Commonwealth and certain offences that are against the law of a state. One of these laws is the Commonwealth Criminal Code, which establishes a number of Commonwealth offences (e.g. terrorist-related offences, war crimes and some drug offences).



Source 2 The AFP works at major airports in Australia. Law enforcement activities at airports include deterring acts of terrorism and investigating organised crime.

The AFP is provided with various powers to enforce criminal law. For example, protective service officers have the power to arrest a person without a warrant and to search a person.

Depending on the nature of the offences, the AFP may work with Victoria Police or other investigative agencies (including other state police forces) to identify and arrest possible offenders, as illustrated in the following scenario.

Actual scenario

Operation Jumbuck

In this case, the AFP led a joint organised crime police taskforce called Operation Jumbuck, which involved the AFP, the Australian Border Force (ABF), the Australian Criminal Intelligence Commission and Victoria Police.

In January 2021, the ABF intercepted three large boxes that had been delivered from South Africa to Melbourne via Hong Kong. The boxes were examined, and 63.3 kilograms of methamphetamine (sometimes referred to as 'ice') was found in the lining. Methamphetamine is a highly dangerous and addictive drug that has a devastating effect on individuals, families and communities, and is banned in Australia. The AFP regularly works with agencies to prevent the importation of the drug into Australia.

The finding of the drug resulted in the taskforce being established. The drug packages were substituted with pool salt, and a controlled delivery took place. The boxes were delivered to their address by a police officer posing as a delivery driver. The address was a lockup shed behind a residential property in the Melbourne suburb of St Albans that was used to store building materials. Soon after the delivery, various persons attended the property, which was kept under surveillance.

The police ultimately arrested several people, including a man from Sunshine North for his involvement in the importation. The man was identified as being a key facilitator in the importation. He pleaded not guilty. In October 2022 he was found guilty of one charge of attempting to possess a commercial quantity of an unlawfully imported border-controlled drug.

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

The offender was sentenced to 16 years' imprisonment with a non-**parole** period of 11 years. In sentencing the offender, the County Court judge noted that the sentence must 'send a signal to all those involved in the pernicious trade in a drug that is wreaking havoc in the community that they must expect heavy punishment to deter others'.

In its media release about the sentence, a Victoria Police representative said: 'Illicit drugs contribute to a range of other serious criminal offending, and it is incredibly rewarding to work in collaboration with our State and Federal partners to prevent over 60 kg of methamphetamine reaching our local community.'

DPP v Nguyen-Huynh [2023] VCC 190 (17 February 2023)

Delegated bodies

delegated body
an authority or agency given power by parliament to make and/or enforce laws

In addition to state and federal police forces, there are a number of bodies in Victoria that are given authority by the Victorian Parliament to enforce criminal laws. These bodies are known as **delegated bodies** because they are delegated (i.e. given) power by parliament to make and/or enforce laws.

The power to enforce criminal law is given by an Act of Parliament, which specifies who has the power to enforce the law. For example, the *Estate Agents Act 1980* (Vic) regulates real estate agents and the sale of property in Victoria. Section 47C of the Act makes it an offence for a person to market (advertise) a property for sale at a lower price than the estimated selling price. This is known as underquoting. The Act provides power to the Director of Consumer Affairs Victoria to initiate a prosecution if a real estate agent underquotes a property.

Victorian delegated bodies

Some of the Victorian bodies that have the power to enforce criminal laws are listed in Source 3.

Victorian delegated body	Description of powers to enforce criminal laws
Consumer Affairs Victoria	Consumer Affairs Victoria can take action in relation to breaches of consumer trading laws and tenancy laws.
Environment Protection Authority Victoria (EPA)	The EPA has the power to investigate breaches of environmental laws and to commence proceedings for offences committed in relation to the environment.
Local councils	Local councils govern at a local level and have the power to enforce a local law that makes an act or an omission a criminal offence.
State Revenue Office (SRO)	The SRO is Victoria's tax collection agency. The SRO also administers laws relating to taxes, duties and levies. For example, the SRO can take action in relation to individuals who seek to avoid paying state taxes, or who provide false or misleading information about their personal affairs.
VicRoads	VicRoads has authority to prosecute certain road and traffic offences. It can also issue infringement notices for breaches of road rules.
Victorian WorkCover Authority (WorkSafe Victoria)	WorkSafe Victoria monitors and enforces compliance of Victoria's occupational health and safety laws. It can investigate breaches of laws and prosecute in relation to any breaches.
Wage Inspectorate Victoria	Wage Inspectorate Victoria can monitor and enforce compliance with wage theft laws, and investigate employee entitlement offences (such as where a business has underpaid an employee).
Victorian Building Authority (VBA)	The VBA regulates the building and plumbing industries in Victoria, and can monitor and enforce compliance with building laws.

Source 3 Examples of Victorian bodies that have the power to enforce criminal laws

An example of a delegated body, the Victorian Building Authority, enforcing a law is described in the scenario below.

Actual scenario

Victorian man fined

The Victorian Building Authority (VBA) is responsible for regulating the building and plumbing industries in Victoria. As part of its role, the VBA deals with complaints relating to breaches and offences under the *Building Act 1993* (Vic) and the *Domestic Building Contracts Act 1995* (Vic), and can file charges for breaches of building laws. For example, it is an offence for a person to carry out domestic building work unless they are a registered builder.

In March 2023, a man was convicted in the Broadmeadows Magistrates' Court after he was found to have been operating a building company, but the company was not registered and the man was at no time a registered builder. The offender had been hired by a couple to build their home, which was left unfinished.

The offender was fined just over $43 000. The VBA noted that the sanction reflected the seriousness of the matter and the stress and harm it caused to the couple.



Source 4 The VBA has warned consumers to check that anyone they engage as a builder is registered.

Commonwealth delegated bodies

Some of the Commonwealth bodies that have the power to enforce criminal laws are listed in Source 5.

Commonwealth delegated body	Description of powers to enforce criminal laws
Australian Securities and Investments Commission (ASIC)	ASIC investigates breaches of legislation, including where directors have acted in breach of their duties. Sometimes, matters are prosecuted by the Commonwealth DPP.
Australian Taxation Office (ATO)	The ATO investigates serious tax-related fraud offences. The ATO prosecutes summary offences (e.g. failing to lodge a tax return) and generally refers serious cases to the Commonwealth DPP.
Australian Competition and Consumer Commission (ACCC)	The ACCC is Australia's national competition, consumer, fair trading and product safety regulator. Breaches of consumer laws can result in criminal prosecutions. The ACCC can refer certain conduct for prosecution by the Commonwealth DPP.

Source 5 Examples of Commonwealth bodies that have the power to enforce criminal laws

There are also a number of other bodies and agencies that can refer matters to the Victorian DPP or the Commonwealth DPP to prosecute. They include the Australian Government department Services Australia (in relation to welfare fraud) and AUSTRAC, which is the Commonwealth's anti-money laundering and terrorist financing intelligence agency.

Example: WorkSafe Victoria

WorkSafe Victoria is the trading name of the Victorian WorkCover Authority, which was established under the *Occupational Health and Safety Act 2004* (Vic). This Act is the main statute in Victoria that aims to ensure the health, safety and welfare of employees and other individuals at work. Laws that



Source 6 WorkSafe Victoria is a body established by the Victorian Parliament to monitor and enforce workplace health and safety laws.

regulate safe work conditions are designed to ensure that workers are protected, and do not feel their safety is at risk when working. These laws also ensure that businesses do not have to pay the financial costs associated with having unsafe practices. For example, a business may end up spending more as a result of workplace injuries, lack of productivity and worker absenteeism if unsafe practices are in place.

One of the functions of WorkSafe is to monitor and enforce compliance with the *Occupational Health and Safety Act* and other statutes such as the *Dangerous Goods Act 1985* (Vic). It is a criminal offence to not comply with some health and safety obligations.

For example, section 21 of the *Occupational Health and Safety Act* imposes a duty on an employer to provide and maintain a working environment that is safe and without risks to health.

In many prosecutions, WorkSafe works with the OPP to prosecute the matter. This means that WorkSafe investigates the breaches and prepares the evidence, and then the OPP prepares for and conducts the hearings.

The following scenario outlines an incident involving a serious breach of workplace safety.

Actual scenario

Protecting miners

The offender, a company, operated a vertical shaft mine in Woods Point, Victoria. On 6 November 2020, an employee of the company was operating a machine known as a scraper. The machine was an older model that was not fitted with any safety guards. The employee was standing on top of the scraper, and at one point he stopped operating it to explain a risk to a trainee; but he did not shut the scraper down. A loose strand of wire rope came across his gumboot, tearing off the steel cap and part of his big toe.

The company pleaded guilty to failing to 'provide or maintain plant [i.e. equipment] . . . that [is], so far as is reasonably practicable, safe and without risks to health' – an obligation under section 21 of the *Occupational Health and Safety Act.* In particular, the company had failed to install a guard on the scraper to prevent access to the wire rope.

The company was ordered to pay a fine of $30 000 and costs of $4098. A conviction was also recorded against it. The company's early guilty plea and cooperation with the investigation were taken into account as part of sentencing.

Study tip

The WorkSafe Victoria website provides information about its recent prosecutions, including a detailed summary of each action taken and the penalty imposed. Looking at this information is a useful way to get an idea of the sorts of incidents that WorkSafe investigates and prosecutes. A link is provided on your obook pro.

Weblink
WorkSafe Victoria

Example: Local councils

Local councils – sometimes referred to as 'municipal councils' – were established to ensure the peace, order and good government of local districts. There are 79 local councils in Victoria. They have been given authority by the Victorian Parliament under the *Local Government Act 1989* (Vic) to make and enforce local laws, often called **by-laws**, for their own local district. These include laws relating to building and planning permits, childcare centres, rubbish and local libraries.

For example, the General Purposes Local Law 2015 is a by-law passed by Maribyrnong City Council. Section 13 of that by-law makes it an offence for a person to consume alcohol or be in possession of alcohol, other than in a sealed container, on a road or on council land. The penalty for committing this offence is 20 **penalty units** (approximately $3800). The use of penalty units instead of fixed monetary fines enables the government to increase all fines by increasing the value of a penalty unit each year without having to change every statute.

by-laws
local laws or regulations made by local councils that apply to residents in local areas

penalty unit
a measurement used to calculate the amount of a fine. The government can change the value of a penalty unit to increase the amount of a fine.

If the law noted above is broken, Maribyrnong City Council could enforce it by:

- warning the person who has breached the law
- directing the person to cease the activity
- issuing an infringement notice
- commencing legal proceedings.

In addition to making and enforcing by-laws, local councils can also enforce certain state laws. That is, there are Victorian statutes that give local councils the power to enforce the law if an offence has been committed. For example, the *Food Act 1984* (Vic) establishes a number of offences in relation to food handling. The purpose of these offences is to ensure that food for sale is safe and suitable for human consumption. The *Food Act* gives local councils the power to bring proceedings for offences under the Act.

The following scenario is an example of a food safety offence.

Actual scenario

Restaurant company fined

In 2022, a company that operated a cafe and restaurant facility in Maribyrnong was convicted of food-related offences in the Sunshine Magistrates' Court and fined $3304. It was also required to pay $181.70 in costs. The prosecution was brought by Maribyrnong City Council.

The charges were laid under section 16(1) of the *Food Act* on the basis that the company failed to comply with a requirement to maintain all fixtures, fittings and equipment, as well as vehicles used to transport food, to a standard of cleanliness. It was also found that the company did not adequately clean eating and drinking utensils, and food contact surfaces of equipment. A conviction was recorded against the company.



Source 7 The *Food Act* is the key piece of legislation regulating the sale of food in Victoria. Owners of food businesses must ensure that food sold to customers is safe. This includes food products that are sold as being suitable for people with allergies to ingredients such as nuts, lactose, seafood and gluten.

7.3 Check your learning

Remember and understand

1 **Explain** what it means to enforce criminal law.

2 **Define** the term 'delegated bodies', and **state** how they get their power to enforce criminal law.

3 **Identify** at least five different bodies or institutions that have the power to enforce criminal law.

4 **Distinguish** between Victoria Police and the Australian Federal Police in terms of the offences they investigate.

Examine and apply

5 For each of the following breaches of law, **identify** the body that is most likely to enforce the law.

- **a** A street party has been organised without a permit.
- **b** A house has been deliberately burnt down and has injured two of its occupants.
- **c** Bernard runs a sushi shop. A customer has complained because she just found maggots in her sushi.
- **d** Scaffolding has fallen down on a construction site, injuring three workers.
- **e** A cafe has failed to maintain its refrigerated vans to an acceptable standard of cleanliness.
- **f** A real estate agent in a Melbourne suburb has been underquoting properties for sale.
- **g** There have been some rumours of a proposed terror attack in Melbourne.
- **h** Pippa works at a local cafe. She is being underpaid by the owner of the cafe, Bunda.

6 Read the scenario 'Protecting miners'.

- **a** **Describe** the nature of the offence in this case.
- **b** **Outline** one reason why WorkSafe Victoria has the authority to prosecute this offence.
- **c** **Explain** how the publication of outcomes of cases on WorkSafe's website helps to achieve the principle of fairness.

7 Read the scenario 'Operation Jumbuck'. Conduct some research on each of the bodies involved in this operation, and **explain** why they would have been involved.

8 Visit the website of your local council.

- **a** Find the page that shows the local laws.
- **b** Find a general local law.
- **c** **Identify** at least three offences in that law. **What** are the sanctions for these offences?

Reflect and evaluate

9 Conduct some further research on:

- one police force
- one delegated body.

Write a report in which you **explain** how the force or body helps to ensure fairness in the way it enforces criminal law.

7.4 Powers and rights

Key knowledge

In this topic, you will learn about:

- the balance between institutional powers and individual rights.

Australians are entitled to a number of rights and freedoms. These come from various sources of law, including statute law. For example, the Victorian Parliament has passed the *Equal Opportunity Act 2010* (Vic), which is designed to protect people from discrimination, sexual harassment and victimisation.

Rights are also given to people who are suspected or accused of committing a crime, and people who are guilty of crimes.

For example, as explored in Chapter 4, every accused person has the right to be presumed innocent until proven guilty. This right is recognised internationally in documents such as the *International Covenant on Civil and Political Rights* (1966), an **international treaty**. It is protected in Victoria by the **Human Rights Charter**, a statute that protects and promotes human rights in Victoria.

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)

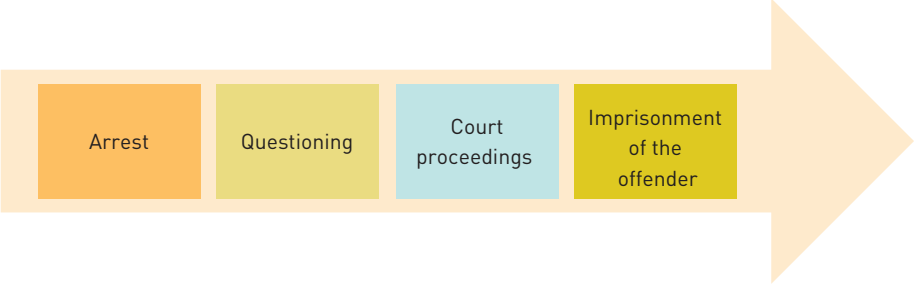
Human Rights Charter the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Its main purpose is to protect and promote human rights

On the other hand, investigative and prosecution agencies such as Victoria Police and the Office of Police Prosecutions (OPP) have powers that enable them to investigate crime and bring offenders to justice. The powers given to these bodies to carry out their job of enforcing the law are sometimes referred to as **institutional powers**. They include powers such as gathering fingerprints, charging an accused, and initiating criminal proceedings against an accused.

institutional powers the authority (i.e. power) given to bodies (i.e. institutions) such as Victoria Police to undertake certain actions

Those powers, however, must be balanced against the rights of individuals. If institutions have too much power, individuals may be unjustly treated. However, if their powers are too few or too limited, crime prevention and law enforcement can become difficult or almost impossible.

In this topic, you will explore how institutional powers are balanced against individual rights in the following stages of a criminal case: arrest, questioning, court proceedings and the imprisonment of the offender.



Source 1 The balance between institutional powers and police rights can be examined through the stages of a criminal case.

Arrest

Once a crime has been committed, the police have the power to arrest an accused person. The power of arrest, with or without a warrant (i.e. a document issued by a court that allows a person such as a police officer to undertake an action such as arrest), is found in the *Crimes Act 1958* (Vic). Most arrests are made without a warrant.

Police can arrest without a warrant any person found committing an offence if the police believe it is necessary to:

- ensure that the offender appears in court
- preserve public order
- prevent the continuation or repetition of an offence or the commission of a further offence
- ensure the safety or welfare of the public or the offender.

Did you know?

A member of the public can arrest another person if that person is committing an offence and arresting the offender is necessary. This is called a 'citizen's arrest'.

Police officers can also arrest a person without a warrant if the police officers reasonably believe the person has committed an indictable offence either in Victoria or elsewhere that, if committed in Victoria, is an indictable offence.

Police officers can use reasonable force when making an arrest, although what is reasonable force depends on the circumstances of the arrest.

An individual has certain rights in relation to an arrest. These rights ensure there is a balance between the power of arrest and the rights of an individual. For example:

- An individual can refuse to attend a police station unless they are under arrest. This upholds a person's right to freedom of movement and right to liberty.
- Under the Human Rights Charter, if a person is arrested, they must be informed of the reason for the arrest at the time of the arrest. The arrested person must also be promptly informed about any proceedings that are to be brought against them.
- The Human Rights Charter also states that an arrested person must be promptly brought before a court and that they have the right to be brought to trial without an unreasonable delay.
- A person does not need to say anything when arrested, other than to provide their name and address (it is an offence to refuse to do so).
- If arrested, a person must be released (unconditionally or on **bail**) or brought before a **bail justice** or magistrate in the Magistrates' Court within a reasonable time of being taken into custody. What is a reasonable time depends on the circumstances of the case.

The scenario below provides an example of Victoria Police making numerous arrests.

Study tip

It can be difficult to remember all of the institutional powers and rights. Research suggests that many people learn well by teaching others – why not try to teach someone else in your class, or even someone not in your class, about some of these rights and powers?

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

bail justice
a volunteer who works within the justice system, generally outside normal court operating hours, to hear applications in relation to bail or remand

Actual scenario

Youth gang crackdown leads to nearly 70 arrests

In March 2023, it was reported that Victoria Police had arrested nearly 70 people, the majority of whom were aged between 15 and 17 years, during an operation to tackle the growing issue of gang activity among young people.

A specialist taskforce involving multiple agencies, including Victoria Police, was developed to crack down on gang activity. The taskforce helped the police to identify those who were part of a youth gang and to divert young people away from gangs and away from offending. It was noted that intelligence (i.e. the collection of information) was used to prevent crimes from occurring.

Between 5 and 9 March 2023, more than 100 theft, assault and drug-related offences were identified. Of the 67 people who were arrested and charged, 15 were linked to youth gangs. Those arrested included five young people over alleged multiple car thefts near the Werribee area in Melbourne, and a 20-year-old man with suspected youth gang links who was allegedly in possession of an imitation firearm and a quantity of cannabis.



Source 2 A specialist operation involving youth gangs resulted in nearly 70 arrests across Victoria.

Questioning

Under section 464A of the *Crimes Act*, if a person has been arrested and is in custody for being suspected of committing an offence, an investigating official has the power to question that person within a reasonable time. The person may be questioned to determine what involvement, if any, they had in the offence.

To balance this power, rights are given to a person who is questioned:

- The person must first be informed that they do not have to do or say anything, but that anything the person does say or do may be given in evidence, and the giving of that information must be recorded if the crime is an indictable offence.
- The person must be informed that they can communicate with or attempt to communicate with:
  - a friend or relative (to inform them of their whereabouts)
  - a legal practitioner.

They are allowed to do so unless the communication would result in the escape of an accomplice, or the fabrication or destruction of evidence, or unless the questioning is so urgent that it should not be delayed.



Source 3 Victoria Police has various powers in relation to gathering fingerprints.

- The person has a right to an interpreter if they do not have sufficient knowledge of the English language.
- Communications with the person's legal practitioner must be such that the communication is not overheard.
- The questioning can only occur within a reasonable time (that time depends on circumstances such as the number and complexity of offences to be investigated).
- The person may stay silent and does not need to respond to any questions (other than to supply their name and address).
- If the person is under 18 years of age, a parent, guardian or independent person must be present during the questioning.

The following scenario describes a situation where a person was interviewed in relation to the disappearance of two people in March 2020. The person was ultimately charged with murder.

Actual scenario

Questioning in relation to missing campers

In March 2020, two campers went missing in the Victorian Alps. Their campsite and one of their cars were found destroyed by fire after police searched bushland. That discovery resulted in a 20-month investigation into what happened to them, and whether there was any foul play.

The investigation involved reviewing CCTV footage of local businesses to show any cars that may have been involved, analysing phone data, and speaking with witnesses. As part of the investigation, one man became a person of interest, and further information was obtained about him and his movements in relation to the missing campers.

Eventually, the person of interest was arrested and taken to a police station. He was then interviewed over the next four days, but details of that interview were not made public. The man was ultimately charged with two counts of murder and was committed to stand trial. As at the time of publication, the trial had not yet been held, but it was expected to be held at the end of 2023.

Court proceedings

As you have learnt, many bodies have the power to enforce the law. Along with that power is the power to commence criminal action against an accused for the purposes of determining whether a person is guilty of committing an offence and to sentence the offender for their actions.

For summary offences, the Magistrates' Court hears and determines the charges and the magistrate decides on guilt. For indictable offences, the Magistrates' Court determines whether there is evidence of a sufficient weight to support a **conviction** at trial (through a **committal proceeding**) before the matter is then transferred to either the County Court or the Supreme Court for pre-trial procedures and, eventually, a trial.

conviction
a finding of guilt made by a court, whether or not a conviction is recorded. Where a conviction is recorded, it will form part of the person's criminal record

committal proceeding
the pre-trial hearings and processes held in the Magistrates' Court for indictable offences

Various powers are given to the prosecution as part of the proceedings. The team that forms the prosecution has the power to prepare the case, speak with witnesses, obtain evidence and negotiate with the accused (normally through their legal practitioners) about an early guilty plea.

In these proceedings, the accused also has certain rights. Many of these rights are protected by the Human Rights Charter. The accused's rights include the right to:

- have the charge or proceeding decided by a competent, independent and impartial court after a fair and public hearing
- be presumed innocent until proven guilty
- be informed promptly and in detail about the nature of and reason for the charge
- have adequate time and facilities to prepare a defence
- be tried without unreasonable delay
- obtain **legal aid** if the interests of justice require it
- have the assistance of an interpreter if needed
- have the opportunity to challenge and rebut the evidence put against them, which includes examining the prosecution's witnesses, and examining their own witnesses.

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

Many of these rights aim to ensure the principles of justice are achieved. For example, the right to have the assistance of an interpreter aims to uphold equality, by seeking to put an accused person who is not proficient in the English language on an equal footing with a prosecutor who is proficient in English.

Imprisonment of the offender

If the accused person is found not guilty, they are immediately released. If they are found guilty, then they are known as an offender, and the court's role is to impose a sanction. The sanction of last resort is **imprisonment**, which involves removing an offender from society and placing them in jail for a period of time. You will learn more about imprisonment later in this chapter, but imprisonment aims to protect the community and to punish an offender by depriving them of their liberty.

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

If the maximum penalty for a crime is a term of imprisonment, and the court considers it to be the most appropriate sentence, then the court has the power to imprison the offender for a period of time. Once that occurs, Corrections Victoria, a business unit of the Victorian Government's Department of Justice and Community Safety, oversees the detention of the offender.

The management of prisons is governed by the *Corrections Act 1986* (Vic). This Act provides prison officers with various powers to enable them to manage prisons. These include the power to search and examine any person, seize unauthorised goods, arrange for medical tests for alcohol or drugs, and require a prisoner to be electronically monitored. The *Corrections Act* also includes other powers, such as the power to open, inspect and read letters sent to prisoners.

Every prisoner has certain rights under section 47 of the *Corrections Act*:

- the right to be in the open air for at least an hour each day (weather permitting)
- the right to be provided with adequate food and, where necessary, special dietary food (e.g. where the prisoner is vegetarian or has religious beliefs that dictate what food they can eat)
- the right to be provided with suitable clothing
- the right to have access to reasonable medical care and treatment, as well as to reasonable dental treatment
- if the prisoner is intellectually disabled or mentally ill, the right to appropriate special care and treatment
- the right to practise a religion, which includes the right to join with other prisoners to practise that religion (so long as it does not jeopardise prison security)
- the right to receive at least one half-hour visit a week.

Young persons who are detained have additional rights under the *Children, Youth and Families Act 2005* (Vic). These include an entitlement to have their developmental needs catered for, the right to receive visits from family and legal practitioners, and the right to have their medical, religious and cultural needs met.

The importance of the rights of youth offenders was highlighted in the case, described below, of a group of young offenders who were placed in Barwon Prison, a maximum-security prison for adult men.

Actual scenario

Legal proceedings to get youth offenders out of Barwon Prison

Following a series of incidents at the Melbourne Youth Justice Centre in Parkville – where inmates had caused extensive damage to the facility – the Victorian Government moved some of the young offenders from the Parkville facility to the Grevillea unit at Barwon Prison. Barwon Prison is a maximum-security prison for high-risk adult men.

A series of proceedings began in the Supreme Court of Victoria in which it was alleged that the detention of children at Barwon Prison was unlawful. Proceedings were commenced through a litigation guardian (a person who commences proceedings on behalf of children). One of the issues raised was that the decision to transfer the young offenders was contrary to certain rights under the Human Rights Charter, including the right of children to be protected from cruel, inhumane or degrading treatment. Evidence was given about the conditions at Barwon Prison, which included long periods of confinement in cells that were meant for adults, threats by prison staff, and a lack of space.



Source 4 The transfer of young offenders from the Melbourne Youth Justice Centre to Barwon Prison sparked a series of proceedings in the Supreme Court about the rights of young offenders in detention.

In December 2016, the young offenders' lawyers were successful in challenging the decision to transfer them to Barwon Prison. Despite an appeal, the Supreme Court ordered that the young offenders be removed from the adult prison by 30 December 2016.

The Victorian Government issued new directions that resulted in the young offenders remaining at Barwon Prison. In addition, two other young offenders were transferred to the prison. A proceeding was again issued in the Supreme Court, which was heard in April 2017. Judgment was handed down by Justice Dixon on 11 May 2017, who held that the government's directions were incompatible with the human rights afforded by the Human Rights Charter. Justice Dixon ruled that the transfer of the young offenders to Barwon Prison was unlawful. As a result, they were removed from Barwon Prison and returned to the Melbourne Youth Justice Centre.

Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families & Children (2016) 51 VR 473 (21 December 2016) and *Certain Children v Minister for Families & Children (No 2)* [2017] VSC 251 (11 May 2017)

7.4 Check your learning

Remember and understand

1 **Outline** two sources of individual rights and two sources of institutional powers.
2 **Identify** two institutions that have powers in criminal law. For each institution, **describe** one of its powers.
3 **Explain** why there is a need for a balance in the criminal justice system between powers and rights.
4 **Identify** whether the following statements are true or false.
   - **a** A police officer can arrest a person using force.
   - **b** A person must give their name and address when asked by a police officer at any time.
   - **c** A person can be asked any questions by an investigating official about a crime.
   - **d** A prisoner can be placed in solitary confinement for 24 hours a day.
5 **Explain** why youth prisoners have particular rights and entitlements.

Examine and apply

6 Create a poster or multimedia visual presentation that shows the balance between individual rights and institutional powers in three stages of a criminal case.
7 Read the scenario 'Youth gang crackdown leads to nearly 70 arrests'.
   - **a** **Identify** and **describe** one power used by Victoria Police in this scenario.
   - **b** **Explain** whether the police would have been able to use force when arresting young people.
   - **c** **Outline** the rights that would have been available to the individuals arrested.
8 Read the scenario 'Questioning in relation to missing campers'.
   - **a** **Describe** what happened in this scenario.
   - **b** **Identify** two rights available to the accused person when being questioned.
   - **c** Discuss as a class what types of investigations the police could undertake in relation to missing campers in the Alps. Try to be as comprehensive as possible about the potential leads or information that the police could seek.
9 As a class, find a recent article about prisons in Victoria and the rights of offenders. Discuss why it is important for prisoners to have rights.

Reflect and evaluate

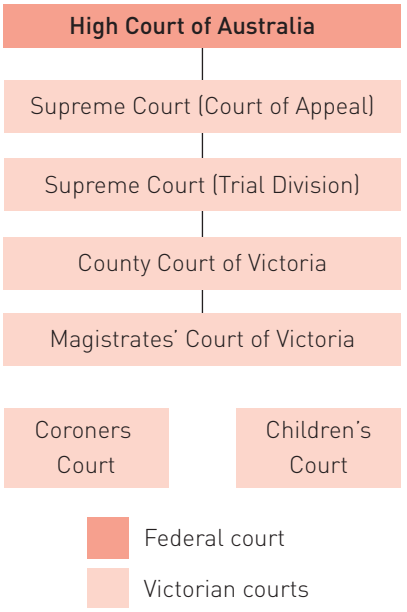
10 'The balance is too much in favour of the individual. We need to give more power to the institutions.' With reference to at least two rights and powers, **discuss** the extent to which you agree with this statement.
11 Conduct some further research about the young offenders kept in Barwon Prison.
   - **a** **Describe** the circumstances in which the youth offenders were transferred to a unit of Barwon Prison.
   - **b** Provide three reasons why there was concern about youth offenders being kept in Barwon Prison.
   - **c** In your view, should young offenders be given greater rights than adult offenders? Give reasons for your answer.

7.5 The Victorian courts

Key knowledge

In this topic, you will learn about:

- an overview of the role and criminal jurisdictions of the Victorian courts.



Source 1 The court hierarchy in Victoria

In Australia, there are a number of courts that provide a means of resolving and determining both criminal cases and civil disputes.

There are two types of courts: state courts and federal courts. Generally, state courts deal with issues arising under state law, and federal courts deal with issues arising under federal law.

In Australia, courts are ranked in a court hierarchy, with the higher courts hearing the more serious and complicated cases, and the lower courts dealing with minor offences.

As explored in Chapter 3, there are various reasons for a court hierarchy, which include:

- to allow for specialisation or expertise
- to allow parties to appeal a decision to a higher court
- to ensure that the doctrine of precedent can operate by having lower courts and higher courts
- to ensure administrative convenience.

The role of Victorian courts in criminal cases

Even though laws provide guidelines for acceptable behaviour, laws are broken and crimes are committed. The courts' role is to decide whether a person is guilty of a crime. Unlike civil disputes, in criminal cases there are no alternative bodies such as **tribunals** or **complaints bodies** that can resolve them.

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

complaints body
an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

In general, the role of the Victorian courts in criminal cases is to:

- determine a criminal case (by deciding whether the accused is guilty)
- impose a sanction (if a person has been found, or has pleaded, guilty).

Determine a criminal case

If an accused pleads not guilty, then it is the role of the courts to determine whether the accused is guilty by managing and hearing criminal proceedings. If an accused continues to plead not guilty, then their guilt is determined by a magistrate at a hearing in the Magistrates' Court for a summary offence, or by a jury at a trial in the County Court or Supreme Court for an indictable offence. A judge or magistrate oversees the trial or hearing. The judge or magistrate, in doing so, acts as an impartial referee who has no bias against or connection with either party, and who does not favour any side.

If the accused is charged with an indictable offence, the case first goes to the Magistrates' Court for a committal proceeding. Several stages occur during a committal proceeding. The final stage is

a **committal hearing**, where the magistrate decides whether there is evidence of a sufficient weight to support a conviction at trial. After this, the proceeding continues in either the County Court or the Supreme Court. This process is intended to act as a filter to ensure that only the strongest cases use the resources of the higher courts, which are often overburdened. However, recent inquiries have shown that most persons are committed to stand trial, with only very few cases not proceeding any further.

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

As part of the court's role in determining the guilt of an accused, the court:

- provides specialisation and expertise in the type of case it is hearing – the Magistrates' Court specialises in minor criminal offences (e.g. minor thefts and assaults), whereas the Supreme Court specialises in the most serious indictable offences (e.g. murder)
- manages the case – judges and magistrates have significant powers of case management, which means they can give orders and directions to the parties. This includes setting down a timeline of when certain steps are to occur, so that delays can be managed
- hears appeals – certain Victorian courts have the power to hear an appeal made by one or both parties following a guilty verdict. An appeal may be in relation to a conviction, sentence or on a point of law. The party who appeals is known as the appellant, and the other party is known as the respondent.

The following scenario involves an appeal more than 17 years after the incident happened.

Actual scenario

Appeal refused in murder case

In the early hours of 27 November 2005, Albert, aged 22, was at a warehouse party in Brunswick. Around 100–200 people were there. Albert went through a glass window and fell 5.4 metres to the ground. He died two days later, although the impact of the fall was not considered to be the primary cause of death. This suggested that Albert had been wounded prior to falling out of the window.

Following a police investigation, two men were charged with Albert's murder: Khalid Baker and a man known as LM. A critical issue at the trial was whether it was only Baker or only LM who had physically engaged with Albert immediately before he went through the window. The prosecution alleged that both had intended to cause Albert really serious injury, and that one or other or both of them had pushed or punched Albert, or made him back away, causing him to fall.

Neither man gave evidence at trial. LM made a statement to the police suggesting that at one point he pushed Albert. However, the trial judge ruled that those statements were not admissible (i.e not acceptable as evidence). In May 2008, the jury acquitted LM of murder, but found Baker guilty of murder. Baker was sentenced to 17 years in prison with a non-parole period of 12 years.

Baker appealed against his conviction to the Court of Appeal, on the basis that the verdict was unreasonable and could not be supported having regard to the evidence. The Court of Appeal dismissed the appeal. Baker then appealed to the High Court, but the High Court also dismissed the appeal.



Source 2 Khalid Baker continues to fight against his conviction, claiming he is innocent.

Baker was released on parole in September 2018, having served 13 years in jail. In 2022, he again appealed to the Court of Appeal on the basis that there was fresh and compelling evidence that demonstrated there had been a substantial miscarriage of justice. In particular, Baker claimed that LM had admitted that he had the final physical contact with Albert, which caused Albert to go through the window, and that Baker was not involved in or close to this final physical contact. Baker alleged that LM made these statements to police, to friends and in media interviews, including on television shows such as *60 Minutes* and *The Project*.

Although the Court of Appeal accepted that the evidence was 'fresh', it did not accept that the evidence was 'compelling'. The Court of Appeal noted that the evidence must be reliable and substantial. It said that there were inconsistencies in the 'fresh' evidence, and that it did not address the principal issue, being whether Baker's acts caused the death of Albert.

Baker's case had been taken up by RMIT University's Bridge of Hope Innocence Initiative, which aims to investigate claims of wrongful conviction.

Baker v The King [2022] VSCA 196 (14 September 2022)

Impose a sanction

If an accused pleads guilty, or the magistrate or jury finds the accused guilty, then the court sets a date for a plea hearing. At this hearing, both parties make submissions about the facts of the case, the offender's circumstances, the relevant factors that should be taken into account in sentencing, and the type of sentence the offender should receive.

Following the plea hearing (on that day or on a later date), the judge or magistrate hands down a sanction. In higher courts, a judge normally provides a written judgment about the sanction they have imposed. This document can be made available to the public at a later date.

The following scenario is an example of a sanction the County Court imposed in a case where the offender pleaded guilty.

Actual scenario

Breach of family violence order with armed robbery

In this case, the offender pleaded guilty to one charge of armed robbery, one charge of making a threat to kill, one charge of contravention of a family violence intervention order, and three summary matters: assault, aggravated cruelty to an animal, and driving while disqualified. At the time of sentencing (in 2023), the offender was 30 years of age.

The offender had a significant history of family violence, and there had been several intervention orders against him over the years. A final intervention order had been issued in 2020 to protect the offender's mother from him.

On 1 January 2021, the offender had been drinking heavily and returned home at 4:15 am. The offender asked his father for the keys to the father's car. The father refused. A series of violent incidents then occurred, including the offender attacking his father with various weapons, punching him, stabbing the family dog multiple times in anger, and threatening to kill his father. During this time, his mother called triple-0 (emergency) and was terrified. The judge in the County Court noted that the offending was almost incomprehensible in terms of the violence and the cruelty of it.

The offender pleaded guilty to the charges. The judge said that the offender had a history of violent offending, which included killing animals. The judge also noted that other than a plea of guilty there was no evidence of remorse, and this suggested that the offender had no insight into his offending.

The judge sentenced the offender to eight years and three months in prison with a non-parole period of five-and-a-half years. In sentencing, the judge said that 'the prospects of your reoffending if you use liquor or drugs is going to be very high'.

DPP v Cattanach [2023] VCC 357 (8 March 2023)

The criminal jurisdiction of Victorian courts

Jurisdiction refers to the right or power of a court to apply the law and hear cases. There are two types of jurisdiction: **original jurisdiction** and **appellate jurisdiction**. When a court is hearing a case for the first time, it is operating in its original jurisdiction. When a court is hearing an appeal, it is operating in its appellate jurisdiction.

jurisdiction
the lawful authority (or power) of a court, tribunal or other dispute resolution body to decide legal cases

Source 3 summarises the criminal jurisdiction of the Victorian courts.

Victorian court	Original jurisdiction	Appellate jurisdiction
Magistrates' Court	• Summary offences • Indictable offences heard summarily • Committal proceedings • Bail and warrant applications	No appellate jurisdiction
County Court	Indictable offences except treason, murder, attempted murder, certain conspiracies	From the Magistrates' Court on a conviction or sentence (unless the Chief Magistrate decided the case)
Supreme Court (Trial Division)	Serious indictable offences	From the Magistrates' Court on a point of law (unless the Chief Magistrate decided the case)
Supreme Court (Court of Appeal)	No original jurisdiction	• All appeals from the County Court or the Supreme Court (Trial Division) • From the Magistrates' Court if the Chief Magistrate decided the case
Children's Court	Offences committed by children 10–17 years of age (except for certain offences)	No appellate jurisdiction
Coroners Court	Investigation of deaths and fires	No appellate jurisdiction

Source 3 A summary of the criminal jurisdiction of Victorian courts

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

Magistrates' Court

Original jurisdiction

The Magistrates' Court has jurisdiction to hear summary offences and indictable offences heard and determined summarily. When the accused pleads not guilty, the hearing that is conducted to determine guilt is called a hearing (not a trial).

The Magistrates' Court also has the power to hear applications in relation to bail and warrants, and to conduct committal proceedings for indictable offences.

Appellate jurisdiction

As the Magistrates' Court is the lowest court in the Victorian court hierarchy, it is not able to hear any appeals from other courts.

Did you know?

The Magistrates' Court has various specialist lists and courts, such as the Sexual Offences List, the Assessment and Referral Court List, the Drug Court, and the Koori Court.

County Court

Original jurisdiction

The County Court hears all indictable offences except those set out in section 36A of the *County Court Act 1958* (Vic) (those involving treason, murder, attempted murder and certain conspiracies). If the accused pleads not guilty, the hearing at which guilt is determined is known as a trial.

Appellate jurisdiction

The County Court can hear criminal appeals against convictions or sentences handed down in the Magistrates' Court (unless the Chief Magistrate decided the case). This means that people can appeal to the County Court if they think they have been wrongly convicted in the Magistrates' Court and no

reasonable magistrate would have convicted them on the facts presented in the case, or their sentence was too harsh. The DPP can also appeal on the basis of a sentence being too lenient.

Supreme Court (Trial Division)

Original jurisdiction

The Trial Division of the Supreme Court has jurisdiction to hear all indictable offences. It generally hears the most serious indictable offences that cannot be heard by the County Court, such as treason, murder and attempted murder. If the accused pleads not guilty, the hearing at which guilt is determined is known as a trial.

Appellate jurisdiction

The Trial Division can hear criminal appeals on questions of law from cases heard in the Magistrates' Court (unless the Chief Magistrate decided the case). For example, an appeal can be made on a question of whether the magistrate incorrectly applied the law when determining whether an offence was committed.

Supreme Court (Court of Appeal)

Original jurisdiction

The Court of Appeal has no original jurisdiction.

Appellate jurisdiction

The Court of Appeal hears appeals from the County Court and the Supreme Court, which are usually determined by three judges. The Court of Appeal also hears appeals from the Magistrates' Court where the Chief Magistrate heard the case in the Magistrates' Court. These appeals may question a conviction, the severity or leniency of a sentence, or a question of law. The Court of Appeal's leave (i.e. permission) is required for the offender to appeal, but no leave is required for the DPP to appeal to the Court of Appeal against a sentence imposed.

Any further appeals from the Court of Appeal are heard by the High Court of Australia, which is the final appeal court. Leave is required from the High Court to appeal a decision.

Specialised Victorian courts

Children's Court

The Children's Court is a specialist court for children. It has two divisions: the Criminal Division and the Family Division.

The Criminal Division deals with all cases in which a child (aged 10–17 years at the time of the offence, and under 19 years old when proceedings begin) has been charged with an offence, except for certain offences (i.e. murder, attempted murder, manslaughter, child homicide, arson causing death, and culpable driving causing death). These offences are dealt with in the County or Supreme Court.

The Family Division deals with issues in relation to child protection where a child is at risk, as well as applications for **intervention orders**.

intervention orders a court order that is designed to protect a person, their children and their property from another person

Coroners Court

The Coroners Court investigates any death that is considered to be unexpected, unnatural or violent, or that resulted from an accident or injury, or that occurred during or following a medical procedure. The coroner also investigates fires that involve death, serious injury or significant damage to property.

Strengths and weaknesses of courts in resolving criminal cases

Source 4 sets out some of the strengths and weaknesses of courts in resolving criminal cases. Try to link at least two of the strengths and two of the weaknesses to one or more of the principles of justice.

Strengths of courts in resolving criminal cases	Weaknesses of courts in resolving criminal cases
Judges, juries and magistrates are impartial referees who decide cases (including, in relation to magistrates and juries, whether a person is guilty) based on fact and law. They do not make decisions based on what they think happened or based on their own personal biases or prejudices.	The courts and the way they decide cases are difficult to understand for accused people, particularly those who are not represented, or those with little to no education.
Because of the court hierarchy, judges and court personnel are specialised, which helps to ensure fairness and expertise in the way that cases are managed.	Without legal representation, which can be expensive, a party may be disadvantaged by representing themselves, as they will not be equal to a party with legal representation.
Formal court processes, the way in which cases are managed, and rules of evidence help to ensure procedural fairness by allowing an accused person to present their case and rebut the other party's case.	The formalities of the court process can result in parties feeling stressed, intimidated or nervous.
The court hierarchy allows for a party to appeal a case.	The right to appeal is not automatic in many cases, e.g. the Court of Appeal needs to give leave (permission) for an offender to appeal a decision, and the appeal process is difficult without a lawyer.

Source 4 Some of the strengths and weaknesses of courts in resolving criminal cases

7.5 Check your learning

Remember and understand

1 **Identify** and **describe** the two main roles of Victorian courts in criminal cases.
2 **Outline** the jurisdiction of two specialised courts in Victoria. **Explain** the extent to which they have jurisdiction to hear and determine criminal cases.
3 **Explain** why the Magistrates' Court does not have an appellate jurisdiction.
4 **Define** the term 'committal proceeding', and **outline** one of its purposes.

Examine and apply

5 Read the scenario 'Appeal refused in murder case'.
   a **Explain** the key facts in this case. In doing so, prepare a chronology of the key events in the case.
   b **What** was the principal issue at trial?
   c **Why** was this matter brought back to court decades later?
   d **Outline** the criminal jurisdiction of the Court of Appeal.
   e With reference to the need for fresh and compelling evidence to support the appeal, **explain** the decision of the Court of Appeal.
6 Read the scenario 'Breach of family violence order with armed robbery'.
   a **Describe** the circumstances of the offending.
   b **Explain** whether a jury would have been involved in hearing and determining this case.
   c **Outline** the original jurisdiction of the court that sentenced the offender.
   d If the offender were to appeal, **identify** the court that would hear the appeal.
   e Access the judgment of this case. As a class, **identify** all the factors that were taken into consideration as part of sentencing, and discuss whether each of the factors would have weighed in favour of a lighter or harsher sentence.
7 For each of the following scenarios, **identify** whether a committal proceeding is required, whether a trial or hearing is necessary, and which court would hear the case.
   a Akala has been charged with petty theft and is pleading not guilty.
   b Valentin has been charged with manslaughter and is pleading guilty.
   c Simone has pleaded not guilty to 17 charges of sexual assault.
   d Kenji has pleaded guilty to a minor assault.

Reflect and evaluate

8 **Discuss** two strengths of the role of the courts in resolving criminal cases.

7.6 The jury

Key knowledge

In this topic, you will learn about:

- the role of the jury in a criminal trial.

In Australia, the jury system is sometimes used to determine whether a person is guilty of an offence.

The jury system began in medieval Europe, around 1215. Before this time, the way in which a person's guilt or innocence was determined was by trial by ordeal. This involved subjecting the accused to some sort of experience (i.e. an ordeal), after which time their guilt or innocence was declared. For example, an ordeal by water involved throwing the accused into a river or lake. If the accused sank, they were taken out of the water and presumed to be innocent. If they floated, they were considered to be guilty.

Trial by ordeal was abolished in 1215. By this time, trial by jury had started to become more common. A trial by jury is a trial by peers in which an impartial group of people are randomly selected to hear the evidence and hand down a verdict as to whether the accused is guilty or not guilty.

When are criminal juries used?

Criminal juries are used in the original jurisdiction of the County Court and Supreme Court. That is, criminal juries are used to determine the guilt of an accused person who is charged with an indictable offence. Between 2020 and 2023, temporary measures were put in place to allow for judge-alone trials (i.e. a judge and not a jury decided guilt) in certain circumstances as a result of the COVID-19 pandemic. Jury trials were suspended during the pandemic because of social distancing measures and public health risks. This resulted in delays in hearing criminal trials because of the backlog that was created.

Juries are never used in the Magistrates' Court and are not used in appeals. Juries are also not used when an offender has pleaded guilty, because a jury's only role is to determine whether a person is guilty, and not the sanction.

The *Juries Act 2000* (Vic) governs the selection, composition and role of a jury in Victoria. The *Jury Directions Act 2015* (Vic) is another important statute, which establishes the way in which **jury directions** are to be given to a jury by a judge (these are instructions about the law or about the way that certain evidence should be considered by the jury).

jury directions instructions given by a judge to a jury either during or at the end of a trial

Composition of a criminal jury

A jury of 12 is compulsory in criminal cases heard in the County Court and Supreme Court, where the accused pleads not guilty. Three extra jurors can be empanelled (i.e. selected to form part of the jury panel) for lengthy trials in case a situation arises where one of the jury members has to withdraw from the trial (e.g. if a jury member falls ill). If extra jurors are empanelled, the extra jurors sit in on the trial, but only 12 jurors will ultimately deliberate and decide whether the accused is guilty.

Individuals aged 18 years or over who are enrolled to vote in Victoria are qualified and liable for jury service. Individuals are selected at random and are sent a form to determine their eligibility for jury service. If they are then eligible, they are then sent a jury summons requiring them to attend court for jury service at a later date.

There are a number of rules about who can sit on a jury panel in Victoria. For example:

- Some people are *disqualified* from serving as jurors because of their past history. These include people who have been sentenced to a term of imprisonment for three years or more, people who

are currently on bail or on **remand**, and people who are undischarged bankrupts (i.e. who have been declared bankrupt and remain bankrupt).

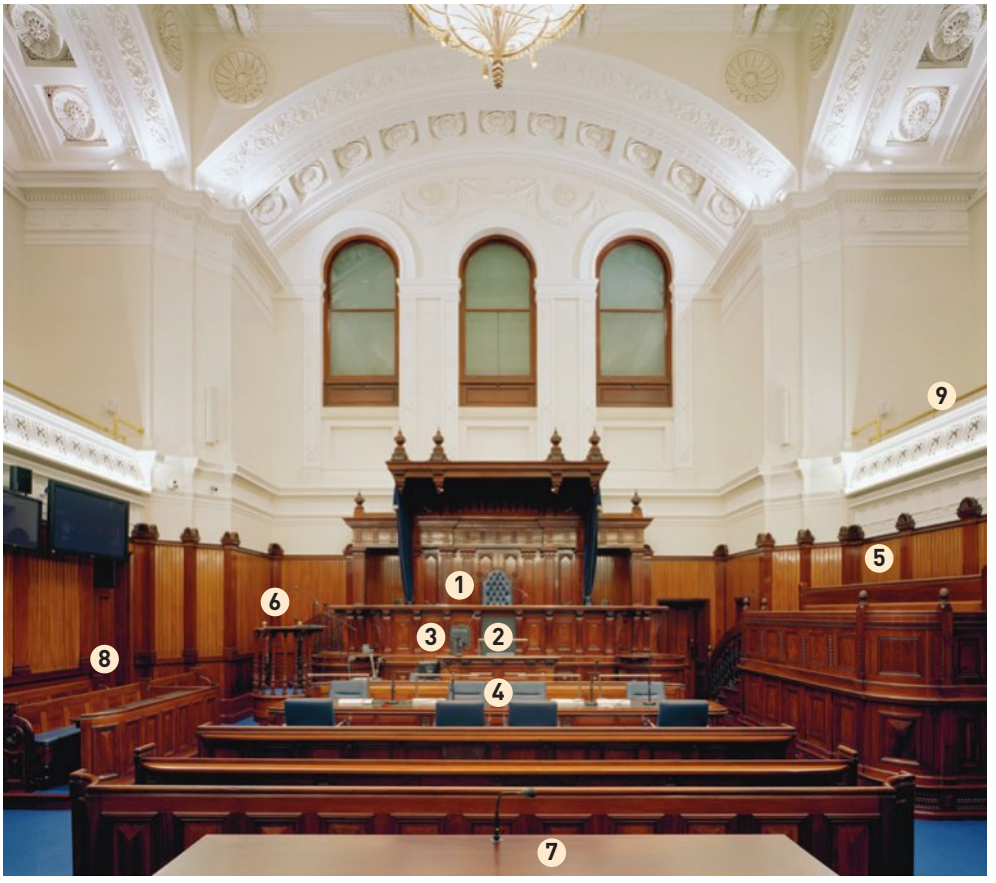
- Some people are *ineligible* to serve as jurors because of a particular characteristic or because of their occupation. These include lawyers, judges, magistrates, police officers, members of parliament, people who cannot communicate in or understand the English language adequately, and people who have a physical disability that means that they are incapable of performing jury service.
- Some people may ask to be *excused* from jury service because of circumstances that make it difficult for them. These include people who have poor health or are ill, people who live more than 50 kilometres away from Melbourne, people who are of advanced age, people who would suffer substantial inconvenience or financial hardship if they had to attend, and people who are carers for other people.

In addition, both parties have the right to challenge (i.e. object to) people on the jury panel. There are no limits to the number of challenges for good reason each party has (known as 'challenges for cause'). However, for each party there is a limit of three challenges for no reason (known as 'peremptory challenges'). Both parties are given only very limited information about each potential juror before they decide whether to challenge for no reason – that information is the potential juror's name (unless the judge has directed that they be given a number, rather than be referred to by name) and their occupation.

remand
the situation where an accused is kept in custody until their criminal trial can take place

Did you know?

In 1994 in the United Kingdom, four members of a jury used a ouija board to conduct a séance to determine what happened to the murder victims. A re-trial was ordered.



1 Judge
2 Judge's associate
3 Tipstaff
4 Lawyers
5 Jury
6 Witness
7 Accused
8 Media
9 Public gallery

Source 1 This is the inside of a courtroom in the Supreme Court of Victoria. The number 5 shows where the jury sits.

The role of a criminal jury

The jury in a criminal trial must:

- listen to all the evidence
- concentrate during the trial
- piece the evidence together and decide whether the accused is guilty or not guilty.

It is the judge's role to explain the law to the jury. The jury considers the evidence with respect to the law and makes its decision.

A key part of a jury trial is the directions given by the judge to the jury. The *Jury Directions Act* was passed in 2015 to reduce the complexity of jury directions in criminal trials, and to simplify and clarify the issues that juries must determine. In particular, there are now legal requirements about what directions should be given to a jury in trials related to sexual offences and family violence offences. For example, if requested by either party to do so, the judge must give a direction to a jury that family violence is not limited to physical abuse, and may include sexual abuse and psychological abuse.

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)

The following scenario explores a trial by jury where the jury failed to reach a **unanimous verdict**, following which the jury was discharged (i.e. the jury was free to go).

Actual scenario

Jurors discharged after failing to reach verdict

In 2023, a man faced a five-week murder trial in the Supreme Court of Victoria after he was accused of killing a woman. The woman's body was discovered in her home eight months after she died. The man pleaded not guilty.

On the fourth day of deliberation (i.e. consideration of the case), the jurors notified the Supreme Court judge that they did not think they could reach a unanimous verdict, which requires all 12 jurors to agree. This is the only verdict that can be accepted in murder trials. The judge urged them to persist, and gave them more time.

A day later, one of the jurors wrote a note to the judge, indicating that the jury had experienced a high level of distress in trying to reach a verdict. The Supreme Court judge decided to discharge the jury, and no verdict was reached. The judge thanked the jurors for their time and effort.

The discharge of the jury means that there will be a re-trial, for which a new jury will be empanelled.



In a criminal case, the finding of guilt by a jury must be made beyond reasonable doubt. This means that if a member of the jury is not sure that the accused is guilty, they must state 'not guilty'. It is not possible for a juror to be absolutely certain, because they were not there when the crime was committed, but they must be as sure as rationally possible. In this instance, 'reasonable' is what the average person in the street would believe to be the case; that is, when the evidence is looked at in a logical and practical manner. Reasonable doubt does not include a doubt that is imaginary or fanciful, or an unrealistic possibility.

Source 2 One of the roles of a jury is to concentrate during the trial. In 2008, a trial in the Sydney District Court was abandoned after it was found that some of the jurors were playing Sudoku during the proceedings.

A criminal jury must first try to reach a unanimous verdict. That is, 12 out of 12 jurors must agree. If this is not possible, a judge may allow a majority decision for criminal offences other than murder, treason, trafficking or cultivating a large commercial quantity of drugs, and for Commonwealth offences. For a **majority verdict**, 11 out of 12 jurors must agree. If a majority verdict cannot be reached, there is a hung jury. This means that the accused has not been found either guilty or not guilty, and can be tried again at a later date.

majority verdict a decision where all but one of the members of the jury agree. In a criminal trial, this means 11 of the 12 jurors agree

A jury does not have to give reasons for the verdict it reached. All deliberations that take place in the jury room are confidential and cannot be revealed to the parties, the judge or the public. Therefore, the parties have no way of knowing how the jurors decided, or whether they understood the facts and law that were relevant to making a decision. Interestingly, for judge-alone trials requested between 2020 and 2023, judges (as noted at the start of this topic) were required to give reasons for their decision.

At no stage are members of a criminal jury – from the time they are selected to be on a jury until they are excused from jury service – allowed to make enquiries about matters related to the trial. This includes using the internet to search for information about the case or visiting crime scenes to try to work out what happened.

The following scenario is an example of where a new trial was ordered as a result of the conduct of two jurors.

Actual scenario

Jurors attend crime scene

In August 2000, Bilal Skaf orchestrated a series of horrific and brutal sexual assaults that were committed against young girls in New South Wales. One of the attacks occurred on 12 August 2000, when Skaf and another man committed a sexual crime against a 16-year-old school student in Gosling Park, Greenacre. Twelve other men were present at the time.



Source 3 Gosling Park was visited by two jurors who were conducting their own investigations. Their actions, although well-intentioned, wasted the court's time, money and resources.

The actions of the jury appointed to hear this case highlight the responsibilities of jurors hearing criminal trials in Australia. The day before the jury was due to deliver its verdict, the jurors went home early. The foreperson (head juror) called one of the other jurors and they decided to visit Gosling Park. The two jurors spent 15–20 minutes at the park, walking through the park and observing the lighting.

The reason the jurors visited the park was that the foreperson felt he had a duty to the court to be right, and he wanted to clarify something for his own mind. The lighting in the park was relevant to the case because a key issue was whether the victim had properly identified Skaf as the man who first assaulted her, and whether Skaf was present when a second man assaulted her.

As a result of the jurors visiting the park and conducting their own investigations, the offenders' convictions were quashed, and a new trial was ordered.

In the re-trial, nine men who were involved in the attacks were sentenced to a total of 240 years in jail.

R v Skaf (2004) 60 NSWLR 86

Strengths and weaknesses of the jury system

Source 4 sets out some of the strengths and weaknesses of the jury system. Try to link at least two of the strengths and two of the weaknesses to one or more of the principles of justice.

Strengths of the jury system	Weaknesses of the jury system
Jurors are independent and impartial – and in particular, they are independent of the legal and political system – thus ensuring equality and fairness in their decision.	Jurors do not give reasons for their decision, and deliberations occur behind closed doors, so some may question whether the decision has been made based on the facts and the evidence.
The jury system allows the community to be involved in the justice system. This increases the confidence that the community has in the system, and ensures that the verdict reflects the values of the community.	The task is difficult, particularly where there is complicated evidence or a significant amount of evidence. It has been questioned whether ordinary members of the public can understand the evidence and come to the right decision.
The jury system ensures fairness by requiring the jury to deliberate based on the evidence and facts, and not on their own independent research or investigations.	A jury trial may result in delays because legal terms have to be explained to the jury and the judge must give directions to the jury.
The jury system spreads the responsibility for making a decision. Therefore, the decision is more likely to be fair and correct than if it was made by one person (a judge).	Jurors may have biases that may play a role in their deliberations, even if they are not aware of those biases.
The jury system reflects community values and brings a common-sense approach to decision-making to the court.	Not all community members are able to be part of the jury, because they may be disqualified or ineligible, or they may be excused.

Source 4 Some of the strengths and weaknesses of the jury system

7.6 Check your learning

Remember and understand

1 **Justify** why jurors are selected at random.
2 **Describe** the role of a jury in a criminal trial.
3 **Distinguish** between a person being ineligible for jury service, and a person being excused from jury service. Give an example of each.

Examine and apply

4 Read the scenario 'Jurors discharged after failing to reach verdict'.
   a **Explain** why the jury was discharged in this case.
   b **Describe** the effect that the need to abort the trial would have on the criminal justice system and the parties involved in the case.
   c 'In these sorts of cases, it is more appropriate for a judge to decide the case in the new trial'. Do you agree? Discuss as a class.
5 Read the scenario 'Jurors attend crime scene'.
   a **What** happened in this case?
   b **What** did two of the jurors do? **Why** did they do this?
   c Do you think the jurors' actions were appropriate? Discuss with a classmate.
6 Read the following scenarios and state whether a jury is necessary for each. **Justify** your answers.
   a Paolo has appealed against his conviction and sentence to the Court of Appeal.
   b Drago has pleaded not guilty to drug trafficking.
   c Oendrila has pleaded not guilty to offensive behaviour (she urinated in a public place).

Reflect and evaluate

7 'Jurors should be able to conduct their own research into a case.' **Explain** whether you agree with this statement. In your answer, refer to the principle of fairness.
8 **Evaluate** the ability of the jury system to achieve the principle of equality in criminal cases.

7.7 Difficulties in the criminal justice system

Key knowledge



In this topic, you will learn about:

- the difficulties faced by different groups in the criminal justice system, such as First Nations people, young people, culturally and linguistically diverse people, people with mental health issues, and people with disabilities.

The criminal justice system can be daunting for people who do not regularly engage with it. These include those accused of committing a crime, witnesses, victims of crimes (who may be vulnerable, traumatised and suffering injuries), and friends and families of victims. Not only can the criminal justice system be daunting, but it can also be difficult to understand, expensive for those who need lawyers to help them, and potentially unfair for those who do not get a proper opportunity participate in the system or tell their own story.

A number of inquiries in Victoria and in Australia have explored the difficulties faced by people in the criminal justice system. These include:

- the Legislative Council's Legal and Social Issues Committee – a **parliamentary committee** that conducted an inquiry into Victoria's criminal justice system and handed down its report in March 2022
- the Law Council of Australia's Justice Project report, which was a national review into the state of access to justice in Australia for people experiencing disadvantage. It handed down its final report in August 2018
- the **Royal Commission** into Victoria's Mental Health System – a comprehensive review of the mental health system in Victoria, which considered mental health in the context of the criminal justice system, among other issues. The final report was handed down in February 2021
- the national Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, established in April 2019 in relation to people with disability. It considered experiences of people with disability in various contexts, including in jails and detention centres. The final report was to be delivered by September 2023
- the Victorian Access to Justice Review, which considered a broad range of issues relating to access to justice in Victoria. The final report was delivered in October 2016
- the Yoorrook Justice Commission, a royal commission in Victoria that considered past and ongoing injustices experienced by First Nations people in Victoria, including in relation to the criminal justice system. It delivered an interim report in June 2022.

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

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

Some groups may face additional challenges when interacting with the criminal justice system; for example, people who experience economic disadvantage, prisoners, recent arrivals to Australia, people in regional, rural and remote areas, elderly people, and victims of family violence. Other groups are:

- First Nations people
- young people
- culturally and linguistically diverse people
- people with disability, including those with severe mental health issues.

The difficulties possibly facing people within these four groups are explored on the following pages. Not all people who have characteristics of these groups face challenges or difficulties when dealing with the legal system, and not all of them will have the same challenges or difficulties.

Study tip

The *VCE Legal Studies Study Design* requires you to study 'difficulties' faced by 'different groups', so you should aim to study two groups.

Study tip

'Yarning Up' is a podcast hosted by Caroline Kell, who is a proud Mbarbrum woman from Far North Queensland who grew up on Kulin Lands. In the podcasts, she showcases conversations with First Nations people to help all Australians, including VCE Legal Studies students, to better understand First Nations' perspectives.

First Nations people

First Nations people have lived in Australia for at least 65 000 years – well before the British colonised the land and invalidly declared it as belonging to no one. There are numerous different Aboriginal groups in Australia. Some speak different Aboriginal languages, or Aboriginal English, which is a dialect of English.

The term 'First Nations people' is used to describe Aboriginal and Torres Strait Islander people, and recognises that they are the sovereign people of this land. Other acceptable terms include 'First Peoples' and 'Koori', the latter of which describes Aboriginal people of south-east Australia (New South Wales, Victoria and some parts of Tasmania).

In the 2021 Australian Bureau of Statistics national census, 66 000 people in Victoria identified as Aboriginal and/or Torres Strait Islander, representing 1 per cent of Victoria's population. Some examples of First Nations Victorians include the Yorta Yorta people; the Wotjobalu, Jaadwa, Jadawadjali, Wergaia and Jupagulk peoples of the Wimmera; the Gunditjmara people; the Gunaikurnai people; and the Gunditjmara and Eastern Maar peoples.

First Nations people have a powerful connection to land, ancestry, kinship and language, and a rich culture passed on from generation to generation. An important feature of Aboriginal culture is respect for Elders and Respected Persons, who are people in the Aboriginal community with significant standing and who are held in high esteem. Elders are usually addressed as 'Aunty' and 'Uncle'. They aim to provide guidance, knowledge, cultural wisdom and storytelling to community members.

In Australia, First Nations people have suffered significant injustices and human rights breaches, including violence and death, racism, the dispossession of traditional lands, and the forced removal of children from their families. These injustices and events have resulted in **intergenerational trauma** for many First Nations people. This is trauma experienced as a result of distressing or oppressive events, and can be felt in varying degrees by different people through different generations of First Nations people.

intergenerational trauma
a psychological response to highly distressing, stressful or oppressive historical events, such as war or significant injustices, which is passed on to future generations. First Nations people experience intergenerational trauma for many reasons, including being subjected to brutal and harmful government policies, racism and discrimination since the British colonisation of Australia

Laws and policies put in place over time that have discriminated against First Nations people have also resulted in a loss of self-determination, which is about First Nations people having control over their lives and communities. Self-determination has been recognised as a key right of First Nations people, and is now enshrined in legislation protecting their rights to enjoy their identity and culture, maintain and use their language, and maintain their kinship ties and relationship with land and waters.

Overrepresentation in the criminal justice system

One of the key issues in the criminal justice system is what is described as the overrepresentation of First Nations people. Despite comprising 3.8 per cent of the Australian population, First Nations people make up around 32 per cent of the prison population. In Victoria, approximately 9 per cent of the prison population is Indigenous, although First Nations people comprise about 1 per cent of Victoria's population. First Nations children and young people account for about 15 per cent of children and young people under supervision.

Some First Nations people experience a number of social disadvantages with respect to health, finances and employment. Some suggest that these disadvantages are related to the historic discrimination and injustices suffered by First Nations people, and can result in a higher risk of interaction with the criminal justice system. For example, socioeconomic disadvantage and feelings of disempowerment, intergenerational trauma and discrimination can lead people – particularly young people – towards crime or substance abuse.

Another issue is that of deaths in custody of First Nations prisoners. A national Royal Commission into Aboriginal Deaths in Custody was held between 1987 and 1991 in response to growing public concerns that deaths of First Nations people in prison were far too common. Aboriginal deaths in custody have also been the subject of more recent inquiries.

These issues continue to be monitored at a national and state level. For example, the Australian Institute of Criminology produces an annual report with a focus on addressing the issue of First Nations overrepresentation in the criminal justice system.

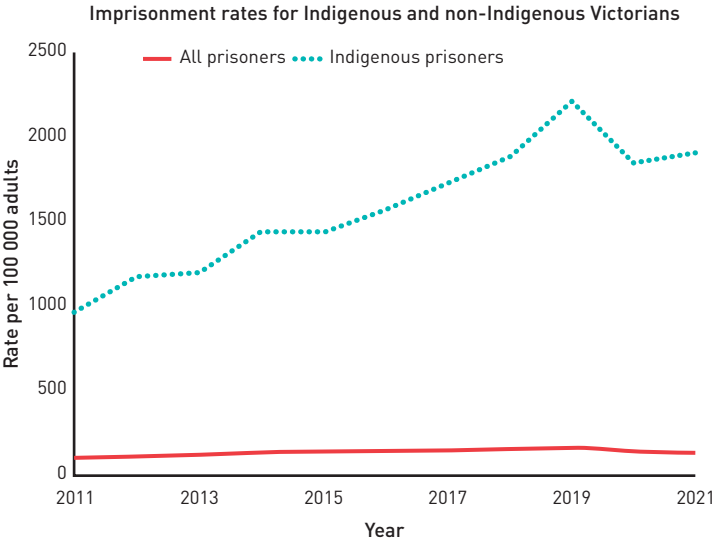
Difficulties faced by some First Nations people in the criminal justice system

The issues surrounding First Nations people and the difficulties some of them have faced and continue to face in the criminal justice system are vast and complex. There have been numerous inquiries and royal commissions to try to address the disadvantage faced by First Nations people in the system.

Like other people, First Nations people may need to deal with the criminal justice system because they are suspected or accused of committing a crime, or because they are a victim or witness. In dealing with the system, some First Nations people may experience a number of difficulties including:

- cultural differences
- language differences
- distrust in the criminal justice system.

These issues are summarised below.



Source 1 This graph uses data from the Sentencing Advisory Council to show the imprisonment rates for Indigenous and non-Indigenous Victorians.

Cultural differences

One of the challenges faced by some First Nations people when dealing with the criminal justice system lies in the differences between the **customary law** of different Aboriginal and Torres Strait Islander cultures and the Australian criminal justice system. The Law Council of Australia's Justice Project report noted that customary law clashes with the law adopted in the criminal justice system, both in terms of how the processes are conducted, and the consequences involved. For example, in customary law, Elders are involved in sentencing an offender, and may even carry out the punishment. In addition, a focus of customary law and punishment is to restore balance and aim as far as possible to maintain and recognise relationships. Sentencing in Victorian courts, on the other hand, is more focused on retribution and making an example of the offender so that they, and others, do not offend again.

customary law a body of norms, practices and beliefs that a local community or group of people accept as legal requirements or rules of conduct

Therefore, some First Nations people may not understand the law and the criminal justice system, or may feel that the criminal justice system is not well equipped to understand them or their culture. Some may not feel welcome, or may feel that it is a hostile and alien environment. The processes may also be unfamiliar, and First Nations people may feel those processes do not take into account matters that are important to them. For example, First Nations people may wish to have their own Elders or Respected Persons involved in the various stages of the criminal justice system, but usually they are not.

In addition, some may feel intimidated or resentful when they need help. For example, it has been noted that



Source 2 Elders aim to provide guidance, counselling and knowledge, and can help their people feel a positive connection to their history and culture. Pictured here is Aunty Nellie Flagg, a Wemba Wemba woman who has advocated for culturally specific family violence support for First Nations women.

First Nations women may not seek out help or services when they have suffered family violence because they may believe that the service providers are not culturally trained, or they may not feel comfortable in that setting or environment.

Language differences

As noted above, not all First Nations people speak English as their first language. Rather, some First Nations people may speak either an Aboriginal language or Aboriginal English (a dialect of English). Aboriginal English has been recognised as a language since the 1960s, and it is estimated that 80 per cent of First Nations people in Australia use Aboriginal English as their first language.

Aboriginal English is a distinctive language that non-speakers may not understand. Some English words have different meanings in Aboriginal English, such as 'Sorry Business' (a ceremony associated with death), 'Country' (which refers to land generally, or a place of belonging) and 'big mob' (a lot of). Distinctive sounds and accents are used, and there are unique grammatical features. This means that some First Nations people may need an interpreter when dealing with the criminal justice system; however, there are not enough suitably qualified language interpreters available.

In addition, some First Nations people have different ways of communicating:

- direct questioning, which is often the way evidence is obtained in criminal matters, can be inappropriate for some First Nations witnesses. In many Indigenous cultures, group agreement through long – sometimes roundabout – discussion and storytelling is the polite way to settle differences, and directness is impolite
- direct eye contact is seen as disrespectful to some First Nations 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 their customs
- some First Nations people appreciate extended periods of silence, and may pause to show respect. However, this may be misunderstood as being evasive or indicating guilt.

If personnel in the criminal justice system – such as lawyers, police officers, judges, magistrates or court personnel – are not culturally trained, then this can result in a miscarriage of justice. For example, a First Nations person may be found guilty simply because they have not been able to communicate what happened, or have inadvertently agreed with what they have been asked for fear of seeming impolite if they did not.

Distrust in the criminal justice system

Another difficulty faced by some First Nations people is potential distrust in the criminal justice system, which means that if they are victims of crime, they may not be prepared to seek out help. There may be a distrust of the systems that, for many, have not protected First Nations people.

The March 2022 final report of the Inquiry into Victoria's Criminal Justice System suggested that in 2018, an Aboriginal Victorian was 3.1 times more likely to be recorded as a victim of crime than a non-Aboriginal Victorian. In addition, the report suggested that much of the violence committed against First Nations women was underreported. Djirra, an organisation that provides support to Aboriginal people who experience family violence, suggested that Victorian Aboriginal women underreport crimes because there is a mistrust in the criminal justice system and they believe no action will be taken, or because they are scared that reporting crimes will result in child removal, incarceration, or misidentification of who is the victim and who is the offender.

The Law Council of Australia in its Justice Project report noted that many First Nations people have personal experience of the criminal justice system working 'against them' rather than for them, and that therefore there is a real resistance to engaging with services to help them. Many do not see the courts or legal services as a safe place, and therefore will not report family violence, crimes, racist behaviour or other complaints. This can then result in cycles of abuse, trauma and crime.

Other difficulties

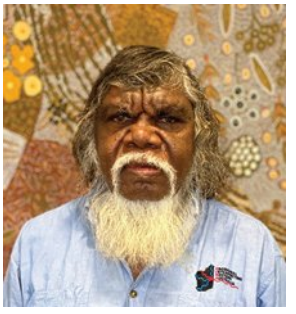
In addition to those described above, other difficulties that some organisations and people argue are faced by First Nations people include the following:

- a lack of legal services, including culturally safe services, available to First Nations people, particularly in remote communities
- a lack of respect for the right of self-determination, with suggestions that there has been, in the past, a lack of genuine consultation with First Nations communities when developing policies and laws, and that there is no consultation with First Nations communities when sentencing offenders
- a lack of culturally appropriate sentencing options, with most sentencing taking place in mainstream courts rather than specialised courts
- hardships experienced in prison and detention, including because of insufficient supports for First Nations prisoners and the possible risk of intergenerational trauma not being adequately addressed.

Addressing difficulties

Some of the ways in which the criminal justice system seeks to address the above difficulties are:

- having dedicated funding for Aboriginal legal aid to ensure that professional and culturally appropriate legal services are available to First Nations people. In Victoria, this includes the Victorian Aboriginal Legal Service (VALS) (a government-funded legal service organisation that provides First Nations people with legal services, including legal advice in relation to criminal issues) and Djirra (which provides family violence support services to Aboriginal people). Funding remains an issue, however, for these services, where resources cannot keep up with demand
- developing specialised courts and programs to ensure that cultural differences are addressed in the criminal justice system. For example, the Koori Court provides a culturally safe space for sentencing Aboriginal offenders. As you will learn in Topic 7.11, the Koori Court is a division of the Magistrates' Court, Children's Court and County Court that sentences offenders, and involves Elders and Respected Persons. In addition, Umalek Balit, formerly the Koori Family Violence Victim Support Program, offers culturally safe and appropriate family violence services at particular Magistrates' Court locations
- ongoing cultural competence training for people who work in courts and tribunals to ensure that First Nations people can engage with the criminal justice system. For example, Court Services Victoria, which helps with the administration of Victoria's courts, assists in ensuring that court personnel attend cultural awareness training and trauma training
- developing self-determination initiatives. For example, Court Services Victoria has developed a self-determination plan that seeks to provide a Koori-inclusive environment and a pathway to self-determination. Cultural awareness and support programs, the display of artwork and flags in the Supreme Court, and increasing Aboriginal and Torres Strait Islander employment rates, are all part of the plan.



Source 3 David Newry Nyoongoongoong is an Aboriginal Elder, Senior Miriwoong interpreter and founder of Aboriginal Interpreting WA (since 2000). AIWA's interpreters are trained and registered and have cultural protocol as the cornerstone of all interactions and service delivery. He works to ensure that First Nations people receive a fair hearing in court. In 2022, he was part of a program that saw 26 judges, including from Melbourne, travel to the West Kimberley to enhance their understanding of First Nations culture.

Young people

'Young people' is a term generally used to describe those who are less than 25 years of age, and includes children. A 'child' in Victoria is a person who is aged less than 18 years.

Young people may interact with the criminal justice system because they are suspected or accused of committing a crime, because they are a victim of crime, or because they are a witness to crime, particularly crimes associated with family or domestic violence. Although children aged less than 10 years cannot be charged with committing a crime, due to the age of criminal responsibility, such children can be victims and witnesses of crime, and thus may still have to interact with the criminal justice system. Therefore, in the criminal justice system, the term 'young people' encompasses children less than 10 years old (with respect to victims and witnesses only), children aged between 10 and 17, and young adults aged between 18 and 24.

In the 2021 national census, the Australian Bureau of Statistics reported that 12 per cent of Australia's population was aged 0–9 years (called 'Gen Alpha'), and 18.2 per cent of the population was aged 10–24 years (called 'Gen Z').

Difficulties faced by some young people in the criminal justice system

Young people who are particularly at risk when having to deal with the criminal justice system include those who are experiencing homelessness, are First Nations, or have experienced family violence.

'Young offenders' (those aged between 10 and 24 years of age) may have committed crimes such as shoplifting, minor theft, trespass, fare evasion on public transport, or property damage. The **Sentencing Advisory Council's** statistics show that while children aged between 10 and 14 years of age do not make up a large proportion of offenders in Victoria, the total alleged offender rate for people who fall within the 15–19 and 20–24 age brackets exceeds offending rates in all other age brackets.

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



Source 4 Young homeless people can be at greater risk of becoming offenders and victims of crime.

The Inquiry into Victoria's Criminal Justice System considered statistics in relation to 'youth offenders' (those between the ages of 10 and 17), and noted that some have a one-off incident with the criminal justice system, and never interact with it again. However, some youth offenders end up becoming adult offenders and continue to offend throughout their lives. The Sentencing Advisory Council has found a link between the age of a child and their likelihood of reoffending, in that the younger a child is when they are first sentenced, the more likely they are to reoffend.

In addition, as noted earlier, young people can be victims of crime or witnesses to crime. The Victorian Government's Youth Justice Strategic Plan (2020–2030) found that 53 per cent of children and other young people in youth justice (the system that supervises young people in the criminal justice system, such as in a youth facility) were a victim of abuse, trauma or neglect as a child, and 42 per cent had been witness to family violence.

When interacting with the criminal justice system, young people can experience difficulties, including:

- a lack of understanding of the justice system
- negative effects of custody.

Lack of understanding

Many young people struggle to access justice because they are not able to understand the system, and therefore are not able to properly engage with it.

The criminal justice system is essentially an adult-orientated system. The language and processes that are used in the system were created by adults, and can be difficult to understand. For example, complex vocabulary and formal documents are used, and complex questions may be asked during an examination of a witness. Young people may not have sufficient communication skills, expertise, knowledge and experience to be able to understand the language and processes. This can be more complicated for those who do not speak English as their first language, those with intellectual disabilities, First Nations young people, and very young children.

Because of this lack of understanding, young people may need to rely on other people, particularly adults, to help them understand the criminal justice system, and to provide them with support while they do so. Most young people would not be able to participate in the criminal justice system without a representative, such as a lawyer or a parent. However, this can become difficult if the young person cannot afford a lawyer, or if they have a challenging relationship with their parents (e.g. where the young person is a victim of family violence perpetrated by a parent). Therefore, the criminal justice system needs to ensure that free lawyers and independent support people are available to help a young person navigate the system.

Negative effects of custody

Another difficulty faced by young offenders is the negative effects of custody. Custody includes time spent in remand, and time spent in a youth facility as part of a sentence that has been imposed. It has been recognised that even a short period in custody can have serious negative effects, including the following:

- it can be difficult to overcome the stigma of being in custody
- it can expose young people to the negative effects of prison and cause them to form criminal associations with other offenders
- it reduces the opportunity for positive intervention and rehabilitation.

Research also shows that time in custody can increase the possibility of a young offender reoffending. This can result in a life cycle of offending, with young offenders becoming adult offenders. It has therefore been recognised that being remanded in custody should be a last resort for young people.

The issue of young offenders in custody was considered in the Court of Appeal case described in the scenario below.

Actual scenario

Young offender jailed

In 2022, the Supreme Court (Court of Appeal) of Victoria heard an appeal by a young offender, who had committed the serious offence of aggravated carjacking just four weeks after his eighteenth birthday.

Although there was expert evidence that showed the offender was exceptionally immature and would be vulnerable in prison, he was sentenced to prison for a minimum of three years because of mandatory minimum sentencing in Victoria. Mandatory sentencing applies to a particular range of offences, including aggravated carjacking. If the court is sentencing an offender for one of these offences, and the offender is aged 18 or over, then it must impose a custodial sentence and fix a minimum term of imprisonment unless 'a special reason' exists that would justify a different sentence. However, a special reason will only exist if the judge is satisfied there are 'substantial and compelling circumstances that are exceptional and rare'.



Source 5 The decision in *Buckley v The Queen* was one of the last handed down by Justice Chris Maxwell, the former President of the Victorian Court of Appeal, before he retired.

In this case, the Court of Appeal stated that mandatory minimum sentences are 'wrong in principle' and that they reveal a 'profound misunderstanding of where the community's best interests lie, especially in the sentencing of young offenders'. The Court of Appeal found that in this case, because of the offender's characteristics, a more appropriate sentence would have been some form of community correction order with tight conditions that were focused on rehabilitation. However, the mandatory sentencing regime prevented the courts from imposing a sentence other than imprisonment on the offender because the circumstances were not 'exceptional and rare'.

In dismissing the offender's appeal, the Court of Appeal noted the impact of custody on young offenders, citing another judge's summary in a separate case:

> Courts sentencing young offenders are cognisant that the effect of incarceration in an adult prison on a young offender will more likely impair, rather than improve, the offender's prospects of successful rehabilitation. While in prison a youthful offender is likely to be exposed to corrupting influences which may entrench in that young person criminal behaviour, thereby defeating the very purpose for which punishment was imposed. Imprisonment for any substantial period carries with it the recognised risk that anti-social tendencies may be exacerbated. The likely detrimental effect of adult prison on a youthful offender had adverse flow-on consequences for the community.
>
> *Buckley v The Queen* [2022] VSCA 138 (14 July 2022)

Other difficulties

In addition to those described above, other difficulties faced by young people include the following:

- psychological barriers – the Law Council of Australia, in its Justice Project report, noted that young people may find court processes intimidating and overwhelming, or may feel fear or helplessness when interacting with the criminal justice system
- a lack of specialist legal services and courts – there are not many services that are youth-specific, with many of them more targeted towards adult offenders or victims of crime
- a lack of formal education for some young people, which results in lower literacy levels and potentially a lack of awareness of rights.

Addressing difficulties

Some of the ways in which the criminal justice system seeks to address the difficulties facing young people are as follows:

- In Victoria, YouthLaw is a dedicated community legal centre for young people aged under 25 years. YouthLaw can help with a range of criminal issues, such as those relating to fines, criminal charges, violence and abuse, and issues associated with victims of crime.
- Youth **diversion programs** are used in the Children's Court to 'redirect' young people away from the court. Such programs enable the offender to be placed on a program (or plan) rather than formally entering a plea or being found guilty. They aim to 'divert' young people from a criminal life and promote rehabilitation, and research has found that they reduce the likelihood of further offending. Additional benefits include offenders accepting responsibility for their behaviour and avoiding the stigma associated with having a criminal record.
- In Victoria, intermediaries (skilled communication specialists) are used to assist vulnerable witnesses, including children, to communicate with the court and give evidence. This helps young witnesses participate in criminal trials when they otherwise would not be able to do so, due to their comprehension and communication skills.
- A national conversation continues about increasing the age of criminal responsibility from 10 years to 12 or 14 years. The current age of criminal responsibility has been criticised as being too low and inconsistent with international standards, which recommend a minimum age of 14 years. In 2023, the Victorian Government committed to increasing the age of minimum responsibility to 12 years in 2024, and then subsequently to 14 years.

diversion program a method used in the Magistrates' Court and Children's Court to 'redirect' offenders away from the court and avoid a criminal record by placing them on a plan



Source 6 Some young people may find the prospect of going to court intimidating.

Culturally and linguistically diverse people

Another group of people who experience challenges when dealing with the criminal justice system are those from culturally and linguistically diverse (CALD) communities or backgrounds. The term 'CALD' is used to describe those people born overseas in countries other than 'main English-speaking countries'. According to the Australian Bureau of Statistics, the main English-speaking countries are Canada, the Republic of Ireland, New Zealand, South Africa, the United Kingdom and the United States of America.

Australia is a diverse country. According to the 2021 Australian Bureau of Statistics national census, just over 7 million people (27.6 per cent of Australia's population) were born overseas. In Victoria, it is slightly higher, with 35 per cent of Victorians born overseas. The top five countries of birth for Victorians, excluding Australia, were India, England, China, New Zealand and Vietnam. While there are more than 300 languages spoken in Australia, the top five languages used at home in Victoria, other than English, were Mandarin, Vietnamese, Greek, Punjabi and Italian. These languages reflect the rich and diverse history of Victoria and Australia, which includes a history of migration from European countries such as Greece and Italy.



Source 7 Australia has a rich and diverse population, including those born in India or of Indian descent.

Difficulties faced by some CALD people in the criminal justice system

Like any other people, CALD people may be required to interact with the criminal justice system for various reasons. They may be accused of committing a crime, they may be a witness, or they may be a victim themselves. As noted above, however, not all CALD people experience these difficulties, and not all CALD people experience the same difficulties.

Research suggests that CALD people are disproportionately affected by family violence and face more hurdles when seeking assistance than other people. In Victoria, CALD people have been identified as a priority group who are affected by family violence. This is for a variety of reasons, which can include social isolation (being ostracised by the community or being away from home, and therefore are at a greater risk of being abused or taken advantage of), forced marriages in some cultures, and spiritual abuse (where perpetrators use faith to condone or excuse their behaviour, such as violence against women).

In addition, the Inquiry into Victoria's Criminal Justice System suggested that there were some overrepresentation issues with respect to CALD communities. It noted the following:

- Adults from New Zealand, Vietnam, Samoa, Sudan, Afghanistan and Lebanon are disproportionately imprisoned in Victoria.
- Approximately 25 per cent of incarcerated young people are non-native English speakers.
- More than 40 per cent of offenders are from CALD backgrounds.

Two difficulties experienced by some CALD people are:

- limited awareness of and familiarity with the criminal justice system
- language differences.

Limited awareness and familiarity

One of the challenges faced by some CALD people is their limited knowledge and awareness of their rights, the services that are available, and the processes involved in the criminal justice system.

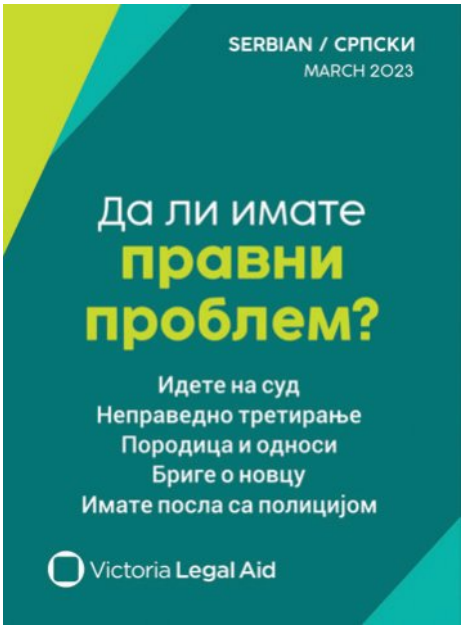
Many features of Victoria's criminal justice system are substantially different to those in other countries. For example, Australia's criminal justice system is based on a common law system, in that parts of Australia's laws have been developed by the courts over time. Australia also adopts an adversarial approach to resolving criminal cases and civil disputes, which involves each party presenting their evidence and arguments, and the court deciding on guilt (or, in civil law, liability). This is different to the inquisitorial system used in many European countries, where the judge has a more active role and can investigate the case, make inquiries and examine witnesses. If CALD people have previously been exposed to a different criminal justice system in their country of birth, then this can impact on their ability to understand the system adopted in Australia.

In addition, some CALD people have described the criminal justice system as complex, daunting and overwhelming. They may therefore be too scared to seek help, relying instead on people within their own communities, who may or may not be able to help with resolving criminal issues.

Language differences

Another difficulty faced by some CALD people is language differences. A low level of English language skills can impact on a person's ability to engage and interact with the criminal justice system. This includes being able to communicate with their lawyers, with the police and with court personnel, including judges and magistrates. While there are many service providers that provide information in languages other than English, such as Victoria Legal Aid (VLA), the court system adopts English as the language in which to communicate.

Language differences mean that a person who does not speak and read English well will require an interpreter to help them understand and communicate. However, the Law Council of Australia has noted that there are issues with appropriate interpreter services for CALD people. Sometimes there are difficulties in finding a qualified interpreter in the first place, and, if one is found, there may be additional difficulties in ensuring that the interpreter is not conflicted (such as being from the person's own community), or ensuring that the interpreter is appropriate for the person based on their own characteristics (e.g. a female person wanting a female interpreter). It has been recognised that interpreters are in high demand, but there are shortages in many languages.



Source 8 VLA produces resources in many different languages. This image shows a help card in Serbian, which outlines common legal problems that VLA may be able to help with.

Another issue associated with language difficulties is a potential risk that a victim is misidentified as the perpetrator. This is explored in the scenario below.

Actual scenario

Saira was being abused by her husband. Police believed she was the aggressor

Amy Hall and Emma Brancatisano, *SBS News*, 3 March 2022

Living in Victoria with no job or money, Saira (not her real name) says her husband was monitoring her every move.

She knew their relationship was 'bad', even before she moved to Australia from India to continue their relationship, but says she didn't realise the financial, emotional and sexual mistreatment she would endure was considered abuse.

...

Saira's husband was an Australian citizen and both of them had family in India. She arrived in Australia on a tourist visa in 2015 and received her temporary residency the following year.

She became physically and socially isolated during the relationship but having already spent money on her visa and fearful that their families would blame her for a marriage breakdown, Saira says she decided to 'stick it out'.

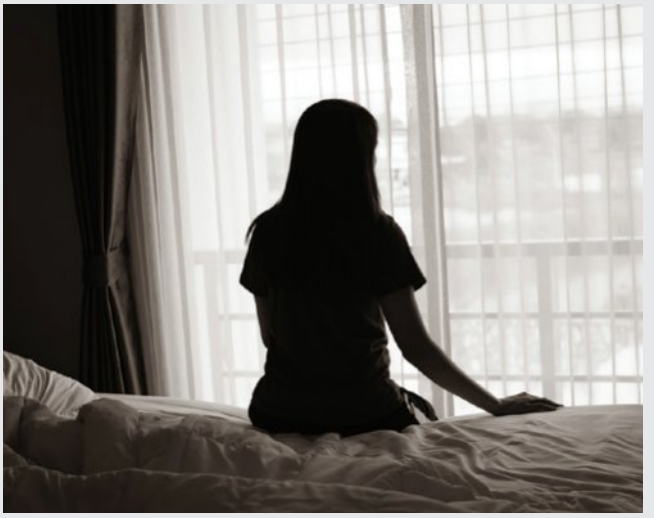
That is, until she says her husband began to restrict her food intake and withdrew all of her money from their joint bank account.

...

Saira describes an incident in 2017 in which she rang Victoria Police to ask them to give her husband a warning, 'to ask him to control his temper'.

She says police responded by saying they could issue an Intervention Order (IVO) – but she didn't know at the time what that was.

She says police called her back four hours later but during that time, the couple had another altercation which left both of them with bruising.



Source 9 One of the issues associated with language difficulties is misidentification.

Saira's husband then filed a police report against her, claiming he was the victim, which led to Saira being incorrectly identified as the primary aggressor.

Saira says she was so isolated at the time, she didn't know where the local police station was and her husband monitored her internet use, so she didn't know what to do.

'I was new to the country and the location ... Australia is not my native place.

'I just called them [the police]. I didn't go to the [station] and they didn't see the bruises on my body. They could only see the bruises on his hand.

'So they just came to a conclusion that I was the perpetrator and he was the victim.'

Victoria Police declined a request to comment on Saira's case but Family Violence Command assistant commissioner Lauren Callaway says the force is aware misidentification is an ongoing issue.

'Victoria Police is particularly concerned about the impact of misidentification on our priority communities. We know the risk of misidentification can be higher where there are communication barriers and distrust of police.'

'We are committed to addressing the issues contributing to misidentifying predominant aggressors as we know the impact it has on victims.'

In a position paper released in February, inTouch Multicultural Centre Against Family Violence, which helps women from migrant and refugee backgrounds across Victoria, says misidentification is estimated to occur in every one in 10 cases – and significantly more when incidents take place in culturally and linguistically diverse communities.

Other difficulties

In addition to those described above, other difficulties faced by some CALD people include the following:

- distrust – some CALD people may distrust the criminal justice system or authorities (e.g. the police), particularly if they have had negative experiences in the past, such as in relation to racism or discrimination. For example, recent arrivals in Australia who have been detained or been the subject of negative media attention may not feel comfortable engaging with legal service providers or the legal system
- religious or cultural barriers – some victims may experience cultural or religious barriers that prevent them from seeking help (particularly if they are experiencing family violence), such as a fear of being 'disowned', or a fear of stigma within their own community
- lack of financial resources – more recent arrivals may lack the financial ability to be able to get help, either if they are accused of committing a crime, or if they are a victim themselves
- experiences of racism and discrimination – in the past, some CALD communities have spoken out about their portrayal in the media, which has resulted in experiences of racism and systemic discrimination.

Addressing difficulties

Some of the ways in which the criminal justice system seeks to address the difficulties facing CALD people are as follows:

- Various courts and service providers, such as VLA and community legal centres (CLCs), provide free interpreters. For example, the Magistrates' Court is able to arrange an interpreter for accused people, and for parties involved in a family violence matter. The Victorian Government also offers victims of crime a helpline that is interpreter-friendly. However, as noted above, there continues to be a challenge with the availability of suitably qualified interpreters.
- Information is available in different languages. For example, VLA and the courts provide resources in various languages, and the Supreme Court offers videos about court processes, which are also in multiple languages.
- There are specialist CLCs for asylum seekers and refugees. For example, the Asylum Seeker Resource Centre and Refugee Legal provide a range of legal services, including for those who are experiencing family violence.
- Advice and resources are provided to court personnel to ensure procedural fairness and equality of treatment for all court users. For example, the Judicial Council on Diversity and Inclusion provides resources to ensure that judges and magistrates are competent in running hearings and trials that involve CALD people, such as fact sheets on conducting proceedings with interpreters. It also offers training, including a cultural diversity e-learning course.

People with disability

People with disability also experience challenges in dealing with the criminal justice system. The *Equal Opportunity Act 2010* (Vic) – a statute that seeks to prevent people with certain characteristics, such as a disability, from being discriminated against – defines disability as one of the following:

- total or partial loss of a bodily function
- the presence in the body of organisms that may cause disease
- a total or partial loss of a part of the body
- malfunction of a part of the body, including a mental or psychological disease or disorder, or a condition or a disorder that results in a person learning more slowly than people who do not have such a condition or disorder
- malformation or disfigurement of a part of a body.

Therefore, a 'disability' is not limited to a physical disability. It also includes serious or complex mental health conditions or disorders, intellectual difficulties (such as learning difficulties) and sensory disabilities. Disabilities can be permanent or temporary. Some are visible, while others are not. For some, their disabilities may fluctuate (go up and down) over time.

One type of disability that has become a stronger focus in recent years is severe mental illness. Mental illnesses include complex mental health conditions such as schizophrenia and bipolar disorder, as well as anxiety disorders and depression. The Royal Commission into Victoria's Mental Health System found that almost half of Victorians will experience mental illness during their life. However, not everyone who has a mental health condition has a disability. Rather, a mental health condition may become a disability if it is severe and long-term, such that a person cannot do basic, everyday things; for example, banking, shopping and looking after themselves. It is then described as a 'psychosocial disability'.

A number of Victorians (and Australians) live with a disability. For example:

- people with disability form about 18.4 per cent of the Victorian population, with a majority of those having a physical disability
- an estimated 3 per cent of people living in Victoria experience severe mental illness, such as bipolar disorder
- it is estimated that First Nations people and people living in regional, rural and remote areas generally have higher rates of disability and higher rates of mental health conditions.

Difficulties faced by some people with disability

People living with a disability may, like people who do not live with a disability, be accused of committing a crime, or may be a victim or witness.

According to the Law Council of Australia, data suggests that people with disability have high levels of interaction with the criminal justice system – not only as accused persons, but also as witnesses and victims. People living with a disability are more vulnerable to becoming victims of crime and abuse. For example, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability found that people living with a disability are almost twice as likely to experience violence and abuse as people who are not living with a disability. This includes sexual violence and assault, as well as abuse associated with the withholding of food, water, medication or personal care. In addition, the Justice Project conducted by the Law Council of Australia found that there was an overrepresentation of people with a disability in the corrections system, noting that almost 50 per cent of adult prisoners in Australia had a disability, and that approximately 98 per cent of First Nations prisoners had a cognitive impairment.

There are significant barriers that people living with a disability may face when trying to interact with the criminal justice system, though the barriers depend on the disability the person has. These include:

- physical barriers
- lack of understanding by others about disability.

Physical barriers

One of the key difficulties faced by some people living with a disability when interacting with the criminal justice system is a lack of accessibility because of physical barriers. This includes a lack of access to the courts, legal services such as VLA, police stations, CLCs and support services. For example, people who have impaired mobility or are in a wheelchair may not be able to physically access a building or a site.

Physical barriers are not just associated with those who have a physical disability. They also extend to people who have a mental or a neurological disorder. For example, lights or noise can be prohibitive for people who have a mental disorder, while formal courtrooms can be particularly stressful and intimidating for people with a neurological disorder. Some of the courts and buildings that provide services are old, and are not designed in a way that ensures accessibility for all.



Source 10 The new law courts in Bendigo are designed to ensure greater access, including physical access.

In addition, some people may not be able to access information because the information is communicated in a way that they do not recognise or understand. For example, people with a cognitive or neurological disability may not understand the complex language used in the criminal justice system. As another example, a deaf person will likely need information communicated to them in a different way, such as through an Auslan interpreter who may or may not be available.

Lack of understanding by others about disability

The Law Council of Australia found that one of the key difficulties associated with people living with a disability is a lack of understanding of disability. In particular, the Law Council of Australia noted:

- People living with a disability continue to face negative stigma, prejudice and discrimination. Stigma, in particular, can result in people living with a disability not being willing to report crime or seek help if they are a victim of crime, for fear that they will not be believed, that they will be seen to be difficult, or that they will not get the support that they need.
- Disability training is important to ensure that personnel – including the police, court staff, judges and magistrates – are aware of and understand the various disabilities. However, the Law Council of Australia also noted that there have been concerns raised about the adequacy of disability training, including in relation to identifying the various types of disabilities, responding to them, and accommodating the needs of people with a disability.

Stigma, a lack of awareness and a lack of training can also result in further discrimination. For example, a deaf person in custody may face punishment for failing to follow instructions if their disability has not been properly identified and treated. As another example, a person with a speech impediment may not be prepared to seek help for fear that they will not be listened to or understood.

Other difficulties

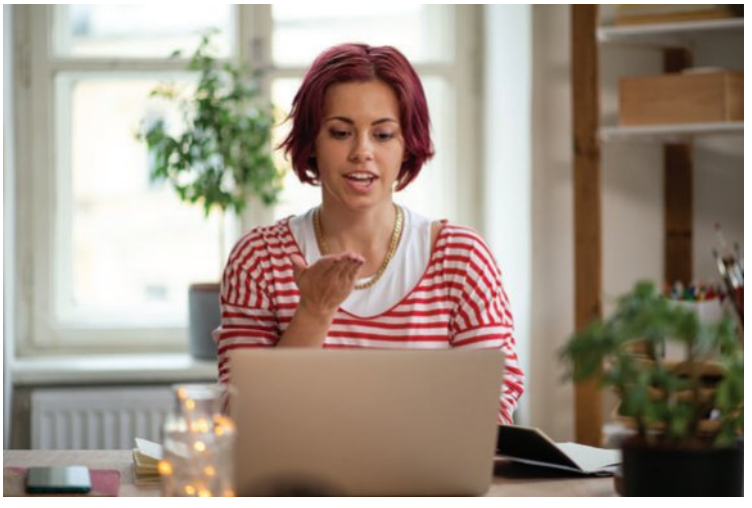
In addition to those described above, other difficulties faced by people living with disabilities include the following:

- lack of services – support services (including support people) are often required for people living with a disability to help them participate in the criminal justice system. These include support services in prisons (which are particularly important given the number of prisoners with a disability). However, gaps in support services mean they may not be readily available
- lack of appropriate accommodation for prisoners with a mental health condition – it has been reported that there are a lack of beds available for prisoners with serious mental health conditions and that some mental health patients may be at risk of not getting the treatment that they need
- lack of rehabilitation programs – the Law Council of Australia indicated that there was a lack of rehabilitation programs available for people living with a disability, and that often such people require tailored or intensive support that may not be available in prisons
- community attitudes and/or discrimination – the March 2022 Inquiry into Victoria's Criminal Justice System noted that community attitudes or discrimination may prevent people from reporting crimes committed against them for fear that they will not be believed or that they will not be viewed as credible.

Addressing difficulties

Some of the ways in which the criminal justice system seeks to address the difficulties facing people living with a disability are as follows:

- Various specialist courts and programs are now available to address the needs of accused people living with a disability. For example, the Magistrates' Court's Assessment and Referral Court aims to help people address underlying factors that contributed to their offending. It is available for accused people who have been diagnosed with a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder or neurological impairment. The Mental Health Advice and Response Service also operates in some courts. It provides advice and support to people involved in the criminal justice system who may need mental health treatment.
- Adjustments can be made to courtroom procedures to accommodate people living with a disability. For example, people with a cognitive impairment and who are a victim of a crime can give evidence through a pre-recorded statement, or may be able to have a support person with them when they give evidence. They may also have an intermediary (a skilled communication specialist) to assist them in giving evidence.
- Certain CLCs provide specialist advice to people with disability. For example, the Mental Health Legal Centre provides free legal services to people with lived experiences of mental health issues (not just disabilities).
- VLA provides various supports to people living with a disability. For example, it has a National Relay Service for people who are deaf or who find it hard to hear or speak on the phone. It also has Legal Help Chat online.



Source 11 The National Relay Service can provide help to people who find it difficult to communicate over the phone.

7.7 Check your learning

Remember and understand

1 **Identify** three different groups or organisations that help people overcome difficulties faced in the criminal justice system. Briefly **describe** one of those groups or organisations.

2 **Define** the following terms:
   - **a** young people
   - **b** culturally and linguistically diverse
   - **c** disability
   - **d** Aboriginal English.

3 **Describe** one review or inquiry that has taken place in Victoria, or in Australia, in relation to difficulties confronted in the criminal justice system.

Examine and apply

4 For each of the following individuals, **describe** one difficulty they may face in the criminal justice system and one measure that is in place to help overcome that difficulty. In your answer, **refer** to at least one of the principles of justice:
   - **a** a young person with an intellectual disability.
   - **b** a First Nations Victorian who speaks Aboriginal English
   - **c** an elderly Chinese woman who does not speak any English.

5 For each of the following individuals:
   - **a** Write down on a sticky note or small piece of paper all the difficulties that the person may be confronted with in the criminal justice system. You may have to conduct some more research, such as where the local court services are.
   - **b** Once you have done this, come together as a class and have one classmate write each individual's name on the whiteboard or a poster. Stick the notes around the person's name. Group common notes together (e.g. 'no money to pay for a lawyer').
   - **c** Discuss as a class what the outcome may be for the individual.

   The individuals are:
   - **i** Julianna, aged 65, lives in Bendigo, Victoria. She uses a wheelchair, and does not speak fluent English. She relies on her son, Pablo, to take her everywhere. Recently, Pablo has been denying Julianna her medication and has been withholding food from her. Pablo has also been stealing money from Julianna's bank account, which means she barely has enough money for her basic needs. Julianna depends on Pablo for all of her needs. Julianna has a mobile phone, but is not sure who to call.
   - **ii** Gus, aged 14, is a young Aboriginal person. One night, Gus was forced by some other young people to steal some money from a cash register in a small Chinese takeaway in Melbourne. When they were caught by the police, the others claimed they had nothing to do with it. Gus was charged with theft, and was denied bail. He is now in a youth prison waiting for his case to be heard. Most of Gus's family lives in Queensland and they are unable to come down to Victoria. Gus has no friends or family in Victoria other than his sister, who is studying law.

Reflect and evaluate

6 Choose one of the organisations referred to in this topic, e.g. Victoria Legal Aid or the Asylum Seeker Resource Centre. Access their website and answer the following questions.
   - **a** **Who** are they?
   - **b** **How** are they staffed?
   - **c** **Who** do they help, and **what** sort of cases do they help with?
   - **d** **Discuss** the ability of this organisation or group to help overcome difficulties in the criminal justice system.

7 **Discuss** the ability of the criminal justice system to address the needs of a young First Nations person who has a disability and speaks Aboriginal English as their first language, and who is a victim of crime.

7.8 The purposes of sanctions

Key knowledge

In this topic, you will learn about:

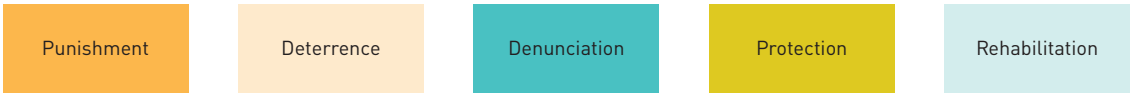
- the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation.

If an accused pleads guilty or is found guilty, the judge or magistrate decides on a suitable penalty for the offender. Criminal penalties imposed by the courts are known as sanctions.

In Australia, any sanction given to an offender must be proportionate to the crime committed. The victims or their families also have the right to see the offender punished for the harm they have done. However, it is possible that each person affected by the outcome will feel differently. An accused who has been found guilty but given a lenient sentence may feel that the outcome is just. The victim may disagree.

The law in Victoria that governs sentencing is the *Sentencing Act 1991* (Vic). This Act sets out the purposes for which sanctions (or sentences) may be imposed.

The purposes of sanctions are set out in Source 1.



Source 1 The five purposes of sanctions

When sentencing an offender, a court can hand down a sentence that achieves one or more of the five purposes set out in Source 1 (more often than not, at least two purposes are sought to be achieved by sentencing an offender). However, the court must not sentence an offender for any purpose other than these five purposes.

A sentencing judge (or magistrate) 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 (this is called the principle of parsimony).

The five purposes are explained further below.

Punishment

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

One of the purposes of a sanction is to **punish** the offender; that is, to penalise the offender when they have done something unacceptable. This allows victims and their families to feel a sense of justice without taking the law into their own hands. If individuals did take the law into their own hands, crime would increase and there would be no social cohesion. Therefore, the courts take it upon themselves to ensure that an offender is punished by imposing a sanction that is just and fair in light of the relevant circumstances of the offending.

In our society, imprisonment and the deprivation of freedom are the ultimate punishment. Australia no longer uses capital punishment or corporal punishment as sanctions. These punishments are considered to be inhumane and unacceptable in the twenty-first century.

Punishment is often a purpose for which courts impose sanctions, particularly in serious or violent cases involving the death or injury of another person.

Deterrence

The law aims to **deter** or discourage the offender and others in society from committing the same or similar offences in the future by imposing a penalty that is severe enough that the offender and others can see the serious consequences of committing crime. There are two types of deterrence: **general deterrence** and **specific deterrence**. A sanction imposed as a general deterrent is one that discourages people in general from committing crime. On the other hand, a sanction imposed as a specific deterrent is aimed at stopping the particular offender who is being sentenced from committing crimes again.

Whether a sanction can act as a general deterrent may depend on people knowing and understanding the sentence that is being imposed. Therefore, sentences should be communicated to the public through the media and through court websites. In addition, people should be able to understand the sanction. While people understand the concept of imprisonment and fines, they are less familiar with sanctions such as community correction orders and how they can be a harsh sanction.

Whether a sanction can act as a specific deterrent depends on many factors, including the offender's personal circumstances. In particular, if the offender has a significant prior criminal history, this may mean they are at risk of offending again, and so specific deterrence may be a high priority. On the other hand, if this offence was a one-off incident and the offender is otherwise of excellent good character, this may mean that specific deterrence is of less importance.

The scenario below is an example of a case where the sentencing judge considered the need for both general deterrence and specific deterrence.

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

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

specific deterrence
one purpose of a sanction, designed to discourage the offender from committing further offences

Actual scenario

Aggravated burglary

One night in March 2022, the offender went to the home of the victim, who lived there with her three children. The offender knew the victim through an associate of his, but went to her home with the intention of assaulting someone else who he thought was at the property (i.e. not the victim).

The offender parked his car in the victim's driveway and approached the house with a wooden pole in his hand. The victim was sitting in her loungeroom and heard someone come inside. She went to the front door and saw the offender there. At this point, the offender started shouting. Two of the victim's children watched what was happening. The offender walked out of the house and stood on the front lawn, continuing to yell, and then went to the side of the house and began banging on it with the wooden pole. The offender left soon afterwards. Although the entire incident occurred in under two minutes, the victim was scared and shocked by what had happened. The offender was ultimately charged with committing aggravated burglary, the maximum penalty of which is 25 years' imprisonment, and two other offences.

The offender pleaded guilty. In sentencing the offender, the County Court judge noted that the incident was short-lived, and the offending was not sophisticated or elaborately planned. Rather, it appeared that the offender was angry and in a state of intoxication, and mistakenly thought that another person was at the property. Although the offender did not use any force, the judge said that the victim and her children had a right to be safe in their home, and that the offender's conduct breached that right.

In sentencing the offender, the County Court judge found that general deterrence was important, stating that she must deter others from entering people's homes with the intention of committing violence. However, the need for specific deterrence was less important, having regard to the fact that the offender had a relatively limited criminal history, and had reasonably good prospects of rehabilitation. The judge did note that the offender would benefit from ongoing treatment and counselling.

The offender was sentenced to a total effective imprisonment term of eight months. Following

the imprisonment, the offender was to be placed on a community correction order for 18 months, the focus of which was rehabilitation and treatment in relation to drug use, alcohol abuse and mental health.

DPP v Kerney [2023] VCC 350 (9 March 2023)

Denunciation

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

When deciding on an appropriate sanction for a crime, the court may impose a sentence that is harsh enough to show its disapproval. This is known as **denunciation** and it is designed to convey the message that this type of criminal behaviour will not be tolerated by the courts. The denunciation purpose of a sanction is often emphasised in cases involving offending that could be undertaken by many members of society (e.g. theft and tax fraud).

Recently, the need for public denunciation of offences has been seen in relation to family violence cases. In particular, it is estimated that on average, one woman per week is murdered by her current or former partner in Australia. This is considered further in the scenario below.

Actual scenario

Murder of separated domestic partner

The offender in this case pleaded guilty to the murder of his partner in October 2021. Knowing that his partner was intending to leave him, the offender attacked her out of the blue in their home, stabbing her three times. One of the thrusts of the knife entered her back and severely damaged her spinal cord, which led to her rapid death. The woman had two young children with the offender, and was 12 weeks' pregnant at the time. The Supreme Court noted that her death was tragic, not only for her, but also for her unborn child, her children, her family and friends, and for the community.

The victim was described by her sister as being 'a beautiful girl with a heart of gold'. Her family and friends described her relationship with the offender as surprising, given their very different personalities and habits. A constant source of concern and disapproval by the victim was the offender's drug use throughout the relationship – which was tumultuous, largely because of that drug use. The couple also had financial issues, as the offender had withdrawn a large sum of money from their joint savings to buy a car.

At the time of offending, the offender was 29 years of age. The Supreme Court judge, Justice Tinney, noted that the crime was of a very high degree of seriousness. In sentencing the offender, the judge commented that the crime was committed in a setting of family violence. In finding that the important reasons for which the sentence must be imposed are 'just punishment, denunciation and general deterrence', he said:

> You must be punished in a way which reflects the seriousness of your crime and amounts to an appropriate response to it. The sentence must communicate in clear terms this Court's condemnation and disapproval on behalf of the community of your violent criminal conduct towards [the victim]. Your crime represents yet another instance of the murder of a female domestic partner by an angry and embittered male, a type of crime which has become distressingly familiar in the life of this Court and of our community, and causes enormous grief and trauma. [The victim] should have been free to remain in or leave her relationship with you as she saw fit, without the prospect of being met with unforgivable violence from you. Her life was precious to her, her young children, her family, her friends and the community in which she lived and was making a great contribution. In respect of general deterrence, the sentence I pass must bring it clearly home to any person who might be minded to carry out serious crimes of violence against people – disproportionately women – in domestic settings, extending to violence of such magnitude as to take the

life of others, that such conduct will be met with very strong punishment. In your case, in light of the [positive] steps you have taken since your crime, and your good prospects of rehabilitation, I do not believe that specific deterrence and protection of the community loom large in the sentencing synthesis.

The offender was sentenced to 25 years in prison with a non-parole period of 20 years.

DPP v Coman [2023] VSC 159 (31 March 2023)

Protection

Protection is a purpose of sanctions that seeks to ensure the safety of society by imposing a sanction that prevents the offender from harming again. An offender may be required to serve a term of imprisonment to remove them from society so that they cannot commit any more harmful acts, and to ensure the safety of all members of the community. While imprisonment is seen as a sanction of last resort, some offenders are given very long periods of imprisonment because the courts consider them to be a danger to society. A horrendous crime, a lack of remorse and an offender's callous attitude indicate that the person should be kept out of society for as long as possible.

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)

Rehabilitation

The final purpose of a sanction is to **rehabilitate** (i.e. treat) the offender. It is in society's interests to help offenders change their ways, otherwise crime rates and prison costs will escalate. In providing offenders with opportunities in the form of education, training, assistance and support (e.g. counselling), the legal system hopes that they will grasp the chance of a better future, change their offending ways, and become law-abiding citizens.

The following scenario illustrates how an offender's prospects of rehabilitation are considered by a court.

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

Actual scenario

Assault at Barwon Prison

In August 2020, the offender, who was 21 at the time, and another prisoner were in the yard at Barwon Prison. They attacked another prisoner, who was 45 years old, causing him serious injury. The victim was stabbed, kicked, punched and stomped on as part of the attack. The two offenders admitted that this was a planned attack. The victim was flown by air ambulance to the Royal Melbourne Hospital and underwent emergency surgery. When the offender was interviewed about his role in the attack, he gave untruthful and unhelpful answers.

The offender ultimately pleaded guilty to intentionally causing serious injury. The Supreme Court judge, Justice Jane Dixon, noted that the victim had suffered physically and psychologically, and that although the offender was not the one who stabbed the victim, it was he who initially knocked the victim to the ground and continued to assault him in a violent manner.



Source 2 Although Barwon Prison is a maximum-security facility, crimes can still occur there.

The offender was sentenced to seven years' imprisonment with a non-parole period of six years. However, given the offender was already serving a term of imprisonment, some of this was to be served at the same time as his existing prison sentence.

In sentencing the offender, Justice Dixon pointed to the offender's good prospects of rehabilitation:

> The time you have spent in solitary confinement will have given you time to reflect about the future direction of your life. I accept that your letter of apology is a reflection of a genuine desire to change. You have also expressed your remorse for the offending to your mother and you appear to accept that you have disappointed her.
>
> Rehabilitation is an important purpose of sentencing, especially where young offenders are concerned. Although the seriousness of the offending reduces the extent to which your youth can be treated as mitigatory, it remains an important consideration.
>
> There are some positive signs, including the remorse you have expressed, and the fact that you appear to have been sincerely engaged in counselling with Caraniche [a counselling service that operates in prisons]. It seems that you will continue to engage in counselling at the Metropolitan Remand Centre [where the offender had been transferred]. It is in your favour that you have the ongoing support of your mother and sisters. I therefore regard your prospects of rehabilitation as reasonable.

R v Hall [2023] VSC 151 (27 March 2023)

7.8 Check your learning

Remember and understand

1 **Identify** the main statute that governs sentencing in Victoria.
2 **Identify** and **describe** the five purposes of imposing a sanction.
3 **Distinguish** between general deterrence and specific deterrence.

Examine and apply

4 Read the scenario 'Aggravated burglary'.
   a **Identify** the parties in this case.
   b **Describe** the key facts of the case.
   c Would a jury have been involved in this case? **Justify** your answer.
   d Conduct some research on what constitutes aggravated burglary. **Identify** the point in time in the case at which the crime of aggravated burglary was committed.
   e **Explain** why there was a need for general deterrence, but less of a need for specific deterrence in this case.
5 Read the scenario 'Murder of separated domestic partner'.
   a **Describe** the key facts of the case.
   b **Explain** why there was a need for denunciation in this case. In your answer, refer to family violence.
   c **Explain** why there was a need for general deterrence, but less of a need for specific deterrence in this case.
6 Read the scenario 'Assault at Barwon Prison'.
   a **Identify** the parties in this case.
   b **Describe** the nature of the offending.
   c **Outline** the main purposes of the sentence.
   d Do you agree with the sentence? Give reasons for your response.
   e **Describe** the factors that were relevant to deciding that the offender had good prospects of rehabilitation.

Reflect and evaluate

7 Create your own scenario of a crime that has just been committed. You can be as inventive as you want to be, but you should address matters such as the nature and gravity of the offence, the accused's prior offending, the type of crime committed, and whether there is any need for rehabilitation. Exchange scenarios with a classmate. **Identify** the purposes of sanctions that you think are most appropriate in each case. Discuss your findings with each other.
8 'In sentencing, rehabilitation is more important than punishment.' **Discuss** the extent to which you agree with this statement.

7.9 Types of sanctions

key knowledge

In this topic, you will learn about:

- types of sanctions such as fines, community correction orders and imprisonment.

When an offender pleads guilty or is found guilty, it is the role of the court to impose a sanction (penalty). Given that most crimes committed in Victoria are minor offences, the Sentencing Advisory Council states that about 90 per cent of sentencing in Victoria occurs in the Magistrates' Court.

If a statute makes an act or omission a crime, it states the maximum penalty that may be imposed on a person for committing that crime. For example, section 20 of the *Crimes Act 1958* (Vic) states that the maximum penalty for threatening to kill another person is 10 years' imprisonment. Section 11 of the *Summary Offences Act 1966* (Vic) – which makes leaving a fire in the open air which that person has lighted a crime – states that the maximum penalty for that crime is 12 months' imprisonment, or 25 penalty units (approximately $4800), or both. Penalty units are described below.

Sanctions can be divided into two types: custodial sentences (where the offender is removed from society and into an institution) and non-custodial sentences (where the offender serves the sentence in the community). The *Sentencing Act 1991* (Vic) sets out a hierarchy of possible sentencing options. The most serious sanction that can be imposed, and which is a sanction of last resort, is imprisonment.

In this topic, you will explore three possible sanctions: fines, community correction orders and imprisonment.

Most severe ↑ ↓ Least severe

Sanction	Description
Imprisonment with conviction	Record a conviction and order that the offender serve time in prison
Court secure treatment order with conviction	Record a conviction and order that the offender be detained and treated in a mental health facility as a security patient
Drug and alcohol treatment order with conviction	Record a conviction and order that the offender undertake a supervised drug or alcohol treatment program; this is only available from the Drug Court (a specialised division of the Magistrates' Court and the County 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 cases involving 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 cases involving 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 – a sanction that the offender serves in the community. The order will have 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 state
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 offender to be discharged
Dismissal without conviction	Without recording a conviction, order the charge(s) to be dismissed

Source 1 An overview of the sentencing hierarchy in Victoria. The sentences in the second column highlighted in light red (imprisonment, fines and CCOs) are explored in this chapter.

Fines

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

A **fine** is a monetary penalty that is paid by the offender to the state of Victoria (not the victim). Fines are expressed in penalty units, ranging from one penalty unit to 3000 penalty units. Fines are expressed in this way to make it easier to change the dollar amount of fines across all offences and statutes every year.

When can a fine be imposed?

A fine can be imposed in addition to another sentence. When deciding whether to impose a fine, and what fine to impose, a court considers:

- the financial circumstances of the offender
- any loss or destruction of, or damage to, property suffered as a result of the offence
- the value of benefit received by the offender from the offence
- any forfeiture, compensation or restitution order imposed (being orders that may have already resulted in the offender paying compensation or handing over property).



Source 2 A fine may be the only sanction imposed for an offence, or it may be in addition to another sanction.

Conditions of fines

The court can order that the fine be paid by instalments. If the offender defaults in making payments, the court can issue a warrant to arrest them. The court may instead order the offender to do community work, or may allow further time to pay, depending on the offender's circumstances.

Often, a fine is imposed on a company or business, particularly given that companies are corporate entities which are separate to their owners or directors, and corporate entities cannot personally spend time in prison.

The scenario below describes a situation where a fine was imposed on a company.

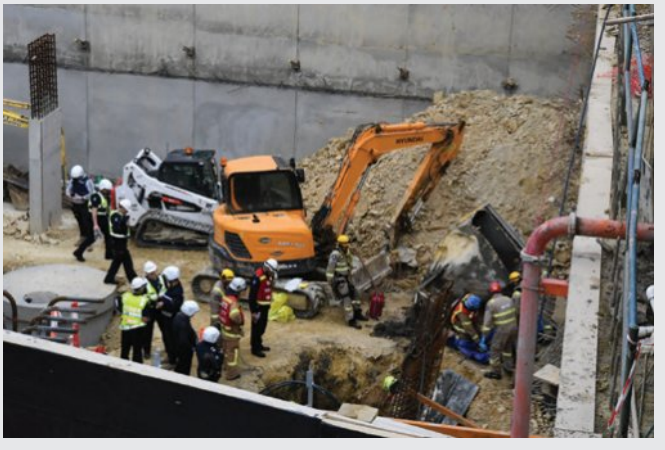
Actual scenario

Crane failure results in a fine

This case involved a brand new crane that had been manufactured in Italy. The offender, a company, imported and erected the crane, which was then put into service in June 2018 at a development site in the Melbourne suburb of Box Hill.

In September 2018, the crane failed while carrying a load that weighed a number of tonnes. The failure meant the load went into freefall, causing the death of a worker, the serious injury of another (who became a paraplegic) and injuries to a third worker. The cause of the failure was a missing or improperly fitted 'split pin' that was supposed to have been inserted through a bolt, which would have prevented a rope unwinding, resulting in the load going into freefall.

The offender was found guilty by a jury for failing to ensure, so far as reasonably practicable, that the plant (i.e. equipment) supplied was safe and without risks to health. The maximum penalty was 9000 penalty units (just under $1.5 million).



Source 3 A crane that went into freefall caused the death and injuries of workers and resulted in a substantial fine.

While the prosecution argued this was a serious example of offending, the County Court judge could not be satisfied that the company was acting other than in accordance with what were, at the time, prevailing industry standards, which was that it was not industry practice to check for the 'split pin'.

The company took steps to address the risk and now conducts inspections targeting specific parts of assembly and the crane itself. The judge therefore accepted that there was a reduced need for specific deterrence. He also noted that four-and-a-half years had elapsed between the incident and sentencing because of delays related to COVID-19 and investigative measures.

The significant impact on family members, particularly those of the worker who had died, was recognised. In determining the appropriate sanction, while the judge did not have any financial details of the company, he decided to impose a fine of $400 000 with conviction, having regard to the significance of the breach of health and safety.

Purposes of fines

The general purposes of fines are to punish the offender, deter the offender from committing further crimes and deter the general community from committing similar crimes. If a high enough fine is given, the court may also be denouncing the crime. A fine is not likely to help in the rehabilitation of the offender; nor does it protect the community, unless it is imposed in addition to another sentence such as imprisonment, or unless the offender 'changes their ways' such that the offending doesn't happen again (for example, in relation to companies and workplace safety issues).

Effectiveness of fines

Whether a fine achieves its purposes largely depends on the facts of each case and the ability of the offender to pay the fine. Some of the factors that can be considered are set out in Source 4.

Factor	Points
The financial circumstances of the offender and their ability to pay	The amount of a fine needs to be high enough to act as a punishment, specific deterrent and general deterrent, having regard to the person's financial circumstances. For example, if the offender has sufficient financial resources to pay, these purposes may not be achieved. On the other hand, if the offender has no financial resources, then careful attention will need to be given to the amount of the fine (e.g. if it is too high, the offender may not pay it).
The amount of the fine	The fine must be high enough to impose a burden on the offender to achieve punishment, special deterrence and general deterrence, although a smaller fine could be appropriate depending on the offender's social and financial circumstances and the type of the offence. In addition, a larger fine is likely to send a strong message of disapproval (denunciation).
Whether the fine is ever paid	If the fine is never paid and not enforced, then punishment, specific deterrence and general deterrence may not be achieved. If the fine is paid, then these purposes may be achieved.
Whether people know about the fine being imposed	If the fine being imposed is publicised and gets media attention, this is likely to increase the ability to achieve both general deterrence and denunciation.
Whether the offender has addressed their behaviour	An offender who has addressed their behaviour (e.g. addresses health and safety risks in their workplace) may demonstrate rehabilitation and reduce the need for specific deterrence. It may also mean there is greater protection.

Source 4 Factors that impact on the ability of a fine to achieve its purposes

Community correction orders

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

A **community correction order (CCO)** is a sanction that allows an offender to remain in the community while serving the sanction. The sanction requires them to comply with certain core conditions that are attached to the order. In addition, the offender is required to comply with at least one other 'optional' condition, such as performing unpaid community work.

Given the range of conditions that can be imposed, a CCO is seen as a flexible sentencing option that can be given as a sanction for a wide range of crimes. A CCO can be combined with either a fine or imprisonment of one year or less.

When can a community correction order be imposed?

A CCO can be imposed if:

- the offence is punishable by more than five penalty units, and
- the offender consents to the making of a CCO.

A CCO cannot be imposed on an offender who has committed a 'category 1' offence (which includes murder). It also cannot be imposed on an offender who has committed a 'category 2' offence (which includes manslaughter and kidnapping) unless special circumstances exist (e.g. where the offender has impaired mental functioning).

A CCO must not exceed five years if it is made in the Magistrates' Court in respect of three or more offences (or two years in respect of one offence), or five years if made in the County or Supreme Court.

Conditions of community correction orders

There are two types of conditions imposed on an offender when given a CCO:

- mandatory (core) conditions – conditions that apply to every offender
- optional conditions – conditions that are specific to an offender.



Source 5 One example of an operational condition that can be imposed as part of a CCO is a place or area exclusion condition. Such a condition may prevent a person from attending a attending a nominated place such as the Melbourne Cricket Ground, or licensed venues such as a hotels and nightclubs.

At least one optional condition must be attached to a CCO. Source 6 sets out the mandatory conditions and the optional conditions.

Mandatory conditions	• Must not commit an offence punishable by imprisonment during the period of the order • Must report to and receive visits from the community corrections officer • Must report to the community corrections centre within two clear working days after the order comes into force • Must notify any change of address or employment • Must not leave Victoria except with permission • Must comply with any direction given
Optional conditions	• Unpaid community work condition: must perform unpaid community work (which must not exceed 600 hours in total) • Treatment and rehabilitation condition: must undergo treatment and rehabilitation • Supervision condition: must be supervised, monitored and managed • Non-association condition: must not contact or associate with a particular person • Residence restriction or exclusion condition: must live at a particular place • Place or area exclusion condition: must not enter or remain in a specified place or area • Curfew condition: must remain at a particular place between specified hours of each day • Alcohol exclusion condition: must not enter licensed premises or must not consume alcohol on licensed premises • Bond condition: must pay an amount of money as a bond that is forfeited if there is a failure to comply with the order • Judicial monitoring condition: must be monitored by the court • Electronic monitoring condition: a monitoring device must be attached to the offender • Justice plan condition: for intellectually disabled offenders, must participate in services specified in a plan prepared for the offender

Source 6 The types of conditions that must be and can be imposed on an offender as part of a CCO

Purposes of community correction orders

A CCO is a punishment because it can often impose certain conditions on an offender that are an imposition or an annoyance – for example, the condition to undertake unpaid community work, or have a curfew imposed. A CCO can also serve as a general deterrent, as well as a specific deterrent.

Depending on the conditions that are imposed, a CCO can help to rehabilitate an offender. This is particularly so if the treatment and rehabilitation condition or alcohol exclusion condition is imposed, both of which aim to address the reasons for offending. A CCO can also protect society if the offender is kept busy, is prevented from entering certain areas, or must reside at certain places as part of the conditions.

An example of a CCO given to an offender that involved two special conditions is set out in the scenario below.

Actual scenario

Drugs and the bitcoin millionaire

In a case heard before the Magistrates' Court in December 2022, the offender faced seven charges for offences including drug trafficking, drug possession, and dealing with property reasonably suspected of being proceeds of crime. The case attracted media attention because the offender was a well-known cryptocurrency millionaire.

The two drug trafficking charges related to offending in 2012, when the offender was 21 years of age. The remaining charges related to offending in 2021. For the drug trafficking and the drug possession charges, the magistrate imposed an adjourned undertaking without conviction (sometimes called a good behaviour bond). An adjourned undertaking is where the offender promises to be of good behaviour for a period of time, failing which they will be back before the court to be re-sentenced.

In relation to the remaining charge (dealing with property reasonably suspected of being proceeds of crime), it was alleged that the offender had dealt with bitcoin using proceeds of crime (being any proceeds from the drug trafficking in 2012). It is an offence to deal with property derived by or released from criminal activity, including drug activity.

The offender was assessed as being suitable for a CCO. There was a low risk of reoffending. He had no prior convictions and the media attention on the matter had had a significant psychological impact on him. The magistrate ordered that the offender complete a 20-month CCO, and required him to perform 180 hours of community work, and be assessed and treated for drug dependency. A conviction was recorded.

Victoria Police v Raymond [2022] VMC 34 (19 December 2022)

Effectiveness of community correction orders

Whether a CCO achieves its purposes largely depends on the facts of each case, the conditions imposed, and whether the offender will comply with the conditions. Some of the factors that can be considered are set out in Source 7.

Factor	Points
The mandatory conditions imposed	Many of the mandatory conditions act as a punishment, specific deterrent and general deterrent (e.g. requiring the offender to stay in Victoria). However, the impact of these conditions may depend on the offender and how they view the conditions.
The optional conditions imposed	Some of the optional conditions act as a punishment, protection, specific deterrent and general deterrent, such as conditions that impose on the offender's freedom (e.g. electronic monitoring). Other conditions may not achieve these purposes as much.
Whether the offender's liberty is restricted	Some of the conditions can achieve denunciation, punishment, protection, general deterrence and specific deterrence, by restricting a person's liberty, such as requiring electronic monitoring or requiring a person to reside at a particular place.
Whether there are treatment conditions imposed	Some of the conditions better achieve rehabilitation as they focus on treating the underlying causes of behaviour, e.g. drug and alcohol treatment. This requires the right conditions to be imposed, and the offender to actively participate. It can also increase protection in the long term.
The length of the CCO	A longer CCO is likely to act as a greater punishment, protection and deterrent (general and specific), and is likely to send a stronger message to the community that this behaviour is not acceptable (denunciation).
Whether the CCO is understood and known by the public	If the CCO imposed is publicised and gets media attention, this is likely to increase both general deterrence and denunciation.

Source 7 Factors that impact on the ability of a CCO to achieve its purposes

Imprisonment

Imprisonment is the most serious sanction that can be imposed, and involves the removal of the offender from society and into a secured facility known as a jail or prison.

When can imprisonment be imposed?

Each offence has a maximum penalty that can be imposed for that offence. This is set out in the relevant statute. For example, the maximum penalty for murder is Level 1 imprisonment, being life in prison. Maximum penalties are reserved for the worst examples of an offence. Therefore, it is rare for an offender to be given the maximum penalty.

For 'category 1' offences, imprisonment is the only option as a sanction. 'Category 1' offences include murder.

Level	Maximum term of imprisonment
1	Life
2	25 years
3	20 years
4	15 years
5	10 years
6	5 years
7	2 years
8	1 year
9	6 months

Source 8 Sentencing levels and the maximum term of imprisonment for each level, as set out in the *Sentencing Act 1991* (Vic)

Conditions of imprisonment

Parole

Parole is an early release from prison. In certain situations (e.g. where an offender has been imprisoned for a term of two years or more), the court must fix a non-parole period. This period is the time an offender must serve in prison before applying for parole.

Being granted parole is not automatic. The offender must prove to the Parole Board that they are worthy of serving the rest of their sentence in the community.

The scenario below is an example of when imprisonment was an appropriate sanction, with particular reference to the need for deterrence in a case where the offender pleaded guilty to the charge of manslaughter.

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

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

Actual scenario

A planned attack that went too far

In 2023, a Melbourne woman was sentenced to more than six years in prison for what the judge said was a 'hare-brained' plan to have another man attack her partner, which resulted in her partner's death.

The offender and the 39-year-old victim met in September 2020 on a dating website, and formed a relationship. They did not live together. The victim lived in an apartment near Melbourne CBD, and was a long-term user of the drug methamphetamine (known as 'ice').

The offender met another man, SH, on a social networking website. She complained to SH about how her partner was treating her, and they came up with a plan to 'bash' the victim. One night, SH went beyond that plan and attacked the victim so ferociously and brutally that he died.

SH was charged with murder. The offender was also arrested and charged with murder because of her involvement in the crime. She eventually pleaded guilty to manslaughter, and was sentenced to six years and three months in prison with a non-parole period of three years and three months.

Did you know?

One of the longest prison sentences ever handed down in the world was for the Oklahoma City Bombing, which occurred in 1995. Terry Nichols was ordered to serve 161 life sentences without parole. He remains incarcerated in the United States.

In sentencing the offender to time in jail, the Supreme Court judge noted the need for all the purposes of sanctions:

> General deterrence, denunciation and just punishment are important sentencing purposes in this case. All should understand that to be complicit in an assault aware that it is probable that, in the course of that assault, an unlawful and dangerous act will be committed, and where an act of that kind causes death, even if death and the means by which it is caused are completely unforeseen, usually will result in punishment by way of a substantial prison sentence for the crime of manslaughter, even following a plea of guilty.
>
> As for specific deterrence and protection of the community, those purposes, while relevant, are of less weight on account [of the offender's] prior good character, plea of guilty, remorse, and prospects of rehabilitation, and the hardship of her incarceration. The criminal justice process, I am satisfied, has had a salutary effect on [the offender].
>
> Rehabilitation is an important purpose in fixing sentence in this case. [The offender's] excellent prospects make rehabilitation a sentencing purpose that must be afforded substantial weight. It is also necessary to recognize the interplay between rehabilitation and protection of the community. She will be returning to the community eventually. It is therefore in the community's interests that her prospects of rehabilitation be maximised, so that, when she is released from prison, her chances of successful reintegration into society are as strong as they can be.

R v Bos [2023] VSC 68 (22 February 2023)



Source 9 The Dame Phyllis Frost Centre is in the suburb of Ravenhall in Melbourne's outer west. It is a women's maximum-security prison, with capacity for just over 600 prisoners.

Concurrent and cumulative sentences

If the offender is guilty of more than one offence, more than one sentence may be imposed, and therefore more than one term of imprisonment may be imposed. If that is the case, the court needs to specify whether the terms of imprisonment are to be served concurrently or cumulatively.

Most sentences are concurrent sentences (i.e. served at the same time). This means that if an offender is given, for example, three years for burglary, and one year for stealing, they would serve three years because the sentences are served at the same time. If the sentences are served cumulatively (i.e. successively), in the above example the offender would serve four years in prison.

Purposes of imprisonment

Imprisonment, as it removes the offender from the community, serves to both protect the community and punish the offender (by denying them of liberty). Imprisonment also generally serves to act as a deterrent (both generally and specifically for the offender), and shows the court's disapproval of the acts committed.

Imprisonment may lead to rehabilitation, but this largely depends on the circumstances of the offender, the nature and length of the time served in prison, and the support network of the prisoner. The high rate of **recidivism** (when prisoners return to crime) also suggests that imprisonment is not an effective means of rehabilitating people, as they continue to commit crimes. For example, in Victoria, it is estimated that approximately 44 per cent of prisoners return to custody within two years of their release.

recidivism
re-offending; returning to crime after already having been convicted and sentenced

Effectiveness of imprisonment

Whether imprisonment achieves its purposes largely depends on the facts of each case, the length of the sentence, and the offender themselves. Some of the factors that can be considered are set out in Source 10.

Factor	Points
The length of the prison sentence	A longer prison sentence acts as a punishment and deterrent (general and specific), and can achieve protection and denunciation. While a lesser prison sentence may not achieve those purposes to the same extent, prison sentences are in and of themselves significant, given that they deprive a person of their liberty, and the person will feel the impact of being a prisoner.
The offender and their circumstances	Whether imprisonment achieves its purposes depends on the offender's circumstances. For example, a mentally disabled offender may not be punished or deterred because they do not understand the sentence.
The conditions of the prison	Time in prison can normalise violence and reinforce behaviour. This may mean that the offender does not learn, and may impact on specific deterrence and protection.
Whether the prisoner is treated	If the prisoner is given the opportunity to be treated, this may achieve rehabilitation and protection in the long term.

Source 10 Factors that impact on the ability of imprisonment to achieve its purposes

7.9 Check your learning

Remember and understand

1 **Outline** one reason why fines are described in penalty units.
2 **Describe** the key elements of a community correction order.
3 With reference to the scenario, 'A planned attack that went too far', **justify** the need for deterrence.
4 **Distinguish** between a cumulative sentence and a concurrent sentence.

Examine and apply

5 Read the scenario 'Drugs and the bitcoin millionaire'.
   a **Identify** the offender in this case. What was the offender charged with?
   b Did a jury hear this case? Give reasons.
   c **Identify** the two sanctions that were imposed, and briefly **describe** each.
   d Discuss as a class whether you agree with the sanction imposed.
6 For each of the following statements, **state** whether you agree or disagree. Your teacher may use this activity as the basis for a class discussion or debate.
   a Prisoners should be able to access government funding to complete university degrees.
   b All prisoners should have the right to vote.
   c There should not be any consideration of the offender's financial circumstances when imposing a fine.
   d There should be a public register of people who are on a CCO.
   e Prisoners should be electronically monitored at all times following their release.

Reflect and evaluate

7 Read the scenario 'Crane failure results in a fine'.
   a **Describe** the circumstances of the offending.
   b **Outline** the relationship between what the offender did after the incident, and specific deterrence.
   c **Discuss** the extent to which the sanction imposed can deter:
      - the offender
      - other companies
      - individuals.
8 Conduct some research into current recidivism rates in Victoria. **Discuss** whether imprisonment is an effective sanction.
9 **Discuss** the extent to which a CCO can rehabilitate an offender.

7.10 Sentencing factors

Key knowledge

In this topic, you will learn about:

- **factors considered in sentencing.**

When sentencing an offender, the court must ensure the sentence that is given is appropriate to the crime committed.

Section 5(2) of the *Sentencing Act 1991* (Vic) sets out the factors a court must take into consideration when sentencing an offender. They include current sentencing practices, the maximum penalty for the offence, the personal circumstances of any victim, and the presence of any **aggravating factors** or **mitigating factors**.

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

Some of these factors may reduce the sentence, whereas other factors may increase the sentence that may be imposed.

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

Factors that may reduce the sentence

The factors listed in Source 1 may reduce the sentence imposed. These are likely to be factors that the offender, when submitting to the court what the appropriate sentence should be, emphasises as being important considerations.

Study tip

You do not need to know the section numbers of statutes to answer questions. However, accessing relevant sections (e.g. section 5 of the *Sentencing Act 1991* (Vic)) will help you understand many legal concepts. Use AustLII or the Victorian register of legislation to find current statutes.

Factor	Description
Nature and gravity of offence	If the offending is on the low end of the scale of seriousness then this may persuade the court that a sentence less than the maximum penalty should be imposed.
Early guilty plea	If an offender has pleaded guilty, a court may impose a lesser sentence. Also, the earlier in the process the guilty plea is submitted, the better. An early guilty plea can reduce an offender's sentence as it saves time and resources by not having to have a trial. It also spares the witnesses and victims the trauma and inconvenience of a trial.
Mitigating factors	Mitigating factors are factors that reduce the seriousness of an offence or the offender's culpability. Examples of mitigating factors include where the offender was acting under duress, the offender's good prospects of rehabilitation, any personal strain the offender was under, the lack of injury or harm caused by the offence, or full admissions made by the offender. An early guilty plea and remorse are also mitigating factors.
Lack of prior offending	If the offender has not offended before, this is likely to work in their favour, as their offending may be considered to be a one-off incident. This can also show an offender's lack of criminality.
Remorse	If the offender shows significant remorse, then the court may take this into account. Remorse can be demonstrated through an early guilty plea, apologies to victims, early confessions or admissions, or full cooperation with investigative agencies (e.g. the police).

Source 1 Some of the factors that may help in reducing a sentence

Factors that may increase the sentence

The factors listed in Source 2 may act to increase the sentence imposed.

Factor	Description
Nature and gravity of the offence	If the offending is on the high end of the scale of seriousness, the court may view a higher sentence as more appropriate. For example, the use of weapons, or the intentional conduct of the offender, are likely to increase a sentence.
Aggravating factors	Aggravating factors increase the seriousness of the offence and the offender's culpability. Such factors include the use of violence or explosives, the offence taking place in front of children, the offender being motivated by hatred or prejudice, or the offender being in a position of trust and breaching that trust (e.g. a parent committing a crime against a child).
Prior offending	If the offender has engaged in previous criminal behaviour, then this may result in the sentence being increased.
Impact of the offence on any victim	If the victim has significantly suffered as a result of the offence, then this may persuade the court to increase the sentence. The victim can demonstrate their loss or suffering by filing a victim impact statement, which is read in court during sentencing.
Injury, loss or damage as a result of the offence	If there was significant injury, loss or damage to property or to a person, then this is likely to increase the sentence. For example, if someone died, or there was widespread property damage, this is taken into account.

Source 2 Some of the factors that may increase a sentence

The scenario below contains an extract from a sentencing judgment, showing how a court may take certain factors into consideration when sentencing an offender.

Actual scenario

Reasons for sentence

In this case, the offender had pleaded guilty to one charge of causing serious injury recklessly, the maximum penalty for which is 15 years' imprisonment. He was convicted and sentenced on 14 March 2023 in the County Court to four years and four months in prison with a non-parole period of three years. In sentencing the offender, Judge Webb made the following points.

> Causing serious injury recklessly is a serious criminal offence carrying a maximum penalty of 15 years' imprisonment. This indicates the seriousness with which the legislature, on behalf of the Victorian community, views this offence.
>
> In my opinion, objectively, this is a serious example of the offence. You violently attacked [the victim] in your home where he was a guest. You used a sharp weapon or weapons; probably, one or more of the blood-stained knives and/or scissors located at the scene. From the photographs taken of the scene depicting the amount of blood loss [the victim] suffered, the extent and nature of his injuries and the contemporaneous observations of neighbours, I infer your attack on [the victim] was extremely violent and to some extent prolonged. Nonetheless, I cannot find it was premeditated or planned ...
>
> Your counsel briefly summarised your personal circumstances. You are currently aged 46, and were 43 years of age at the time of committing this offence. You are Aboriginal and identify with the Yorta Yorta nation ...

You have a significant prior criminal history commencing in March 1994 when you were aged 17 ...

You pleaded guilty to the present charge ... [W]hilst yours is not the earliest plea, it is nonetheless a forensically early plea, and I take this into account in your favour ...

While I accept you are undoubtedly regretful for the situation in which you find yourself and the effect this has had on you, there is insufficient evidence before me to make a finding in your favour that you demonstrate true contrition and remorse for your offending conduct, beyond what is evident from the plea itself ...

I am satisfied that your life has been seriously adversely affected by your intellectual disability, which has no doubt contributed to you falling into the abyss of alcohol and drug abuse which has led to you engaging in extreme risk-taking behaviour while using illicit substances. Accordingly, your moral culpability is reduced and the full measure of denunciation, general deterrence and just punishment must be moderated having regard to your intellectual deficits ...

Accordingly, I accept your counsel's submissions that you suffered three forms of significant disadvantage in childhood:

(a) cognitive deficits;
(b) early exposure to drugs and alcohol that was not at an age of 'rational choice' that would give rise to the full responsibility for the moral culpability and the predictable consequences of a choice to become addicted; and
(c) a lack of educational stability in your early life. I note that you attended eight different schools between primary and secondary education, and you only completed Year 10.

DPP v Webb [2023] VCC 355 (14 March 2023)

7.10 Check your learning

Remember and understand

1 Using examples, **identify** one factor that may reduce the severity of a sentence and one factor that may increase the severity of a sentence.

2 Using examples, **distinguish** between mitigating factors and aggravating factors.

Examine and apply

3 For each of the following scenarios, **identify** two factors that may be taken into account in sentencing. For each factor, **outline** whether it is likely to increase or decrease the sanction imposed.

a Barty is a first-time offender and has committed a violent assault against his former wife. She is now in a coma in hospital.

b Giovanna has pleaded guilty at the time of arrest to drug trafficking. She has been found to have been a significant trafficker in the Melbourne area.

c Cassius laughed when he was arrested and pleaded not guilty to the charges. He has had a terrible childhood and suffered physical and mental abuse from his parents.

4 Read the scenario 'Reasons for sentence'.

a **Identify** the parties in this case.

b **Identify** the court that had a role in sentencing.

c As a class, **identify** all the factors that were relevant to sentencing in this case. Agree on whether each factor would have weighed towards a more severe or a less severe sanction.

5 Access the 'Virtual you be the judge' page on the Sentencing Advisory Council's website. A link is provided in your obook pro. Choose one of the videos to watch, then do the activity. Once you have finished, discuss what you learnt during the activity.

Reflect and evaluate

6 Do you think that an early guilty plea should reduce a sentence? Write down the possible different views on this question. In particular, consider the views of the accused, the victim, society and the courts. **What** is the most objective view in light of the principles of justice?

Weblink
Sentencing Advisory Council: You be the judge

7.11 Alternative sentencing approaches

Key knowledge

In this topic, you will learn about:

- alternative approaches to sentencing, such as the use of the Drug Court, Koori Courts and diversion programs.

Courts sometimes adopt different approaches to sentencing (rather than sentencing through the traditional method of a plea hearing in court). Three of these approaches are the use of the Drug Court, the Koori Court and diversion programs.

The Drug Court

Drug Court
a specialist court that is able to impose a drug treatment order on an offender where drugs or alcohol contributed to the commission of the offence

The **Drug Court** was established in 2002 as a division of the Magistrates' Court. The first Drug Court was located at Dandenong Magistrates' Court, and a second Drug Court opened at Melbourne Magistrates' Court in March 2017. In 2022, the Drug Court was expanded to Ballarat and Shepparton Magistrates' Courts, and it is now also a division of the County Court (where it is called the Drug and Alcohol Treatment Court). The Drug Court deals with offenders who commit crimes while under the influence of drugs or to support a drug habit.

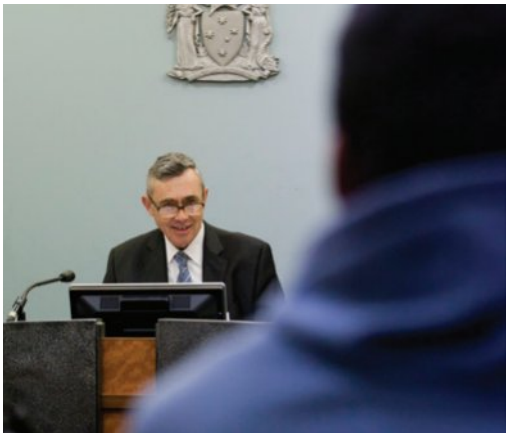
The Drug Court is intended to respond to the failure of traditional methods of sentencing offenders to adequately address drug use and offending, by directly addressing the issue of drug and alcohol dependency. It does this by imposing a **drug and alcohol treatment order** (DATO) on the offender.

drug and alcohol treatment order
a type of sanction imposed by the Drug Court that aims to treat the underlying causes of offending, and includes both the treatment and custody of the offender

Eligibility

Not every offender is eligible to be sentenced in the Drug Court. To be eligible, the following criteria must be met:

- the offender must reside within an area serviced by the Drug Court
- the offender must plead guilty to the offence
- the offence must be within the jurisdiction of the Magistrates' Court or the County Court (as the case requires) and punishable by imprisonment
- the offence must not be a sexual offence or an offence that involved actual bodily harm
- the Drug Court must be satisfied that the offender is dependent on drugs or alcohol, and that this dependency contributed to the offence being committed
- the Drug Court considers that it would have otherwise been appropriate to impose a sentence of imprisonment of no more than two years, or, in the case of the County Court, a sentence of imprisonment of no more than four years.



Source 1 Former Drug Court Magistrate Tony Parsons speaking at a hearing in the court

Process

A screening process first determines whether an offender is suitable to participate in a DATO program. This involves determining the offender's location, prior and current offences, whether drug or alcohol abuse is a significant factor in the offending, and whether the offender is willing to participate.

An assessment process then determines whether the program can address the offender's behaviour. Once the screening and assessment processes are complete, a treatment plan is prepared and a DATO is imposed.

Drug and alcohol treatment order (DATO)

A DATO is an order that aims to rehabilitate the offender by providing a judicially supervised, therapeutically oriented drug or alcohol treatment program. There are two parts to a DATO:

- the treatment and supervision part – this consists of core conditions and program conditions
- the custodial part – this requires the Drug Court to impose a sentence of imprisonment of no more than two years (or four years if made in the County Court). The court defers the prison term while the offender undergoes treatment and supervision.

The conditions of a DATO that must be imposed (i.e. core conditions) and those that may be imposed (i.e. program conditions) are listed in Source 2.

Core conditions	• Must not commit an offence punishable on conviction by imprisonment during the period of the order • Must attend the Drug Court when required • Must undergo treatment for drug or alcohol dependency • Must report to and accept visits from a relevant officer • Must give notice of any change of address • Must not leave Victoria except with permission • Must obey all lawful instructions and directions given
Program conditions	• Must submit to drug or alcohol testing • Must submit to detoxification or other treatment • Must attend vocational, educational, employment or other programs • Must submit to medical, psychiatric or psychological treatment • Must not associate with specified persons • Must reside at a specified place for a specified period

Source 2 Core conditions and program conditions associated with a DATO

The Drug Court has the power to give a reward from time to time to an offender who has been compliant, such as a movie voucher. However, failure to comply with conditions can result in sanctions, such as requiring that the offender perform unpaid community work, or ordering that the custodial part of the DATO be activated for a specified period (but for no more than seven days). The intention behind imposing a short period of time in custody is to encourage offenders to stay in the program, rather than risk the effects associated with time in prison.

A DATO can be cancelled if the offender is no longer willing to participate, or its continuation is not likely to be effective. The offender is re-sentenced or taken into custody to serve out the custodial part of the DATO.

The following scenario explains how the Drug Court has helped people break the cycle of reoffending.

Actual scenario

Drug Court marks 20-year success

Star Journal, 20 August 2022

Twenty years of the Dandenong Drug Court 'success story' were celebrated on 23 August.

In that time, the court has been found to break the cycle of reoffending for many of the near 1700 offenders across four venues in Victoria.

About 35 per cent of them completed the intensive two-year program, known as a Drug and Alcohol Treatment Order (DATO).

At the 20-year birthday were judicial officers, staff, elders and politicians at Dandenong Drug Court.

Chief Magistrate Lisa Hannan outlined the court's history from when it started as a three-year pilot in Dandenong in May 2002.

Its approach gave a 'life changing opportunity' to offenders whose crimes were fed by their substance addiction.

The success stems from a 'carrot-and-stick' model that tackles the underlying causes of offending such as homelessness, mental illness and trauma.

It involves a multi-disciplinary team who deliver frequent drug testing, counselling, stable housing and pathways to employment and education.

Past graduates became mentors and even employees of the program, Justice Hannan said.

'It's an incredible achievement and shows what can be achieved when people are committed to change and given the right supports to enable that change to happen.'

Drug Court supervising magistrate Suzie Cameron said the program was 'not easy – in fact it's extremely difficult'.

Many participants who have served time inside say that prison is the easier option, she said.

The 'daunting exercise' requires commitment to change, being vulnerable and confronting issues that led to their substance abuse.

...



Source 3 One of Victoria's Drug Courts is located at Dandenong Magistrates' Court.

Effectiveness of the Drug Court

The Drug Court benefits both participants and the community. For participants, the Drug Court breaks the cycle of offending by addressing the underlying causes of a person's offending, by helping connect the offender to the local community, by providing them with improved health and wellbeing, self-esteem and employment prospects, and by rehabilitating the offender to reduce the possibility of them reoffending.

In December 2014, KPMG released a report that evaluated the Drug Court in Victoria. Some of the key findings of the KPMG evaluation were as follows:

- There was a significant reduction in the rate of reoffending compared to those who were imprisoned. For example, the rate of reoffending in the first 12 months for Drug Court participants was 31 per cent lower than those who were imprisoned.
- There was a cost saving of approximately $1 212 840 over a two-year period as a result of fewer imprisonment days.
- There were significant improvements in the participants' health and wellbeing.

There are limits on the number of offenders who can be given a DATO. This is largely because of the intensity of the treatment plan and the resources required to ensure that participants are given adequate treatment. However, the opening of the Drug Court in other areas of Victoria and in the County Court has substantially expanded the number of offenders who are able to access a DATO.

Some have criticised the Drug Court, and in particular the rewards program. Following the launch of the Melbourne Drug Court in 2017, the then Opposition Attorney-General, John Pesutto, was reported by the *Herald Sun* as suggesting that the rewards program 'bribed' people to obey the law, and saying 'people should abide by the law because it's the right thing to do, not because there's something in it for them'.

There have also been calls to expand the number of Drug Courts across Victoria, which would support people who are among the most vulnerable in our community. The following hypothetical scenario highlights some of the complex issues for those who would benefit from accessing a Drug Court program.

Hypothetical scenario

Zara's story

Zara, who is 27, has a friend the same age called Ahmed who lives in Geelong, within the catchment area of a Drug Court. Ahmed was able to access the Drug Court after being charged with theft, and it has helped him to deal with his addiction. He enjoyed working with the Drug Court support staff and he was connected to a TAFE course as a result. Zara also knows of a homeless man, Max (aged 30), who attended her school. He was charged with low-level drug possession and his offending was linked to use of amphetamines. Max has prior convictions and is facing immediate imprisonment. Given that Max at that stage did not have an ordinary place of residence, he could not apply to access the Drug Court.

Zara has been charged with theft offences and has been summoned to appear at her local Magistrates' Court. A large part of Zara's income is spent on cannabis, and the offences were related to providing for her three-year-old daughter. Zara also has prior convictions dating back to when she was 15. However, Zara does not live in an area that has a Drug Court. She is from a rural part of Victoria, and although she could travel to a Drug Court in a regional centre, it is two hours away by bus. Zara does not have a driver licence and has to care for her daughter.

Zara has heard that there is a plan to establish new Drug Courts in other locations in Victoria. Zara has written to her local member of parliament asking for 'better support for people in rural and remote areas who can't access facilities in regional centres. Giving people like me fines and community correction orders is not solving the problem. The Drug Courts in Ballarat and Shepparton, while excellent, are too far me to travel and I can't access the program in an effective way. Please help.'

The Koori Court

Koori Court
a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for First Nations people

The **Koori Court** was first established as a division of the Magistrates' Court in 2002. Since then, it has expanded to become a division of the Children's Court and County Court. The Koori Court is a sentencing court available to a First Nations accused person. Its aim is to provide an informal atmosphere for sentencing, and to allow representation from the First Nations community in the sentencing process. This is achieved by having Elders, Respected Persons and family members present during the conversation before sentencing, as well as the sentencing. Koori Courts are particularly important given the overrepresentation of First Nations people in the criminal justice system, and the experiences that are associated with that overrepresentation.

The Koori Court system has been successful in Victoria, as it aims to explore sentencing alternatives to imprisonment, and increases First Nations participation in the justice system. It also aims to increase self-determination for First Nations people by enabling people to tell their own story.

Source 4 identifies where the Koori Court sits in Victoria. As at the date of publication, the latest Koori Court to open was in Wodonga County Court in late 2022.

	Magistrates' Court	Children's Court	County Court
Number	15	12	8
Locations	Bairnsdale, Bendigo, Dandenong, Geelong, Hamilton, Heidelberg, Latrobe Valley, Melbourne, Mildura, Portland, Shepparton, Swan Hill, Wangaratta, Warrnambool, Wodonga	Bairnsdale, Dandenong, Geelong, Hamilton, Heidelberg, Latrobe Valley (Morwell), Melbourne, Mildura, Portland, Shepparton, Swan Hill, Warrnambool	Bendigo, Geelong, Latrobe Valley, Melbourne, Mildura, Shepparton, Warrnambool, Wodonga

Source 4 The locations of Koori Courts in Victoria as at mid-2023

Eligibility

To be eligible to be sentenced in the Koori Court, the following criteria must be met:

- the accused must be a First Nations person
- the offence must be within the jurisdiction of the relevant court
- the offence must not be a sexual offence
- the accused must intend to plead guilty or has pleaded guilty
- the accused must consent to the case being dealt with by the Koori Court.



Source 5 A sitting of the Koori Court in the Children's Court

The Koori Court process

The Koori Court is less formal than the Magistrates' Court, the Children's Court and the County Court. All court participants sit around a table. The magistrate or judge sits opposite the offender, who may have the support of a lawyer, a family member, one or more Elders or Respected Persons, and a First Nations justice worker. The magistrate or judge can take advice from the Elders or Respected Persons on cultural issues and appropriate sentencing. However, the magistrate or judge is the ultimate decision-maker and has the same sentencing options that are available in the relevant court.

A First Nations justice worker, corrections officer, prosecutor and lawyer for the offender may assist the magistrate or judge with the case. A range of sentences can be imposed on the offender, depending on the offence and relevant sentencing factors.

Effectiveness of the Koori Courts

An independent university study concluded that Koori Courts reduce recidivism, with an average of 14 per cent of offenders reoffending, compared to the general recidivism rate of 29 per cent.

An evaluation conducted for the County Court also found the following:

- Of the 31 offenders included in the analysis, only one had reoffended, and that was for a low-level offence.
- The experiences of the offenders in the justice system were vastly improved, with the majority finding the process more engaging and inclusive, and less intimidating.
- There was a need to have greater participation of service providers, such as those who provide drug and alcohol services, in the process to address underlying causes of offending behaviour.
- The Koori Court provided access to fair, culturally relevant and appropriate justice.

In 2018, the Supreme Court of Victoria made a significant decision for First Nations people in Victoria. The details of this decision are outlined in the scenario below.

Actual scenario

Cultural rights, access and the Koori Court

In September 2018, the Supreme Court of Victoria confirmed that the cultural rights of First Nations people must be considered by the courts when deciding whether to grant an accused's request that their matter be heard in the Koori Court.

In this case, the accused was a 22-year-old 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 that were alleged to have been committed in 2016 in or around Echuca. The accused was also alleged to have breached a community correction order. The case was heard in the Echuca Magistrates' Court.

The accused applied to have his case transferred to the Koori Court division of the Magistrates' Court in Shepparton. This meant that he was intending to plead guilty, as the Koori Court is a sentencing court only. The Magistrates' Court refused his request.

The accused appealed to the Supreme Court to review the decision to refuse his transfer request. The Supreme Court found in favour of the accused and ordered that the Echuca Magistrates' Court's decision be set aside. The Supreme Court judge (Justice Ginnane) ordered that the case go back to the Magistrates' Court, and that a different magistrate consider the accused's transfer request.

Justice Ginnane said that the Koori Court can help ensure that equality is upheld.

Justice Ginnane referred to section 8(3) of the Human Rights Charter, which states 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. Justice Ginnane then 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.

Cemino v Cannan [2018] VSC 535 (17 September 2018)

Diversion programs

diversion program a method used in the Magistrates' Court and Children's Court to 'redirect' offenders away from the court and avoid a criminal record by placing them on a plan

A **diversion program** is available in the Magistrates' Court and Children's Court for summary offences. It is a way in which a criminal matter can be dealt with out of court by placing the offender on a program (sometimes called a plan), rather than entering a plea or being found guilty. It is an opportunity for an offender to avoid a criminal record, and avoid being sentenced by a court, on the basis that they comply with certain conditions as part of the plan.

The program is intended for first-time offenders. It aims to reduce reoffending and assist rehabilitation, rather than have first-time or low-risk accused people enter the criminal justice system. It also aims to save court resources by avoiding the need for a hearing, and aims to enable the accused

to avoid a criminal record and to access assistance such as rehabilitation and counselling. The program can involve victims, who may participate in the process.

Eligibility

Section 59 of the *Criminal Procedure Act 2009* (Vic) established the diversion program in the Magistrates' Court. For a person to be eligible to take part in the program, the following criteria must be met:

- the accused must acknowledge to the Magistrates' Court responsibility for the offence
- it must appear appropriate to the Magistrates' Court that the accused should participate in the program
- both the prosecution and the accused must consent to the matter being diverted
- the offence must not be one that is punishable by a minimum or fixed sentence or penalty (e.g. a suspension of a licence).

Generally, first-time offenders are afforded the opportunity to undertake a diversion program if the offence is not too serious. More common offences that the offender may have committed include criminal damage, theft or minor drug offences.

Following a 12-month pilot, from January 2017 a youth diversion program became available in all Children's Courts across Victoria. The Children's Court Youth Diversion (CCYD) program operates in the same way as the diversion program in the Magistrates' Court. It aims to ensure that offenders take responsibility for their actions, address underlying causes of offending, and avoid the stigma associated with a criminal record. The Sentencing Advisory Council reported in December 2016 that children who are first sentenced between 10 and 12 years of age are more likely to reoffend than those who are first sentenced when they are older, suggesting that diversion programs may assist in reducing recidivism rates for children.

The scenario below details the importance of diversion programs for youth offenders.

Actual scenario

Vic youth justice system shake-up needed

Tara Cosoleto, *7news.com.au*, 26 May 2022

A shake-up of the court diversion program could ensure more Indigenous children and other young people stay out of the youth justice system, a Victorian report has found.

Diversion focuses on rehabilitation rather than incarceration and allows children who have offended to avoid a criminal record.

There were 4187 Victorian children referred to diversion between 2017 and 2020, the Youth Justice Reform Act Review found, with Aboriginal children accounting for 12.2 per cent of that figure.

Access to the youth diversion program should be 'as broad as possible', especially for those over-represented in the youth justice system, the report tabled in state parliament on Thursday said.

Police prosecutors should no longer hold the power to refer a child to the diversion program, with that job instead falling to a magistrate or a judge, the report recommended.

The government should also establish designated Aboriginal and culturally-diverse diversion coordinator positions, and prioritise investment in Aboriginal-led programs, the report said.

Communication was also key, with the report recommending court orders be explained in culturally sensitive ways to ensure young people and their families better understand the legal process.

The review made 20 recommendations in total, also calling for more support for victims of crime and a tailored model focusing on early intervention for offenders aged 10 to 13.

The Victorian government responded to the review, saying it would carefully consider the findings and undertake further work before adopting a final position to each recommendation.

The government maintained it was committed to delivering a youth justice system that reduced reoffending, improved community safety, and provided genuine opportunities for young people to turn their lives around.

Process

The onus is on the offender to ask for a diversion. The court may seek the victim's views on the matter.

If a magistrate agrees that the offender should be 'redirected' away from sentencing in court, the offender is put on a diversion plan, and the proceeding is adjourned for up to 12 months to enable them to participate in and complete the plan.

The diversion plan might involve the offender having to:

- obtain treatment, such as counselling, or drug or alcohol treatment
- write a letter of apology to the victim
- compensate the victim
- undertake an appropriate education course
- make a donation or do some other service such as community work.

If the diversion program is successfully completed, then the offender does not need to enter a plea, and they are discharged without any finding of guilt. If the diversion program is not successfully completed, then the case returns to the court for a hearing, and the offender is sentenced.

Effectiveness of diversion programs

Between 2020 and 2022, the Victorian Government undertook an evaluation of the CCYD program. The findings showed:

- The CCYD program has had a positive impact on reoffending rates, with less than a quarter of participants reoffending within six months of completing the program.
- Two years after completion of the program, more than 50 per cent of all participants had not reoffended.
- When reoffending did occur, it was less frequent and less serious in comparison to young people with similar offending histories who had not completed a diversion program.
- The CCYD program brought about positive behaviour changes that remained after completion of the program.

Strengths and weaknesses of alternative approaches

Source 6 sets out some of the strengths and weaknesses of the Drug Court, Koori Court and diversion programs.

Alternative approach to sentencing	Strengths	Weaknesses
Drug Court	• Addresses underlying causes of crime – drug and alcohol dependency • Avoids effects of imprisonment • Provides ongoing support and supervision • Provides positive reinforcement through the rewards program • Better alternative to prison • More cost-effective • Breaks the cycle of offending and helps to connect offender with their local community	• Not every offender is eligible to be sentenced • Not always successful in reforming offenders • Limited in its capacity to accept offenders • Expensive to establish • Some have previously criticised the rewards program

Alternative approach to sentencing	Strengths	Weaknesses
Koori Court	• Increases First Nations ownership of and participation in the criminal justice system • Increases self-determination for First Nations people by being able to explain their story in their own words • Strong focus on rehabilitation as Elders try to address the cause of the offending with the offender • Provides an informal atmosphere for sentencing • Reduces recidivism • Experience of the accused is vastly improved, with the experience being more engaging and inclusive, and less intimidating	• Not available to all offenders • Not available in all locations • Not all offences are eligible • Limited to sentencing only and does not extend to trials • Not a 'whole solution' to the difficulties faced by some First Nations people
Diversion programs	• Allows avoidance of criminal records • Saves court resources • Provides offenders with access to assistance such as rehabilitation and counselling • Can involve victims • Reduces recidivism	• Limited to certain offenders and offences • Effectiveness depends on the offender • Prosecution can prohibit the offender from participating • May be seen as 'soft option' for punishing offenders

Source 6 Strengths and weaknesses of alternative approaches to sentencing

7.11 Check your learning

Remember and understand

1 **Explain** how each of the following is a method of alternative sentencing approaches:
   - Drug Court
   - Koori Court
   - diversion program.

2 **Describe** the two parts of a drug and alcohol and treatment order (DATO).

3 Using an example for each, **distinguish** between the core conditions and program conditions of a DATO.

4 **Outline** three features of a Koori Court hearing.

5 **Explain** the key elements of a diversion program. **Identify** the groups that diversion programs are intended to assist.

6 **Describe** one benefit each of the Drug Court, the Koori Court and diversion programs.

Examine and apply

7 For each of the following situations, **identify** whether the accused is eligible for the Drug Court, the Koori Court or a diversion program. **Justify** your answers.

   a Jose has pleaded not guilty to petty theft.

   b Zoran from Wodonga has pleaded guilty to petty theft that was caused when he was drinking heavily. He has an alcohol addiction.

   c Ivy is a First Nations person from Dandenong. She wants to plead guilty to murder.

   d Nic has been charged with offensive behaviour. She has no prior convictions.

Reflect and evaluate

8 **Discuss** the benefits of a diversion program for youth offenders.

9 There has been a suggestion that the Drug Court is 'soft on crime' and that the rewards it gives to participants are 'over the top'. Do you agree? In your response, **describe** the challenges highlighted in the scenario 'Zara's story'.

10 **Discuss** the ability of the Koori Court to achieve the principle of equality. In your answer, refer to the scenario 'Cultural rights, access and the Koori Court'.

7.12 Sentencing in the Northern Territory

key knowledge

In this topic, you will learn about:

- sentencing practices in one other jurisdiction.

As you explored in Chapters 2 and 3, in Australia there are nine parliaments: one Commonwealth Parliament, six state parliaments and two territory parliaments. Some areas of power in Australia are given exclusively to the Commonwealth to make laws (such as laws in relation to migration, defence and currency), and some areas of power are given to the states and territories to make laws (such as health, education and transport). Other areas of power are shared between the Commonwealth and the states and territories.

The states and territories hold the power to make laws in relation to crime and the criminal justice system. This means that each state and territory has its own criminal justice system, its own prisons and its own laws about what constitutes a crime. Each state and territory also has its own laws about sentencing, including the purposes of sentencing, the types of sanctions that can be imposed, and the operation of their prisons.

So far, you have explored in detail the Victorian sentencing regime. In this topic, you will explore sentencing in the Northern Territory, so that you can consider how its sentencing is similar to, and different from, Victorian sentencing.

Introduction to the Northern Territory

Did you know?

It is an offence in the Northern Territory to pretend to tell fortunes to deceive another person. The maximum penalty is a $1000 fine or six months in prison.

The Northern Territory is in the central and central northern part of Australia, sharing its borders with Western Australia, South Australia and Queensland. It is a large part of Australia, but sparsely populated (much of its central region is desert area). Its capital is Darwin, and a large economic feature of the territory is tourism, given its significant and important destinations such as Uluru, Kakadu and Kata Tjuta.

According to the 2021 national census, the Northern Territory has a population of 233 000, an increase from 229 000 in 2016. Three in five people in the Northern Territory live in the capital city area of Greater Darwin. The median age is 23 years, as opposed to the median age of Australia, which is 38 years. In the 2021 census, 61000 people in the Northern Territory identified as being of First Nations origin. While 7.5 per cent of Australia's First Nations population live in the Northern Territory, 26.3 per cent of the Northern Territory population are First Nations people.

The Northern Territory was part of South Australia from 1863 to 1911, at which time it was separated from South Australia and transferred to federal control. That means the Commonwealth Parliament made laws for the territory, and the territory itself had no government. The laws made for the Northern Territory were called ordinances and made by a federal minister responsible for the territory.

Australian Constitution a set of rules and principles that guide the way Australia is governed. The Australian Constitution is set out in the *Commonwealth of Australia Constitution Act*

In 1978, legislation was passed that granted the Northern Territory the right to self-govern. This meant that the Northern Territory could make its own laws in relation to most state-type functions except for certain matters, such as matters relating to Aboriginal land, national parks and uranium mining. However, the Commonwealth Parliament retains the right to legislate for the Northern Territory, and can override any legislation passed by the Northern Territory Parliament. This is because the Northern Territory is a territory, not a state, and the **Australian Constitution** deals with territories differently.

Unlike the Commonwealth Parliament and most state parliaments, the Northern Territory Parliament is a unicameral parliament, not a bicameral parliament. This means that it only has one house: the Legislative Assembly. The Administrator of the Northern Territory is also part of its parliament. The Administrator represents the King (Crown). All laws passed by the Legislative Assembly must be presented to the Administrator for royal assent.



Source 1 The Legislative Assembly of the Northern Territory has the power to make laws for Northern Territory citizens.

Northern Territory's criminal justice system

The Northern Territory's criminal justice system is in many ways similar to Victoria's criminal justice system in terms of laws, bodies that enforce criminal law, and courts that determine whether someone is guilty of a crime. For example:

- Various laws establish what is a crime, and the maximum penalty that can be imposed. The main relevant statute in the Northern Territory is the *Criminal Code Act 1983* (NT). Schedule 1 of that statute contains the Northern Territory's Criminal Code. Crimes include homicide offences such as murder, property offences such as arson, assault offences and driving offences. The *Summary Offences Act 1923* (NT) also establishes various summary offences such as loitering, obscenity, stealing domestic animals, and violent disorder.
- Various bodies investigate criminal law and can charge people with committing a crime (who are called defendants in the Northern Territory). The most prominent of these is the Northern Territory Police Force. Others include NT WorkSafe (which regulates workplaces to ensure that they are safe), the Northern Territory Environment Protection Authority (which seeks to ensure the environment is free from harm), and local councils, such as the City of Darwin.
- The Northern Territory has its own court system and court hierarchy. There are two main courts: the Local Court (which hears summary offences such as drink-driving and assault), and the Supreme Court (which hears indictable offences). The Local Court also conducts committal proceedings to determine whether there is sufficient evidence for an accused (defendant) to go to trial in the Supreme Court. The Supreme Court also has the Court of Criminal Appeal, which hears criminal appeals. There is one specialist court, the Youth Justice Court, which hears charges against young offenders who are under 18 years of age when they are charged or appear in court. While specialist approaches have been established to address specific issues such as mental health and family violence, there is no specialist court in the Northern Territory similar to the Koori Court in Victoria; nor is there a Drug Court.
- A jury of 12 is used to decide on guilt for criminal cases in the Supreme Court when a defendant is charged with an indictable offence. In rare cases, a jury can be used for summary offences. The standard of proof is beyond reasonable doubt.
- The Northern Territory has a number of prisons, including Darwin Correctional Centre and Alice Springs Correctional Centre.

Sentencing in the Northern Territory

Sentencing in the Northern Territory is primarily governed by the *Sentencing Act 1995* (NT). Set out below is an overview of some of the key features of sentencing in the Northern Territory.

Sentencing purposes

The purposes of sentencing in the Northern Territory are set out in section 5 of the *Sentencing Act*. They are the same as Victoria's purposes, namely:

- punishment – to punish the offender in a way that is just in all the circumstances
- rehabilitation – to provide conditions that will help the offender be rehabilitated
- deterrence – to discourage the offender or other persons from committing the same or a similar offence
- denunciation – to make it clear that the community does not approve of the sort of conduct that the offender was involved in
- protection – to protect the community from the offender.

When sentencing an offender, a Northern Territory court can consider more than one purpose of sentencing (and, as in Victoria, it often does).

Sentencing factors

In sentencing an offender, the court must consider a number of factors, including the following:

- the nature of the offence and how serious it was, including any harm that was inflicted on the victim, any harm to the community, and any damage, injury or loss otherwise caused by the offender (such as damage to property)
- the extent to which the offender is to blame for the offence
- the offender's character, age and intellectual capacity
- how much assistance the offender gave to agencies (e.g. the police) when they were investigating the offence
- whether the offender pleaded guilty to the offence, and if so, when the offender did so
- the offender's character, including their reputation and how many offences they have previously committed
- any other mitigating factors and aggravating factors (e.g. whether there was violence, whether the offence was motivated by hate against a group of people, and whether the offender was armed with a weapon).



Source 2 The Supreme Court of the Northern Territory

Types of sentences

The types of sentences that can be imposed in the Northern Territory are set out in Source 3.

	Sentence	Description
Most severe ↓	Imprisonment with conviction	Order the offender to serve a term of imprisonment, i.e. in jail. This is considered the sentence of last resort. In the Local Court, a judge can only impose up to five years' imprisonment. The Supreme Court can impose a maximum sentence of life imprisonment. A non-parole period must be fixed unless the court does not believe it is appropriate, and this period should not be less than 50 per cent of the total sentence
	Community custody order with conviction	Similar to Victoria's community correction order (a non-custodial sanction that offender serves in the community), requiring intensive supervision by a probation and parole officer, and participation in community work and programs, treatment or training. The offender must see their probation and parole officer at least twice each week and complete 12 hours of community work each week.
	Home detention order with conviction	For offenders who are sentenced to a term of imprisonment, order the offender to spend some of that term (but no longer than 12 months) at a specified residence or place, and to remain there unless they are given permission to leave
	Suspended sentence with conviction	For offenders who are sentenced to a term of not more than five years in prison, make an order that all or part of the sentence is suspended (i.e. some of it does not have to be served in prison). If the offender is found guilty of another offence during the suspended period, they will be required to spend the suspended period in prison, plus any additional term imposed for the new offence
	Community based order with or without conviction	Similar to Victoria's community correction order, requiring the offender to comply with certain conditions imposed, such as assessment and treatment, community work and wearing a monitoring device
	Community work order with or without conviction	Order the offender to perform unpaid community work to a maximum of 480 hours
	Fine with or without conviction	Impose a fine on the offender. Courts can only allow 28 days for a fine to be paid
	Release on bond with or without conviction	Order the release of the offender on a bond for a specified sum of money and require the offender to be of good behaviour for a period of up to five years. These are also known as good behaviour bonds
Least severe ↓	Dismissal or discharge with or without conviction	Order the dismissal of the charge for the offence or the discharge of the offender. This can occur when the charge is proven, but the court decides no sanction should be imposed

Source 3 The types of sentences that can be imposed in the Northern Territory

In addition to the sentences in Source 3, a court can also hand down an indefinite sentence for violent offenders. This can be imposed where the offender is a serious danger to the community, and there is a real risk to members of the community if an indefinite sentence is not imposed.



Source 4 The Darwin Correctional Centre, a minimum- to maximum-security prison for both men and women

Mandatory minimum sentences

In some situations, the courts in the Northern Territory must impose a minimum sentence. This is a minimum period of time that an offender must serve in prison. For example, if a court finds an offender guilty of a 'Level 5 offence' (such as causing serious harm), and the offender has not previously been convicted of a violent crime, the court must impose a minimum sentence of three months' actual imprisonment.

The Northern Territory's mandatory minimum sentencing regime has been criticised. This is in part because such regimes remove the power to impose the most appropriate sentence from judges. Judges are required to send people to prison for a minimum period of time because parliament has legislated this. This can be seen to be compromising the independence of the courts.

Calls have been made for the entire mandatory sentencing regime to be repealed. In November 2022, the Northern Territory Parliament passed laws that abolished mandatory minimum sentencing for a small range of offences. Mandatory minimum sentencing remains for some offences, such as murder, sexual offences and assaults.

One of the primary issues facing the Northern Territory in recent years is overcrowding and a lack of capacity in its prisons, as explored in the scenario below.

Actual scenario

Northern Territory prisons

In 2023, it was reported that the Northern Territory's corrections system was struggling to keep up with demand. Data showed that Darwin's adult prisons were over capacity, and there were more prisoners than beds. It was reported that in some situations, mattresses were being placed on floors to deal with the number of inmates.

To address the overcrowding issue, the Northern Territory Parliament abolished some of its mandatory minimum sentencing laws, and sought to introduce new sanctions that would allow some corrections orders to be served in the community, with a focus on rehabilitation and avoiding repeat offending.

A community survey showed that people in the Northern Territory wanted the government to address underlying causes of crime rather than imposing harsher prison sentences, and that very few believed that the current system was working. Crime was rising in the territory; therefore it was suggested that a 'tough on crime' approach was not effective. Various individuals and campaigns encouraged the government to focus on early intervention, mental health, and drug and alcohol treatment as a way of preventing crime from occurring in the first place.

A report by the Justice Reform Initiative notes that the incarceration (imprisonment) rate in the Northern Territory is among the highest in the world, and is four times the Australian average for



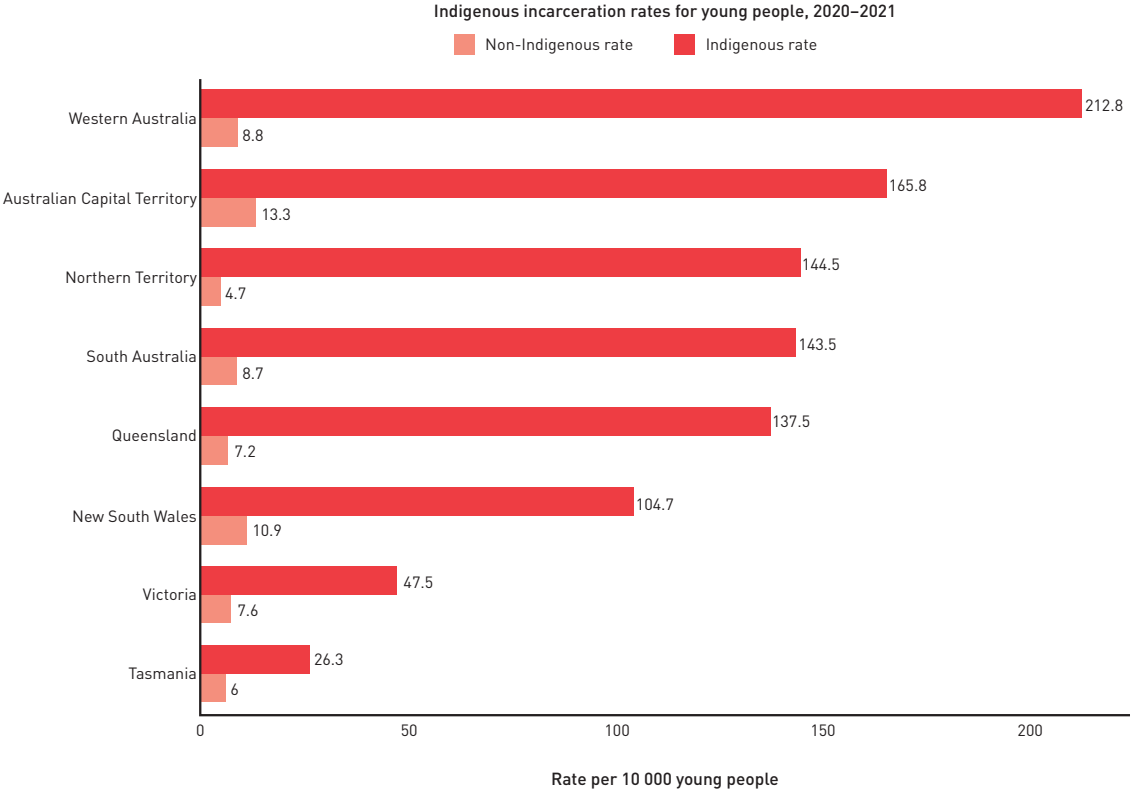
Source 5 Rising crime rates in the Northern Territory have made national headlines.

adults. In particular, the incarceration rate in the Northern Territory is 1044 prisoners per 100 000 members of the adult population, whereas nationally it is 202 prisoners per 100 000 members of the adult population. In Victoria, the incarceration rate is 128 prisoners per 100 000 members of the adult population. Almost 1 per cent of adults in the Northern Territory are in prison at any one time. Almost 75 per cent of people in prison have been in prison before.

In 2022 and 2023, the issue of crime rates made national headlines after spiralling crime levels in several areas, including Alice Springs. In some places, restrictions were placed on takeaway liquor sales. However, it was recognised that more needs to be done to address crime levels.

First Nations people

As of 30 June 2022, First Nations people accounted for 32 per cent of all prisoners in Australia. In the Northern Territory, about 85 per cent of all prisoners were First Nations people, despite First Nations people making up only 26.3 per cent of the territory's population. More than 80 per cent of all young people in custody in the Northern Territory were First Nations people. First Nations offenders were also statistically more likely to be sentenced to a term of imprisonment than non-Indigenous offenders. The statistics and general consensus recognised that First Nations people were overrepresented in Northern Territory prisons, and were at a disadvantage when confronted with the criminal justice system.



Source 6 The detention rates for Indigenous and non-Indigenous young people aged 10–17 in 2020–2021

As noted earlier, there is no specialist court in the Northern Territory similar to the Koori Court in Victoria. That means that First Nations offenders are sentenced in mainstream courts, rather than in a court that recognises cultural differences for First Nations people.

In the past, Indigenous Community Courts existed in the Northern Territory. As with the Koori Court, Elders and Respected Persons would provide advice to the judge in these courts with regard to sentencing, and could communicate with the offender about the impact of their offending. However, Indigenous Community Courts were abolished in December 2012.

In May 2023, legislation was passed by the Northern Territory parliament to reintroduce community courts. As part of the changes, Aboriginal elders and leaders will be able to have a say on what sentences First Nations offenders should receive. It will only be available to Local Court matters (i.e. not serious crimes dealt with in the Supreme Court).

Comparison with Victoria

A summary of how the Northern Territory's sentencing is similar to, and different from, that in Victoria is set out in Source 7.

Similarities	Differences
The sentencing purposes in both Victoria and the Northern Territory are the same: punishment, rehabilitation, deterrence, denunciation and protection.	There are fewer courts in the Northern Territory that sentence offenders. The Northern Territory only has two mainstream courts, while Victoria has three.
The sentencing factors that can be taken into account are similar, and include guilty pleas, mitigating factors and aggravating factors.	The Northern Territory has fewer prisons than Victoria, and fewer beds within prisons, given its smaller population.
There are similar sentences, such as imprisonment, fines and community-based orders.	The Northern Territory has some sentences that are not available in Victoria, such as home detention orders and suspended sentences.
Both jurisdictions have minimum terms of imprisonment for a number of offences.	The minimum sentencing regime in the Northern Territory is much more extensive than in Victoria, and imposes minimum sentences for a much wider range of offences.
Both jurisdictions' prison populations show an overrepresentation of First Nations people.	The incarceration rate for Indigenous and non-Indigenous offenders in the Northern Territory is one of the highest in the world, with First Nations offenders making up about 85 per cent of its prison population.

Source 7 Similarities and differences between sentencing in Victoria and the Northern Territory

7.12 Check your learning

Remember and understand

1 **Identify** the five purposes of sentencing in the Northern Territory.
2 **Describe** one feature of the relationship between the Northern Territory Parliament and the courts in sentencing.
3 **Distinguish** between a suspended sentence and a home detention order.
4 **Explain** why there are fewer prisons in the Northern Territory than in Victoria.

Examine and apply

5 Using the information in this topic and your own research, create an infographic about the Northern Territory and sentencing. Including the following figures or information in your infographic:
   a the Northern Territory's population, including the number of First Nations people
   b incarceration rates for First Nations and non-Indigenous offenders (both adults and children)
   c the number of prisons, prison beds and prisoners
   d the recidivism rate.
   Include any other interesting or relevant statistics you can find.
6 **Compare** sentencing in Victoria and in the Northern Territory.

Reflect and evaluate

7 **Discuss** the ways in which the Northern Territory could address increasing crime rates. In your answer, consider the extent to which a 'tough on crime' approach reduces offending.

Chapter

7

Review



Top assessment tips from Chapter 7

1 One of the key skills you are expected to show in this course is the ability to discuss the principles of justice in relation to the determination of criminal cases. When looking at cases in the media, always consider where the three principles of justice (fairness, equality and access) are most achieved (or not achieved).

2 You are expected to understand fines, community correction orders and imprisonment in Unit 3, so look closely at these in this course. It will help in your studies next year!

3 There's a lot to remember when it comes to institutional powers and individual rights. The goal is not to memorise each of the powers and rights. Rather, choose one or two of them, get to know them well and show *how* the law tries to balance the powers and rights. Put these rights into the context of your own life to help you understand them fully.

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 assessment tasks are composed of a variety of questions. A great way to identify the difficulty of the question is to look at the command term (or terms) used in the question and the mark allocation. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 Distinguish between aggravating factors and mitigating factors in criminal cases.

(3 marks)

Difficulty: medium

2 Compare community correction orders and imprisonment. In your answer, refer to **one** purpose of sanctions.

(6 marks)

Difficulty: high

3 'Drug Courts, Koori Courts and diversion programs are soft on crime. They don't achieve justice, and they should be abolished.' Discuss this statement.

(10 marks)

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Practice assessment task

Before attempting this practice assessment task, re-read the information at the beginning of this chapter about the learning outcome, key knowledge and key skills.

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

Night out leads to crime

Amedeo is 22 years old. He attends university and is a good student.

One night, Amedeo went out drinking with his mates. He wanted to get home early to study, but was convinced by his friend Victor to continue drinking at one of the local pubs.

While at the pub, Victor suggested it would be a good idea to rob the convenience store next door. Amedeo knew that Victor had drunk a lot of alcohol. Victor also seemed to be under the influence of drugs.

Amedeo disagreed, but Victor told him that it would be fun. Amedeo, who was drunk, agreed. They got to the front of the convenience store and Victor pulled out a small handgun. Amedeo went to walk away, but Victor grabbed him and said, 'You owe me one. If you don't do this, I'll hurt you.'

Victor went inside the convenience store. The convenience store employee was terrified and screamed. Victor started yelling and pointing the gun at her, and told her to open the till.

Amedeo stood frozen in the doorway, not knowing what to do. Victor grabbed all the money from the till and ran out of the store. He took Amedeo with him.

Both Victor and Amedeo were charged with aggravated burglary. Amedeo wants to plead guilty, but Victor laughed, saying he's going to 'take the case all the way'.

Practice assessment task questions

1 Outline the original criminal jurisdiction of the court that is likely to hear this case.
(2 marks)

2 Describe **one** right available to Amedeo during court proceedings.
(3 marks)

3 Explain **two** roles of the police in this case.
(4 marks)

4 Would WorkSafe Victoria or the local council have had the power to arrest Amedeo or Victor? Justify your answer.
(5 marks)

5 If Victor were questioned, to what extent could he legally be able to remain silent? Give reasons for your response.
(4 marks)

6 Would any of the courts listed below be involved in this case? Justify your answer.
- **a** Magistrates' Court
- **b** Koori Court
- **c** Drug Court

(6 marks)

7 Is Victor eligible for a diversion program? Justify your answer.
(3 marks)

8 Explain **two** roles of the court in Amedeo's case.
(4 marks)

9 Describe **two** factors that are likely to be relevant in sentencing Amedeo.
(4 marks)

10 Discuss the extent to which **two** of the principles of justice can be achieved in Victor's case.
(7 marks)

11 If Victor is found guilty, identify **one** sanction that is likely to be imposed on him. Discuss the extent to which this sanction could achieve rehabilitation and punishment.
(8 marks)

Total: 50 marks

Chapter checklist

Now that you have completed this chapter, reflect on your ability to understand the key knowledge from the Study Design. If you feel you need some more practice, use the revision links to revisit the key knowledge.

Remember that you will also need to be able to draw on and understand the key skills outlined in the Study Design.

Key knowledge	I understand this	I need some more practice to understand this	Revision link
• The principles of justice: fairness, equality and access	☐	☐	Go back to Topic 7.2.
• Institutions that enforce criminal law, such as the police and delegated bodies	☐	☐	Go back to Topic 7.3.
• The balance between institutional powers and individual rights	☐	☐	Go back to Topic 7.4.
• An overview of the role and criminal jurisdictions of the Victorian courts	☐	☐	Go back to Topic 7.5.
• The role of the jury in a criminal trial	☐	☐	Go back to Topic 7.6.
• The difficulties faced by different groups in the criminal justice system, such as First Nations people, young people, culturally and linguistically diverse people, people with mental health issues, and people with disabilities	☐	☐	Go back to Topic 7.7.
• The purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation	☐	☐	Go back to Topic 7.8.
• Types of sanctions such as fines, community correction orders and imprisonment	☐	☐	Go back to Topic 7.9.
• Factors considered in sentencing	☐	☐	Go back to Topic 7.10.
• Alternative approaches to sentencing, such as the use of the Drug Court, Koori Courts and diversion programs	☐	☐	Go back to Topic 7.11.
• Sentencing practices in one other jurisdiction	☐	☐	Go back to Topic 7.12.

Check your Student obook pro for these additional resources and more:

Chapter 7
Chapter review quiz

Revision notes
Chapter 7

Chapter summary
Chapter 7

Quizlet
Revise key legal terms from this chapter.

Unit 1 Review

Part A Assessment essentials

Now that you have completed your revision for Unit 1, it is time to put your skills into practice so that you can answer assessment questions with confidence. Our expert authors have created the following advice and tips to help you maximise your results in your assessment tasks.

Tip 1: Become familiar with the structure of Legal Studies questions

- Legal Studies questions typically contain a defined set of items (or components) arranged in different orders.
- These items include the command terms, the content or subject matter of the question, and the mark allocation. A question may also include stimulus material, and limiting or qualifying words. See Tip 3 in Chapter 1 on page 17 for more information.
- Make sure you understand each item (or component) of the question, as this will make answering the question much simpler.

See it in action

Read the question below and see how the different items appear in the question, and how they are responded to in the sample response.

Question 1

Simran, 35, was found guilty by a jury in the County Court of Victoria of recklessly causing serious injury. The judge imposed a community correction order (CCO) on Simran.[1]

Other than rehabilitation,[2] explain[3] how a CCO could achieve **one**[2] purpose of sanctions in this case.[4]

[4 marks][5]

[1] Stimulus material
[2] Limiting phrase/word
[3] Command term
[4] Content
[5] Mark allocation

A sample response

One of the purposes of sanctions is punishment. A CCO can punish Simran[1] in this case through the conditions that are imposed on him, and by way of the impact that the sanction can have on him generally.[2]

There are both core and mandatory conditions imposed as part of a CCO, many of which can be detrimental to Simran.[1] For example, Simran[1] is not allowed to leave Victoria without permission, which places punitive limits on his basic freedom. Many of the mandatory conditions act as a punishment too; for example, Simran[1] may have to do community work.[2]

In addition, a CCO can punish Simran[1] because of its ultimate effect. For example, Simran[1] may have to disclose to his employer that he has been given a CCO. This can have a punishing effect on Simran because he may not be able to gain employment in particular industries and jobs if they have a policy of not engaging people who have previously offended and been given a CCO.[2]

[1] This question requires reference to the stimulus material given it is about 'this case'.

[2] The student has provided a detailed explanation of punishment and identified their chosen purpose in the first sentence. Any other purposes of sanctions (other than rehabilitation) would also have been an appropriate choice.

Tip 2: Show the reader that you understand both knowledge and skills

- When answering questions in Legal Studies, you are not just expected to recite or write down what you have learnt. You are also expected to demonstrate a skill you have learnt, such as the skill of evaluating, discussing or explaining.
- When looking at a question, make sure you understand the content you are expected to know, and the skill you are expected to demonstrate.
- The skill may also include the synthesis, analysis and application of stimulus material (such as an actual or hypothetical scenario).
- Use 'signposts' to show the skill that you are expected to demonstrate. For example, for an **evaluate** question, use words such as 'one strength', 'one weakness' and 'to conclude'. For an **analyse** question, use words such as 'moreover', 'this is significant because' and 'in particular'. For a **discuss** question, use words such as 'however', 'on the other hand' and 'although'.

See it in action

Read the question below and then look at the sample response to see what skills you are expected to demonstrate, and what content the question is asking about.

Question 2

Parker, 19, is experiencing homelessness. He was out one night and decided to attend a nightclub in Melbourne, Victoria. He had been drinking heavily all night as he has an alcohol addiction. While at the nightclub, Parker started to swear loudly in front of other attendees. He was asked by a security guard to leave. Parker laughed at the security guard and started to sing a loud, abusive song. As he was leaving, Parker smacked a fellow nightclub attendee. The police were called, and Parker was charged with common assault and using obscene language – both summary offences. This scared Parker, as he had never been charged before. Parker is an Aboriginal man. He has decided to plead not guilty and to represent himself. His hearing in the Magistrates' Court will be held in three months' time.

Discuss ❶ the ability of the Magistrates' Court to achieve the principle of fairness when deciding whether Parker is guilty of the offences.

[6 marks]

❶ Command term

A sample response

*To some extent, the Magistrates' Court can achieve the principle of fairness, as the Court will act impartially. However, Parker will have challenges because he is not represented, and he may have difficulties participating fully in the case.*❷

*One of the key*❹ *features of a fair trial is that there is impartiality. This involves the magistrate (who will in this case decide whether Parker is guilty of the summary offences with which he is charged)*❸ *listening to the evidence and deciding, beyond reasonable doubt, whether Parker is guilty.*❸ *Magistrates will not act in a prejudicial matter when doing so.*

❷ The student has established their contention at the start, setting the scene for the arguments they will pose.

❸ There is meaningful use of the stimulus material, drawing on points such as who will decide whether Parker is guilty, and who will prosecute the case (the police prosecutor).

In addition,[4] one of the key features of a fair trial is an open court. The Magistrates' Court hearing where Parker's case will be heard will be open to the public[3] to allow justice to be seen to be done, and to allow there to be scrutiny of the processes. It is very unlikely that 'open justice' will be denied in this case.

However,[4] fairness also requires there to be participation in the case. That is, Parker will need to have the opportunity to present his case and challenge the prosecution's case. Parker may struggle to do this as he is not represented by a lawyer.[3] The courts have generally held that people who represent themselves lack the necessary skills, experience and objectivity to be able to properly present their case and make the right decisions. Therefore,[4] it may be a challenge for Parker to adequately participate in the proceedings,[3] in contrast to an experienced police prosecutor who will be familiar with the processes and will have the necessary skills, experience and objectivity. In addition,[4] given that Parker is experiencing homelessness, he may lack the necessary skills and education to do a proper job of presenting his case.[3]

While[4] Parker is self-represented, the magistrate will actively ensure that he is not disadvantaged and is able to participate;[3] for example, the magistrate will likely explain various processes to him. However,[4] this does not extend to the magistrate advocating on behalf of Parker, so it will only do so much in terms of allowing him to participate.

[4] The student has used 'signposting' to emphasise opposing points of view, such as to argue impartiality and open justice, as against the issue of participation because Parker is representing himself.

Tip 3: Structure your responses

- When answering questions in Legal Studies, it is important to structure your responses according to the question.
- Use paragraphs if you are making multiple points in your response. As a general rule, if you are asked to discuss, analyse, evaluate or compare, you should use paragraphs. You should also use paragraphs if you are asked to identify, outline, describe or explain more than one point or feature.
- Each paragraph should start with a topic sentence that clearly states the main point or topic that you are going to write about in that paragraph.
- You should also ensure that you signpost your responses. This means you should use key words or phrases at the beginning of each paragraph that help guide the reader (or the assessor) to the key points you are making in your response. For example, you may use words and phrases such as 'however', 'on the other hand' or 'in contrast' to show (or signpost) a limitation, weakness or difference. The signpost words you use depend on the skill you are expected to show.

See it in action

Read the question below and then look at the sample response to see how you might structure your response.

Compare[1] sentences in Victoria to those in **one**[2] other Australian jurisdiction.

[6 marks]

[1] Command term

[2] Limiting word

A sample response

The types of sentences that can be imposed in Victoria are similar to, as well as different from, those that can be imposed in the Northern Territory.

In both[2] Victoria and the Northern Territory, an offender can be sentenced to a term of imprisonment (i.e. jail).[1] Like Victoria,[2] in the Northern Territory imprisonment is seen as a sanction of last resort and is normally reserved for the most serious type of offending.

Similarly,[2] both Victoria and the Northern Territory have community based orders, being sanctions that offenders serve in the community.[1] In Victoria, these are called community correction orders (CCOs), which are flexible sanctions that can be adjusted based on the needs and requirements of the offender. In the Northern Territory, there are also community orders that can be imposed, including a community based order requiring the offender to comply with certain conditions that are imposed.

On the other hand,[2] there are some sanctions that are different, such as the home detention[1] order.[1] In the Northern Territory, one of the sanctions that can be imposed is a home detention order, which is an order that requires the offender to spend no longer than 12 months at a specified residence or place. Unlike the Northern Territory,[2] Victoria does not have home detention orders, but rather the CCO can have a condition requiring a person to reside at a particular place.

Another difference[2] is in relation to suspended sentences.[1] The Northern Territory courts can impose a suspended sentence on a person, which means the term of imprisonment is suspended for all or part of that term, but if the offender commits an offence during this period they can be sent to prison. Victoria does not have suspended sentences available.

[1] This answer uses paragraphs to address the command term *compare*. Each paragraph commences with a topic sentence that clearly states the main point being made in that paragraph.

[2] Signposts or key words and phrases have been used throughout this answer to help guide the reader (or the assessor) to the key points being made. For example, as the command term requires a **comparison** between sentences in Victoria and one other Australian jurisdiction, terms such as 'like', 'similarly', 'on the other hand', 'unlike' and 'another difference' have been used throughout the response to highlight (or signpost) similarities and differences.

Think like an assessor

To maximise your marks in an assessment task, it can help to think like an assessor. Carefully read the following two assessment task questions and think about what might constitute a high-scoring response. Consider all the items (or components) in each question, including the command terms, content or subject matter, mark allocation and any stimulus material.

After you have carefully considered each question, read the sample response. Imagine you are an assessor, and use the marking guide checklist to mark the response.

Assessment task question

Question 1

Aman, 23, decided to rob a bank. He has agreed with Viktor that he will share any of the money he steals with Viktor, on the basis that Viktor supplies Aman with the equipment he needs to undertake the robbery. Viktor agrees. Aman robs the bank on his own and escapes to Viktor's house, where Viktor hides him. Aman and Viktor are eventually charged with armed robbery.

Explain whether Aman and Viktor can be charged as a principal offender or as an accessory.

[4 marks]

A sample response

Aman can be charged as a principal offender. This is because he was the one who actually committed the actus reus; that is, the act of robbing the bank.

Viktor can be charged as an accessory. Viktor was not at the scene and did not commit the robbery. However, because he entered into an arrangement with Aman to share the proceeds, he helped Aman with supplying him with the equipment, and he kept Aman at his home after the offence, he has been involved in the offence and therefore is an accessory.

Marking guide checklist

To get full marks, check whether the response has all the following features. Identify any features that are missing in the response and decide what mark you award.

Features for a full-mark response
☐ The command word has been addressed (i.e. the response provides a detailed account of whether Aman and Viktor will be charged as a principal offender or as an accessory).
☐ The response demonstrates a good understand of participants in a crime.
☐ The response makes meaningful and accurate use of the stimulus material.
☐ Legal terminology has been correctly used.
☐ There are no significant errors.

Fix the response

Consider where you did not award marks in the above response. How could the response be improved? Write a response to the same question that you believe would achieve full marks from the assessor.

Assessment task question

Question 2

Discuss **one** difficulty faced by **one** different group in the criminal justice system.

[5 marks]

A sample response

One difficulty faced by young people in the criminal justice system is financial barriers.

If a young person is charged with committing an offence, or if they are a victim of crime, they may need assistance from a lawyer to help them with their case. This is because the criminal justice system is challenging to navigate without a lawyer, due to the processes and the legal terminology involved, and the fact that it is generally an 'adult-oriented environment' that would be challenging for a young person to deal with themselves. A young person may not be able to afford a lawyer, which can be very expensive, as they generally do not have the financial means available to them. This could potentially mean they have to represent themselves.

Marking guide checklist

To get full marks, check whether the response has all the following features. Identify any features that are missing in the response and decide what mark you award.

Features for a full-mark response
☐ The command word has been addressed (i.e. the response contains a reasoned argument for and against a particular issue – the difficulty that may be faced and whether that difficulty may be or could be addressed).
☐ The response demonstrates a comprehensive understanding of the difficulty faced and the operation of the criminal justice system.
☐ The response provides a comprehensive understanding of how the difficulty may be addressed in the criminal justice system (e.g. availability of VLA or CLCs).
☐ Legal terminology has been correctly used.
☐ There are no significant errors.

Fix the response

Consider where you did not award marks in the above response. How could the response be improved? Write a response to the same question that you believe would achieve full marks from the assessor.

Part B Practice assessment tasks

For Unit 1 – Area of Study 1

Read the information at the beginning of Chapter 3 (page 41) 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.

Victorian road rules are changing to cut down on driver distraction. Here's what that means

Yara Murray-Atfield, *ABC News*, 15 February 2023

New Victorian drivers will have to be parked to change a song under road rules set to come into effect next month.

The changes are aimed at reducing potentially deadly incidents, with government statistics showing distraction is involved in at least 11 per cent of road fatalities.

The rules will come into effect from March 31 and will bring Victoria into line with a number of other jurisdictions across the country.

But since they've been announced, there's also been some confusion about how they will be enforced.

Here's what we know.

P-platers and L-platers won't be able to make calls or change songs while driving

Put simply, learner and probationary drivers are not allowed to touch any phone, tablet or smart device while operating a vehicle on the road.

The limited exceptions relate to mounted devices and navigation or entertainment systems built into the car.

Once a phone or navigation device is mounted, it will still only be able to be used for navigation or playing audio which is set up before the vehicle gets going.

'You must pull over and park to change a song or enter a different address,' the VicRoads explanation says.

Voice controls cannot be used for any device, including those which are mounted, in-built or wearable, if you're on your Ls or Ps.

Taking or making any phone calls is banned, even if you're using voice controls.

Drivers can briefly touch in-built systems 'to adjust navigation settings, climate controls and audio functions'.

…

There are now specific rules about smart watches and other wearables

As many more people adopt wearable technology, the laws now specifically mention smart watches and smart glasses.

You are only allowed to use a smart watch as a fully licensed driver if you're making or taking a call, playing audio or adjusting volume levels.

You can still use the time-telling functions of the watch.

Before you're fully licensed, the no-distraction rules are still in place.

L and P-platers can only use a smart watch to play music while driving, for instance, if it's set up before the journey begins.

The rules have been met with some confusion

There has been some confusion about policing and enforcement since the laws were announced on Tuesday.

A Department of Transport representative told radio station 3AW on Wednesday that drivers could be fined $555 for having their phone on the passenger seat.

The department later clarified that as long as the driver was not interacting with the phone, they would not.

Reporters on Wednesday asked government minister Ben Carroll how police or cameras would know whether someone was looking at their smart watch for the time or for another purpose.

Similarly, he faced questions about how they would know whether someone was touching a mounted phone screen briefly, as is permitted, or to read a text, which is banned.

He said there was 'always a right to challenge' fines through the legal system.

The opposition has criticised the government for the confusion, with Shadow Police Minister Brad Battin saying the laws have been rushed through.

Practice assessment task questions

1 Are the new road laws an example of statute law or common law? Justify your answer.
(3 marks)

2 Justify **one** reason for the Victorian court hierarchy.
(3 marks)

3 Explain how the new road laws may be relevant in a criminal case and in a civil case.
(5 marks)

4 If a young person is charged with changing a song while driving and pleads not guilty, discuss the ability of the principle of fairness to be achieved.
(5 marks)

5 Explain how the road laws aim to achieve social cohesion and protect the rights of individuals.
(6 marks)

6 Describe **two** features of the relationship between parliament and the courts in relation to road laws.
(6 marks)

7 Evaluate the effectiveness of the proposed new road laws.
(7 marks)

Total: 35 marks

Practice assessment task

For Unit 1 – Area of Study 2

Read the information at the beginning of Chapter 4 (page 79) 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.

Part 1

Taylor Cyrus charged

Taylor Cyrus is a 25-year-old university student from Duff in Victoria. She is part of the 'Musician Gang'. The Musician Gang's main enemies are people in the 'Code Gang', who live in the neighbouring suburb of Stem.

One night, Taylor and a few of her gang members decided to drive over to Stem and damage a few letterboxes and egg some houses. They continued to do this throughout the night until Taylor decided to 'step things up', and substantially damaged a car parked outside one of the houses.

Before they could drive home, the Musician Gang members were confronted by several Stem Gang members. They got into a big fight. Police officers arrived, and several people were arrested, including Taylor. After some weeks, Taylor was also charged with destroying property, which is an indictable offence.

Practice assessment task questions

1 Referring to the above scenario, describe **two** purposes of criminal law.
(4 marks)

2 'Taylor needs to prove her innocence.' Is this statement true? Justify your answer.
(3 marks)

3 Outline the standard of proof in Taylor's case.
(2 marks)

4 Distinguish between a crime against the person and a crime against property. Use examples from the scenario above to demonstrate your response.
(4 marks)

5 Is Taylor a principal offender or an accessory? Justify your answer.
(3 marks)

6 Explain **one** difference between a summary offence and an indictable offence.
(3 marks)

7 Taylor has been charged under section 197 of the *Crimes Act 1958* (Vic), which states that 'a person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence'. Describe the *mens rea* and the *actus reus* for Taylor's crime.
(6 marks)

Total: 25 marks

Part 2

Practice assessment task questions

In Unit 1 – Area of Study 2, you have studied two criminal offences. Choose **one** of these offences and answer the following questions.

1 Explain the elements that need to be proven by the prosecutor. Refer to **one** recent criminal case you have studied in your response.
(6 marks)

2 Outline any possible defences that may be raised by a defendant. Refer to **one** recent criminal case you have studied in your response.
(5 marks)

3 Compare trends in Victoria in relation to this offence to trends in **one** other Australian jurisdiction.
(5 marks)

4 Describe **two** possible sanctions that may be imposed on an offender who commits this crime, and **two** factors that may be relevant in sentencing.
(6 marks)

5 Explain the impact that this offence can have on the community. Refer to **one** recent criminal case you have studied in your response.
(3 marks)

Total: 25 marks

Practice assessment task

For Unit 1 – Area of Study 3

Read the information at the beginning of Chapter 7 (page 197) 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.

Crime and punishment

Alex, 18, has an addiction to the drug methamphetamine, also known as 'ice'. His use of the drug costs him $500 per day. Alex decided to stalk pedestrians and take their money. He asked his mate, Ben, to assist in the commission of this offence. Ben is not a drug user.

One night, Renee and Tony were walking outside when Alex emerged from the shadows, produced a flick knife and demanded money. Renee escaped and ran down the street in the direction of Ben, who was waiting, armed with his knife. Fortunately for Renee, a taxi drove into a driveway in front of her and she screamed for help. Ben remained in the shadows, unnoticed.

After Alex grabbed Tony's wallet, Alex ran towards the city, where he had earlier parked a stolen car, and fled. Such was Alex's speed that the car swerved onto the wrong side of the road, and struck and killed a cyclist who was riding without lights or a helmet.

Alex has been charged with a number of indictable offences. He has pleaded not guilty to all charges. Alex has eight prior convictions, all for property offences. He is an Aboriginal man.

Practice assessment task questions

1 If Alex is found guilty and sentenced, describe **one** factor that may be considered in sentencing.

(3 marks)

2 Describe **two** powers that each of the following bodies has, and **two** rights that Alex has when dealing with these bodies:

- **a** Victoria Police
- **b** Corrections Victoria.

(8 marks)

3 Outline the jurisdiction of **two** courts that may be or would have been involved in this case.

(6 marks)

4 **a** Outline **two** sanctions that could be imposed on Alex.

(4 marks)

b For **one** of the sanctions identified in your answer to question 4a, discuss the ability of this sanction to achieve the purposes of punishment and protection.

(6 marks)

5 Describe the role of the jury in this case. In your answer, discuss the extent to which the jury helps to ensure fairness and equality.

(8 marks)

6 Discuss **two** difficulties that may be faced by Alex in his case. In your answer, explain how the criminal justice system seeks to address both difficulties.

(10 marks)

Total: 45 marks


2

Unit 2 Wrongs and rights

Source 1 There are a number of human rights protected in Australia, including the right to liberty and the right to be treated with dignity. Sometimes, a breach of human rights can give rise to a civil dispute; for example, this has occurred in relation to refugees and asylum seekers who are seeking to live in Australia. In Unit 2, you will explore civil law and how civil disputes can be resolved, as well as the protection of human rights in Australia.

Area of Study 1 – Civil liability

OUTCOME 1

On completion of this unit, you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

	Chapter	Title	Key knowledge
Unit 2 – Area of Study 1: Civil liability	Chapter 9	Civil liability	• the purposes and types of civil law • key concepts of civil law, including: – breach – causation – loss – limitation of actions – the burden of proof – the standard of proof • possible plaintiffs and defendants to a civil dispute
	Chapter 10	Tort law	• two areas of civil law and for each area of law: – the rights protected by the law – the elements required to establish liability – the limitation of actions – possible defences – possible remedies – the impact of the breach on the parties
	Chapter 11	Other areas of civil law	• two areas of civil law and for each area of law: – the rights protected by the law – the elements required to establish liability – the limitation of actions – possible defences – possible remedies – the impact of the breach on the parties

Area of Study 2 – Remedies

OUTCOME 2

On completion of this unit, you should be able to explain the key concepts in the resolution of a civil dispute, discuss the principles of justice in relation to experiences of the civil justice system, and discuss the ability of remedies to achieve their purposes.

	Chapter	Title	Key knowledge
Unit 2 – Area of Study 2: Remedies	Chapter 12	Remedies	*The principles of justice and experiences of the civil justice system* • the principles of justice: fairness, equality and access • methods used to resolve a civil dispute such as mediation, conciliation and arbitration • institutions that resolve civil disputes such as tribunals, ombudsmen and complaints bodies • an overview of the role and civil jurisdictions of the Victorian courts • the role of the jury in a civil trial • the difficulties faced by different groups in the civil justice system, such as First Nations people, people of low socioeconomic status, young people, and people in regional, rural and remote areas *Remedies* • the purposes of remedies • types of remedies, such as damages and injunctions

Area of Study 3 – Human rights

OUTCOME 3

On completion of this unit, you should be able to explain one contemporary human rights issue in Australia, and evaluate the ways in which human rights are protected in Australia.

	Chapter	Title	Key knowledge
Unit 2 – Area of Study 3: Human rights	Chapter 13	Human rights	• the meaning and development of human rights, including the significance of the *Universal Declaration of Human Rights* • an overview of the ways in which human rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law • one human rights issue in Australia and in relation to that human rights issue: – the nature and development of the human right – the laws that apply to the human right in Australia – possible conflicting attitudes – possible reforms to the protection of the human right in Australia – one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right

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Chapter

8

Introduction to Unit 2 – Wrongs and rights



Source 1 Each year, many people raise awareness of human rights issues in Australia. In Unit 2, you will learn about the ways in which human rights are protected in Australia and consider possible reforms to the protection of human rights.

Aim

The aim of this chapter is to introduce some of the topics covered in Unit 2 of the VCE Legal Studies course. It is intended to support students who did not complete Unit 1 of the course, but it also provides useful revision for those who did. Many of the topics covered in this chapter will be explored in greater detail throughout Unit 2.

Topics covered

The following topics are covered in this chapter:

- the purposes and sources of law
- an overview of criminal law
- the relationship between criminal law and civil law.

Key legal terms

accused a person charged with a criminal offence but who has not been found guilty or pleaded guilty

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

civil 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)

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

damages an amount of money that one party is ordered to pay to another party for loss or harm suffered. 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

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 determine questions of fact in a trial and reach a decision (i.e. a verdict)

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

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

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

remedy any order made by a court (or a tribunal) designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant

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

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

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

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

Key legal cases

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

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

Warm up!
Check what you know about wrongs and rights before you start.

Quizlet
Test your knowledge of the key legal terms in this chapter by working individually or in teams.

8.1

The purposes and sources of law

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 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

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

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

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

Laws are legal rules made by a legal authority such as the **parliament** or the courts. Laws identify different behaviours and actions that are considered acceptable or unacceptable for individuals in the community. By establishing boundaries of acceptable behaviour, laws can regulate a wide range of situations in society and achieve **social cohesion**; that is, they enable people to live together in an orderly, unified and peaceful way.

Laws also protect society and our safety, including the safety of our most vulnerable people, and establish basic human rights. These rights include the right to life, the right to live free from discrimination, and the right to freedom of expression and freedom of movement.

Laws apply to every member of society equally and are enforced by legal bodies or authorities, such as the police and courts. For example, a person who breaks the law by committing an unlawful offence (such as theft, assault or stalking) may be charged by the police and receive a penalty (referred to as a **sanction** or sentence) imposed by the courts. In less serious cases, this sanction may be a **fine**. In more serious cases, it may be a term of **imprisonment**.





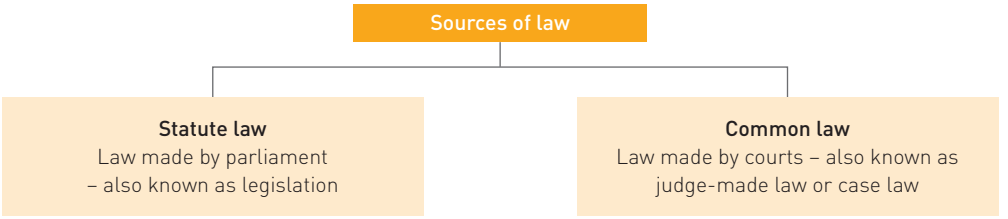


Source 1 Laws are enforceable legal rules. They define a range of different behaviours and actions as acceptable or unacceptable for individuals in society.

Sources of law

'Sources of law' is a term used to refer to the type of law, and more particularly which legal bodies or authorities made the law. There are two main sources of law in Australia:

- statute law – law made by parliament
- common law – law made by the courts.



Source 2 There are two main sources of law in Australia: statute law and common law.

Statute law

Statute law is law made by parliament. Parliament is the supreme (i.e. the highest) law-making body in Australia, meaning that the final law-making power rests with parliament. Laws made by parliament are known as statutes, Acts of Parliament or legislation.

The Parliament of Australia (which sits in Canberra) and the Parliament of Victoria (which sits in Melbourne) are both **bicameral parliaments**, meaning that they each have two houses (or chambers). That means there are two separate 'groups' of people who together make laws.

The Parliament of Australia, which is also known as the Commonwealth Parliament or the Federal Parliament, is made up of the:

- House of Representatives (also known as the lower house)
- Senate (also known as the upper house).

The Victorian Parliament is made up of the:

- Legislative Assembly (also known as the lower house)
- Legislative Council (also known as the upper house).

Each of these houses of parliament is made up of members of parliament who are elected by the people at a general election. Within each parliament, there is also a representative of the King, who acts on his behalf as Australia's or Victoria's head of state.

Each parliament's role is to pass laws for the good government of the country, state or territory. For an Act of Parliament to pass in the Commonwealth Parliament or the Victorian Parliament, it must pass through both houses of parliament. After that, it will receive **royal assent** from the King's representative in that parliament.

An example of a new law made by the Victorian Parliament is the law that prohibits (or bans) individuals from knowingly distributing, or threatening to distribute, an intimate image of another person without consent. This includes publishing, displaying and sending the image to any other person. A person who breaks this law can be sentenced to three years' imprisonment. The Victorian Parliament made this new law in August 2022 by passing the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).

Did you know?

There are nine parliaments in Australia:

- one Commonwealth Parliament
- six state parliaments
- two territory parliaments.

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

bicameral parliament
a parliament with two houses (also called chambers). In the Commonwealth 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)

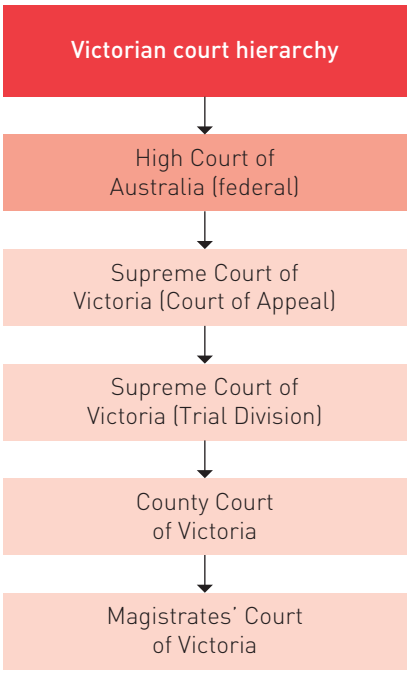
royal assent
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or a governor (at the state level) after which the bill becomes an Act of Parliament (also known as a statute)

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)

Common law is law made by the courts. It is also referred to as judge-made law or case law.

In Australia there are federal, state and territory courts. The three federal (or Commonwealth) courts are the High Court, the Federal Court, and the Federal Circuit and Family Court. The main Victorian courts are the Supreme Court (which has two divisions: the Trial Division and the Court of Appeal), the County Court and the Magistrates' Court. There are also two specialist courts in Victoria – the Coroners Court and the Children's Court – which hear very specific types of cases. In addition, there are specialist divisions within the main courts. One of these is the Koori Court, which sentences Koori offenders to try to reduce the inequality that First Nations Victorians experience when dealing with the courts. The Koori Court sits in the Magistrates' Court and the County Court (as well as the Children's Court).



Source 3 The hierarchy of courts in Victoria; although the High Court is a federal court, it can hear appeals from the Court of Appeal of the Supreme Court of Victoria.

court hierarchy
the ranking of courts from lowest to highest according to the seriousness and complexity of the matters they deal with

The courts in Australia are ranked in a **court hierarchy**, with the higher courts hearing the more serious and complicated cases, and the lower courts dealing with less serious cases and more everyday issues.

The main role of the courts in Australia is to resolve disputes. To do this, the courts will ordinarily apply existing laws (e.g. laws made by parliament) to the facts in cases brought before them, and decide the cases based on those laws. The secondary role of the courts is to make laws as part of their determination of cases. Law made by the courts is called common law, case law or judge-made 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

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

A court can make common law in two situations or circumstances:

- by interpreting the meaning of the words in a statute (an Act of Parliament) when applying the statute to a case the court is hearing (this is known as **statutory interpretation**)
- by deciding on a new issue that is brought before the court in a case where there is no legislation in the area, or when a previous principle of law requires expanding to apply to a new situation.

When a higher court (e.g. the Supreme Court or High Court) decides a case that is the first of its kind – and in doing so establishes or creates a legal principle – the court is said to be setting a **precedent**. Precedents can also be established when a court interprets a statute in a way in which it has not been interpreted before. A precedent may be followed in similar cases that come before the courts in the future. This helps ensure that laws made by the courts are consistent and predictable. These precedents become part of the law.

The scenario below is an example of the courts making common law through the process of statutory interpretation. To resolve the case before it, the court (or judge) was required to give meaning to words or phrases in the relevant statute so it could be applied to resolve the case.

Actual scenario

What is a public place?

In this case, the Supreme Court of Western Australia was required to interpret the words 'public place' to determine whether conduct that took place in a taxi had occurred in a public place. The case involved a taxi driver who had been charged with breaking the law after he used his mobile phone to take images of a female passenger while she was in the front seat of the taxi. The taxi driver argued that he had not broken the law because the conduct did not occur in a public place.



Source 4 A taxi was held to be a 'public place'.

The Court considered past cases that had interpreted the words 'public place' and found that it has been generally held that a person in a motor vehicle located in a public place is treated as being in a public place. The Court also noted that the interior of the taxi could be seen from the outside, and that the passenger photographed was a member of the public. The Court therefore held that the conduct in the taxi was conduct that occurred in a public place.

The accused was convicted (i.e. found guilty of breaking the law). He appealed, but the Western Australian Court of Appeal dismissed the appeal.

Wright v McMurchy (2011) 42 WAR 113

The rule of law

The **rule of law** means that everyone – individuals, groups and the government – is bound by and must adhere to the law. 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 rule of law also means that laws should be such that people are willing and able to abide by them.

In Unit 2, you will explore a number of principles that seek to uphold the rule of law, including:

- the ability of all people who have suffered a **breach** of their rights to use the courts, tribunals and complaints bodies to seek a civil remedy
- the protection of human rights in Australia
- the use of the courts by people to challenge laws made by parliament.

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

breach
the breaking of or failure to fulfil or comply with a duty or obligation

8.1 Check your learning

Remember and understand

1 **Identify** two purposes of laws.
2 **Identify** two sources of law. In your answer, **distinguish** between statute law and common law.
3 **Define** the term 'bicameral parliament'. **State** the names of the houses of the Victorian and Commonwealth Parliaments.
4 **Explain** the meaning of 'statutory interpretation'.

Examine and apply

5 Look at the three images in Source 1 on page 304.
  a **Suggest** one type of law that may apply to each.
  b **Identify** the individual right that each law is protecting.
  c **Explain** how each law aims to achieve social cohesion.
6 Read the scenario 'What is a public place?'
  a **Describe** the issue that needed to be decided by the court in this case.
  b **State** the 'law' that was created in this case.
7 Access the website of the Rule of Law Institute of Australia. A link is provided on your obook pro.
  a Go to the 'Education' section of the website and watch one video that interests you.
  b Prepare a short summary of the video to present to your class.
  c If other students have chosen the same video, join together to collate your summaries and present them to the class as a group.

Weblink
Rule of Law Institute of Australia

8.2

An overview of criminal law

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

crime
an act (i.e. undertaking an action) or omission (i.e. failing to undertake an action) that is against an existing law, harmful both to an individual and to society, and punishable by law (by the state)

Criminal law is the body of law that protects the community by:

- defining acts or omissions that are considered crimes
- establishing maximum penalties or sanctions for people who commit crimes.

A **crime** is an act or omission that:

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

Examples of crimes include murder, theft, damage to property and assault.

There are many laws that make certain acts or omissions (i.e. failures to act) a crime. For example, if a person steals an item from a store, they are breaking a criminal law by committing the offence of theft (stealing). By committing the theft, the person is causing harm to an individual (the owner of the store) and undertaking an action that is punishable by law.

An omission is a failure to act when it is necessary to do so. For example, under Victorian law, a driver who is involved in a motor vehicle accident in which a person is injured or property is damaged is required to immediately stop and, if necessary and possible, help people who are injured – even if the accident is not their fault. A driver who fails to stop and help can be charged with committing a crime. This law also applies to cyclists and people riding motor scooters.



Source 1 Criminal law is the body of law that aims to protect the community by defining acts that are considered to be crimes and setting sanctions for people who commit crimes. A driver who fails to stop when they are involved in a car accident in which a person is injured or property is damaged is breaking a criminal law.

Parties to a criminal case

There are two parties to a criminal case:

- the **accused** – the person who has been charged with allegedly committing a criminal offence
- the **prosecution** – the lawyers and personnel (including the prosecutor) responsible for bringing the criminal case against the accused on behalf of the state or the Crown.

In most criminal cases, while a person or company is generally the victim of the offence committed, they are not a party to the case. This is because the case is between the prosecution and the accused. The victim may, however, be a witness for the prosecution.

The result of a successful criminal prosecution is a finding of guilt and the imposition of a sanction. When there is a finding of guilt, the accused generally becomes known as the offender.

accused
a person charged with a criminal offence but who has not been found guilty or pleaded guilty

prosecution
tthe party that institutes criminal proceedings against an accused on behalf of the state. The prosecution team includes the prosecutor



Source 2 Generally, the victim of the offence committed is not a party to the case. They may, however, be a witness for the prosecution.

Key concepts of criminal law

There are three key concepts of criminal law that you should become familiar with: the presumption of innocence, the burden of proof and the standard of proof.

Presumption of innocence

The **presumption of innocence** is a fundamental right in Australia. It is a guarantee to an accused that they will be assumed to be not guilty (innocent), and as far as possible treated as not guilty, until they are proven or plead otherwise (guilty).

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

Burden of proof

The **burden of proof** (also known as the onus of proof) refers to the party with the responsibility of proving the facts of the case. In a criminal case, the prosecution holds the burden of proof.

However, in certain circumstances, the burden of proof can be reversed; for example, if the accused pleads a defence such as mental impairment. In this situation, the accused has the responsibility of proving they were not of sound mind at the time they 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)

Standard of proof

The **standard of proof** refers to the strength of evidence required to prove or succeed in a case. In a criminal case, the prosecution must prove the case **beyond reasonable doubt**. If an accused has pleaded a certain defence (e.g. mental impairment), then they must prove this defence on the **balance of probabilities**.

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 claim is true

Summary offences and indictable offences

There are two types of crimes or offences:

- summary offences
- indictable offences.

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

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 determine questions of fact in a trial and reach a decision (i.e. a verdict)

indictable offence heard and determined summarily
a serious offence that is dealt with as a summary offence if the court and the accused agree

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

Summary offences are minor criminal offences that are generally heard before a magistrate in the Magistrates' Court. Summary offences include minor theft, drink-driving and minor assaults. The *Summary Offences Act 1966* (Vic) establishes a number of summary offences, as do various other statutes. These statutes also set the maximum sanctions for each offence.

Indictable offences are serious criminal offences that are generally heard before a judge and a **jury** in the County Court or the Supreme Court if the accused pleads not guilty. If the accused pleads guilty, there is no need for a jury (as a jury is only required to determine guilt). Many indictable offences are found in the *Crimes Act 1958* (Vic). Examples of indictable offences are arson, murder and manslaughter.

Certain indictable offences can be heard in the Magistrates' Court as if they were summary offences. These are known as **indictable offences heard and determined summarily**. For example, in Victoria a magistrate may hear and determine any offence that is punishable by no more than 10 years' imprisonment – such as obtaining property by deception or destroying property where the amount involved does not exceed $100 000. The accused must give their consent to have the case heard in the Magistrates' Court rather than by a judge and jury in a higher court.

Sanctions

When a person pleads guilty or is found guilty of a criminal offence, the court may impose a penalty or sanction. In Victoria, the sanctions available to courts are set out in a statute called the *Sentencing Act 1991* (Vic). The most severe sanction, and the sanction of last resort, is imprisonment, which requires the offender to spend a specified period of time in prison. Two other common sanctions are:

- a **community correction order** – a flexible, non-custodial sanction (i.e. one that does not involve a prison sentence) that requires the offender to comply with certain conditions attached to the order while remaining in the community. For example, in addition to not reoffending for a specified period of time, the offender may be required to perform unpaid community work and/or undertake treatment and rehabilitation for alcohol or drug addiction
- a fine – a sanction that requires the offender to pay an amount of money to the court.

The following scenario examines a case where the sanction was imprisonment.

Actual scenario

Tragic stabbing of partner leads to 18 years' imprisonment

On 29 April 2019, a 39-year-old man pleaded guilty to murdering his partner on 7 July 2018.

The offender and the victim first met in 2001. They had three children together. At the time of the offence, they all lived together in a house in Cranbourne North. According to the victim's family, the offender exhibited controlling behaviour towards her.

In the weeks before the murder, the offender's mood and demeanour had deteriorated. He was struggling with depression due to his loss of employment and income, and had

been self-medicating with alcohol and cannabis. In the days leading up to the murder, neighbours observed the offender acting strangely.

On the day of the murder, the offender attacked the victim. Horrific violence then followed, during which the victim was seriously injured. The offender ultimately put his three children and dog in the car, and drove away. Neighbours were alerted. By the time paramedics arrived, the victim had passed away. The offender was arrested that afternoon.

In sentencing, the Supreme Court judge, Justice Champion, said that this was a brutal killing, witnessed by three children. He said that the killing of an intimate partner is one of the most serious forms of offending, and that the Court must emphasise that through sentencing. Taking all the factors into account, the offender was ordered to serve a period of 18 years' imprisonment. He must serve a minimum of 14 years before he is eligible for parole.

R v Eckersley [2020] VSC 22 (30 January 2020)

8.2 Check your learning

Remember and understand

1 Using two examples, **define** the term 'crime'.

2 Copy the sentences below and fill in the following gaps.
   - **a** The _____ and the _____ are the parties to a criminal case.
   - **b** A possible outcome of a criminal case is a finding of _____ and the imposition of a _____.
   - **c** In a criminal case, the _____ of _____ is on the prosecution.
   - **d** The standard of _____ in a criminal case is _____ _____ doubt.

Examine and apply

3 Your friend believes that a person accused of a crime should be presumed to be guilty until they are proven otherwise. Devise a way to convince your friend that it is better for a person to be presumed innocent until they are proven to be guilty.

4 Conduct some research to find and **identify** three examples of indictable offences and three examples of summary offences.

5 Read the scenario 'Tragic stabbing of partner leads to 18 years' imprisonment'.
   - **a** **Identify** the words used in the scenario that suggest that this is a criminal case and not a civil dispute.
   - **b** **Describe** the central facts of the case.
   - **c** Would this case have been heard by a jury? **Justify** your answer.
   - **d** **Describe** the sanction imposed by the Supreme Court. Do you agree with the sanction imposed? Give reasons for your answer.
   - **e** The Supreme Court judge who heard the case noted that the killing of an intimate partner is one of the most serious forms of offending.
     - i **Identify** at least two other cases involving a person killing their partner.
     - ii As a class, discuss this type of offending.
     - iii Conduct some research to **identify** what is being done by the parliament and courts in response to this type of offending.

8.3 The relationship between criminal law and civil law

In contrast to criminal law, which protects the community by creating and defining crimes and setting out sanctions (penalties) for people who commit crimes, **civil law** is an area or body of law that sets out the rights and responsibilities of individuals, groups and organisations. It also provides ways to resolve private disputes that may arise when these rights have been infringed. In this way, civil law protects the rights of individuals, groups and organisations.

Civil law aims to uphold rights by enabling a party who has suffered harm or loss because of a breach of their rights to seek a **remedy**. The purpose of a remedy is to return that party (known as the **plaintiff**) to the position they were in before their rights were infringed. The most common type of civil remedy is **damages**, which is an amount of money that must be paid by the party who has infringed the plaintiff's rights to make up for the harm or loss the plaintiff has suffered.

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

remedy
any order made by a court (or a tribunal) designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant

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

damages
an amount of money that one party is ordered to pay to another party for loss or harm suffered. It is the most common remedy in a civil claim

assault
the intentional or reckless use of force against another person without a lawful excuse (also extends to other types of assault-related offences)

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

The overlap between criminal law and civil law

There is some overlap between criminal and civil law. Some behaviour, such as an **assault**, may result in a criminal prosecution by the state as well as a civil action by the victim. The difference between the two actions is the consequences. For example, where the wrongful behaviour results in both a criminal and a civil action:

- the two cases will be heard separately and may even be heard in different courts
- the party initiating (bringing) the case (i.e. the prosecution in the criminal action and the plaintiff in the civil action) will need to prove different elements to succeed. This means it may be possible for the person who undertook the wrongful behaviour to be found in the wrong or liable in the civil case, but not guilty in the criminal case relating to the same behaviour
- The standard of proof required to succeed in each case will differ. This is because the standard of proof required to succeed in a criminal case is much higher than in a civil dispute. For example, to succeed in a criminal case, the prosecution must prove that the person who allegedly committed the wrongful behaviour (i.e. the accused) is guilty beyond reasonable doubt. By contrast, to succeed in a civil dispute, the plaintiff must prove their version of the facts is more believable (likely or probable) than the other party's (i.e. the **defendant**'s) version of the facts.

The scenario below highlights how a criminal case can also result in a corresponding civil case or action.

Hypothetical scenario

Footy fight results in two legal actions

Willow, a 39-year-old man, was charged with assault after he struck an innocent bystander, Billy (aged 21), during a crowd fight at a local football match. After the incident, which was captured on security camera, Willow admitted striking Billy once in the face with his elbow,



Source 1 An assault can result in a criminal case and civil action.

fracturing his nose and jaw; although he claimed the blow was accidental.

Nine months after the incident, Willow pleaded guilty to the charge in the Magistrates' Court and was ordered to pay a $2500 fine. Shortly after the criminal case was finalised, Billy initiated a separate civil action against Willow. Billy sought to be compensated for the medical costs he had incurred after being struck, and the physical and emotional harm he suffered as a result of the assault.

Differences between criminal cases and civil disputes

The key differences between criminal cases and civil disputes are set out in Source 2.

Action	Criminal case	Civil dispute
Person bringing the action	Prosecution, on behalf of the state	Plaintiff
Person defending the action	Accused	Defendant
Case name	*Director of Public Prosecutions (DPP) v Accused* (also *R v Accused*)	*Plaintiff v Defendant*
Consequence of action	Sanction	Remedy
Party who has the burden of proof	Prosecution	Plaintiff
Standard of proof	Beyond reasonable doubt	Balance of probabilities (i.e. more likely than not)
Evidence or investigation	The police investigate the matter on behalf of the state	The plaintiff gathers the evidence to establish the case
Heard by a jury?	• No jury in the Magistrates' Court • Jury of 12 in higher courts when the accused pleads not guilty	• No jury in the Magistrates' Court • Jury of six in higher courts is optional

Source 2 Some of the differences between criminal cases and civil disputes

8.3 Check your learning

Remember and understand

1 **Distinguish** between criminal and civil law.

2 **Explain** how one incident can result in both a criminal case and a civil dispute.

3 **Explain** why it is possible for an accused to be found not guilty in a criminal case but liable in a civil action.

Examine and apply

4 Read the scenario 'Footy fight results in two legal actions'.

- **a** **List** all the words in the scenario that relate to the criminal component of this case, and all the words that relate to the civil component.
- **b** **Explain** why Willow had criminal and civil actions brought against him.
- **c** **Describe** the sanction imposed upon Willow.
- **d** **Suggest** one remedy Billy might be seeking in the civil action.

5 Find two media articles about civil disputes. Highlight the words in each article that indicate the dispute is a civil matter (rather than a criminal case). **Summarise** the facts of each dispute.

Chapter

9

Civil liability



Source 1 Civil law is an area of law that governs disputes between individuals, groups and organisations. In this chapter, you will learn about the purposes and types of civil law, and explore the different parties involved in civil disputes to determine whether they may be liable for loss suffered to another person. 'Liability' is a term used to describe the legal responsibility of a party (i.e. a person or group) for any loss or harm caused to another party because of a breach of civil law. For example, in 2020, nearly $7 million was paid to more than 70 people who suffered injuries after being caught in a stampede at the Falls Festival in Lorne in 2016.

Outcome

By the end of **Unit 2 – Area of Study 1** (i.e. Chapters 9, 10 and 11), you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

Key knowledge

In the chapter, you will learn about:

- the purposes and types of civil law
- key concepts of civil law, including
  - breach
  - causation
  - loss
  - limitation of actions
  - the burden of proof
  - the standard of proof
- possible plaintiffs and defendants to a civil dispute.

Key skills

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

- define and use legal terminology
- research and analyse relevant information about civil law
- classify civil law according to its type
- explain the purposes and key concepts of civil law.

Key legal terms

accessorial liability the responsibility imposed on one person for the wrongdoing of another, where there is a connection to the wrongdoing (e.g. where the first person encourages the other person to cause 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 claim is true

causation the direct relationship between one event (Event 1) and another event (Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

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

contract law an area of civil law governing the validity and enforceability of agreements made between two or more parties

damages an amount of money that one party is ordered to pay to another party for loss or harm suffered. It is the most common remedy in a civil claim

defamation a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

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

limitation of actions the restriction on bringing a civil law claim after the allowed time

loss a type of harm or damage suffered by a person. It can involve both economic and non-economic loss

negligence a type of tort that involves a breach of a duty of care, causing loss or harm

nuisance a type of tort that involves interference with a person's right to use and enjoy private and/or public property

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

remedy any order made by a court (or a tribunal) designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant

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)

tort a term that literally means 'wrong'; a wrong that interferes with a person's legally protected interests

trespass a type of tort involving the interference with or intrusion upon a person's body, property or goods without the consent of that person

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 the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

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



Warm up!
Check what you know about civil liability before you start.

Quizlet
Test your knowledge of the key legal terms in this chapter by working individually or in teams.

9.1 Purposes and types of civil law

Key knowledge

In this topic, you will learn about:

- the purposes and types of 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 liability
the legal responsibility of a party for loss or harm caused to another party because of a breach of civil law

tort
a term that literally means 'wrong'; a wrong that interferes with a person's legally protected interests

Some of the laws made by parliament and the courts are known as **civil law**. Civil law regulates disputes between individuals, groups and organisations. Civil law enables people to seek compensation when they have been harmed or wronged because of a breach that has occurred.

Civil liability is a term used to describe the legal responsibility of a party (i.e. an individual, group or organisation) for loss or harm caused to another party because of a breach of civil law. In this topic, you will explore the purposes and types of civil law.

Purposes of civil law

Civil law has several purposes. Civil law aims to:

- provide guidelines for acceptable behaviour – civil law (including **tort** law) establishes what is acceptable and what is not, so that people can live together in harmony and social cohesion can be achieved. If these guidelines did not exist, some individuals might exploit or abuse the rights of others. For example, if there was no law regulating the standard and quality of toys, some toy manufacturers might make toys using the cheapest materials without concern for the safety of the children playing with them. Similarly, there are laws that set minimum standards and conditions for workers in workplaces, such as duties around health and safety, pay and conditions. If there were no such laws, workers – particularly vulnerable workers – may be exploited
- protect the rights of individuals – key rights are enshrined in civil law, including the right to be protected from false statements that might damage your reputation, the right to have a promise made under a contract fulfilled, and the right not to be harmed



Source 1 In Victoria, laws are in place to protect people with disabilities from discrimination. If those laws are infringed, it may give rise to a civil dispute.

- provide an avenue for people to seek compensation where a breach of civil law has occurred – individuals can seek compensation for a breach of civil law through the courts, tribunals, complaints bodies and ombudsmen (you will explore these dispute resolution bodies in Chapter 12). If there were no dispute resolution bodies, there would be no specialised bodies available to help people resolve their disputes, so disagreement would linger in the community. This would impact on social cohesion and create disharmony
- remedy the harm that has been suffered – when a person's rights have been infringed, civil law provides a way to return the harmed person, as far as possible, to the position they were in before the harm occurred. This is achieved through the awarding of civil **remedies**. The most common civil remedy is an amount of money paid as compensation (i.e. **damages**) to the plaintiff for the loss they suffered.

Certain types of civil law also have specific purposes. For example:

- **contract law** aims to ensure that people who make promises under a contract (i.e. an agreement) fulfil those promises, or else they may have to compensate the other party to the contract if they fail to comply with it
- laws relating to **negligence** establish principles about when a person owes a **duty of care** to another; if the person breaches that duty of care, they may be responsible for any loss suffered
- laws relating to **wills** aim to provide a consistent set of rules about the way a person's will (i.e. their instructions about how to deal with their property after they die) must be carried out. If a deceased person did not leave a will, the law sets out the way this must be done to provide a fair and equitable distribution of assets
- laws relating to **nuisance** recognise that people should have a right to enjoy and use their land, or public land, free from interferences or annoyance. The purpose of nuisance laws is to ensure that people can enjoy this right, by establishing guidelines on what counts as an interference or annoyance
- laws relating to **defamation** aim to ensure that a person's reputation is not harmed because of false statements that are made about that person.

The following scenario is an example of a civil dispute involving asbestos.

remedy
any order made by a court (or a tribunal) designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant

damages
an amount of money that one party is ordered to pay to another party for loss or harm suffered. It is the most common remedy in a civil claim

contract law
an area of civil law governing the validity and enforceability of agreements made between two or more parties

negligence
a type of tort that involves a breach of a duty of care, causing loss or harm

duty of care
(in relation to negligence) the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

will
a document that specifies how a person would like their assets to be distributed after they die, and who they would like to carry out their wishes

nuisance
a type of tort that involves interference with a person's right to use and enjoy private and/or public property

defamation
a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

Actual scenario

Large damages payout for asbestos sufferer

Asbestos is a term used for a group of naturally occurring materials that can cause serious illnesses, including various forms of cancer. Asbestos-containing materials were popular products used in building in Australia from the 1940s until the mid-1980s, at which time a national ban on most asbestos-containing materials was imposed. Asbestos is now completely banned in Australia because of the harm it can cause to people.

The plaintiff in this case grew up in the Melbourne suburb of Sunshine, close to an asbestos cement sheet factory. As a child, she played on mounds of dust at the rear of the factory, and walked past the factory every day. On windy days, dust would be blown in the air. She continued to visit the family home regularly after she was married.

In April 2021, the plaintiff was diagnosed with mesothelioma, a cancer that forms in the lining of the lungs or abdomen, and is caused by the inhalation of asbestos. The plaintiff sued the operator of the factory for negligence. She sought damages, claiming that her illness had dramatically affected her life expectancy.

On the second day of trial, the defendant admitted that it owed a duty of care to the plaintiff, and that it had breached that duty of care. Therefore, the only question remaining for the Supreme Court judge was to assess the amount of damages that should be paid to the plaintiff.

The plaintiff was awarded damages for past care, future care and loss of expectation of life. The total amount awarded was $580 000. The defendant appealed the decision, including on the basis that the damages amount awarded was 'manifestly excessive'. The **appeal** was refused (meaning it was not successful).



Source 2 Asbestos is highly dangerous and can result in negligence claims by those exposed to it.

Reid v Seltsam Pty Ltd [2021] VSC 653 (7 October 2021)

appeal
an application to have a higher court review a ruling (decision)

Types of civil law

There are several types of civil law. These include laws relating to:

- negligence – this occurs when someone owes a duty of care to another person and breaches that duty, causing harm or loss to the other person (e.g. a doctor is careless during a medical procedure and something goes wrong, causing physical injury and pain to the patient)
- **trespass** – this occurs when someone interferes with another person, their land or their goods, and that interference causes damage (e.g. destroying another person's car may give rise to a claim for trespass to goods)
- defamation – this relates to the publication of material that causes damage to another person's reputation. For example, if Person A publishes a statement about Person B – in a newspaper article or on social media platforms such as Facebook and Twitter – that is false and harmful to Person B's reputation, this may lead to a defamation claim by Person B
- nuisance – this relates to an individual's right to use and enjoy both public and private property. A nuisance claim may be made by a person who is unable to enjoy their own home because of some sort of interference (e.g. significant noise or odour coming from a factory nearby)
- wills and inheritance – these laws regulate wills, including when they are valid. The laws give guidelines about the decisions made by a will-maker and how a person's estate is distributed if there is no will
- contract – these laws cover the validity of contracts (i.e. legal agreements) and the rights available to a person if a valid contract has been breached. A claim for breach of contract may involve a contracting party who has failed to do something, or has done something contrary to what they agreed to do as part of a contract. Many statutes regulate issues that may arise in contracts, such as unfair terms and guarantees (given by a seller when they sell goods)
- employment – these laws deal with disputes between employers and employees. Disputes often arise in the workplace in relation to pay, conditions, harassment, discrimination and termination of employment
- equal opportunity and discrimination – these laws aim to protect individuals from bias, prejudice or vilification based on a personal attribute such as their sex, marital status, race or religion.

trespass
a type of tort involving the interference with or intrusion upon a person's body, property or goods without the consent of that person

Study tip

Gather newspaper articles and social media references about the different types of civil law. Make note of the different legal terms used for each type of civil law. Learn these legal terms and definitions, and use them correctly to improve your performance in assessment tasks.

As part of this Area of Study, you will examine two areas of civil law. Some of the areas of law covered briefly above are explored further in Chapters 10 and 11.

The following scenario is an example of a defamation claim involving Google, which went all the way to the High Court.

Actual scenario

Google wins defamation case

In this case, the plaintiff was a lawyer and had practised for many years in Melbourne. In 2004, he and another man were charged for alleged criminal offences. However, the charges were withdrawn. Many articles were published about the criminal case in the print media and online.

In early 2016, the plaintiff became aware that an internet search of his name using a Google search engine produced search results showing a snippet (a small part) of an article about him published in 2004. The article could then be accessed via a weblink. The plaintiff commenced proceedings in the Supreme Court of Victoria, claiming damages for defamation from Google as publisher of the material. Google denied publication and relied on various defences to defend the claim.

At trial, the Supreme Court judge found partly in favour of the plaintiff and awarded him damages. Both parties appealed the decision to the Court of Appeal. The Court of Appeal dismissed the appeals.

Google appealed to the High Court. One of the grounds of appeal was that it was wrong to conclude that Google had 'published' the material. The majority of the High Court agreed and found that Google was not liable as a publisher for including within its search results a link to the article. It found that the search result is a reference to something else, and that facilitating (helping) a person's access to contents on another page is not participating in the process of communicating its contents to that person. The appeal was therefore allowed.

Google LLC v Defteros [2022] HCA 27 (17 August 2022)

9.1 Check your learning

Remember and understand

1 **Describe** two purposes of civil law.

2 **What** is a remedy? **What** is the main purpose of a remedy?

3 **Identify** one purpose of the following types of civil law:
- **a** negligence laws
- **b** defamation laws
- **c** laws governing wills
- **d** laws governing contracts
- **e** nuisance laws.

Examine and apply

4 Read the scenario 'Large damages payout for asbestos sufferer'.
- **a** **Identify** the type of civil law that was relevant in this case.
- **b** **Name** the two parties in this case.
- **c** **Describe** the key facts of the case.
- **d** Conduct some research and **identify** at least two other cases involving asbestos and the damages awarded in each case. **Summarise** each of the cases.

5 Read the scenario 'Google wins defamation case'.
- **a** **Who** was suing who?
- **b** **What** type of civil law does this article refer to? **What** is the aim of this law?
- **c** Which courts were involved in this case, and **why**?
- **d** **Explain** what is meant by the term 'the appeal was allowed'.

6 Collect two articles that refer to two different civil cases. Write a report about the two cases. Your report should include:
- a description of the main issues of each case
- a discussion about how the civil law referred to in each article aims to achieve two or more purposes.

9.2 Key concepts of civil law

Key knowledge

In this topic, you will learn about:

- **key concepts of civil law, including breach, causation, loss, limitation of actions, the burden of proof and the standard of proof.**

If there has been a breach of civil law, the person whose rights have been infringed is referred to as the aggrieved party, the wronged party or the **plaintiff** (in court). The party alleged to be in the wrong is referred to as the wrongdoer or the **defendant** (in court).

The plaintiff may use a dispute resolution body such as a court or a tribunal to **sue** the defendant and try to obtain a remedy to compensate them for the **loss** they have suffered.

A number of key concepts of civil law are relevant when a party sues another party. These concepts include breach, causation, loss, limitation of actions, the burden of proof and the standard of proof. Each concept is discussed in detail in this topic.

plaintiff
(in a civil case) a party who makes a legal claim against another party (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)

loss
a type of harm or damage suffered by a person. It can involve both economic and non-economic loss

breach
the breaking of or failure to fulfil or comply with a duty or obligation

Breach

In most types of civil law claims, the plaintiff has to prove that there has been a **breach** by the defendant. This means that the defendant has failed to observe a law or obligation imposed on them. As the plaintiff has the responsibility, or onus, to prove their case, they need to establish that the defendant is in breach. The defendant may argue as a defence that there has been no breach.



Source 1 Sometimes children (i.e. those aged under 18 years) can be involved, directly or indirectly, in a civil dispute, such as when their rights need to be protected. Generally, children who wish to sue will do so through an adult known as a 'litigation guardian'.

The nature of the breach depends on the area of law. For example:

- In contract law, the plaintiff may allege that the defendant has breached an agreement that was reached between them – in other words, that the defendant has failed to fulfil an obligation or promise that they made to the plaintiff. For example, if a person hires a jumping castle for a birthday party, a contract is formed with the supplier that governs the supply of that castle. One of the terms of the contract may be that the castle is to be set up at the person's house by 11 am, in time for the party. If the supplier fails to complete the installation by that time, or if the castle never arrives, the contract may have been breached.
- In negligence, the plaintiff may allege that the defendant breached their duty of care to the plaintiff. This means that the defendant had an obligation or duty to care for the plaintiff, and that duty was not complied with. For example, in schools, teachers supervise the grounds before, during and after school hours. If a school fails to roster teachers to supervise a particular area of the grounds before school starts each morning, and a student is injured in that area, it is possible that the school has breached its duty of care to its students.

Study tip

You will examine breach, causation, loss, and limitation of actions more closely when you investigate two areas of civil law in Chapters 10 and 11. For now, you should at least understand the meaning of each of these key concepts and be able to list a few examples of each.

- In a sexual harassment claim, the plaintiff may allege that the defendant breached the relevant laws that prohibit people from sexually harassing another person. For example, if a manager makes sexual comments to a worker in the workplace, the worker could make a claim alleging that the employer has failed to comply with laws that prohibit sexual harassment.
- In a discrimination claim, the plaintiff may allege that the defendant breached the relevant laws that prohibit people and organisations from discriminating against a person on the basis of their profession, gender identity, race, religion or other characteristic. For example, a law in Victoria states that an educational authority (e.g. a school) must not discriminate against a person in deciding who should be admitted as a student. If a school chooses not to enrol students because of their race or religion, the school may be in breach of that law (though there are exceptions to this).

The scenario below provides an example of a breach of contract law.

Hypothetical scenario

Contract to provide editing services

Rakesh runs his own editing business from home. Two months ago, he was contracted by a small accounting firm to edit various reports they were preparing for their clients. Rakesh and the accounting firm agreed that he would be paid a flat fee of $2000 per report, and that he would review six reports in total. Rakesh completed the job on time and issued an invoice for $12000. The accounting firm has only paid $6000 of the invoice, and now says that the agreed rate was $1000 per report.

Causation

In civil law cases, another key element that a plaintiff normally needs to prove is **causation**. The plaintiff must prove that the defendant's actions caused or resulted in the harm suffered by the plaintiff, and that the harm would not have occurred if the defendant had not acted in the way they did. That is, there needs to be a causal link between the actions (or inactions) of the defendant, and the harm that the plaintiff suffered.

causation
the direct relationship between one event (Event 1) and another event (Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

For example, imagine that the plaintiff alleges that the defendant has been playing loud music all night long for several months. The plaintiff may be able to bring a nuisance claim against the defendant, alleging that the defendant has disturbed the plaintiff's enjoyment of their property. If the plaintiff alleges that they no longer sleep at night, are suffering from anxiety and have lost their job, the plaintiff needs to establish that the defendant's actions caused all of those things, and those things were not caused by something else. For example, is the plaintiff not sleeping for another reason, such as a health condition? Or did the plaintiff lose their job not because they cannot sleep or concentrate due to the defendant's actions, but because they are not very good at performing their duties at work?

There can be an intervening event or a break in the chain of causation. This happens when something occurs after the defendant's actions, which may be considered to have actually caused the injury or loss, rather than the defendant's actions. For example, if Bill injures Babak in a fight, Babak might have a civil law claim against Bill. But what happens if Babak had surgery for his injuries, and the surgeon made the loss suffered by Babak worse? Did Bill cause the loss, or did the surgeon? It could be argued that the surgeon's actions broke the link between Bill's actions and Babak's loss or injury.

The following scenario is an example of where the plaintiff alleged there was a break in the chain of causation.

Actual scenario

Alleged break in the chain of causation

In this 1940 case, the High Court had to consider whether there was a break in the chain of causation after a man died, and his wife (the plaintiff) sued for negligence.

The defendant company manufactured and supplied sulphuric acid (a dangerous substance) in jars. The jars were hazardous for persons handling them, because if the jars broke then the acid could escape.

The plaintiff's husband had to handle the jars as part of his job. As he was trying to lift one of the jars to move it, the jar broke and the contents spilled over him. He ran inside a nearby building and began to wash the acid from his legs. He was treated at a hospital and was told to report the next day to a doctor, but he did not do so. The plaintiff treated her husband with a medicine that a chemist advised her was a proper treatment for burns. Her husband developed an infection and died.

The plaintiff sued the defendant company on her own behalf. The lower court found that the particular jar was defective, and was of an unsafe and dangerous type. The plaintiff was awarded damages. The defendant company appealed to the High Court. One of the issues that the High Court had to decide was whether the death was caused by a new and independent cause – that is, the later infection that the husband developed following the treatment by his wife – or by the initial defective jar and the spilling of the acid.

The High Court found in favour of the plaintiff. The High Court disagreed that the new infection was the actual cause of the death, noting that the death could be linked to the sulphuric acid, because an infection is not an abnormal result of such an injury. That is, the High Court recognised that a person exposed to a traumatic injury could get an infection as a result. There was also no evidence that the plaintiff was at fault; rather, she had treated her husband to the best of her ability upon the advice of the chemist. Therefore, the High Court did not find there was a break in the chain of causation.

Adelaide Chemical & Fertilizer Co Ltd v Carlyle (1940) 64 CLR 514



Source 2 'Loss' in a civil law claim can include property damage.

Loss

As a general rule, a plaintiff can only obtain a legal remedy, such as damages, if it can be proved that they have suffered loss or harm. 'Loss' in a civil claim can include:

- economic or financial loss – for example, loss of wages, loss of earning capacity or loss of profits. For personal injury claims, loss may also include money spent on medical expenses
- property damage – for example, a car may have been damaged, or there might be damage to a house, clothing or other goods
- personal injury – for example, the plaintiff might have suffered cuts, bruises, broken bones or loss of a limb
- pain and suffering – for example, mental anguish, anxiety or depression
- loss of amenity – for example, loss of enjoyment of life, loss of job satisfaction, loss of family life or loss of enjoyment of hobbies.

The following scenario is an example of a civil law claim for damages involving Australian Football League (AFL) players who allegedly suffered concussion.

Actual scenario

AFL class action

In March 2023, AFL players who had suffered concussions in training or when playing in AFL games joined together in a class action to seek compensation from the AFL. Concussion is a type of brain injury that affects brain function, and is caused by a knock or blow to the head or a rapid change in motion.

A Melbourne law firm commenced the class action against the AFL in the Supreme Court of Victoria, alleging that the lead plaintiff (Jarad Rooke) had suffered injury, loss and damage, including head injury and psychiatric injury, as a result of concussions suffered as an AFL player. A class action is a type of proceeding in which people who have a similar or same claim against the same person, related to the same circumstances, join together and make a single claim against the defendant. The lead plaintiff takes responsibility for initiating and conducting the case on behalf of the group of people that form part of the 'class' or 'group'. The others in the group are known as group members.

The lead plaintiff alleges that the AFL ought to have known of the potential long-term consequences of concussion, that it owed AFL players a duty of care, and that duty of care was breached. Some reports suggest that the damages sought could be as high as $1 billion, depending on how many players form part of the class action. Other claims have also commenced against the AFL in relation to similar or related issues, and as at the time of print are ongoing.



Source 3 A Melbourne law firm has commenced a class action against the AFL on behalf of players who had allegedly been injured while playing football.

Limitation of actions

For almost all civil claims, there is a time period within which a wronged party can sue the wrongdoer. This is known as the **limitation of actions**. Once that time period has passed, then the defendant can use the defence that the plaintiff is too late to obtain any remedy.

limitation of actions the restriction on bringing a civil law claim after the allowed time

A time limit within which a person must initiate a claim is imposed so that disputes can be resolved efficiently, and so that a defendant does not have to be subjected to a claim a significant time after the alleged acts (or omissions) occurred. A delay in issuing a claim can also impact on the reliability of the evidence (e.g. the evidence of people who saw what happened), including physical evidence.

Each state in Australia has its own statute that sets out the time period within which a civil claim can be commenced. In Victoria, this statute is the *Limitation of Actions Act 1958* (Vic). Source 4 lists the time periods within which an action for certain types of civil claims can be commenced in Victoria.

Type of claim	Time period
Breach of contract	Six years
Under tort law	Six years
Under tort law where there is personal injury consisting of a disease or a disorder	Three years
Defamation	One year
An action to recover arrears of rent	Six years

Source 4 The time periods within which a civil law action can be initiated for certain types of civil claims

In some circumstances, the time period can be extended, depending on the nature of the case. For example, a person who believes they have a defamation claim may apply to a court for an order extending the limitation period (which is one year). If the court is satisfied that it is not reasonable for the plaintiff to commence an action within one year from the date of the publication of the defamatory material, then the court may extend the time period by up to three years.

There are some civil claims for which there is no limitation period. For example, for people who have a civil claim for physical or sexual abuse that they suffered as a minor, or psychological damage that arose out of that abuse, there is no time period within which that claim might be issued. Victoria was one of the first states to amend its limitation periods for children who had suffered sexual abuse.

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 usually 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 claim is true

The burden of proof

The **burden of proof** is the responsibility of proving the facts of a case. This is sometimes called the 'onus of proof'. In every court case, one party has this responsibility. In a civil case, the burden of proof lies with the plaintiff. This means that the plaintiff must present evidence to establish that the defendant is in the wrong (or liable for the harm that has been inflicted on the plaintiff). Placing the burden of proof on the plaintiff follows the idea or principle that it is only fair and just that if someone alleges that another person is liable for the loss or damage suffered by them, then the first person should prove those allegations.

It is not the defendant's responsibility to prove they are not liable. However, there are some situations where a defendant may need to prove an allegation. This includes where a defendant raises a **counterclaim**. This is a claim made by the defendant against the plaintiff in response to the plaintiff's claims in the same case.

The standard of proof

The **standard of proof** is the degree or extent to which a case must be proven in court. In civil cases, the plaintiff must prove the case on the **balance of probabilities**. This means that the plaintiff must prove that they are most likely to be in the right, and the defendant is more likely to be in the wrong.

A case where the County Court had to consider whether the plaintiff had satisfied the standard of proof, and discharged their burden of proof, is described below.

Actual scenario

Negligence claim not proven

The plaintiff claimed that he was struck at a bus stop by a bus that he was intending to board in Moorabbin, a suburb of Melbourne, late one evening in September 2017. He was 56 years old at the time, and he had been out alone, attending music venues. He had consumed a small amount of light beer.

The plaintiff claimed that because of being struck by the bus, he had suffered some minor physical injuries and significant psychological injuries. He sued the bus driver (the defendant), alleging that the bus driver was negligent. The defendant denied he struck the plaintiff as the plaintiff alleged, and denied he was negligent.

The plaintiff gave evidence over several days, and two further witnesses were called about whether the defendant was liable. Those witnesses included another bus driver, who picked up the plaintiff after the incident, and a manager who had received a complaint from the plaintiff about the incident and who had completed a case report. Photographs of the bus stop were provided as evidence. The defendant chose not to give evidence.

The County Court judge found there was little doubt that an incident occurred at the bus stop, and that the plaintiff had at least suffered injuries to his face at the time he boarded the bus. However, the judge noted that there were many possibilities as to what had occurred at the bus stop, and was not satisfied that the plaintiff had established the case against the defendant.

In deciding in favour of the defendant, the judge said:

> As with any other civil proceeding of this type, the plaintiff bears the burden of proof of the defendant's negligence, the nature and extent of injury, causation and entitlement to damages before a judgment can be entered in his favour ...
> ... Precisely what did occur at the bus stop and whether those events lead to a conclusion that [the defendant] was negligent are matters in respect of which [the plaintiff] bears the burden of proof ...
> ... [The plaintiff] was an unsatisfactory witness. I am simply unable to be satisfied that his version of events is preferable to any other of a number of explanations. In those circumstances I cannot be satisfied that he has proved any negligence on behalf of [the defendant].

Moore v Goldhagen [2023] VCC 238 (23 February 2023)

9.2 Check your learning

Remember and understand

1 **What** is a counterclaim? **How** is a counterclaim relevant to the burden of proof?

2 **Define** the following terms:
   - **a** breach
   - **b** causation
   - **c** balance of probabilities
   - **d** intervening event
   - **e** property damage.

   Now use each term in a sentence about a civil dispute (be as inventive as you like).

3 **What** is the justification for imposing a time period within which a civil claim can be initiated?

4 **Describe** two types of loss. **Provide** an example of each type of loss.

Examine and apply

5 Read the scenario 'Contract to provide editing services'. **What** is the main issue in dispute in this case?

6 Read the scenario 'Alleged break in the chain of causation'.
   - **a** **What** law did the plaintiff allege the defendant breached?
   - **b** **What** event did the defendant allege broke the chain of causation?
   - **c** **What** was the decision of the High Court?
   - **d** Do you agree with this decision? Discuss with your class.

7 Read the scenario 'AFL class action'.
   - **a** **What** type of law is alleged to have been breached?
   - **b** **What** is a class action?
   - **c** **What** loss was alleged to have been suffered?
   - **d** Conduct some more research on class actions. Will all the players be a plaintiff? **Explain** your answer.
   - **e** Conduct some research on this class action. **Summarise** the current stage of the action and whether there has been any resolution.

8 For each of the following civil claims, **identify** the time period within which the plaintiff must initiate their claim.
   - **a** Nava is a landlord who is owed rent.
   - **b** On a website, Raja is described as a 'vampire who is out to get people's blood because they are so mean and awful'. The website has been viewed over 40 000 times.
   - **c** Amélie and Yilong entered into a contract for the provision of services relating to Amélie's business. Amélie claims that Yilong has breached the contract by providing the services too late.
   - **d** Georgos is suing his former employer because he contracted a breathing disease as a result of his work conditions.

9 Read the scenario 'Negligence claim not proven'.
   - **a** **Describe** the key facts of the case.
   - **b** **Explain** why the defendant has no obligation to give evidence in a civil case.
   - **c** **Describe** the relationship between the burden of proof and the fact that judge found the plaintiff to be an unsatisfactory witness.

Reflect and evaluate

10 'Limitation periods inhibit justice from being achieved. If a civil dispute arose years ago, a plaintiff should be able to pursue it.' Do you agree? Give reasons for your answer.

9.3 Possible parties to a civil dispute

Key knowledge

In this topic, you will learn about:

- possible plaintiffs and defendants to a civil dispute.

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

In **civil disputes**, there can be more than one plaintiff and more than one defendant. When faced with a possible civil claim, the parties may need to consider:

- who the plaintiffs might be
- who the defendants might be.

Plaintiffs and defendants can be human beings, companies (which are separate legal entities from the directors and managers who run them), or other bodies such as government agencies.

Did you know?

In Singapore in 2023, a man sued a woman in court for more than $3 million, claiming emotional trauma after the woman did not want to pursue a relationship with him. The case alarmed women's rights groups and individuals.

Possible plaintiffs

The possible plaintiffs in a civil dispute include:

- the aggrieved party (i.e. the person who has suffered the loss)
- other victims (i.e. victims other than the aggrieved party).

Aggrieved party

The aggrieved party is the person whose rights have been infringed and who has suffered loss. For example, in a contract claim, the plaintiff is likely to be one of the parties to the contract who suffered loss because of a breach of contract. In a negligence claim, the plaintiff is the person to whom the defendant owed a duty of care, and who has suffered injuries as a direct result of the defendant breaching that duty.

It is possible for a civil action to include more than one aggrieved person. For example, in a nuisance claim, there might be two people whose use and enjoyment of their property might be infringed (as in the scenario below).

Hypothetical scenario

Property owners sue for trespass to land

Polly and Heather are joint owners of a property in Werribee, Victoria. They built a fence around their property and created a sanctuary for a large number of animals. Barry, the next-door neighbour, takes his five dogs for a walk every Saturday morning. During his walk, Barry and his dogs cut across Polly and Heather's land, and the dogs chase and scare the animals. Polly and Heather have told Barry several times that he does not have their consent to go onto their land, but Barry continues to do so. They have now commenced a civil claim against him.

class action
a legal proceeding in which a group of seven or more people who have a claim against the same person 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

A **class action** – also known as a 'representative proceeding' or 'group proceeding' – is a particular type of civil proceeding, where seven or more people have claims against the same party, and those claims are in respect of, or arise out of, the same type of circumstances. The people who have the claims join together to form a 'class' and issue a proceeding against the party against whom they have a claim.

One of the members of the class, known as the **lead plaintiff**, represents the group in the proceeding, and the people who are part of that group are the **group members**.

There have been a number of class actions in Australia and in Victoria, including class actions related to the Black Saturday bushfires that occurred in Victoria in 2009, a class action in relation to alleged losses suffered by taxi drivers in relation to the introduction of Uber in Australia, and a class action in relation to loss suffered by attendees of the Falls Festival in Lorne after they were caught in a stampede (see the chapter opener).

lead plaintiff
the person named as the plaintiff in a class action and who represents the group members; also sometimes referred to as the representative plaintiff

group member
(in relation to class actions) a member of a group of people who is part of a class action



Source 1 In 2022, a class action was commenced over allegations that police officers improperly used capsicum spray on protesters at a mining conference in Melbourne in 2019.

Other victims

A plaintiff can be a person who has indirectly suffered loss as a result of the actions of another party. For example:

- a person may suffer loss as a result of the death of a family member, and may sue another person who they allege has caused that person's death
- a person who was close to an event may suffer loss as a result. For example, a person who has seen people badly burnt by an electric explosion caused by another person, and has suffered **nervous shock** as a result, may be entitled to seek damages for loss.

Study tip

The best way to identify the possible plaintiffs and defendants in a civil dispute is to read as many actual and hypothetical scenarios as you can and to practise identifying the parties. You can write your own hypothetical scenarios, read articles about civil disputes, or work with a friend to develop and exchange scenarios.

nervous shock
a psychological reaction; psychological harm that is more serious than ordinary grief or stress

Possible defendants

The possible defendants in a civil dispute include:

- the wrongdoer (i.e. the person or company that caused the loss to the plaintiff)
- employers
- persons involved in the wrongdoing.

Wrongdoer

It is often the case that a plaintiff will sue the person or company that has directly caused them loss. In a claim for unpaid wages, this is likely to be the employer. In a nuisance claim, this is likely to be the person who is causing the interference (e.g. noise, odour or sight) that has resulted in the plaintiff losing the use or enjoyment of their own property or of public property.

Sometimes there may be two wrongdoers, and both of them may be liable for the loss suffered by the plaintiff. In other situations, a person may be found responsible for the loss or damage suffered, even though they did not directly inflict that loss on the person, as in the following scenario.

Actual scenario

Damages awarded for outreach worker

The plaintiff began working for her employer, a health service provider, in 2008. She started as a receptionist, and ultimately worked as a family violence outreach worker, supporting victims of family violence. Many of the victims were referred to the health service provider by Victoria Police. The plaintiff attended homes of family violence victims to support them, but also provided other support, such as attending court hearings involving the victims. One of those victims was subjected to threats and serious assaults from her husband.

One morning, the plaintiff was attacked when getting out of her car at the carpark of her general practitioner. She had stopped to pick up a prescription on her way to work. After the incident, the plaintiff suffered further distressing events, including receiving a threatening letter and having a brick thrown through the window of her home. The plaintiff suffered post-traumatic stress disorder and was consequently unable to work. The incident in the carpark was described as having destroyed her life.

Following the incidents, the plaintiff was treated for many years, including for severe psychiatric symptoms. She ultimately sued her former employer, claiming that the person who attacked her was the husband of the victim she was helping, that the defendant had negligently failed to remove her from that victim's file, and that the negligence was a cause of her injury, loss and damage. The defendant denied the claim, stating among other things that it did not owe the plaintiff a duty to control a risk posed by the criminal offending of an unknown person, and that it was not confirmed that the person who assaulted the plaintiff was in fact the husband of the victim.

The case went to trial in the Supreme Court of Victoria, and judgment was handed down in October 2022. The Supreme Court judge found in favour of the plaintiff, accepting the plaintiff's account and noting that he was satisfied on the balance of probabilities that the husband of the victim had committed the assault on the plaintiff. The judge also agreed that the employer had a duty to take into account the possible risks to the safety of its employees. In this case, the judge noted that there was a known risk to the safety of family violence outreach workers. He ultimately found that the defendant had breached its duty of care to the plaintiff.

The Supreme Court assessed the plaintiff's entitlement to damages at $1.24 million, which included **general damages** (a type of damages that seeks to compensate a plaintiff for loss or damage such as pain and suffering) of $375 000, and past and future loss of earnings.

Bell v Nexus Primary Health [2022] VSC 605 (13 October 2022)

general damages a type of remedy that requires the payment of a sum of money to compensate for loss that cannot easily be quantified (e.g. pain and suffering)

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)

Employers

An employer of a wrongdoer may become a defendant because of the principle of **vicarious liability**. Vicarious liability is when someone becomes responsible for the actions of another. The reasoning behind the employer being liable instead of the employee is that the employer has a right, ability and

duty to control the activities of the wrongdoer. Therefore, the employer should be responsible if the wrongdoer, in undertaking those activities, has caused harm. Vicarious liability generally arises in negligence claims.

For an employer to be liable, the plaintiff needs to establish that the employee was acting in the course of their employment when the wrong occurred. This means that there must be a connection between the act and the employment. If the employee was acting in an unauthorised way, then the employer may not be found liable.

The scenario below provides an example of a claim for vicarious liability.

Actual scenario

Sexual harassment claim

The applicant in this case applied to the **Victorian Civil and Administrative Tribunal (VCAT)**, a tribunal that can hear a wide range of claims, including sexual harassment claims. The applicant claimed that her former employer was vicariously liable for the conduct of one of its employees, who she alleged had sexually harassed her.

The employer operated a male grooming business. The applicant worked there as a beauty therapist. During 2018, the applicant alleged that one of the other employees engaged in sexually harassing conduct, which included putting his legs between her legs, making comments about her body, attempting to embrace her, and deliberately brushing past her. He also made other sexual comments and sexual gestures that were unwanted. The applicant made two complaints to her employer during 2018. Despite this, the employee subsequently sexually assaulted her at the workplace, after which time the applicant resigned.

VCAT found that the employer did not take reasonable precautions to prevent the conduct from happening and was vicariously liable for the unlawful conduct. For example, after the applicant complained a second time, the employer did not conduct a proper investigation, which VCAT said may have prevented the sexual assault that later occurred.

As to the remedy, the applicant sought general damages and loss of enjoyment of life. She submitted that she had been engaging in weekly treatment with a psychologist to deal with her symptoms following the assault. These symptoms included flashbacks, panic attacks, sleep issues, post-traumatic stress disorder and anxiety. VCAT awarded her $150 000 in general damages, noting that the effects of the sexual harassment will persist long term.

Oliver v Bassari (Human Rights) [2022] VCAT 329 (28 March 2022)

Victorian Civil and Administrative Tribunal (VCAT) a tribunal that deals with disputes relating to a range of civil issues that are 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

Persons involved in wrongdoing

A person who is involved in the wrongdoing of another may also be sued. A person may be involved in wrongdoing if they:

- aided, abetted (i.e. assisted) or procured (i.e. organised) the wrongdoing
- induced or encouraged the wrongdoing
- were in any way, directly or indirectly, a party to the wrongdoing
- conspired with others to cause the wrongdoing.

accessorial liability the responsibility imposed on one person for the wrongdoing of another, where there is a connection to the wrongdoing (e.g. where the first person encourages the other person to cause harm)

Being involved in wrongdoing is known as **accessorial liability**. A plaintiff may sue a person involved in wrongdoing. For example, if the plaintiff was injured during an armed robbery, which was organised by someone who was not present at the robbery, then this person may be considered to be involved in the wrongdoing and can be sued by the plaintiff.

The following scenario further explores accessorial liability.

Hypothetical scenario

Friend who 'egged on' a mate is sued

Vernon and his mate Harry went out on Saturday night. After a few drinks, they both started talking about how it would be really funny if they started tripping people up as they walked past them. They agreed that they would take turns to trip someone.

The men started walking down Domain Road in South Yarra, Melbourne. Harry tripped the first person, who fell over, and both men ran away laughing. They then approached 30-year-old Gina, who had a sore leg after playing soccer that day. As the men walked past her, Harry nudged Vernon and said, 'your turn'. Vernon tripped Gina, who stumbled, fell over and broke her ankle. Gina is suing both Harry and Vernon.

9.3 Check your learning

Remember and understand

1 Generally, **who** is likely to be the plaintiff in a civil dispute? **Who** is likely to be the defendant?

2 **Define** the terms 'vicarious liability' and 'accessorial liability'. **Provide** one example of each type of liability.

Examine and apply

3 Create a civil dispute in which there are two possible plaintiffs and two possible defendants. Exchange your scenario with a member of your class and **identify** the parties to the dispute in your class member's scenario. Give reasons for your answer.

4 Write a newspaper article about a recent civil case in which a plaintiff has sued a defendant. In your newspaper article, **describe**:
- **a** the type of civil law the dispute involves
- **b** the claim the plaintiff is making
- **c** the type of loss the plaintiff alleges to have suffered
- **d** who the plaintiff is suing and why
- **e** whether there are any other possible plaintiffs or defendants.

Swap newspaper articles with another class member. Assess whether the class member has correctly identified all of the points listed above.

5 Conduct some online research and find:
- **a** one class action that has been resolved and has resulted in a payment to the group members
- **b** one class action that is currently before a court
- **c** one class action that is about to start.

Choose one of these class actions and write a brief summary of the case.

6 Read the scenario 'Damages awarded for outreach worker'.
- **a** **Who** were the parties in this proceeding?
- **b** **Who** was found to have assaulted the plaintiff? **Why** do you think they were not a party to the proceeding?
- **c** **Describe** the loss suffered by the plaintiff.
- **d** **Outline** the outcome of this case.

7 Read the scenario 'Sexual harassment claim'.
- **a** **What** type of law was breached in this case?
- **b** **Identify** the parties in this case. **Explain** why the defendant was the one that was sued.
- **c** **What** loss was alleged to have been suffered?
- **d** Conduct some research. Find at least two other cases where an employer has been sued in relation to the conduct of an employee.

Reflect and evaluate

8 Do you think that class actions provide greater access to justice? If so, **how**?

Chapter

9

Review

Top assessment tips from Chapter 9

1 The Study Design does not require you to know what the limitation period is for each type of civil claim. What you *do* need to understand is the concept of limitation of actions, what impact it could have on the parties, and why it is an important feature of civil law.

2 Start incorporating civil law terminology into your responses so you can become familiar with what all the terms mean. To help with this, keep your own glossary of key terms.

3 Read as widely as possible! The more you read actual civil law scenarios, the better you will understand the terminology and concepts in this and other chapters. Aim to read one article about civil law per day. As an extension, highlight the terminology in the articles, and identify the type of civil law, what the plaintiff alleges (or what the court found), and the remedy sought or awarded.

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 assessment tasks are composed of a variety of questions. A great way to identify the difficulty of the question is to look at the command term (or terms) used in the question and the mark allocation. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 For each of the following scenarios, identify the likely plaintiff, the likely defendant, the area of civil law involved, and the loss suffered by the plaintiff.

- **a** Naimi was a passenger in a car travelling on a road in the centre of Melbourne. Without warning, a tram came off the tram tracks and rammed the car, killing the driver (who was Naimi's best friend) and injuring Naimi.
- **b** Sithuli is employed in a local warehouse. For many months, Sithuli was bullied and abused by a fellow employee. Despite her complaints, her manager has done nothing about the bullying. Sithuli has been off work for 12 weeks, suffering from anxiety and depression.
- **c** Gordana's neighbour has been burning rubbish in his yard late at night for some time now. The fumes enter Gordana's home, causing her and her whole family to suffer significant respiratory issues. Gordana has recently found out that both her neighbour and her neighbour's best friend were involved in burning the rubbish.

(12 marks)

Difficulty: medium

2 Justify why there is a time period within which a plaintiff can bring a civil claim.

(4 marks)

Difficulty: high

3 In your view, should an employer be responsible for their employee's actions? In your answer, provide **one** argument for and **one** argument against the principle of vicarious liability.

(6 marks)



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Practice assessment task

Before attempting this practice assessment task, re-read the information at the beginning of this chapter about the learning outcome, key knowledge and key skills.

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

Case study 1 – Luca's Facebook post

Luca has been in a fight with his former girlfriend, Steph, for months. Steph has blocked him on Facebook and ignores his regular attempts to contact her via social media. To get back at her, Luca wrote a public Facebook post that suggested that Steph had faked her exam results to get her current job, and that she had cheated her way through school to get good grades. To validate the post, Luca's friend Bernie responded to the post saying, 'Finally this is out in the open. That girl has been conning people for years.' Steph's colleagues and friends have seen the post. Ever since the post was written, she has been ignored by people at work. She has also been told by her boss that she will not get the promotion that she had previously been promised. Steph has been suffering from depression as a result.

Case study 2 – Andrew's courier run

Andrew worked for a large courier business that had important clients for whom it delivered goods. One afternoon, Andrew's boss told him that there was an urgent delivery for a very important client, and that the goods needed to be delivered no later than 3:30 pm. Andrew's boss told him that he needed to do 'whatever it takes' to get there by that time, even if it meant speeding and breaking the law.

Andrew left and sped all the way to the client. On the way, he lost control of his car and drove into a house, causing significant damage to the front of the house and three of its rooms. The house is now uninhabitable and the house owners have to live elsewhere.

Practice assessment task questions

Write a report that addresses the following for each of the case studies (marks allocated are per case study). You must give a justification for each of your answers:

- the area of law that the dispute involves (3 marks)
- the nature of the claim (4 marks)
- the possible plaintiff(s) (3 marks)
- the possible defendant(s) (3 marks)
- the type of breach involved (4 marks)
- whether causation is likely to be established (4 marks)
- the type of loss that is alleged to have been suffered. (4 marks)

Total: 25 marks

Chapter checklist

Now that you have completed this chapter, reflect on your ability to understand the key knowledge from the Study Design. If you feel you need some more practice, use the revision links to revisit the key knowledge.

Remember that you will also need to be able to draw on and understand the key skills outlined in the Study Design.

Key knowledge	I understand this	I need some more practice to understand this	Revision link
• The purposes and types of civil law	☐	☐	Go back to Topic 9.1.
• Key concepts of civil law, including breach, causation, loss, limitation of actions, the burden of proof and the standard of proof	☐	☐	Go back to Topic 9.2.
• Possible plaintiffs and defendants to a civil dispute	☐	☐	Go back to Topic 9.3.

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

Chapter 9
Chapter review quiz

Revision notes
Chapter 9

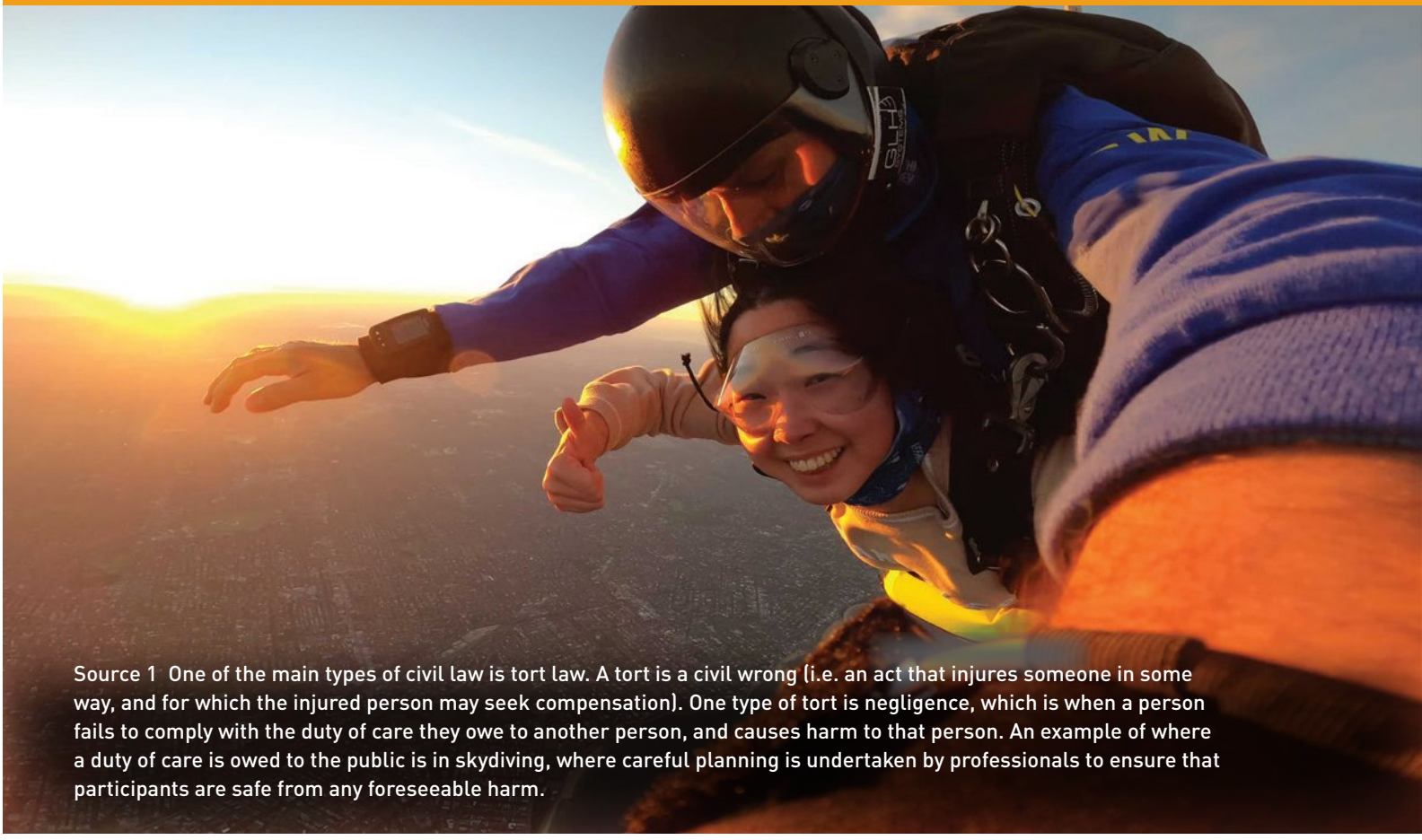
Chapter summary
Chapter 9

Quizlet
Revise key legal terms from this chapter.

Chapter

10

Tort law



Source 1 One of the main types of civil law is tort law. A tort is a civil wrong (i.e. an act that injures someone in some way, and for which the injured person may seek compensation). One type of tort is negligence, which is when a person fails to comply with the duty of care they owe to another person, and causes harm to that person. An example of where a duty of care is owed to the public is in skydiving, where careful planning is undertaken by professionals to ensure that participants are safe from any foreseeable harm.

Outcome

By the end of **Unit 2 – Area of Study 1** (i.e. Chapters 9, 10 and 11), you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

Key knowledge

In this chapter, you have the option of choosing two types of tort law. For each type of tort law, you will learn about:

- the rights protected by the law
- the elements required to establish liability
- the limitation of actions
- possible defences
- possible remedies
- the impact of the breach on the parties.

Key skills

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

- define and use legal terminology
- research and analyse relevant information about civil law
- apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to two actual and/or hypothetical scenarios
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two areas of civil law.

Key legal terms

damages an amount of money that one party is ordered to pay to another party for loss or harm suffered. It is the most common remedy in a civil claim

defamation a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

negligence a type of tort that involves a breach of a duty of care, causing loss or harm

nuisance a type of tort that involves interference with a person's right to use and enjoy private and/or public property

tort a term that literally means `wrong'; a wrong that interferes with a person's legally protected interests

Key legal cases

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

Advice to teachers and students

In **Unit 2 – Area of Study 1** (i.e. Chapters 9, 10 and 11) you are required to study **two areas of civil law** in detail.

You may choose to study	Options include	Page
• TWO torts (from Chapter 10)	10.1 Negligence	336
	10.2 Defamation	347
	10.3 Nuisance	358

OR

You may choose to study	Options include	Page
• TWO other areas of civil law (from Chapter 11)	11.1 Discrimination	372
	11.2 Consumer rights	384
	11.3 Workplace pay and conditions	394

OR

You may choose to study	Options include	Page
• ONE tort (from Chapter 10) • ONE other area of civil law (from Chapter 11)	See above	See above

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Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

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

Warm up!
Check what you know about tort law before you start.

Quizlet
Test your knowledge of the legal terms in this chapter by working individually or in teams.

10.1 Negligence

Key knowledge

In this topic, you will learn about:

- the civil law of negligence, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies, and the impact of the breach on the parties.

In their everyday lives, people regularly encounter others, including strangers. This contact occurs in places such as schools, shopping centres, cafes and on public transport, and involving activities such as sports, school excursions and eating out. In these settings, sometimes an obligation is owed to other people to take care to avoid causing harm. This is known as a **duty of care**.

The law relating to duty of care is known as **negligence**. Negligence is a type of **tort**. When a person has failed to take reasonable care that was due to another person, and that failure causes loss to the other person, then the person who owes the duty of care may be found to have been *negligent*.

Negligence claims arise on a daily basis. For example:

- A person may trip on a footpath or in a shop because of something that has been left on the floor and should have been cleaned up.
- A person may become ill when eating at a cafe because of incorrect handling of food.
- A person may be injured in the workplace by something that was known to be dangerous.

These situations may result in the person making a negligence claim against another person who is said to have owed the injured person a duty to take care to avoid causing them harm.

duty of care
(in relation to negligence) the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

negligence
a type of tort that involves a breach of a duty of care, causing loss or harm

tort
a term that literally means `wrong'; a wrong that interferes with a person's legally protected interests

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)

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

remedy
any order made by a court (or a tribunal) designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant

Rights protected by negligence laws

The laws about negligent conduct have developed over many decades through **common law** and through **statute law**. The *Wrongs Act 1958* (Vic) is now the main piece of legislation in Victoria that deals with negligence claims.

The main purpose of the law of negligence is to protect an individual's right to be safe from harm – harm to the person and harm to their property. This right exists in all circumstances in which we engage with others, including being taught by a driving instructor, preparing food in a retail store as a casual employee and, on a much more serious level, managing a large group of people – such as on a cruise ship – when passengers fall ill. It is expected that while engaging with others, we are aware of the potential for harm that our actions could cause, and we take reasonable steps to avoid causing harm.

The law of negligence also aims to:

- establish legal principles about when someone is owed a duty of care and what sort of precautions they need to take to fulfil that duty
- allow parties to seek an appropriate **remedy** against those people who have breached the duty of care
- establish limitations for what remedies may be sought where there has been a breach of conduct, such as imposing a cap on how much a person can be compensated for harm.

Elements required to establish liability for negligence

When claiming another person has been negligent, the plaintiff must prove that the following four elements exist:

- duty of care – the defendant owed a duty of care to the person injured
- breach of a duty of care – the defendant breached the duty of care
- causation – the breach of the duty of care caused harm to the plaintiff
- injury, loss or damage – the wronged person has suffered harm; that is, injury, loss or damage.

If it can be proved that the plaintiff was owed a duty of care, that the duty of care was breached and that the breach caused harm, then the plaintiff may be entitled to a remedy, such as **damages**.

damages
an amount of money that one party is ordered to pay to another party for loss or harm suffered. It is the most common remedy in a civil claim

Element 1 – Duty of care

The plaintiff must first establish that the defendant owed them a duty of care. As noted above, a duty of care is a legal obligation, owed by one person to another, not to cause harm.

A person owes a duty of care if:

- the risk of harm was foreseeable (i.e. the person knew or should have known about the risk of harm)
- the risk was significant or not insignificant (i.e. not far-fetched or fanciful)
- a reasonable person in the same circumstances would have taken precautions to eliminate the risk of harm.

Over time, the courts have established that certain categories of persons are presumed to owe a duty of care to another category of persons. For example:

- teachers and schools owe a duty of care to their students
- doctors and nurses owe a duty of care to people they are treating
- motorists who are driving their car owe a duty to other road users, including pedestrians and cyclists, to observe road rules at all times
- manufacturers owe a duty of care to consumers.



Source 1 Students are owed a duty of care while at school. The duty may change or expand when teachers take groups of students away on camping or school excursions, where the risk of injury increases and dangers are readily foreseeable. Professional instructors are often used for outdoor education programs.

The following scenario explores the element of duty of care.

Actual scenario

The case of the contaminated underpants

It is now established under negligence laws that a manufacturer of goods may be liable for injury that is caused to the ultimate consumer because of defects in their products, even though the manufacturer themselves did not sell the products to the consumer.

In this 1933 case, the plaintiff, Dr Grant, purchased two pairs of long woollen underpants and singlets, which were manufactured by Australian Knitting Mills Limited (AKM), and sold by a retailer in Adelaide, John Martin & Co (JM). The plaintiff contracted a severe case of dermatitis from the presence of excess sulphite in the woollen underpants, which he wore continuously for a week. He sued both the manufacturer, AKM (on the basis that it was negligent in the preparation of its garments), and the retailer, JM (on the basis that it had breached the contract with him). The defendants denied the claim.

The judge in the Supreme Court of South Australia found in favour of the plaintiff on the grounds that AKM had failed to take reasonable care in the preparation of the underwear purchased by Dr Grant. The Court also held that JM had breached the contract. The plaintiff was awarded damages.

AKM and JM appealed to the High Court, which reversed the decision. The plaintiff then appealed to the Privy Council in London. At that time, there was an option for parties to appeal to the Privy Council from the High Court. This is no longer an option in Australia. The Privy Council held that the plaintiff was entitled to compensation from AKM for negligence on the basis that a buyer of products should have confidence that products have been made with skill, and that in this case they were not. JM was also found liable under contract law.

This case, and many others since, established that manufacturers may be liable if their products cause loss, harm or damage to the consumer of the products. More recent cases have involved food such as peanut butter and soy milk, materials such as asbestos, and medical products (including medication).

Grant v Australian Knitting Mills Ltd [1935] UKPCHCA 1

Did you know?

The Privy Council was a body of advisers to the British monarch, which developed into a final court of appeal for cases that originated in the British colonies, such as Australia. Appeals from Australian courts to the United Kingdom were abolished by the *Australia Act 1986* (Cth). This made the High Court the ultimate court of appeal in Australia.

Element 2 – Breach of a duty of care

A breach of a duty of care occurs when a person does not take all the care they should. The duty is breached (i.e. broken) when a person fails to do what a reasonable person would have done. In determining whether a reasonable person would have taken precautions against a risk of harm (i.e. what standard of care is expected), a court considers:

- the likely risk of harm
- the likely seriousness of the harm
- the burden of taking precautions to avoid the risk of harm
- the social utility (i.e. benefit or worth) of the activity that creates the risk of harm.

For example, in the 1980 case *Wyong Shire Council v Shirt*, the plaintiff suffered quadriplegia in a water-skiing accident. He sustained the injury when he interpreted a sign that read 'Deep water' as

indicating that the water beyond the sign was deep enough for water-skiing. The High Court found that the defendant council ought to have foreseen that this sort of serious harm could occur, and should have taken the necessary precautions, which were small. Another example of a case involving an alleged breach of a duty of care is outlined in the scenario below.

Actual scenario

Incident during school recess

In 1999 an eight-year-old girl was injured when she fell from a flying fox in the playground of a primary school in the Australian Capital Territory. The incident occurred during morning recess.

According to evidence presented in the High Court, there were two teachers on duty in the area in which the girl was injured. The school had developed a 'hands off' rule when others were using the play equipment. Despite this rule, one boy and one girl grabbed the girl's legs while she was on the flying fox, and she fell and sustained injuries. The teacher on duty had momentarily looked away when the incident occurred.

A majority of High Court justices found that the school was not liable as it had not breached its duty of care. The judgment of the majority of justices stated that:

> it must be remembered that there was no evidence of any serious accident on the flying fox in the past, there was no evidence of pupils having pulled each other from the flying fox in the past, and there was a well-known and enforced school policy against this. The magnitude of the risk of injury was not high, and nor was the degree of probability of its occurrence.

The High Court also found that the incident may not have been prevented even if a teacher had been watching the flying fox. On this basis, the cause of the injury to the girl was not the lack of supervision by the school, which the High Court ruled had behaved appropriately by having a clearly stated 'hands off' rule that had been communicated to the children.



Source 2 A playground accident may become the subject of a breach of duty of care claim.

Roman Catholic Church Trustees for the Diocese of Canberra & Goulburn v Hadba (2005) 221 CLR 161

Study tip

When analysing a case study, apply the elements to the facts of the case. In assessment tasks, write a heading for each element and address whether it can be established or not, and why. Where you can, use cases or examples to justify your response.

Element 3 – Causation

To succeed in a negligence claim, a plaintiff must prove **causation**. This means that the harm was caused by a breach of a duty of care, and that the harm would not have occurred if the duty of care had not been breached.

If it can be shown that the harm was too remote from the breach of duty of care, the plaintiff will not be successful in claiming negligence. For example, a person may suffer **nervous shock** from hearing a car accident, but if they did not actually see the accident then this harm may be too remote from the event.

causation
the direct relationship between one event (Event 1) and another event (Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

nervous shock
a psychological reaction; psychological harm that is more serious than ordinary grief or stress

In other circumstances, there may be a break in the chain of causation. This is where some new act occurred between the wrong happening and the harm occurring. The following scenario explores causation further.

Hypothetical scenario

The case of Henry and the stormy night

Henry is a trained dog that has won national canine championships. One weekend, his owners, Cam and Christine, attended a wedding interstate and left Henry at Damo and Dolly's Kennels, a pet-care centre in country Victoria. Christine explained to Damo and Dolly that Henry was afraid of storms and that he would need to be kept indoors if the weather forecast showed there would be storms.

On the Saturday, the weather forecast said there was a 'slight risk of isolated storms' in the area where the kennels were situated. Damo and Dolly decided that although Henry's kennel was located outside, it was well protected from any storm. On that evening, there were high winds. A large tree on the property of a neighbour, Pippa, fell onto the area near the dog kennels, breaking a fence that helped keep the dogs secure. Pippa had been issued with two orders by the local council to remove the tree because it was diseased and was 'a danger to human life and neighbouring buildings'. It also posed a risk to overhead power lines. Pippa had refused to comply with the orders.

When the tree fell, it crashed through the side of Henry's kennel. Henry was startled and escaped through an opening in the fence where the tree had fallen. When Damo tried to grab him, Henry was so scared that he bit Damo badly, causing an injury to his arm. The injury later became infected. Damo ended up spending a lot of money on medical expenses.

Damo claims that Christine and Cam are responsible as Henry's owners, and should have taken precautions to ensure that Henry did not bite him (such as warning Damo that Henry was prone to biting when frightened).

In response, Christine and Cam argue that Damo and Dolly are actually responsible because Christine and Cam had warned them about Henry's fear of storms. Alternatively, they argue that Pippa was actually responsible because Henry was able to escape.



Source 3 Dog owners have a duty of care to ensure that their animals do not harm others.

Element 4 – Injury, loss or damage

As a general rule, a plaintiff can only seek a legal remedy through the law of negligence if it can be proved that they suffered injury, loss or damage, even if it is minor. The injury, loss or damage can be physical, or mental, or it can be damage to property.

Limitation of actions

The *Limitation of Actions Act 1958* (Vic) sets out the limitation periods for negligence claims. A limitation period is the time period within which a civil claim must be made. These are outlined in Source 4, and range from three to 12 years from the date of the act or omission that resulted in harm. In some circumstances, a court can extend a limitation period.

Type of negligence claim	Limitation period
General negligence claims (e.g. for property damage)	6 years
Negligence claims where the plaintiff contracted a disease or disorder	3 years
Negligence claims where the plaintiff died or suffered personal injury	Either 3 or 12 years

Source 4 Limitation periods for negligence claims

The start of limitation periods for negligence claims depends on the type of injury suffered by the plaintiff. For example:

- for general negligence claims (e.g. property damage), the limitation period starts from the date on which the cause of action occurred (i.e. the date the harm was suffered by the plaintiff)
- for actions involving the plaintiff contracting a disease or disorder, the limitation period starts from the date on which the plaintiff first knew they had the disease or disorder and that the disease or disorder was caused by the defendant.

Death or personal injury claims

The limitation period for death or personal injury claims is whichever of the following expires first:

- 12 years from the date of the conduct of the defendant that caused the death or injury (known as the 'long-stop limitation period') or
- three years from the date on which the cause of action was 'discoverable'. A 'discoverable' date is the date the plaintiff knew (or ought to have known) that the harm occurred, was caused by the defendant, and, in relation to personal injury, was serious enough to justify bringing an action.

The above limitation periods do not apply to work injuries, transport accident injuries, or to injuries that occurred because of dust-related conditions.

Child abuse

In 2015, the Victorian Parliament passed legislation that removed limitation periods for certain actions involving child abuse to allow survivors to bring civil actions regardless of the time that had passed since the abuse occurred.

Did you know?

The American Museum of Tort Law shows a history of cases. One exhibit is devoted to the McDonald's hot coffee case, where the plaintiff, Ms Liebeck, suffered third-degree burns over six per cent of her body when she spilt a cup of coffee in her lap. A court awarded Ms Liebeck $640 000 for her injuries on the basis that the coffee was served at an excessively high temperature.

Defences to a negligence claim

A defendant can claim that the plaintiff has not established the four elements of negligence. That is, the defendant may try to prove that a duty of care was not owed, that the duty of care was not breached, that the harm was not caused by the defendant's act or omission, or that no harm has been suffered.

The defendant may also rely on one of the following defences:

- contributory negligence
- assumption of risk (*volenti non fit injuria*).

These defences are discussed in more detail below.

Defence 1 – Contributory negligence

A defendant may try to prove that the plaintiff contributed to the harmful situation or is partly to blame for the harm done. For example, the plaintiff may make a claim that they suffered personal injury as a result of being pushed by the defendant. However, their claim, if proven, may be reduced if it were shown that the plaintiff was intoxicated at the time.

Contributory negligence generally reduces the amount of damages that a defendant is required to pay to the plaintiff to compensate them for their injury, loss or damage.

contributory negligence
a defence that can be used by a defendant who alleges that the plaintiff contributed to the harm caused by the defendant. If proved, this reduces the damages the defendant has to pay

In determining contributory negligence, a court examines the conduct of the plaintiff and assesses how they might have contributed to their own injury, loss or damage. In cases where the plaintiff is found to have contributed very significantly to their own harm, the amount of damages awarded might be negligible.

The scenario below is an example of the defence of contributory negligence being argued unsuccessfully. The case arose from injuries sustained by an employee of a supermarket who was trained in risk assessment.

Actual scenario

The danger of slippery grapes

In this case, the plaintiff was employed as a checkout operator at a Woolworths store in northern Queensland. The plaintiff slipped on a grape on the floor adjacent to the grape display while on her way to the lunchroom. In the fall, she injured her back. She brought a negligence claim against her employer, Woolworths.

Woolworths argued that if it were held to be liable under the tort of negligence, the plaintiff should be found to be 25–35 per cent contributorily negligent. This claim was made on the basis that the plaintiff was trained in risk assessment and knew of the risk; knew to keep a lookout for grapes, particularly in the produce department; was in a hurry and not keeping a proper lookout; and could have avoided walking in the area near the grapes.

The trial judge found that, in these circumstances, a reasonable employer would have foreseen that there was an increased risk of injury, and would have placed mats near the grape display in the produce department. Woolworths was expected to realise that people passing through the fresh produce area may be distracted. Also, Woolworths could not pass the responsibility to its employees to look out for grapes on the floor. The judge concluded that there was no basis for a finding of contributory negligence.

The judge noted that mats were available and should have been used by Woolworths staff. A duty of care is owed by occupiers (e.g. retailers) to have procedures in place to ensure a safe environment for people who lawfully enter into retail or commercial premises. The plaintiff was awarded $491 037.26 in damages.

Woolworths appealed the decision to the Queensland Court of Appeal. The appeal was unanimously dismissed. However, the damages awarded to the plaintiff were decreased by $54 000 to $437 037.26, as the Court of Appeal found that future economic loss (particularly future loss of wages) had been incorrectly assessed by the trial judge.

Woolworths Ltd v Grimshaw [2016] QCA 274 (28 October 2016)



Source 5 Retailers are required to provide a safe environment for their customers and employees. Even where a sign has been placed in a store warning of a slip hazard, the owner of the supermarket may still be liable if a person falls and hurts themselves.

volenti non fit injuria
a Latin term meaning 'to a willing person, injury is not done'. Refers to a defence in which the defendant claims that the plaintiff accepted the dangers of a known and understood risk, either expressly or by implication

Defence 2 – Assumption of risk (*volenti non fit injuria*)

The defence of ***volenti non fit injuria*** is the voluntary acceptance of the risk of injury. In Latin, the term literally means 'to a willing person, injury is not done'. This means that the defendant must prove that the plaintiff was aware of an obvious risk and that they voluntarily chose to take the risk. For example, a person who knowingly accepts a ride with a drunk driver is accepting an obvious risk of being injured in a car accident, as it is well known that excessive alcohol consumption impairs driving ability.

Similarly, sportspeople accept the risk of suffering common injuries that may occur within their sport. For example, jockeys consent to injuries of the type reasonably expected in racing. However,

the assumption of risk does not apply in cases involving the provision of professional or health services, as health providers have a legal responsibility to warn people of any inherent risk associated with their work.

In the following scenario, the defendant cricket team could defend a claim on the basis that a cricketer accepted the risk of playing sport.

Hypothetical scenario

Concussion in cricket

Sam was an aspiring cricketer who played in state-level cricket teams while she was at school. When she was 15, Sam was struck on the head and sustained a severe concussion.

After she left school, Sam was selected to play for a professional cricket team that participated in a national competition. She was 18 years old at the time.

Two months later, Sam was injured during a training session when she was struck on the head by a ball thrown between teammates. She again sustained a concussion. As a result, Sam missed the entire season of cricket and lost $40 000 in match payments. To recover the money, Sam commenced legal action for negligence, claiming that the team's management had failed in their duty of care to provide a safe workplace. The team's management responded by arguing that being struck by a ball in cricket is an accepted risk of playing the sport and that Sam knew the risk, particularly given how long she had been playing the sport.



Exceptions to negligence

In addition to the defences, there are also some exceptions the defendant can rely on to defend a negligence claim.

- When participating in a risky recreational activity, consumers can sign a waiver stating that they accept responsibility for any injuries suffered while participating in the activity. For example, a bungy-jump operator may ask jumpers to sign a waiver that states the jumper accepts the reasonable risks associated with the jump. However, if the operator has not maintained their equipment or has said the jump was safe when it was not, then the operator may still be liable for a jumper's injury.
- A Good Samaritan is a person who gives care, help and advice in an emergency situation. Good Samaritans are exempt from legal liability in negligence claims as long as they act in good faith (i.e. with honesty and integrity), within their competence, and without payment.
- A person who donates food in good faith for charitable purposes is protected from legal liability if a person is harmed by consuming the food. This only applies if the food was safe to consume at the time it left the possession or control of the person who donated it.
- Volunteers (i.e. people who do community work for a community organisation, association, local government or public authority) cannot be held personally liable if they cause damage or injury to another.

Possible remedies

A remedy is a legal solution to a breach of civil law. A person who has suffered injury, loss or damage as a result of negligence may seek a remedy to address the wrongdoing. Generally, a person who has suffered injury, loss or damage due to negligence will seek damages as a remedy. Injunctions are rarely awarded in negligence claims.

Damages involve a payment of money from the defendant to the plaintiff, for the injury, loss and/or damage caused through the actions of the defendant. The most common form of damages awarded for negligence is compensatory damages. **Compensatory damages** include:

compensatory damages
an amount of money awarded to a plaintiff for harm, injury, or other losses suffered. It includes general damages, special damages, and aggravated damages

special damages
the amount of money that one party is ordered to pay to another party to compensate for losses that are easily quantifiable (e.g. medical expenses or loss of wages)

general damages
a type of remedy that requires the payment of a sum of money to compensate for loss that cannot easily be quantified (e.g. pain and suffering)

aggravated damages
an amount of money that a defendant may be ordered to pay when a plaintiff has suffered extreme humiliation, embarrassment or insult because of the defendant's conduct

- **special damages**, which are damages to compensate for loss that can be accurately measured in monetary terms, such as loss of wages and medical costs. For example, this would include the costs of medical treatment if a plaintiff was injured due to the negligence of the defendant
- **general damages**, which are damages to compensate for loss that cannot be accurately measured in monetary terms, such as loss of enjoyment of life, and pain and suffering. In a negligence claim, this could include damages for loss of enjoyment of life if a plaintiff were to lose the use of a limb or had reduced life expectancy
- **aggravated damages**, which are awarded if the defendant shows reckless disregard for the plaintiff's feelings. The court not only looks at the civil wrong that has occurred, but also at the manner in which the defendant infringed the plaintiff's civil rights. The purpose of aggravated damages is to compensate the plaintiff for this distress, which may have caused feelings of shame or humiliation. The conduct of the defendant in such cases is generally considered to be outrageous.

In some situations, the court may decide to award *exemplary damages*, which is a form of damages that the court uses to make an example of the defendant and deter others from that type of behaviour where the defendant can be shown to have acted consciously and in extreme disregard for the rights of the plaintiff.

The amount and type of damages awarded depends on various factors, including the following:

- *whether the loss is economic (financial) only, or non-economic* – economic loss includes loss of wages (past and future), medical expenses, and other costs such as the cost of property that has been damaged. This loss can be easily quantifiable and compensated through special damages. Non-economic loss – such as pain and suffering, psychiatric injury and physical injury – is harder to quantify, but can be compensated through general damages
- *whether the loss is significant or minor* – minor damage (such as a mild illness or minor damage to property) as a result of someone's negligence may result in a small award of damages. On the other hand, significant loss (such as disfigurement, loss of life expectancy or major damage to property) could result in a large award of damages. In some cases, millions of dollars in damages have been awarded in negligence cases
- *caps on damages* – in Victoria, there are 'caps' that limit the amount of damages that can be awarded for various types of loss. For example, there is a maximum amount of damages that can be awarded for loss of earnings. In addition, there is a cap on the amount of damages that can be awarded for non-economic loss, which is approximately $650 000
- *thresholds that apply* – in Victoria, there are also 'thresholds' that apply, which are certain minimums that a plaintiff must satisfy before damages can be awarded. For example, to recover damages for pain and suffering, the plaintiff must establish that they have suffered significant injury. For a psychiatric injury, for example, a significant injury would be where a person has been impaired by 10 per cent or more.



Source 6 Special damages may include the costs of medical treatment if a plaintiff was injured due to the negligence of the defendant.

Possible impacts of negligence

Impacts on the plaintiff

The impact of negligence on the plaintiff varies depending on the nature of the claim. Some of the possible impacts of harm suffered by the plaintiff as a result of negligence are as follows:

- loss of life – this could occur in a workplace setting. For example, an employer may fail to maintain machinery in good working order, causing a fatal accident
- permanent physical incapacity – a negligent situation could result in permanent disability and could require the use of personal carers for the remainder of the person's life. For example, a person may suffer a loss of a limb or significant organ damage, which means they are no longer able to function as they usually did
- serious physical injury – this could require treatment such as surgery and physiotherapy. For example, a customer may trip on a slippery floor and break their leg
- emotional impact of the breach – this could manifest as fear of certain places or fear of engaging in social situations. For example, a person may develop a fear of medical procedures after an experience involving medical negligence
- loss of wages and livelihood – this could be a consequence of requiring surgery or treatment. For example, a person may be unable to return to work for a certain time after surgery
- unemployment – this could be a consequence of physical injury or mental health issues. For example, an electrician may be unable to return to work if they are physically no longer able to perform their job
- effect on mental health – this could include conditions such as depression or anxiety. For example, a person may develop mental health issues as a result of being unable to return to work.

Impacts on the defendant

The impact of negligence on the defendant can also vary, depending on the extent to which the plaintiff contributed to their own injury, loss or damage. Some of the impacts on the defendant are as follows:

- loss of business – this could be a consequence of the publicity of the claim. For example, a restaurant or cafe sued as a result of the death or injury to a customer from consuming contaminated food may be subject to media articles and lose customers as a result
- public humiliation – this could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of an adverse finding in court
- physical injury – this could occur in a case of contributory negligence or a **counterclaim**. For example, the defendant might also have suffered injury, loss or damage as a result of the conduct of the plaintiff
- costs – this could occur when the defendant has to defend a claim, or loses a case. For example, the defendant might be ordered to pay the legal costs of the plaintiff, which could cause financial hardship
- need to sell assets – this could be a consequence of a high damages award. For example, the defendant might be forced to sell their home or business to meet the cost of the damages amount.

counterclaim
a separate claim made by the defendant in response to the plaintiff's claim (and usually heard at the same time by the court)

Source 7 summarises some of the possible impacts that negligence can have on the plaintiff and on the defendant.

Impacts on the plaintiff	Impacts on the defendant
• Loss of life • Permanent physical incapacity • Serious physical injury • Emotional impact of the breach • Loss of wages and livelihood • Unemployment • Effect on mental health	• Loss of business • Public humiliation • Physical injury • Costs • Need to sell assets

Source 7 A summary of the impacts of negligence

10.1 Check your learning

Remember and understand

1 **Outline** the key elements required to establish that the defendant owed the plaintiff a duty of care.

2 Using an example, **define** the term 'contributory negligence'.

3 You have decided to accept the risk of participating in a risky activity. **Explain** how this is relevant in a negligence case if you get hurt as part of the activity.

Examine and apply

4 **Explain** whether teachers owe a duty of care to the groups of people listed below. For each group, **explain** how you think teachers should conduct themselves in a way that reflects their duty of care.
   - **a** students in their class during a regular lesson
   - **b** students on a 250-kilometre bike ride through regional Victoria in November, with high temperatures forecast and an increased risk of fire danger
   - **c** students on a ski trip to Mt Buller
   - **d** a visiting taekwondo instructor who is showing a group of students how to punch and kick.

5 Read the scenario 'The case of the contaminated underpants'.
   - **a** **Outline** the key facts of the case.
   - **b** **Explain** why the plaintiff could not sue the manufacturer under contract law.
   - **c** **What** was the decision of the original court?
   - **d** **Explain** why this case went to the Privy Council in the United Kingdom, and whether this is an option for Australian cases now.
   - **e** Conduct some research and find at least three other negligence cases that have involved a person suing the manufacturer of products they have been harmed by. Get together as a class and prepare a graphical representation of these cases (e.g. you may draw the products on the whiteboard with brief explanations).

6 Read the scenario 'The danger of slippery grapes'. **Explain** the circumstances in which contributory negligence as a defence might be successful in relation to an employee who slips and is injured in a supermarket.

7 Read the hypothetical scenario 'The case of Henry and the stormy night'. As a class, discuss the issue of causation in this scenario.

Reflect and evaluate

8 Read the scenario 'Incident during school recess'.
   - **a** **Describe** the key facts in this case.
   - **b** **Outline** the duty of care that the defendant owed.
   - **c** **Summarise** the decision made by the majority of the High Court justices.
   - **d** Imagine you have been chosen to represent either the plaintiff or the defendant in this case. Write an opening or closing address. In your address, **identify** the key elements of the law of negligence and link these elements to the facts of the case.
   - **e** Imagine that you are in court and the supervising teacher is giving evidence. Write five questions that you would like to ask the teacher. The focus of your questions will depend on whether you are representing the plaintiff or the defendant.

9 Conduct a review of your school's yard duty policies and the areas of the school's grounds that are supervised by teachers. Then complete the following tasks.
   - **a** **Explain** whether all areas of the school (interior and exterior) are adequately supervised.
   - **b** **Justify** one change to the current yard duty policies that might improve their operation.
   - **c** **To what extent** is it reasonable to expect that every student will be closely supervised at all times before school while on the school's premises, and during recess and lunch? **Justify** your answer.

10.2 Defamation

Key knowledge

In this topic, you will learn about:

- the civil law of defamation, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies, and the impact of the breach on the parties.

One of the purposes of laws and the legal system is to protect the rights of individuals, and one of those rights is the right to freedom of expression. That right is protected in Victoria by the *Charter of Human Rights and Responsibilities Act 2006* (Vic), an **Act of Parliament** that aims to promote and protect human rights.

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)

Although there is a right to freedom of expression, it is subject to limitations. That is, we do not have the right to say whatever we think about people, especially if what is being said cannot be proven and ruins the reputation of others. The law of **defamation** seeks to protect individuals against material or free speech that would harm their reputation.

defamation
a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

In Australia, a person who has had defamatory material published about them can take legal action. Such action can be taken against authors, publishers, broadcasters, journalists and distributors, as well as members of the general public. In recent times, there has been an increase in defamation claims as a result of what people have said on social media platforms or apps such as Facebook, X (formerly known as Twitter), TikTok and Instagram.

Rights protected by defamation laws

The tort of defamation is aimed at protecting the character and reputation of individuals against attempts to discredit them. A statement or other published material is regarded as defamatory if it is untrue and lowers the reputation of a person. A person's reputation is considered to be lowered when statements are made and others think less of the person's character, or the person is shunned, avoided or exposed to hatred, contempt or ridicule.



Source 1 Johnny Depp arrives at the High Court of Justice in London for his defamation lawsuit against British tabloid newspaper *The Sun*, 2020.

The rights protected by defamation laws include:

- the right to freedom of expression
- the right to be considered of good character and reputation
- the right to have that reputation protected by placing limits on freedom of expression
- the right of people whose reputations have been harmed to seek effective and fair remedies
- the right to a quick and effective method of resolving a dispute in relation to defamation.

Defamation laws place reasonable limits on the right to freedom of expression, but aim to uphold that right by balancing it against the right to to be considered of good character and reputation. That is, defamation laws seek to balance the right to freedom of expression with the right to to be considered of good character and reputation.

Non-profit organisations and small private companies with fewer than 10 employees can use the law of defamation to protect their business reputations, but other companies cannot sue for defamation.

Elements required to establish liability for defamation

To establish defamation, the following elements must be proven:

- the statement is defamatory
- the statement is untrue
- the statement refers to the plaintiff
- the statement has been published (i.e. communicated to people other than the person it refers to) by the defendant.
- the defamatory material has caused, or is likely to cause, serious harm to the reputation of the plaintiff.

Element 1 – The statement is defamatory

The plaintiff must first establish that the statement made by the defendant is defamatory. A statement is defamatory if it lowers a person's reputation or standing in the eyes of ordinary members of the community. In other words: will ordinary members of the community think less of the plaintiff? If so, then the publication or statement may be defamatory to the plaintiff. It is not necessary to prove that the defendant had the intention to hurt the plaintiff.

In the scenario below, the defendant was found to have made defamatory statements about his former teacher via social media.

Actual scenario

Social media platforms used to make defamatory statements

In 2013, the District Court of New South Wales ordered a former student to pay $105 000 in damages to a teacher after he made defamatory comments about the teacher on Twitter and Facebook.

The defendant was 20 years old when he posted a series of defamatory comments about his former teacher on the two social media sites. The District Court found that the effect of the publication on the plaintiff was devastating. She took sick leave and later returned to work on a limited basis. Judge Michael Elkaim noted: 'When defamatory publications are made on social media, it is common knowledge that they spread. They are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication.'

(The grapevine effect refers to the further spreading of the alleged defamatory material, especially by social media.)

Mickle v Farley [2013] NSWDC 295 (29 November 2013)



Source 2 The tort of defamation allows an individual who has been defamed on a social media platform to bring an action before the courts.

This is not the only case in which a person has been successfully sued for what they have said on social media. The courts are now frequently finding people liable in defamation who have used social media platforms to complain about people or businesses, including in relation to reviews left on business Facebook pages, and pages created specifically about individuals.

Element 2 – The statement is untrue

The plaintiff must prove that the defamatory statement is untrue. A plaintiff cannot be defamed if the statement is substantially true.

Element 3 – The statement refers to the plaintiff

The plaintiff must establish that they were the person referred to in the statement. The person defamed does not need to be mentioned by name. It may be sufficient to prove that people reading, hearing or seeing the statement would reasonably conclude that it was about the plaintiff.

A plaintiff may also be defamed as part of a group. The group must be sufficiently small for it to be recognised that the plaintiff is part of that group and that their reputation is lowered by reference to the group.

The hypothetical scenario below explores this element in relation to an open letter about a mayor.

Hypothetical scenario

The 'corrupt' mayor

Bridget is a mayor in rural Victoria. She acted to prevent a developer, Andrew, from building a luxury golf resort in an area where a caravan park now sits. In response, Andrew wrote a letter to 'the current local mayor', which he nailed to the door of the council offices. In the letter, Andrew made derogatory and allegedly defamatory statements, including stating that the mayor was 'corrupt' and that she would 'destroy the town'.

While the mayor was not named directly in Andrew's letter, her identity could be reasonably inferred by people familiar with the area. One of the town locals, Barry, took a photograph of the letter and posted it to his Instagram account. Barry has 11 followers. When Bridget pursued legal actions against both Andrew and Barry, the issue of 'serious harm' was raised by the defendants (see Element 5).

Element 4 – The statement has been published by the defendant

The plaintiff must prove that the statement was communicated to a person other than the plaintiff. It is not defamation for a person to make untrue or derogatory comments directly to the person concerned if it is done in private. However, these comments become actionable (i.e. a person can sue in relation to the comments made) once a third person reads, hears or sees the defamatory material.

It does not matter whether the material is published to the general public or to a small group. In fact, what seems like harmless chat may be defamatory. For example, a case of defamation may exist where Georgia tells Liam that Shaun is a convicted thief and Liam repeats this to Kahn and Riley, knowing that the information might be wrong.

Publications can either be verbal or in writing, though most defamation cases are in relation to written publications. These can include articles, letters and books, as well as online publications such as blogs, websites, articles and comments made on social media platforms.



Source 3 Defamatory material can be published in a range of ways, including in printed material (such as a magazine) or online (such as on social media platforms).

Element 5 – The publication caused, or is likely to cause, serious harm

Legislative changes to defamation laws in Victoria in 2020 now require plaintiffs to establish that they have suffered, or may suffer, 'serious harm' as a result of the defamatory comments. This means that the plaintiff has the burden of proof of establishing that the publication of allegedly defamatory matter has caused, or is likely to cause, serious harm to their reputation. This reform prevents trivial or frivolous defamation claims. It also limits the burden of unwarranted defamation cases on businesses, individuals and the courts, and encourages the parties to resolve cases without going to court, and so avoiding the costs of a proceeding.

The 'serious harm' element must be determined before the trial commences unless there are special circumstances. That is, the court will first decide whether there is serious harm. If there is, the case will proceed. If there is not, the case will be dismissed. As part of this, the court will consider the scale of the publication, including the extent of its readership, and what loss or harm has been suffered or could be suffered by the plaintiff (including financial and non-financial loss). It may also consider any 'grapevine effect' (i.e. whether the post or its contents had spread) that would be relevant in establishing serious harm. The court is able to make orders to dismiss the case at this stage if it finds that serious harm is not likely to be established.

Although 'serious harm' is not defined in legislation, the courts have considered the term and what it means in defamation cases that have arisen since the changes were made. These include the case described in the following scenario.

Actual scenario

Serious harm case

In this County Court case, a trial was first held to determine whether the serious harm element had been satisfied by the plaintiffs. The plaintiffs were all involved in the same family-run jewellery business. The defendant was the owner of a residential apartment that had previously been leased by him to two of the plaintiffs. The defendant and these two plaintiffs had been involved in a dispute about the rent payable for the apartment.

The plaintiffs alleged that in October 2021, the defendant had written and uploaded a Google review for their business. The plaintiffs claimed that the review contained untrue imputations about them.

The County Court judge noted that there are two potential kinds of serious harm: harm that has already occurred, and harm that is likely to occur. Collectively, the harm must be 'serious' (which is above 'substantial' harm but less than 'grave' harm), but is confined to harm to reputation, and not harm to feelings, no matter how great the harm to feelings is. Special emphasis is placed on the extent of the publication, including the 'grapevine effect', as well as the likelihood that the publication will come to the notice of other people.

In determining whether there was serious harm, the judge considered the following:

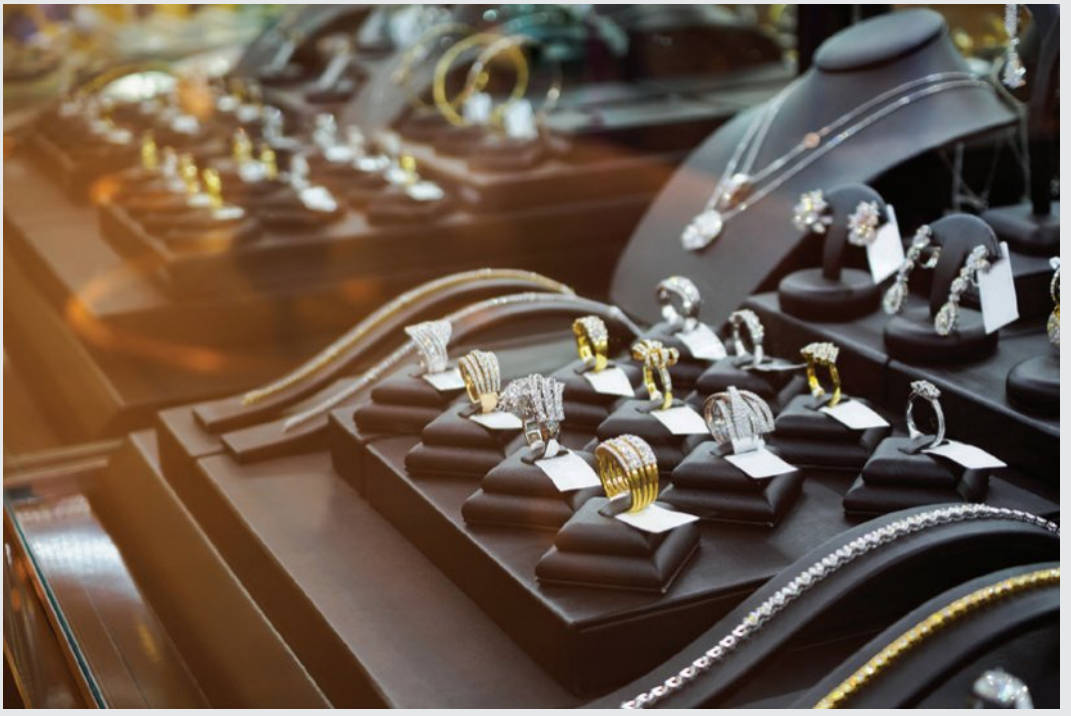
- the extent of the publication – this included the judge determining how many people read the publication, whether the review was at the 'top' of the business's reviews, and whether there was any 'grapevine effect'. However, the judge could not reach a conclusion about the extent of the publication, including how many had read it

(though he noted that even publication to a large audience is insufficient to establish serious harm without more evidence)

- whether the plaintiffs had been financially impacted – in this case, there was evidence given about the lower turnover of the store (i.e. how much money they received), but there was some consideration about why this was so. For example, it was noted that the actual reduction in turnover in this case was high because of the COVID-19 pandemic, which affected jewellery businesses (including how many people were buying gold)
- evidence as to whether the plaintiffs' reputation had suffered, such as whether people were treating them differently, whether people had stopped coming to their store, or whether the plaintiffs had lost opportunities because of the review.

On the evidence, the judge concluded that the plaintiffs had suffered distress and hurt, and most likely had suffered some harm, but that the harm suffered did not rise to the level of 'serious'. The case was therefore dismissed.

High Quality Jewellers Pty Ltd v Ramaihi (Ruling) [2022] VCC 2240 (16 December 2022)



Source 4 The plaintiffs, who were involved in a family-run jewellery business, were not able to satisfy the burden of proof that serious harm had been caused.

Limitation of actions

Under section 5(1AAA) of the *Limitation of Actions Act 1958* (Vic), an action for defamation must be brought within one year from the date of the publication of the defamatory material.

However, a person claiming to have a cause of action for defamation may apply to a court for an order extending the limitation period. A court may extend the limitation period by up to three years from the date of the publication of the allegedly defamatory material, but can only do so if satisfied that it was not reasonable for the plaintiff to have commenced an action within one year from the date of publication.

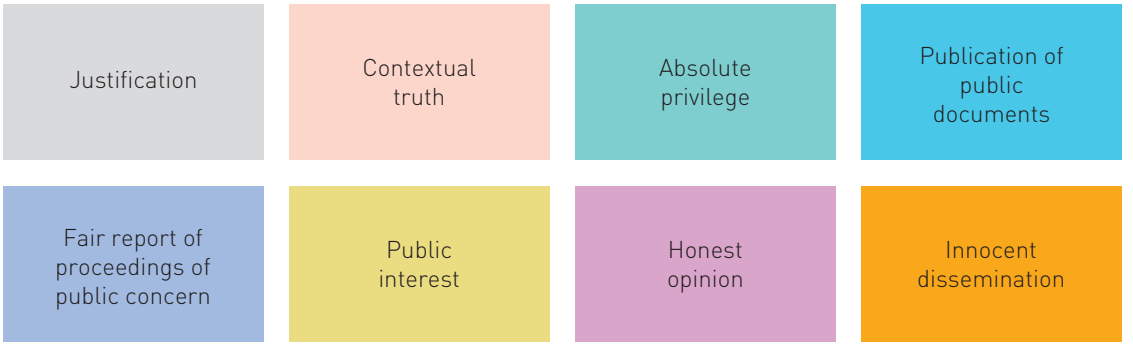
Study tip

Research and gather as many examples of defamation and the uses of these defences as you can. Also look for examples of the 'serious harm' element of the tort of defamation.

Defences to a defamation claim

The defendant may argue that any or all of the elements required to establish liability for defamation have not been proved. That is, the defendant may argue that the statement is not defamatory, that the statement is true, that the statement does not refer to the plaintiff, that the statement has not been published, or that no serious harm has been suffered.

Otherwise, the defendant may be able to rely on one of the eight defences set out in Source 5.



Source 5 If all the elements required to establish liability for defamation are proven, the defendant may rely on any of these defences.

Defence 1 – Justification

The defence of justification applies when a defamatory statement is *substantially true*. This means that the vast majority of the statement is true. For example, a person who commits an act of indecent exposure before a crowd of 30 people cannot claim defamation if a publication wrongly states the exposure occurred before a crowd of 60 people, as the substance (i.e. the core issue) of the statement is true (i.e. the fact that the person committed an act of indecent exposure).

Defence 2 – Contextual truth

The defence of contextual truth applies when defamatory statements are made within the same context as statements that are substantially true, and the defamatory statements do not further harm the reputation of the plaintiff.

An example of contextual truth is where a publication correctly states that a person caused a serious accident by riding a bike into oncoming traffic while intoxicated, but incorrectly states that the rider was not wearing a bike helmet. If the plaintiff claims that the incorrect statement is defamatory, then the defendant may argue contextual truth. This is because, when read in context, the statement is substantially true, and the claim that the plaintiff was without a helmet does not further harm the plaintiff's reputation. The truth of the more serious allegations overrides the falsehood in the less serious allegation, because the effect of the untrue statement on the plaintiff's reputation is insignificant.

Defence 3 – Absolute privilege

Absolute privilege gives a defendant complete immunity from being sued in certain cases. A person may be able to use the defence of absolute privilege where they can prove that the defamatory statement was published in the course of proceedings of parliamentary bodies, courts or tribunals.

Defence 4 – Publication of public documents

It is a defence to a defamation claim if the published statement was a fair copy, summary or extract of a public document, but only if the statement was published for the public or for educational purposes. A public document is one readily available from a parliamentary body, court, tribunal, local government or statutory authority.

Defence 5 – Fair report of proceedings of public concern

A defendant can argue that the statement is a fair report of proceedings, and that the report was published for the public's information or for educational purposes. 'Proceedings of public concern' are those involving:

- a parliamentary body, local government, court or tribunal, because their procedures are usually open to public scrutiny
- government inquiries, law reform bodies, an **ombudsman**, international organisations, and international conferences where governments are represented
- learned, professional, trade, sporting or recreational associations where membership or contractual issues are involved
- company shareholders or other meetings dealing with a matter of public interest.

ombudsman
an office holder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities or bodies

Defence 6 – Public interest

The new defence of public interest is primarily aimed at protecting the publication of matters that concern an issue of public interest, and the defendant reasonably believed that the publication of the matter was in the public interest. This defence aims to assist people or bodies such as journalists and media organisations in publishing matters that are of public interest. The factors listed below are taken into consideration by courts when determining whether the defence of public interest applies:

- the seriousness of any defamatory imputations included in the material
- whether the publication clearly distinguishes between suspicions and allegations on the one hand and proven facts on the other
- whether the published material relates to the performance of the plaintiff's public actions, such as in a professional role
- the sources of information that have been relied on by the defendant, including the integrity of the sources
- whether there were reasonable attempts made by the defendant to contact the plaintiff to allow them to make comment
- whether any other steps were taken to verify the information
- the importance of freedom of expression regarding the contents of the published materials.

Defence 7 – Honest opinion

A defendant may claim that the defamatory material is an expression of their honest opinion (as a commentator) rather than a statement of fact. The matter must be of public interest and the opinion must be based on proper material. Proper material is material that is substantially true, or relates to public documents or a fair report of proceedings of public concern.



Source 6 The movie *Cats* featured an all-star cast, with big names such as Taylor Swift, James Corden, Jennifer Hudson and Judi Dench. The movie received harsh reviews, such as 'this movie is a dog' that 'represents a career low' for its A-list cast. Comedian Ricky Gervais joked that the movie 'is the worst thing to happen to cats since dogs'. If a review is grossly exaggerated or untrue, or goes beyond what would reasonably be expected of a critic, then the honest opinion defence does not apply.

Defence 8 – Innocent dissemination

The defence of innocent dissemination protects people who may unknowingly distribute defamatory information, such as printing companies, booksellers, libraries, and internet or email providers. For this defence to be successful, the defendant needs to establish that they:

- published the material as a subordinate distributor or as an employee or agent of one (a subordinate distributor is any person other than the author, primary distributor or editor of a publication)
- did not know (nor should have known) that the publication contained defamatory information
- did not have an obligation to check for defamatory material.

The law regarding the publication of comments by media platforms such as *The Age* website has been the subject of commentary and judgments in court. One of the issues is whether the owner of the media platform itself should also be liable, as well as the person who actually wrote the comment. This was subject to a High Court ruling in 2021, with the outcome of that case being debated by federal, state and territory governments in 2023. At the time of writing this textbook, changes to the law were being considered to determine whether news outlets should be liable for third party comments, which involve members of the public contributing to debate on social media platforms such as Facebook.

Actual scenario

Defamation in the age of social media

Newspapers such as *The Age* and the *Herald Sun* now frequently use social media to post content relating to news stories, including on their public Facebook and X (formerly Twitter) platforms. The posts often contain hyperlinks to the stories on their website. This type of posting was the subject of a 2021 case which went all the way to the High Court.

The case involved a man, Dylan Voller, who had once been detained in a Northern Territory youth facility. His case was publicised in the media, and the media companies in the case posted content on their Facebook pages about the man. The posts drew a range of responses from readers online, some of which were considered defamatory. Voller brought proceedings against the media companies, alleging that they were liable for defamation because they had published the comments made by third parties. The case had to be decided by the High Court after the NSW Supreme Court and the NSW Court of Appeal held that the media companies who hosted the Facebook pages had published the material, and therefore could be liable in defamation.

The High Court held that news outlets such as *The Age* were the publishers of the readers' Facebook user comments. In the majority judgment of the High Court, then Chief Justice Kiefel and Justices Keane and Gleeson found that 'the acts of the [news outlets] in facilitating, encouraging and thereby assisting the posting of comments by the third-party Facebook users rendered them publishers of those comments'.

The judgment was said to have a 'chilling' effect on people and organisations that have their own websites and social media pages on which third parties post comments or information about other parties. In short, it means that an organisation or person is exposed to a defamation claim if someone else posts on their page or space. While smaller businesses or individuals may be able to actively monitor and track negative or problematic posts, this is much more difficult for larger organisations dealing with multiple posts and thousands of comments on a daily basis.

Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller [2021] HCA 27 (8 September 2021)

Possible remedies

A remedy is a legal solution to a breach of civil law. A party who has suffered injury, loss or damage as a result of defamation may seek a remedy to address the wrongdoing. In a claim for the tort of defamation, there are two remedies that would most likely be sought by the plaintiff: damages and an injunction. Only a judge or magistrate can order remedies in a defamation claim, not the jury.

Damages

Damages involve a payment of money from the defendant to the plaintiff for the injury, loss and/or damage caused through the actions of the defendant. The most common form of damages awarded for defamation is **compensatory damages**. Compensatory damages include:

- **special damages**, which are damages to compensate for loss that can be accurately measured in monetary terms, such as loss of wages. For example, this would include the plaintiff's claim of loss of an employment contract due to the defamatory publication of materials by the defendant, or due to a lost business opportunity because the prospective business partner had heard negative things about the plaintiff
- **general damages**, which are damages to compensate for loss that cannot be accurately measured in monetary terms, such as loss of enjoyment of life. With regard to defamation, this could include a claim for anxiety, sleeplessness or depression because of what the defendant did or said
- **aggravated damages**, which are awarded if the defendant shows reckless disregard for the plaintiff's feelings. The court not only looks at the civil wrong that has occurred, but also at the manner in which the defendant infringed the plaintiff's civil rights. The purpose of aggravated damages is to compensate the plaintiff for this distress, which may have caused feelings of shame or humiliation. The conduct of the defendant in such cases is generally considered to be outrageous.

Although a court can award exemplary damages for other types of civil claims, this form of damages cannot be awarded for defamation.

The amount and type of damages awarded depends on various factors, including the following:

- *whether the loss is economic (financial) only, or non-economic* – economic loss includes loss of wages (past and future) and lost income. This loss can be easily quantifiable and compensated through special damages. Non-economic loss – such as pain and suffering, and psychiatric injury – is harder to quantify, but can be compensated through general damages
- *the seriousness of the harm* – in Victoria, there is now a requirement for the harm to be serious. If the harm is very serious, then the court may award a high amount of damages
- *caps on damages* – in Victoria, there are 'caps' that limit the amount of damages that can be awarded for non-economic loss in defamation proceedings. The maximum amount of damages for this loss is $250 000. This can only be awarded in the most serious case
- *whether there are any factors that mitigate damages* – there may be factors that mitigate the damages to be awarded; that is, they weigh towards awarding a lesser amount of damages. In Victoria, these factors include whether the defendant has made an apology, whether the defendant has published a correction, and whether the plaintiff has already recovered damages in relation to any other publication that also defamed them with regard to the same subject matter. If any of these have occurred, then a court may factor them into account and potentially reduce the amount of damages awarded.

compensatory damages
an amount of money awarded to a plaintiff for harm, injury, or other losses suffered. It includes general damages, special damages, and aggravated damages

special damages
the amount of money that one party is ordered to pay to another party to compensate for losses that are easily quantifiable (e.g. medical expenses or loss of wages)

general damages
a type of remedy that requires the payment of a sum of money to compensate for loss that cannot easily be quantified (e.g. pain and suffering)

aggravated damages
an amount of money that a defendant may be ordered to pay when a plaintiff has suffered extreme humiliation, embarrassment or insult because of the defendant's conduct

Injunction

injunction
a remedy in the form of a court order requiring the defendant 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

An **injunction** is an order requiring the defendant to do or not do something. It is a non-financial remedy that may be awarded in conjunction with damages, or as a single remedy. An injunction can be awarded in defamation cases, and often the plaintiff will seek some form of injunction with respect to the published material. An injunction can:

- compel behaviour (i.e. a mandatory injunction) – that is, force someone to do something. In recent defamation cases, mandatory injunctions have been ordered to force someone to take down a post on social media, or
- prohibit behaviour (i.e. a restrictive injunction) – that is, stop someone from doing something. In a defamation case, this may involve ordering the person to stop posting anything further on social media, or stop them from publishing the defamatory material.

Whether an injunction is awarded depends on the nature of the publication. If there is a risk of further publications, a restrictive injunction may be more appropriate. If there is a desire or need to remove the publications to avoid them from causing further damage, a mandatory injunction may be more appropriate.

When the court is considering the awarding of an injunction in relation to material posted on social media, it needs to take account of whether an injunction would have any lasting effect. While an injunction may be granted where the identity of the individual posting the comment is known, that person could continue posting commentary under a pseudonym (a fake name), so it is very difficult for plaintiffs to keep track of people who are seeking to post defamatory material. This also includes platforms such as the 'dark web', where the identities of users are hidden.

Possible impacts of a breach of defamation law

Impacts on the plaintiff

The impact of a breach of defamation laws on the plaintiff depends on the nature of the statements that have been made about the plaintiff. Some of the typical impacts are as follows:

- loss of reputation – this could include loss of status. For example, the plaintiff could be shunned by people with whom they once associated
- emotional impact of the defamatory material – this could be a consequence of the publicity of the claim. For example, a person could develop conditions such as depression and anxiety as a result of the defamation
- loss of wages and livelihood – this could be a consequence of loss of reputation. For example, the plaintiff might need to take time off work because of the distress or anxiety caused by the loss of reputation
- unemployment – this could be a consequence of loss of reputation. For example, a person may lose business opportunities or may lose the support of their colleagues, resulting in unemployment.

Impacts on the defendant

Some of the possible impacts of a breach of defamation laws on the defendant include:

- costs – this could occur when the defendant has to defend a claim, and/or loses a case. For example, the defendant might be ordered to pay the plaintiff's legal costs, which could cause financial hardship
- need to sell assets – this could be a consequence of a high damages award. For example, the defendant might be forced to sell assets to meet the cost of the damages amount
- public humiliation – this could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of widely reported court proceedings.

Source 7 summarises some of the possible impacts that defamation can have on the plaintiff and on the defendant.

Impacts on the plaintiff	Impacts on the defendant
• Loss of reputation • Emotional impact of the defamatory material • Loss of wages and livelihood • Unemployment	• Costs • Need to sell assets • Public humiliation

Source 7 A summary of the impacts of defamation

10.2 Check your learning

Remember and understand

1 Can a person sue for defamation if they are not named in the defamatory material? Using an example, **justify** your response.

2 **Describe** two different ways that defamatory material can be published.

3 **Outline** two reasons why it is necessary to have uniform defamation laws throughout Australia.

Examine and apply

4 **Distinguish** between the defences of absolute privilege and honest belief.

5 Read the scenario 'Social media platforms used to make defamatory statements'.
   - **a** **Who** were the parties in this case?
   - **b** **Where** were the comments made? Conduct some further research to determine the nature of the comments.
   - **c** **Why** do you think defamation was proved in this case?
   - **d** **What** remedy did the teacher receive?
   - **e** Do you agree with the District Court's decision? **Explain** your response.

6 Read the scenario 'Serious harm case'.
   - **a** **Explain** why serious harm is relevant to a defamation claim.
   - **b** **Why** was the legislation changed to introduce the element of serious harm?
   - **c** **Outline** the factors that may be relevant in assessing whether there has been serious harm.
   - **d** Write your own hypothetical scenario involving the publication of defamatory statements. Include in your scenario material about whether the harm was serious or trivial. Put in as much information as you can. Swap your scenario with another class member. Discuss with each other whether there was in fact serious harm.

Reflect and evaluate

7 Do you think that newspapers should be held liable for third party comments made on their websites? **Justify** your response with reference to the scenario 'Defamation in the age of social media'.

8 Google has been sued for defamation because an old article about a person, which contained factual inaccuracies, could be clicked on when someone conducted a Google search of the person.
   - **a** Imagine you are arguing the case for the plaintiff. Write down the arguments you would make in support of the view that Google is the publisher of the defamatory material.
   - **b** As a class, conduct some searches as to whether this scenario has been considered by the courts. Discuss your findings with the class.

10.3 Nuisance

Key knowledge

In this topic, you will learn about:

- the civil law of nuisance, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies, and the impact of the breach on the parties.

nuisance
a type of tort that involves interference with a person's right to use and enjoy private and/or public property

Nuisance deals with the breach of a person's right to reasonable convenience and comfort in life. In effect, this tort considers competing land uses and which should take precedence over another. For example, if a new freeway is to be constructed, is it reasonable that people living in the area be inconvenienced for three years by dust, noise, vibrations and lack of access to public roads?

There are two types of nuisance:

- private nuisance
- public nuisance.

private nuisance
a type of tort involving an act or omission that substantially and unreasonably interferes with the use and enjoyment of land

Private nuisance occurs where there is an act or omission that substantially and unreasonably interferes with a person's use and enjoyment of their own land. The law also covers activities that might cause people to fear for their safety, such as the aerial spraying of crops.

If a person occupies land and they allow another person to cause nuisance on that land, then the occupier of the land can also be held legally responsible. For example, if a person owns a facility that is used for public events (e.g. weddings and twenty-first birthday parties), they are liable for any excessive noise or other interference to neighbours that occurs on that land. The owner of the facility cannot argue that they are not responsible because they were not present when the nuisance occurred.

public nuisance
a type of tort involving an act or omission that interferes with the comfort or convenience of a number of people to a considerable degree

Public nuisance occurs where, to a considerable degree, there is an act or omission that interferes with the comfort or convenience of a number of people. This can involve the people's ability to access a public place such as a park, roadway or building. A public health nuisance can also include rubbish being left on a property. If a group of people decide to block a public road, this would affect a significant number of people, such as those going to work, students attending school, and children being taken to medical appointments by their parents.

To have an action for public nuisance, any affected person needs to show that they have suffered special damage that extends beyond what may have been experienced by other members of the public.

Under Australian law, public nuisance can also constitute a criminal offence.

Rights protected by the law of nuisance

There is a difference between the word 'nuisance' that we use in everyday life and the tort of nuisance. If someone asks us to go to the shop to buy a carton of milk, that might be 'a nuisance' (a bother) but it is not a legal nuisance. A legal nuisance is a serious impact on enjoyment of property.

The tort of nuisance is designed to protect a person's rights to:

- enjoy their own land, which means that others cannot interfere with a person's access to or enjoyment of private land. The law is clear that people should be protected from excessive interferences with their enjoyment of land from nuisances such as dust, noise and vibration
- freedom of movement, such as movement along roads and waterways (rivers and creeks) unless, for example, there are public works being undertaken that are managed by a statutory authority

- seek an appropriate remedy from the courts where nuisance has occurred. A useful remedy in these cases can be an injunction, which is a court order that stops the defendant from engaging in the nuisance any further.

These rights are upheld through dispute resolution bodies, including the courts, where a range of remedies are available to restore a plaintiff's enjoyment of their land. The scenario below further illustrates how a person's right to enjoy their land can be affected.

Actual scenario

Wild all-night parties at a Ripponlea mansion

In 2015, the Supreme Court of Victoria heard a case about wild parties being held at an old mansion in the Melbourne suburb of Ripponlea, where music was played loudly and a skateboard ramp had been installed in the backyard. The mansion had been divided into three separate units.

The local council, the City of Port Phillip, had issued warning notices to the property owner over this excessive noise, which had caused great inconvenience to the property's neighbours. One of the residents had kept a diary of the nuisance caused by noise, and had recorded more than 70 incidents over a four-month period.

In the hearing, the property owner stated that he was away from the property for six months of the year and was unaware of the noise being caused by his tenants. When he became aware of this, he evicted them.

The case is a good example of how a local council will try to intervene when a neighbour is causing nuisance.

Hallett v City of Port Phillip [2015] VSC 313 (30 June 2015)



Source 1 Wild parties at a Ripponlea mansion resulted in excessive noise.

Did you know?

In the British case of *Hussain v Lancaster City Council*, the plaintiffs, who owned a corner store, suffered racially motivated abuse. They undertook action against the local council for failing to deal with the alleged perpetrators, who were tenants of council properties nearby. One of the issues in the case was whether the council could be liable for the behaviour of its tenants. The Court ruled that although the tenants' behaviour was offensive, it did not relate to the use of the council's land, and so a nuisance claim could not be made.

Elements required to establish liability for nuisance

To establish nuisance, the following elements must be proven:

- the plaintiff has a property right in or over the land
- there has been interference with the plaintiff's use and enjoyment of the land
- the plaintiff has suffered damage.

Element 1 – The plaintiff has a property right in or over the land

A plaintiff must establish that they have some property right in or over the land. This means they must have an interest in the land, usually as the owner of the property or as a tenant (i.e. someone who is renting the property). Individuals also have the right to access public property, and if there is interference with their right to access and enjoy public property, they may be able to sue.

Element 2 – There has been interference with the plaintiff's use and enjoyment of the land

The plaintiff must establish that the defendant interfered with the plaintiff's use and enjoyment of the land. This interference can involve a range of actions on the part of the defendant, including noise, dust, vibration, water run-offs, and even objects (e.g. golf balls). The following scenario provides an example of the way nuisance can affect a plaintiff's ability to develop a property for commercial gain.

Actual scenario

Nuisance and the endangered froglet

In this case, the plaintiff (Gales Holdings) owned a 27-hectare parcel of undeveloped land in the suburb of Kingscliff in New South Wales. The land had been earmarked to be developed into a shopping centre.

The plaintiff claimed that this land had become undevelopable because the local council (Tweed Shire Council) had allowed polluted stormwater to run onto the property. This water lay in pools on the ground, which created an ideal habitat for the wallum froglet, an endangered species. The species breeds in swamps with permanent groundwater, as well as in shallow pools and drainage ditches. Given the endangered nature of the froglet, the plaintiff was unable to develop the land, which it claimed amounted to an interference by the defendant with the plaintiff's use of its property.

The Supreme Court of New South Wales found that the Council had caused a nuisance in allowing stormwater to run onto the property. However, there was evidence that the froglet had existed on the land in the past, so the damages sought by the plaintiff were reduced. The Court found that the Council must contribute to the plaintiff's additional costs in developing the land to make it suitable for the froglet.

The Court awarded damages of $600 000, together with other orders to remove the nuisance that had been occurring since May 2004. The Court also ruled that compensation was not payable by the Council for any loss of value of the land that was to be used for the wallum froglet habitat.

In her judgment, Justice Patricia Bergin said:

> If the defendant knew or ought to have known of the nuisance and the real risk of reasonably foreseeable consequential damage to the plaintiff, it had an obligation to take such positive action as a reasonable person in its position and circumstances would consider necessary to eliminate the nuisance.

Gales Holdings Pty Ltd v Tweed Shire Council [2011] NSWSC 1128 21 September 2011)

To determine whether an interference is reasonable, a court examines:

- the nature of the interference (e.g. what the defendant did, and whether the defendant's behaviour is reasonable and necessary)
- the time of day in which the interference occurs
- the nature of the neighbourhood in which the plaintiff lives (e.g. whether the area is in the inner city, in an outer suburban area or in a rural area)
- whether the nuisance or interference is necessary for the community
- whether the interference is ongoing or intermittent
- how long the nuisance or interference has been in existence (e.g. whether the nuisance was present in the area before the plaintiff moved into their property).

Element 3 – The plaintiff has suffered damage

The plaintiff must also establish that they have suffered some sort of injury, loss or damage that has a negative impact on their life. The damage can be material or non-material. Material damage includes physical damage (e.g. damage to crops). Non-material damage includes non-physical damage (e.g. loss of revenue). For a public nuisance claim, the plaintiff has to establish that the interference had a much greater impact on them than on the wider public.

The following scenario is an example of how neighbours can suffer damage as a result of nuisance.

Study tip

When analysing a case of public nuisance, remember that for an individual to have an action for compensation for the inconvenience or interference, they must show that the impact caused them 'special damage'. The impact on the plaintiff must be shown to be greater than that suffered by the general public.

Actual scenario

Bald Hills and noisy wind turbines

The Bald Hills wind farm, which has been operating since 2015, is located near Tarwin Lower in South Gippsland, Victoria. It has drawn complaints from some neighbours about the noise made by its operation. In this case, two of the neighbours sought both damages and an injunction from the operator of the wind farm for nuisance.

The plaintiffs described the noise from the turbines as a 'continual roar' that disturbed their sleep, caused health problems and reduced the value of their properties. At times, both plaintiffs slept away from their homes. One of them spent the occasional night in his car at a beach, and the other spent longer periods staying with friends. A number of witnesses were called to give evidence about their experience of noise from the wind farm.

The Supreme Court found that the noise from the wind turbines interfered with the plaintiffs' enjoyment of their land, which was both 'substantial and unreasonable'. The plaintiffs were awarded damages of $130 000 ($84 000 for one plaintiff and $46 000 for the other) for past loss of enjoyment of their land due to the noise levels. Furthermore, aggravated damages of $130 000 ($84 000 damages for one plaintiff and $46 000 for the other) were awarded by the Court due to what the judge described as the wind farm's 'high-handed' conduct towards the plaintiffs. The Court also imposed an injunction on the wind farm, restraining its night-time operations and requiring it to take steps to address the nuisance. However, the injunction was stayed (postponed) for three months, to allow the defendant to abate or address the noise without stopping its operations.

Uren v Bald Hills Wind Farm Pty Ltd [2022] VSC 145 (25 March 2022)



Source 2 The Victorian Supreme Court ordered the defendant to pay damages because of the impact of the noise from its wind farm on the plaintiffs.

Limitation of actions

Under the *Limitation of Actions Act 1958* (Vic), an action for damages for nuisance must be brought:

- for general nuisance claims (e.g. where there has been property damage): six years from the date on which the cause of action occurred (i.e. when the damage occurred)
- where the damages claimed by the plaintiff include damages for personal injuries consisting of a disease or disorder contracted by any person: three years from the date the person first knew that they had suffered the injuries and that those injuries were caused by the defendant.

The *Limitation of Actions Act* allows plaintiffs to apply to a court to extend a limitation period to allow the issue of court proceedings. The extension must be considered 'just and reasonable'. In considering applications, the court takes into account factors such as the reasons for the plaintiff's delay in commencing the action.

Defences to a nuisance claim

The defendant may argue that any or all of the elements required to establish nuisance have not been proven. That is, the defendant may try to prove that the plaintiff did not have a right to the property, there was no interference with the plaintiff's use and enjoyment of the land, or the plaintiff did not suffer damage.

The defendant may also rely on one of the following three defences:

- statutory authorisation
- consent
- reasonable use.

Defence 1 – Statutory authorisation

In cases involving the tort of nuisance, a defendant can argue the defence of statutory authorisation. This means that legislation passed by the Victorian or Commonwealth Parliament allows the conduct that the plaintiff has claimed constitutes nuisance. Statutory authorisation also covers the conduct of post office staff, council officers, and gas, water and electricity meter readers. In addition, police officers are allowed to enter property if they have a warrant. At all times, property owners are responsible for the safety of visitors when they enter their premises.



Source 3 Major infrastructure projects in Victoria may impact local residents because of issues such as noise, dust and inconvenience.

The defence of statutory authorisation relies on how the courts view the intention of the relevant law-making body (i.e. legislature). It is presumed that because parliament intended a certain activity (e.g. a major infrastructure project), then parliament has authorised any consequences of that activity. The building of Melbourne's Metro Tunnel and West Gate Tunnel are examples of such a project.

Defence 2 – Consent

The defendant might argue that the plaintiff gave consent to the activity that is now being claimed as having caused injury, loss or damage.

Defence 3 – Reasonable use

Where the defendant can establish that their use of land is reasonable, the plaintiff will not succeed in their action. To determine what constitutes 'reasonable' use in a particular case, the court examines the nature of the alleged nuisance and whether the defendant's use of the property accords with existing standards and expectations for a property of that type and in that location.

The following scenario explores how the Magistrates' Court resolved a neighbourhood noise complaint.

Actual scenario

Magistrates' Court hears neighbourhood noise complaint

In January 2012, the defendants, a couple living in Eagle Point, a small town in Victoria, began using an electronic device to scare away birds that were making a mess on their property. The device, known as an acoustic bird deterrent (ABD), produced bird distress cries and predator calls to scare off unwanted birds. Shortly after the device was installed, the plaintiffs, their neighbours, began complaining about the level of noise created by the ABD and claimed the device was a nuisance. This case is a good example of how a simple neighbourly dispute can escalate and require the intervention of the courts.

The plaintiffs lived on a semi-rural two-hectare property at Eagle Point. They had lived there since 1996. The defendants had lived on the property next door since 2000. Initially, the plaintiffs and defendants got along well as neighbours, but over time minor disputes occurred between them.

The ABD contained eight different bird sounds and included a control unit with four speakers, which was mounted onto the defendants' machinery shed. The ABD could be programmed and controlled by the defendants to change the number of sounds, the volume of the sounds, and the interval between the sounds.

In December 2012, one of the plaintiffs complained to the East Gippsland Shire Council about the noise created by the ABD. In response, the defendants re-programmed the operating times of the device. However, the plaintiffs made further complaints. Subsequently, in February 2013, the defendants reduced the volume of the ABD. On 5 September 2014, the plaintiffs issued a nuisance claim in the Magistrates' Court. The plaintiffs alleged that the noise from the defendants' device constituted an interference.

The plaintiffs claimed that the ABD had a significant effect on them. One of the plaintiffs claimed that her multiple sclerosis, which she was diagnosed with in 1993, had become worse as a result of the noise. She also claimed that she had become increasingly frustrated, annoyed and angry, and that she rarely invited people to her home. The other plaintiff alleged that he was becoming increasingly angry and irritated about the issue, which caused him to spend more time in his house rather than his office (which was adjacent to the fence line with the defendants), even though his office used to be his favourite spot on the property.

Magistrate Simon Garnett dismissed the plaintiffs' claim. He found that one of the plaintiffs had exaggerated the nature and extent of her symptoms to the Court, and described her evidence in the witness box as 'histrionic'. He also found that the other plaintiff's 'annoyance' about the noise arose after a dispute between him and one of the defendants about the costs associated with a shared road. The magistrate also found that one of the defendants was a credible and honest witness and that he was prepared to make adjustments to the device to satisfy the plaintiffs.



Source 4 An acoustic bird deterrent was purchased by the defendants to protect their property from unwanted birds such as swallows. Their neighbours lodged a nuisance claim in the Magistrates' Court, which was dismissed.

Courtney & Jackson v Howell [2016] VMC 11 (26 July 2016)

compensatory damages
an amount of money awarded to a plaintiff for harm, injury, or other losses suffered. It includes general damages, special damages, and aggravated damages

special damages
the amount of money that one party is ordered to pay to another party to compensate for losses that are easily quantifiable (e.g. medical expenses or loss of wages)

general damages
a type of remedy that requires the payment of a sum of money to compensate for loss that cannot easily be quantified (e.g. pain and suffering)

aggravated damages
an amount of money that a defendant may be ordered to pay when a plaintiff has suffered extreme humiliation, embarrassment or insult because of the defendant's conduct

Possible remedies

A remedy is a legal solution to a breach of civil law. A person who has suffered injury, loss, harm or damage as a result of nuisance may seek a remedy to address the wrongdoing. In a claim for the tort of nuisance, there are two remedies that would most likely be sought by the plaintiff: damages and an injunction.

Damages

Damages involve a payment of money from the defendant to the plaintiff for the suffered injury, loss and/or damage caused through the actions of the defendant. The most common form of damages awarded is compensatory damages. **Compensatory damages** include:

- **special damages**, which are damages to compensate for loss that can be accurately measured in monetary terms, such as loss of wages. For example, this would include the plaintiff's claim of loss of earnings due to loss of sleep because of noise on their property. It could also include medical expenses, or even expenses associated with staying in a hotel room if the nuisance is so significant that a person needs to leave their home
- **general damages**, which are damages to compensate for loss that cannot be accurately measured in monetary terms, such as loss of enjoyment of life. With regard to nuisance, this could include a claim where a plaintiff lost their enjoyment of their land due to the nuisance emanating from neighbouring properties. This is known as loss of amenity
- **aggravated damages**, which are awarded if the defendant shows reckless disregard for the plaintiff's feelings. The court not only looks at the civil wrong that has occurred, but also at the manner in which the defendant infringed the plaintiff's civil rights. The purpose of aggravated damages is to compensate the plaintiff for this distress, which may have caused feelings of great frustration and annoyance. The conduct of the defendant in such cases is generally considered to be outrageous.

In some situations, the court may decide to award exemplary damages, which is a form of damages that the court uses to make an example of the defendant and deter others from that type of behaviour, where the defendant can be shown to have acted consciously and in extreme disregard of the rights of the plaintiff.

The amount and type of damages depend on various factors, including the following:

- *whether the loss is economic (financial) only, or non-economic* – economic loss includes loss of wages (past and future), and lost income. This loss can be easily quantifiable and compensated through special damages. Non-economic loss – such as pain and suffering – is harder to quantify, but can be compensated through general damages
- *the seriousness of the harm* – if the nuisance causes a small amount of harm, then the court may award only a small amount of damages. More significant harm, where a person's enjoyment of life or their property has been significantly impacted, may result in a greater amount of damages.

Injunction

An **injunction** is an order requiring the defendant to do or not do something. It is a non-financial remedy that can be awarded in conjunction with damages. An injunction can be awarded in nuisance cases, and often the plaintiff will seek some form of injunction to force the defendant to stop the nuisance, or to do something to ensure that the nuisance will not continue. An injunction can:

- compel behaviour (i.e. a mandatory injunction) – that is, force someone to do something. In a nuisance case, this may be a defendant having to take action to stop the nuisance from happening again (e.g. changing their operations)
- prohibit behaviour (i.e. restrictive injunction) – that is, stop someone from doing something. In a nuisance claim, this may involve the defendant being prevented from operating in a certain way or at a certain time (such as at night) to avoid causing a nuisance.

injunction
a remedy in the form of a court order requiring the defendant 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

Possible impacts of a breach of nuisance laws

Impacts on the plaintiff

The impact of a breach of the tort of nuisance can be significant. Possible impacts on the plaintiff include:

- effect on mental health – this could include conditions such as depression or anxiety. For example, a person may develop anxiety as a result of listening to a very loud wind turbine
- quality of life – this could be a consequence of the breach. For example, a malicious creation of noise or vibration can greatly affect a person's right to enjoy their property
- costs – this could occur as a result of the impact of the nuisance. For example, a person who is operating a business may suffer financially through loss of customers, loss of productivity, or having to spend money to minimise the impact of the nuisance.

Impacts on the defendant

Possible impacts on the defendant of a nuisance claim are as follows:

- inconvenience – this could require the defendant to attend hearings in an attempt to settle the dispute. For example, the defendant may have to attend a **mediation**
- costs – this could occur when the defendant loses the case. For example, the defendant might be ordered to pay the plaintiff's legal costs, which could cause financial hardship
- business failure – this could be a consequence of an injunction. For example, a business might suffer financially with an order to minimise the impact of the nuisance.

mediation
a method of dispute resolution that uses an independent third party (the mediator) to help the disputing parties reach a resolution

Source 5 summarises some of the possible impacts that nuisance can have on the plaintiff and on the defendant.

Impacts on the plaintiff	Impacts on the defendant
• Effect on mental health • Quality of life • Costs to address the nuisance	• Inconvenience • Costs • Business failure

Source 5 A summary of the impacts of nuisance

10.3 Check your learning

Remember and understand

1 **Explain** the purpose of the tort of nuisance.

2 **Describe** two situations in which a person may breach the law relating to public nuisance.

3 **Distinguish** between public nuisance and private nuisance.

Examnine and apply

4 Under Victorian law, complaints can be made about the operation of a domestic air conditioner or evaporative cooler between 10 pm and 7 am on weekdays. Give reasons why:
   - **a** this law was made by the Victorian Parliament
   - **b** this law is rarely, if ever, enforced.

5 Read the scenario 'Wild all-night parties at a Ripponlea mansion'. Assume that the residents who live adjacent to the mansion launched legal action for nuisance against the property owner. Draft a paper that could be presented at a hearing where you are representing the plaintiffs. In your address, **outline** the factors that an adjudicator would consider in a case such as this.

Reflect and evaluate

6 Read the scenario 'Bald Hills and noisy wind turbines'.
   - **a** **Outline** the key facts of this case.
   - **b** **Explain** the decision in this case.
   - **c** **Explain** why the injunction was not immediately enforceable in this case.
   - **d** **Outline** the purpose of the court's award of aggravated damages.

7 'Over the past century, the tort of nuisance has become less available to plaintiffs because parliament has passed statutes that allow for nuisance to occur, with the result that legal action is not available to those affected.'
   - **a** In your own words, **describe** the defence of statutory authorisation. In your answer, refer to infrastructure projects such as Melbourne's Metro Tunnel and West Gate Tunnel.
   - **b** **To what extent** should governments cater for the needs of local residents and retailers when planning projects such as the Metro Tunnel and West Gate Tunnel? Does statutory authorisation allow for an unreasonable interference with a person's right to enjoy their land? **Discuss**.

8 Read the scenario 'Nuisance and the endangered froglet'.
   - **a** **Outline** the key facts of this case.
   - **b** **Explain** the decision of the Supreme Court of News South Wales.
   - **c** **Discuss** whether it is reasonable that a shopping centre development should be affected by an endangered species. **Justify** your response.
   - **d** **Discuss** the impact of the judgment in this case on local councils.

Chapter 10 Review

Top assessment tips from Chapter 10

1 One of the key skills you need to demonstrate in this area of law is to 'argue' the 'elements, possible defences and civil liability' across a range of cases. That means you need to be able to understand the facts that are specific to that area of law, and justify the extent to which a party should or should not be found liable. You can have a lot of fun with this – pretend you're a barrister in court!

2 When looking at the facts of a case, start by highlighting the elements that may be harder to prove for the plaintiff, and the elements that are easy to prove. Also, list the possible defences that are available to the defendant. Remember that to succeed in a claim, a plaintiff needs to prove all of the elements of the relevant tort. The role of the defendant is to either disprove one or more elements, or establish a defence.

3 Developing your application skills is important. It's not enough to memorise and rewrite everything you know about a particular area of civil law. You need to show your understanding of the law by applying it to a particular set of circumstances. The best way to develop your application skills is to practise – ask your teacher for additional scenarios that you can work through.

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 assessment tasks are composed of a variety of questions. A great way to identify the difficulty of the question is to look at the command term (or terms) used in the question and the mark allocation. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 Outline **two** reasons why time limitations are imposed for actions under civil law.

(4 marks)

Difficulty: medium

2 Explain the key elements required to establish **one** tort you have studied in this chapter.

(6 marks)

Difficulty: high

3 Choose **one** tort you have studied in this chapter. Write **two** hypothetical scenarios as follows:
   a where there is doubt about whether a particular element can be established
   b where there is one defence that can be raised.

(8 marks)

Practice assessment task

Before attempting this practice assessment task, re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

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

Chaos at Seoul Survivor

Twelve months ago, Julia, who is 18 years old, began managing a taekwondo club, Seoul Survivor, every night except Sunday. The club is open until midnight, and Julia allows music from bands such as AC/DC, Megadeth and Metallica to be played loudly from speakers.

James, who lives in a flat above the taekwondo club, complains repeatedly to Julia, but she ignores his complaints. James owns the flat, which he purchased in August 2023. Things are made worse by the fact that James is an emerging artist and the music, combined with the noise made by the young people who gather outside the club, affects his ability to create his work. James claims the disturbance is causing him a loss of income. Also, his enjoyment of the local area has been diminished by the young people who have been drawn to the area since the club opened.

In desperation, James posts a message on social media claiming that Julia 'has criminal connections' and 'should be in a juvie prison'. Things become much worse for Julia when one of the club's senior instructors, Thommo, is away on holidays and can't take a class. In the absence of Thommo, Julia asks one of her friends, Emma, to take the class, even though the closest she has come to martial arts is playing computer games such as *Mortal Kombat XL*.

During a 'flying side kick' competition, Emma holds the board at the wrong angle and one of the students, Izzy, falls and tears ligaments in her ankle.

Practice assessment task questions

Choose **one** of the torts that you have studied in this chapter.

1 Identify a likely plaintiff and a likely defendant in this case study for a dispute that could arise in relation to the tort.

(2 marks)

2 Describe **one** right protected by that area of tort law.

(3 marks)

3 Explain how long a plaintiff has to bring a claim. Can this time be extended? Give reasons for your answer.

(4 marks)

4 Describe the purpose of **one** remedy that would be appropriate to pursue as a part of the civil law action.

(4 marks)

5 Describe **one** impact this dispute might have on the plaintiff, and **one** impact it might have on the defendant you identified in Question 1.

(4 marks)

6 Imagine you are a lawyer assisting either the plaintiff or the defendant you identified in Question 1. Your client has asked you to prepare a paper that argues why the defendant is or is not liable (depending on who you are acting for). Prepare the paper. Make sure you address each of the elements that needs to be established for the chosen tort, and any possible defences.

(8 marks)

Total: 25 marks

Chapter checklist

Now that you have completed this chapter, reflect on your ability to understand the key knowledge from the Study Design. If you feel you need some more practice, use the revision links to revisit the key knowledge.

Remember that you will also need to be able to draw on and understand the key skills outlined in the Study Design.

Key knowledge	I understand this	I need some more practice to understand this	Revision link
• The civil law of negligence, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies, and the impact of the breach on the parties	☐	☐	Go back to Topic 10.1.
• The civil law of defamation, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies, and the impact of the breach on the parties	☐	☐	Go back to Topic 10.2.
• The civil law of nuisance, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies, and the impact of the breach on the parties	☐	☐	Go back to Topic 10.3.

Check your Student obook pro for these additional resources and more:

- **Chapter 10** Chapter review quiz
- **Revision notes** Chapter 10
- **Chapter summary** Chapter 10
- **Quizlet** Revise key legal terms from this chapter.

Chapter

11

Other areas of civil law



Source 1 There are many different types of civil law. These cover almost every aspect of our daily lives. For example, in Victoria it is unlawful to discriminate against a person based on attributes such as age, gender identity, race and disability. Australian tennis champion and 2022 Australian of the Year Dylan Alcott continually works to raise awareness of the need to eliminate discrimination against people with disability. In this chapter, you will explore three areas of civil law: discrimination, consumer rights, and workplace pay and conditions.

Outcome

By the end of **Unit 2 – Area of Study 1** (i.e. Chapters 9, 10 and 11), you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

Key knowledge

In this chapter, you have the option of choosing two types of civil law. For each type of civil law, you will learn about:

- the rights protected by the law
- the elements required to establish liability
- the limitation of actions
- possible defences
- possible remedies
- the impact of the breach on the parties.

Key skills

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

- define and use legal terminology
- research and analyse relevant information about civil law
- apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to actual and/or hypothetical scenarios
- synthesise and apply legal reasoning to actual and/or hypothetical scenarios in relation to two areas of civil law.

Key legal terms

acceptance (in relation to contract law) the act of a person (by statement or otherwise) agreeing to an offer

attribute a quality, feature or characteristic of a person, such as race, gender identity, physical features or disability

award a legal document that sets out minimum pay rates and work conditions for employees who work in a particular occupation or industry

contract an agreement or promise (or set of promises) between two or more individuals or groups that is intended to be legally binding and can be enforced

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

National Employment Standards (NES) a set of 12 conditions (i.e. minimum entitlements) of all workers (i.e. employees) protected by Commonwealth legislation

offer (in relation to contract law) the act of a person (by statement or otherwise) that indicates the person is willing to buy or sell goods or services

Advice to teachers and students

In **Unit 2 – Area of Study 1** (i.e. Chapters 9, 10 and 11) you are required to study **two areas of civil law** in detail.

You may choose to study	Options include	Page
• TWO torts (from Chapter 10)	10.1 Negligence	336
	10.2 Defamation	347
	10.3 Nuisance	358

OR

You may choose to study	Options include	Page
• TWO other areas of civil law (from Chapter 11)	11.1 Discrimination	372
	11.2 Consumer rights	384
	11.3 Workplace pay and conditions	394

OR

You may choose to study	Options include	Page
• ONE tort (from Chapter 10) • ONE other area of civil law (from Chapter 11)	See above	See above

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Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

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

Warm up!
Check what you know about other areas of civil law before you start.

Quizlet
Test your knowledge of the key legal terms in this chapter by working individually or in teams.

11.1 Discrimination

Key knowledge

In this topic, you will learn about:

- **the civil law in relation to discrimination, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies, and the impact of the breach on the parties.**

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

attribute
a quality, feature or characteristic of a person, such as race, gender identity, physical features or disability

direct discrimination
a type of discrimination; when an assumption is made about what a person can or cannot do because of a personal characteristic or attribute

indirect discrimination
a type of discrimination; when there is a rule or policy that is the same for everyone, but it has an unfair effect on some people who share a particular attribute

One right that individuals in Australia have is the right to be free from **discrimination**. Discrimination means treating someone less favourably than others based on **attributes** such as race, religious belief, disability, or age. Discrimination can be direct or indirect:

- **Direct discrimination** is when an assumption is made about what a person can or cannot do because of a personal characteristic or attribute. For example, if an older applicant is not considered for a job because it is assumed they cannot use new technologies, then this person is being directly discriminated against.
- **Indirect discrimination** is when there is a rule or policy that is the same for everyone, but it has an unfair effect on some people who share a particular attribute. For example, if a company policy states that all employees must work full-time to get a promotion, people who prefer to work part-time due to family responsibilities are being indirectly discriminated against.

Discrimination can occur in all aspects of life, such as in schools, in the workplace, in sporting clubs, in membership clubs, in places of accommodation and when buying goods or services.

There are many laws that aim to protect people from discrimination. For example, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that every person has the right to enjoy their human rights without discrimination, and every person is equal before the law.

Unfortunately, sometimes situations arise where a person is discriminated against. This may be because of a person's attribute (e.g. race). An example of such discrimination is provided in the following scenario.

Actual scenario

Racial abuse during COVID-19

From 2020, Australia was faced with a health, economic and social crisis as a result of the COVID-19 pandemic.

COVID-19 first emerged in a province in China in January 2020. The virus soon spread across the world. Millions of people fell ill and died after contracting the virus. To contain the spread of COVID-19, Australia adopted strict measures including 'physical distancing', travel restrictions (including interstate border closures), the closure of many public facilities (such as parks and swimming pools) and businesses (such as gyms, hairdressers and restaurants), the compulsory wearing of face masks indoors, and restrictions on public and private gatherings.

During the pandemic, racially motivated abuse and racial discrimination of people of Asian descent increased throughout Australia and the world. A survey by the Asian Australian Alliance also indicated that as COVID-19 spread throughout the Victorian community in 2020–2021 and lockdown restrictions were extended, 'blame' for the existence of the virus moved from mainly people with an Asian cultural background to

other migrant communities, including members of the Muslim community, who lived in areas with high numbers of COVID-19 cases. Racial incidents, which often occurred in public streets, supermarkets and grocery stores, and on public transport, included racial name calling, online harassment and verbal threats.

In 2020, staff members at the Royal Children's Hospital in Melbourne reported being racially profiled. In one instance, a family told a doctor they did not want her treating their child because of her race and their fears the doctor could spread COVID-19 to their child.



Source 1 Laws in Australia seek to protect people from discrimination on the basis of race.

Rights protected by the law

Discrimination is prohibited in Victoria and in Australia under the **Acts of Parliament** listed in Source 2. Some of these are Victorian statutes, which means they only apply to acts or omissions that occur in Victoria, whereas others are Commonwealth statutes, which means they apply all over Australia.

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)

Statute	Description
Equal Opportunity Act 2010 (Vic)	This is the main piece of Victorian legislation that protects individuals from discrimination, sexual harassment, victimisation and unequal opportunity. This Act prohibits direct and indirect discrimination based on various attributes (race, religion, gender identity etc.) in various areas such as employment, sport and schools.
Racial and Religious Tolerance Act 2001 (Vic)	This Act prohibits vilification on the grounds of race or religious belief or activity in Victoria.
Age Discrimination Act 2004 (Cth)	This Act makes it unlawful to discriminate against individuals on the grounds of their age.
Disability Discrimination Act 1992 (Cth)	This Act makes it unlawful to discriminate against individuals on the grounds of disability in areas such as work, education, accommodation, access to premises, clubs and sport, and the provision of goods and services.
Racial Discrimination Act 1975 (Cth)	This Act makes it unlawful for a person to discriminate against another person or treat them unfairly based on their race, colour, descent, or national or ethnic origin.
Sex Discrimination Act 1984 (Cth)	This Act makes it unlawful to discriminate against a person on the grounds of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or whether they are breastfeeding in areas such as work, accommodation, education, and the provision of goods and services.
Fair Work Act 2009 (Cth)	This Act prohibits an award (being a document that sets out the minimum wages for a certain type of job) from including terms that discriminate against an employee because of certain attributes such as race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibility, or political opinion. This Act also prohibits employers from taking adverse action against an employee because of these attributes.

Source 2 Victorian and Commonwealth statutes that prohibit discrimination

The *Equal Opportunity Act 2010* (Vic) is the main piece of legislation in Victoria that makes discrimination unlawful. It prohibits discrimination based on attributes (listed in section 6 of the Act) such as age, breastfeeding, gender identity, disability, lawful sexual activity, marital status, pregnancy and race, in areas such as employment, education, goods and services, accommodation, membership and sport.

The main purpose of anti-discrimination laws is to protect people against victimisation, unfair and unwarranted judgment, **vilification** and persecution. These laws also aim to protect people's rights to:

- feel safe in various social settings, including at work, at school and on the sporting field
- feel accepted and part of the community by making it unlawful to degrade someone or treat them differently because of a certain attribute
- equality, and in particular the right to equality under the *Charter of Human Rights and Responsibilities Act*. The laws aim to ensure that everyone has the same rights to equality before the law, regardless of an irrelevant attribute
- be protected, by imposing penalties on people who engage in unlawful conduct. For example, in some circumstances, the laws make it an offence to engage in certain discriminatory conduct. These laws punish people for engaging in that conduct, and deter the person from engaging in discriminatory behaviour
- seek compensation for any discrimination that has resulted in loss or damage.

vilify (vilification) behaving in a way that encourages or provokes hatred, serious contempt or severe ridicule (teasing) of a person or group on the basis of their race or religion

Did you know?

In 2022, the New Zealand Supreme Court ruled that New Zealand's minimum voting age of 18 years breached the country's *Human Rights Act 1993*, which makes it unlawful to discriminate against young people aged 16 years and above based on their age. The decision forced parliament to consider lowering the minimum voting age to 16 years.

Elements required to establish liability for discrimination

Although various Acts of Parliament (both federal and state) deal with discrimination, there are common elements that need to be proven for a discrimination claim to succeed:

- the discrimination was based on a certain attribute
- the discrimination took place in a particular area or activity
- the discrimination caused harm or less favourable treatment.

Element 1 – The discrimination was based on a certain attribute

The person making the complaint must first establish that the discrimination they suffered was because of a certain attribute. The attributes are different in each statute, and some statutes focus on very specific attributes. The attributes listed in the Victorian *Equal Opportunity Act* are in Source 3.

Age	Sex	Marital status	Profession, trade or occupation	Expunged homosexual conviction	Race	Gender identity
Parental or carer status	Employment activity	Spent conviction	Disability	Sex characteristics	Pregnancy	Industrial activity
Physical features	Sexual orientation	Breastfeeding	Political belief or activity	Lawful sexual activity	Religious belief or activity	Personal association with a person with any of these attributes

Source 3 Under the *Equal Opportunity Act*, a person cannot be discriminated against because of certain attributes.

If a person is hurtful to another simply because they do not like them, but the treatment is not based on any attribute, then it is unlikely to be discrimination.

The *Equal Opportunity Act* makes it unlawful to discriminate in relation to the attributes listed in Source 3 on the basis that these attributes should not be relevant in certain circumstances. For example, if two people are applying for the same job as a lawyer, and one is female and one is male, then there should be no reason why their sex is a relevant factor when selecting which to employ. Similarly, if one person is Muslim and the other person is Buddhist, and they are both members of the same football club, their religious belief should not be a factor in determining whether they are chosen to play a game.

The scenario below is an example of an affected party (often called an 'applicant') claiming they were discriminated against because of their race, marital status, disability and sexual preference.

Actual scenario

Complaint of discrimination on the basis of race, marital status, disability and sexual preference

A man issued an application in the **Victorian Civil and Administrative Tribunal (VCAT)** against his former employer, claiming the employer (a company) had subjected him to discrimination in employment on the basis of his race, marital status, disability and sexual preference.

The applicant had been employed by the company (the respondent), but had his employment terminated while he was still in his probation period. In his VCAT application, the applicant claimed that the respondent made derogatory remarks about his appearance, sexual preference and marital status. The applicant also claimed that the respondent required him to use a business photograph in which his skin tone had been lightened, denied him training opportunities and treated him unfavourably in the allocation of work.

The applicant claimed that the respondent subjected him to this treatment because of his Indian descent, his dark olive-coloured skin, his religion (which requires him to maintain a beard), his gender and sexual orientation, his marital status, his hearing impairment and his union membership. By way of an example, the applicant claimed that the respondent's managing director expressed concerns about him having a beard and requested it be removed. The managing director denied this claim. The applicant sought loss of wages, an apology, damages for embarrassment, humiliation and stress, and costs.

VCAT heard the claim over two days. The respondent had legal representation, but the applicant was self-represented. The applicant gave evidence but did not call any other witnesses.

Ultimately, VCAT was not satisfied that there was any discriminatory conduct by the company. The man's application was dismissed.

Jusrut v Ensure Recruitment Pty Ltd (Human Rights) [2020] VCAT 126 (7 February 2020)

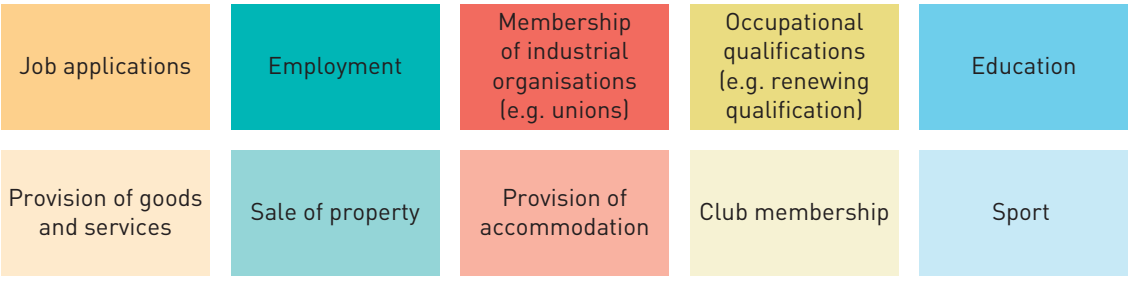


Source 4 A former employee made an unsuccessful discrimination claim in VCAT about his previous employer.

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

Element 2 – The discrimination took place in a particular area or activity

The person making the complaint must establish that the discrimination they suffered occurred in a particular area or activity. The descriptions of these areas and activities vary in the different statutes. The areas and activities listed in the *Equal Opportunity Act* are in Source 5.



Source 5 The areas and activities listed in the *Equal Opportunity Act*

Even though these areas or activities are broad, they do not cover discrimination in a private setting. For example, if one person is discriminated against by another in a private home (e.g. being served food last because of a certain attribute), then the person who is discriminated against will not be able to do much about it (other than complain loudly).

The following scenario describes legislation in Victoria that prevents religious organisations from discriminating against the employment of people based on certain attributes.

Study tip

A useful way to get an idea of the types of discrimination claims being made is to access the human rights websites on your obook pro. These websites provide reports on recent cases and examples of discriminatory conduct. This will help you develop your ability to apply the law of discrimination to particular cases.

Weblink
Victorian Equal Opportunity and Human Rights Commission

Actual scenario

Religious organisations and discrimination

In 2021, the Victorian Parliament passed legislation (the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic)) to specifically prevent religious organisations and schools from refusing to hire people, or terminating the employment of people, based on protected attributes such as sexuality, gender identity or marital status. The only general exception to this is in a situation where the religious organisation or school believes that conforming to and upholding its religious beliefs is inherent (or of central importance) to the job. For example, a faith-based school may claim its religious studies teachers need to uphold the religious beliefs of the school. It may, however, be more difficult to argue that a person employed in a different position, such as an administrative or maintenance worker, needs to uphold the religious beliefs of the school.

A main reason for the new legislation was to prevent religious organisations and schools from discriminating against LGBTQIA+ teachers and other employees based on their gender identity, sexuality and marital status. For example, in 2019, a teacher at a Christian school in regional Victoria commenced a civil action against the school claiming she was forced to resign from her job because she refused to accept and uphold the school's 'statement of faith' (or policy) which opposed marriage equality (i.e. same-sex marriage). The teacher and the school settled the dispute in 2020 after the school agreed to pay the teacher an unspecified amount of money and provide her with a positive reference.

Element 3 – The discrimination caused harm or less favourable treatment

If a person has been discriminated against on the basis of a particular attribute and in a particular area or activity, they must then establish that the treatment caused them harm or resulted in them being treated less favourably.

A person may suffer harm, or be treated less favourably, as a result of either direct or indirect discrimination. Examples of each are below:

- direct discrimination – if a person in school is chosen for a public speaking competition, and another person is not because of their race, then this is direct discrimination. The harm may vary depending on the person, but can include anxiety and loss of opportunity
- indirect discrimination – if a sporting club made it a rule that every person who entered a building must first stand and walk up the stairs to say hello to the president of the club, this is likely to discriminate against people with physical disabilities who cannot stand or walk up the stairs. The harm may be a loss of membership because the person did not comply with the rule.

Did you know?

In Victoria, it is unlawful to discriminate against a person on the basis of their physical features, including their height, weight, size, shape, facial features, hair and birthmarks. Your school can, however, require you to adhere to reasonable standards of dress and appearance (e.g. impose a dress or uniform code) that reflects the values of the school community, providing it makes allowances for wearing religious or cultural dress (such as hijabs or patkas).

Limitation of actions

There is no specific time period set out in the *Limitation of Actions Act 1958* (Vic) within which a discrimination claim must be made. However, there are some time limits that a plaintiff needs to be aware of.

Discrimination claim under a Victorian statute

Victorian statutes that prohibit discrimination state that the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) – which is the Victorian complaints body that provides dispute resolution services for discrimination claims – may decline to provide dispute resolution services if the discrimination occurred more than 12 months before the person complained. This limitation is set out in section 116 of the *Equal Opportunity Act*.

However, a person can apply to VCAT in relation to the discrimination, regardless of whether they have first complained to the VEOHRC.

Discrimination claim under a federal statute

The *Australian Human Rights Commission Act 1986* (Cth) states that a complaint lodged with the Australian Human Rights Commission – the federal complaints body that hears complaints in relation to discrimination that is contrary to federal statutes – may be terminated if it was lodged more than six months after the alleged acts, omissions or practices took place.

Defences to a discrimination claim

A defendant in a discrimination claim may argue that the plaintiff has not satisfied all the elements of discrimination. For example, the defendant may argue that the treatment was not based on a certain attribute, or the treatment did not take place in a particular area or activity, or that the treatment did not cause the person harm or result in them being treated less favourably.

The defendant may also be able to rely on one of the following defences:

- an exception allowed lawful discrimination
- an exemption from discrimination laws applied
- inherent requirements
- unjustifiable hardship.

Defence 1 – An exception allowed lawful discrimination

On some occasions, the laws relating to discrimination include exceptions that allow for lawful discrimination in specified circumstances. A defendant in a discrimination claim may be able to raise one or more of the exceptions as a defence. For example:

- An educational authority can set and enforce reasonable standards of dress, behaviour and appearance for students. Therefore, if a school states that a certain standard of care must be taken in terms of a student's appearance, the school may be able to defend a discrimination claim on the basis that it is enforcing its uniform code.
- A club can exclude from membership a person on the basis of that person's sex if membership of the club is available only to persons of the opposite sex. This exception allows female-only gyms to operate without being subjected to the discrimination claim by males.
- A sporting club can exclude a person of another sex from participating in a competitive sporting activity if strength, stamina or physique is relevant.

The following scenario describes a situation where the exception defence could be used.

Hypothetical scenario

Accommodation refused to children

Juliet runs the Romeo Hotel in an exclusive location in Daylesford, Victoria. The hotel is especially designed for couples and, because of its design and location, it is unsuitable and inappropriate for children. Juliet is likely to be able to defend a discrimination claim if one is brought by someone because Juliet did not let their children stay at the hotel. This is because of section 58A of the *Equal Opportunity Act*, which allows a person to refuse accommodation to children or people with children because of the design or location of the accommodation.

Defence 2 – An exemption from discrimination laws applied

Some individuals, groups and organisations are exempted from discrimination laws. For example, a person can discriminate against another if that discrimination is necessary for the person to comply with their religion. As another example, a government can provide benefits to a person based on their age, but not providing benefits to a younger person does not amount to age discrimination (this is often the case for retired people who receive certain benefits).

A defendant in a discrimination case can also apply for a temporary exemption (not exceeding five years) if that exemption is required to undertake a certain activity. In 2021, a temporary exemption was granted to a private school in Melbourne, as the school wanted to target female students in its advertising to improve its gender balance. This particular exemption is detailed in the following scenario.

Actual scenario

Melbourne school gains exemption to discrimination laws

In 2021, a Melbourne private school was granted a temporary exemption to Victoria's anti-discrimination laws to allow it to undertake conduct that would otherwise be discriminatory. VCAT granted the co-educational school an exemption to the *Equal Opportunity Act* so that the school could enrol more females to better balance the male–female student ratio.

Under the exemption, the school is permitted to advertise for potential female enrolments, structure its waiting list on the basis of sex, and offer scholarships and bursaries to current and prospective students on the basis of their sex (e.g. offer more academic and 'general excellence' scholarships to talented and deserving female students).

In determining whether or not to grant the exemption, VCAT considered four responses that opposed the school's application. One response expressed fears about the practical negative effects the discrimination would have on boys who otherwise would be accepted by the school, including the increased time and cost associated with travelling to another similar private school. It also cast doubt on whether there were enough potential female students for the school to maintain its gender balance, given the large number of private girls' schools in the surrounding area. Another response expressed the view that, while the school may not have an equal gender balance of students, it does have a large number of female students and so did not need an exemption from discrimination laws to 'operate successfully as a school'.

The exemption, which was granted for five years (until 2026), was one of a number of exemptions granted to the school since 1999. For example, the school had been granted a similar exemption in 2016.

Ivanhoe Grammar School – Exemption (Human Rights) (Corrected) [2021] VCAT 1452 (10 December 2021)

Defence 3 – Inherent requirements

This defence only applies to allegations of discrimination in employment (and not in any other area or activity). An employer can argue that a person, because of their age or disability, cannot carry out the 'inherent requirements' – or the essential duties – of the job. For example, it is likely to be an inherent requirement of a baggage handler's job at an airport to be able to lift heavy items. If a person is unable to do this because of their age or disability, then this is unlikely to be discrimination because of the inherent requirements defence.



Source 6 An inherent requirement of being a baggage handler is to be able to lift heavy items.

Defence 4 – Unjustifiable hardship

This defence is only available to employers. If an employer is facing a discrimination claim by an employee, the employer could defend the claim on the basis that the working arrangement would cause 'unjustifiable hardship' to the employer. This means that it would be extremely difficult for the employer to accommodate the employee. For example, if the employer operates out of a particular building that is not accessible to people with disabilities, and adjusting it to allow accessibility would cost a significant amount of money that the employer does not have, the employer may be able to argue that adjusting the building for a disabled person would cause the employer unjustifiable hardship.

Whether this defence succeeds depends on an assessment of what is fair and reasonable for the employer to do to make adjustments for the employee. For example, if the adjustments are easy and inexpensive to make, then it is unlikely that the defence will succeed.

Possible remedies

remedy
any order made by a court (or a tribunal) designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant

A **remedy** is a legal solution to a breach of civil law. A person who has suffered injury, loss or damage as a result of having their civil rights breached may seek a remedy to address the wrongdoing. People who have suffered injury, loss or damage due to unlawful discrimination may seek one or more remedies to have their rights restored and be compensated for their loss. The type of remedy a person may seek will depend upon a range of factors, including:

- *the type of discrimination that has taken place and the impact of the discrimination* – for example, in a case where the discrimination has caused the applicant to lose their job or ability to earn money, the party may seek to be reimbursed for their lost income. Alternatively, in a case where the applicant has been denied access to a service (e.g. refused entry to restaurant or denied the opportunity to play in a sporting team), they may seek a remedy that will ensure they are able to use the desired service. In cases where the applicant has been publicly humiliated by discriminatory remarks, they may seek a public apology as a remedy
- *the body or institution involved in the dispute resolution* – in Victoria, there are several bodies or institutions that can assist with the resolution of discrimination disputes, including VCAT, the VEOHRC and the courts. These bodies or institutions each have their own processes for dispute resolution. They may also have limitations as to what remedies are available. For example, VCAT and the courts have the power to determine and impose a range of remedies to resolve discrimination disputes. VEOHRC provides a service to help the parties come together and resolve their dispute through informal discussion and compromise, but cannot make a binding decision.

  A brief description of the main types of remedies for unlawful discrimination is provided in Source 7.

Remedy	Description
Damages	Requires the respondent to pay the applicant an amount of money to reimburse and compensate for the injury, loss and/or damage suffered
Injunction	Requires the respondent to undertake a specific action or refrain from undertaking (cease) a specific action to stop and prevent further injury, loss and/or damage to the applicant
Apology	Requires the respondent to express their regret and sorrow for their discriminatory behaviour, e.g. by means of a written or verbal apology to the applicant, or a public apology
Undertake equal opportunity training	Requires the respondent to undertake training (i.e. an education program and course) to increase their awareness of their responsibilities regarding discrimination and the impact of discriminatory behaviour, to help ensure that such behaviour does not reoccur

Source 7 A brief description of remedies that may be sought to resolve discrimination disputes

When resolving discrimination disputes, VCAT and the courts can also order that the respondent is not required to take any further action, and, in cases where the applicant is unsuccessful, dismiss their claim.

You will look at damages and injunctions, and their ability to achieve their purposes, in greater detail in Chapter 12.

The scenario below is an example of VCAT ordering the payment of money (damages).

Actual scenario

VCAT sexual harassment claim

In June 2022, VCAT ordered a dental practice to pay its former employee $12 000 to compensate for the loss and harm she suffered as a result of being directly discriminated against due to her parental status or status as a carer.

The dispute arose after the applicant, who worked on a casual basis as a dental assistant, was dismissed during the COVID-19 pandemic after her employer decided to hire a new permanent staff member and reduce their number of casual workers (from six to five). The applicant alleged that she was chosen as the casual worker who would lose her job because she had broken her foot (outside work hours) and, as a parent, had family responsibilities that meant she needed to alter her casual shifts during the COVID-19 pandemic so she could care for and supervise her two children during remote learning from home (in the lockdown periods). The applicant had worked at the dental practice for three years and had never been involved in any other issue that gave her reason to think that she would be dismissed.

While VCAT dismissed the applicant's claim that she was terminated due to her physical disability (i.e. having a broken foot), it did find that she was terminated because of her parental status or status as a carer. VCAT awarded the applicant $10 000 for the economic loss she suffered (i.e. lost income) as a result of being dismissed and a further $2000 to compensate for the general stress and anxiety she suffered.

Carpenter v Pearly Whites Pty Ltd (Human Rights) [2022] VCAT 623 (9 June 2022)

Possible impacts of a breach

Discrimination based on a certain attribute can have wide-ranging consequences for the parties.

Impacts on the plaintiff

The impact of a **breach** of discrimination laws can be significant. Possible impacts on the plaintiff are:

- public humiliation – this could include degradation or vilification. For example, a person might tell an inappropriate joke in a workplace setting that discriminates against the plaintiff
- loss of opportunity – this could occur as a direct consequence of the discrimination. For example, a female could be denied a promotion based on her gender
- inconvenience – this could occur when accommodation, goods or services are denied to a person. For example, an accountant could deny their services to a person of a particular race
- effect on mental health – this could include conditions such as depression or anxiety. For example, a person could develop depression as a result of suffering continued discrimination due to a particular attribute.

breach
the breaking of or failure to fulfil or comply with a duty or obligation

Impacts on the defendant

Possible impacts of a discrimination claim on the defendant are:

- public humiliation – this could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of widely reported court proceedings
- loss of business – this could be a consequence of a loss of reputation. For example, a hotel may receive less business because people may not want to support an organisation that they think is being discriminatory
- inconvenience – this could be a consequence of the defendant needing to attend hearings in an attempt to resolve the dispute; for example, an employer attending a court hearing.

Source 8 summarises some of the possible impacts that discrimination can have on the plaintiff and on the defendant.

Impacts on the plaintiff	Impacts on the defendant
• Public humiliation • Loss of opportunity • Inconvenience • Effect on mental health	• Public humiliation • Loss of business • Inconvenience

Source 8 A summary of the impacts of discrimination

Actual scenario

Breastfeeding in court

In March 2023, a County Court judge attracted media attention after telling a woman that she would not be permitted to breastfeed her baby in the courtroom because it would be a 'distraction for the jury'. The woman was breastfeeding her baby in the public gallery during the trial of a former school principal who had pleaded not guilty to 29 charges of sexual assault. It was reported that the mother left the courtroom visibly upset and in tears.

In Victoria, under the *Equal Opportunity Act*, it is unlawful to discriminate against a person because of their pregnancy or their need to breastfeed in areas of public life including employment, education (e.g. schools and universities), shops and restaurants. The judge's remarks raised the question of whether the equal opportunity laws applied to Victorian courtrooms, which have their own rules (referred to as 'court etiquette') for attendees. For example, people who enter a courtroom must turn off their mobile devices, remove their hats and sunglasses, and not eat or drink. They must also nod their head at the judge when entering or leaving the courtroom, and follow any directions given by the judge or magistrate.

The incident attracted commentary from a range of people and bodies, including politicians, parent groups, and legal and human rights organisations. For example, the Minister for Early Childhood and Pre-Prep expressed her disappointment by stating 'women should never be feeling that they can't feed their child, which is a perfectly natural and pretty basic thing in 2023'.

11.1 Check your learning

Remember and understand

1 **Define** the following terms and **provide** an example of each:
   - **a** direct discrimination
   - **b** attribute
   - **c** indirect discrimination
   - **d** breach.

2 **Outline** three rights protected by anti-discrimination laws.

3 **Describe** one defence that may be used in defending a discrimination claim.

4 Which of the following bodies or institutions *cannot* make an order to resolve a discrimination case: the Victorian Civil and Administrative Tribunal, the Victorian Equal Opportunity and Human Rights Commission, or the Victorian Magistrates' Court? **Provide** a reason for your choice.

Examine and apply

5 Lou, who has moderate hearing loss, believes she has been discriminated against by an airline that refused to allow her on a flight with her assistance dog, Buddy. Under the *Disability Discrimination Act 1992* (Cth), it is unlawful to discriminate against a person with disability who is using an assistance dog. Lou showed proof to the airline that Buddy had been fully trained by a certified service dog training organisation to assist her, but the airline said it was 'company policy' not to allow dogs in the cabin (where passengers sit) on their flights. The airline did, however, offer to fly Buddy, with all the other dogs, in the plane's separate heated cargo section.
   - **a** **Describe** each of the elements of discrimination that Lou needs to establish to succeed in her claim.
   - **b** **Outline** any defences the airline might be able to raise.
   - **c** **Explain** whether you think Lou's discrimination claim will be successful.

6 **Suggest** two types of remedy the applicant may seek in the following scenarios. **Justify** your response.
   - **a** After completing a lengthy interview process, Rani, aged 35 years, was offered an administrative job at a major financial company. Two days before she was due to start, the company withdrew its offer after they became aware that she had a criminal history, having pleaded guilty to a minor criminal offence (property damage) when she was 19 years old. Rani had already resigned from her previous job, so she is now unemployed.
   - **b** The owner of a Victorian ski lodge refused to accept a week-long accommodation booking from David and Patrick, both aged 18 years, because he worries that they will not take care of the apartment and will make too much noise.

7 Read the scenario 'Melbourne school gains exemption to discrimination laws'.
   - **a** **Explain** why the school applied for an exemption to the *Equal Opportunity Act 2010* (Vic) and why the application was granted.
   - **b** Do you agree with VCAT's decision in this case? **Justify** your answer.

8 Access the *Equal Opportunity Act*. A link is provided on your obook pro.
   - **a** Choose one of the exceptions included in the Act (e.g. section 59).
   - **b** Write a scenario about a person who has been discriminated against, but make sure that the exception you have chosen applies.
   - **c** Exchange scenarios with another person in your class. Using the Act, see if you can **identify** the exception that applies to your classmate's scenario. Your classmate should do the same with your scenario.



Weblink
Equal Opportunity Act 2010 (Vic)

Reflect and evaluate

9 As a class, discuss whether a school should be able to set and enforce reasonable standards of dress, appearance and behaviour for students, and therefore be exempt from discrimination laws.

11.2 Consumer rights

Key knowledge

In this topic, you will learn about:

- **the civil law in relation to consumer rights, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies and the impact of the breach on the parties.**

Most Australians love shopping, both in physical stores and online. While online sales only account for approximately 19 per cent of total retail sales, they continue to become more and more popular. In 2021, Australians spent $62.3 billion buying online goods, and 81 per cent of Australian households made at least one online purchase during the year. Approximately 1.4 million Australians were online 'super shoppers' who bought goods online at least once a week. These 'super shoppers' made up nearly 50 per cent of total online shopping sales in 2021. The online stores of Gumtree, Amazon, Woolworths, JB Hi-Fi, Kmart, Big W and Kogan are among the more popular in Australia, and 'click and collect' sales account for approximately 14 per cent of total online purchases. In fact, online shopping has become so popular that there is a concern that many traditional 'bricks and mortar' stores (i.e. stores that do not have an online presence) are at real risk of not surviving.

There are laws in place to protect consumers (i.e. people who buy goods) and vendors or traders (i.e. people who sell or supply goods and services). These include laws relating to contracts, and consumer laws that aim to ensure that the terms of contracts are fair. In this topic, you will learn about the laws that protect online shoppers, because although online shopping is a popular way of purchasing goods and services, it can sometimes go wrong, and result in a party (the vendor or the consumer) having a civil claim.



Source 1 Online shopping continues to grow in popularity in Australia.

Rights protected by the law

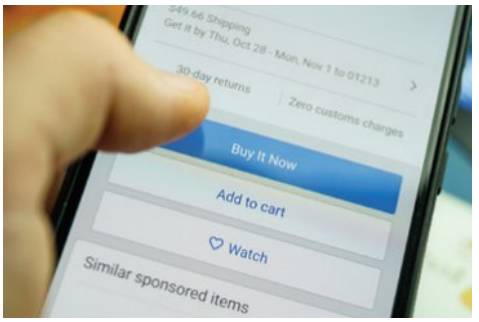
There are two main areas of law that govern online shopping:

- contract law, which governs agreements (oral or written) between two or more parties
- consumer law, which aims to protect consumers and vendors when buying or selling goods and services.

Contract law

contract
an agreement or promise (or set of promises) between two or more individuals or groups that is intended to be legally binding and can be enforced

A **contract** is an agreement or promise (or set of promises) between two or more individuals or groups that is intended to be legally binding and can be enforced. A contract can be written or oral, although online shopping contracts are normally in writing (as online shopping generally involves an electronic communication or exchange between the consumer and the vendor in which there is a record of the agreement to sell and purchase).



Source 2 A contract may be created with a single click on a 'buy it now' button.

Online shopping involves a contract between two people or companies. Each time a product or service is bought online, a contract is made. The contract normally starts operating when a consumer clicks the 'I agree' or 'purchase' button on a vendor's website. Once that happens, Australian **contract law** may apply to the purchase, just as it does to a purchase that occurs in a shopping centre.

contract law
an area of civil law governing the validity and enforceability of agreements made between two or more parties

Consumer law

Once a purchase has been made, then it may be subject to Australian consumer law. If it is, then the online consumer has the same protections as a consumer who has walked into a store to buy the product.

Various statutes in Australia govern the provision of goods and services. The main law is the Australian Consumer Law (ACL), which is Schedule 2 of the *Competition and Consumer Act 2010* (Cth). The ACL promotes and encourages fair trading practices, protects consumers, and provides legal uniformity across Australia for the purchase of goods and services. The ACL applies to most domestic transactions (i.e. it applies to goods or services costing less than $40 000 that are purchased for personal or domestic use) where the consumer has bought the goods or services in a commercial environment (e.g. where the vendor is a retailer of goods).

The ACL provides various guarantees to the consumer, and the vendor must comply with these guarantees. Some of the guarantees that a vendor gives to any consumer of goods and services are listed in Source 3.

Guarantees relating to the supply of goods	Guarantees relating to the supply of services
The goods are of an acceptable quality. Goods are of an acceptable quality if they: • are fit for purpose • are acceptable in appearance and finish • are free from defects • are safe and durable	The services will be performed with care and skill
The goods are fit for any purpose that was made known to the consumer	The services will be fit for the purpose for which the consumer purchased them
The goods match any description of them given by the vendor	The services will be supplied within a reasonable time
If an express **warranty** is given, the vendor will comply with the express warranty	

Source 3 Types of guarantees that automatically apply to the purchase of goods and services

warranty
a guarantee (or promise) provided by a business about the quality or standard of its products or services. Warranties often include actions the business will undertake, in addition to those required under consumer law, to address any faults or defects (e.g. offering a repair, replacement or refund)

In relation to online shopping, the rights that are protected by contract law and consumer law are:

- the right of consumers and vendors to be protected in the purchase of goods and services
- the consumer's right to goods and services that have been paid for. These goods and services should meet the description and quality that the consumer expects
- the vendor's right to the money for the goods and services
- the consumer's right to be protected from the unscrupulous business practices of some vendors
- the right of consumers and vendors to seek a remedy for any problems that may arise.

Elements required to establish liability

If an online shopping order goes wrong, it may give rise to a civil claim. Some of the things that can go wrong with an online shopping order are as follows:

- the goods did not arrive, or the services were not performed, even though the money was paid
- the goods did arrive, but they were broken or faulty
- the goods did arrive, but they did not fit the description, were not fit for purpose, or were not of a good quality
- the customer failed to pay the full amount for the goods or services, or failed to pay any amount
- there was a significant delay in the goods arriving, or the services being performed.

If any one of these problems occurs, a party may have a contractual claim. To establish the vendor's liability, the plaintiff needs to demonstrate the following four elements:

- a binding contract existed
- the contract was breached
- the breach caused loss
- loss or damage was suffered.

Element 1 – A binding contract existed

First, for a binding contract to exist, there must be a valid contract. For a valid contract to exist, the plaintiff must establish the following three elements:

- there was an **offer** – an offer is normally some sort of act, by statement or otherwise, that indicates an offer is being made. An offer must be clearly communicated, and can be withdrawn before acceptance as long as the withdrawal is clearly communicated
- there was **acceptance** – acceptance can also be in the form of an act, by statement or otherwise (although in online shopping, the acceptance is normally written in some sort of electronic communication). The acceptance must be in the exact terms as the offer – if it differs, it is considered to be a counteroffer
- there was **consideration** – consideration is something of value that passes from one party to the other. In an online shopping context, the consideration from the vendor to the consumer is the goods or services, and the consideration from the consumer to the vendor is the money. For example, if Victor purchases an iPhone online for $1400, the consideration from Victor to the vendor is $1400, and the consideration from the vendor to Victor is the iPhone.

offer
(in relation to contract law) the act of a person (by statement or otherwise) that indicates the person is willing to buy or sell goods or services

acceptance
(in relation to contract law) the act of a person (by statement or otherwise) agreeing to an offer

consideration
(in relation to contract law) something of value that passes from one party to the other, at which time a contract is complete. Consideration can also be a promise to pay

In addition, for a binding contract to exist:

- there must be capacity to contract – that is, the parties must be 18 years of age or older, although there are a number of exceptions (e.g. where a minor is buying necessities)
- there must be real consent – if there is a mistake, **duress** or undue influence (i.e. unfair pressure), the contract may not be valid. Although this is unlikely to occur in most online shopping purchases, there have been occasions when there has been a mistake
- the contract must be legal – for example, if the goods were stolen or illegal, the contract is not valid.

Consumers of online goods or services should be aware of the location of the vendor, as this can impact on whether Australian law applies.

duress
strong mental pressure on someone to overcome their independent will and force them to do something

Element 2 – The contract was breached

When an online shopping contract is made, an agreement is reached between the parties to carry out a service or supply goods in return for payment. If one of the parties fails to fulfil the agreement, then that

party is in breach of the contract. For example, a breach of contract can occur when a consumer fails to pay for the goods or services, or when a vendor fails to deliver the goods or services on time.

Failure to fulfil any terms and conditions of a contract can lead to a breach of contract. Contract terms can include **express terms** as well as **implied terms**. Express terms are clearly set out in the contract. In an online shopping contract, express terms are often included in the 'terms and conditions' section of the purchase.

The scenario below illustrates how express terms can be contested in court.

express terms
(in relation to contract law) provisions or conditions that are written in the contract or are clearly stated or discussed between the parties as forming part of the contract

implied terms
(in relation to contract law) provisions or conditions that are not expressed or written down, but are assumed and intended to be included in the contract

Actual scenario

No refund for cancelled online booking

On 12 August 2016, a customer paid $5390 by direct deposit to a travel company for a 29-day European trip from Vienna to Dubrovnik that was due to begin 22 days later, on 3 September 2016. On 15 August 2016, the travel company emailed the customer saying that booking the transport and accommodation for the trip would usually take three to four days.

After checking her finances and realising she could not afford the trip, the customer emailed the travel company to request a cancellation. However, she falsely stated that she needed to cancel the trip so she could attend a specialist appointment scheduled for during the trip. She telephoned the travel company the next day and was told that if she cancelled, she would have to forfeit the entire amount she had paid, as the terms and conditions stated that the travel company would retain 100 per cent of the money paid if a trip was cancelled 30 days or less prior to departure. The travel company confirmed the trip by email on 16 August 2016.

On 28 August 2016, the customer requested that her trip be postponed. This was refused. The customer felt that the travel company's refusal to refund any money was in excess of any expenses that would have been incurred by the company and that the cancellation term in the contract was unfair. She sought a full refund or a postponement.

The travel company argued that because the customer booked online, she was aware of the terms and conditions of the contract when she booked. The travel company stated it had suffered loss and damage because it had begun booking accommodation and travel once the customer had made the booking, and it therefore should retain the amount she had paid.

The **Victorian Civil and Administrative Tribunal (VCAT)** found that the travel company was entitled to the money. It found that the customer had entered into a contract, and that she had paid the full amount to the travel company and it accepted this, and that she was not entitled to the money being returned because she changed her mind. VCAT found that the cancellation clauses were not harsh or unconscionable, and therefore the customer's application was dismissed.



Source 4 A travel company was not required to repay money in a case that involved an online customer changing her mind and cancelling her booking.

Joyner v Intrepid Travel Pty Ltd (Civil Claims) [2017] VCAT 233 (17 February 2017)

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

Implied terms are implied at law or are implied by the parties' conduct. For example, if an online consumer tells a vendor that they need the goods before Christmas and the vendor acknowledges this, the consumer might argue that there was an implied term that the goods would be supplied before Christmas.

Implied terms at law include the guarantees that are set out in the ACL. These terms are not expressly agreed by the parties, but are assumed by the law to be operating in the background. For example, there is a guarantee that the goods will be 'fit for purpose'. If they are not, then the consumer can argue that there has been a breach of contract.

Element 3 – The breach caused loss

causation
the direct relationship between one event (Event 1) and another event (Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

To be successful in claiming damages, the plaintiff must prove **causation**, that is, that the breach of contract has caused loss. For example, if a consumer purchased a special edition boxed set of the *Harry Potter* novels online, but it never arrived, the consumer has suffered the loss of the cost of the boxed set, and this financial loss was caused by the breach of contract by the vendor.

The defendant could argue that their conduct did not cause the loss or damage suffered by the plaintiff. Using the above situation, if the vendor did send the goods to the consumer, but the boxed set was stolen from the consumer's mailbox, then the vendor could argue that they did not cause the loss, but rather the thief did.

The person who has not fulfilled the contract is only liable for the financial loss that could be reasonably contemplated as likely to result from the failure to perform the contract. If the financial loss is too remote from the wrongful act, the defendant is not liable. For example, imagine that a vendor (V) has provided goods to a customer (Customer A) who has not paid V the full amount. V tries to contact Customer A, and gets so distracted that they fail to serve Customer B, who is waiting for service. Customer B walks out of the store. V cannot claim damages for a lost purchase from Customer B, as that loss is too remote from Customer A's actions in not making full payment.

Parties to a contract cannot make a claim for the worry or anxiety caused by the failure to perform the contract. However, in some instances, they can claim loss of enjoyment; for example, when there is an online contract with a travel agency and the holiday goes horribly wrong.

Element 4 – Loss or damage was suffered

Did you know?

In a 2023 Canadian case, a judge ruled that a 'thumbs up' emoji sent in a text message was considered to be acceptance of contractual terms relating to the sale of flax (a plant used for food, oil and fibre).

The party seeking compensation also needs to establish that they have suffered some form of loss or damage. In an online shopping context, this is normally the money (or part of the money) paid for the goods or services, or the goods and services that have been delivered but not paid for.

Limitation of actions

Under the *Limitation of Actions Act 1958* (Vic), a party must issue a claim under contract law within six years of the cause of action accruing (i.e. occurring or arising). In contract law, the cause of action accrues at the time of the breach. Once the breach occurs (e.g. when the goods become faulty), the six years begins.

However, the time period can be extended in two circumstances:

- where there has been fraud or mistake (e.g. where the defendant has fraudulently concealed the breach), or
- where the plaintiff has a disability.

For contract claims involving death or personal injury, the time limit is either three years from the date on which the plaintiff discovered the cause of action, or 12 years from the date of the act or omission that caused the death or personal injury.

Defences to a breach of contract claim

If someone is sued for breach of contract, there are no standalone defences. Instead, the defendant could argue that one of the four elements does not exist, and therefore the plaintiff cannot establish the claim. For example, the defendant could argue that:

- there was no binding contract – this means that one or more of the elements of a binding contract did not exist
- they did not breach the contract – this means that the conditions of the contract had been fulfilled.

A party could also argue that they did not have the capacity to form a contract, that consent was not freely given, or that the contract was not legal.

Study tip

When you are required to argue liability and defences in relation to two areas of civil law, make sure that you look at the other party's perspective and rebut any arguments they might make. This shows that you are considering all the possible arguments that could be made.

Possible remedies

A remedy is a legal solution to a breach of civil law. A number of remedies are available to consumers who have had their rights under the ACL breached, or who have suffered loss or damage due to a breach of contract. The type of remedy a person may seek will depend on a range of factors, including the following:

- *the type and circumstances of the dispute* – for example, in a case where the consumer has purchased a faulty product, they may be entitled to a refund, repair or replacement under the ACL. Alternatively, in a case where goods or services have not been provided as required under a contract, the consumer may seek a remedy that will ensure the goods or services are delivered or completed (e.g. if an online personal assistant failed to complete administrative tasks as promised, the consumer may seek an order that directs the assistant to complete the tasks as required in the contract). A person who is adversely (or unfavourably) affected by a breach of contract may also wish to seek damages to reimburse them for the loss they have suffered as a result of the breach
- *the body or institution involved in the dispute resolution* – in Victoria, there are several bodies or institutions that can assist with the resolution of consumer disputes, depending on the type of dispute, including Consumer Affairs Victoria (CAV) and other industry-specific and/or government complaints bodies (such as Domestic Building Dispute Resolution Victoria, which can help resolve disputes involving building construction, extensions and demolition), VCAT and the courts. These bodies or institutions each have their own processes for dispute resolution. They may also have limitations as to what remedies are available.

A brief description of the main types of remedies for breach of contract is provided in Source 5.

Remedy	Description
Specific performance	Requires the defendant to perform the contract (i.e. to do what they said they would do under the terms of the contract)
Injunction	Requires the defendant either *not to perform* an act that would continue to breach the contract, or *to perform* an act that is prescribed by the contract (this is similar to specific performance)
Damages	Requires the defendant to pay the plaintiff an amount of money to compensate them for the breach and any loss or harm suffered
Termination of the contract	Enables the plaintiff to terminate (end) the contract because of the breach
Change the terms of the contract	Enables the parties to resolve their dispute by entering into discussions to change the terms of the contract. This may enable some terms of the contract to be fulfilled and both parties to achieve some level of satisfaction with the outcome

Source 5 A brief description of some remedies for breach of contract

Remedies under the Australian Consumer Law

In Australia, all consumers have a number of 'rights' or guarantees that automatically apply when buying goods or services. These rights or guarantees are protected by the ACL. The ACL offers protections to consumers in a range of areas, including:

- unfair contract terms
- product safety
- unsolicited consumer agreements (including the rights of consumers who buy goods and services from telephone salespeople or from door-to-door salespeople).

The type of remedy available to consumers who buy a product or service and later find a problem (e.g. the product is damaged or faulty, or the service has not been provided with the necessary care and skill) will vary depending on the severity of the problem. For example, if a consumer buys a product and later finds it has a 'major' problem (i.e. a problem that, had the consumer known existed prior to purchase, would have stopped them from buying the product), the consumer is automatically entitled to choose one of the following remedies:

- to be provided with a refund (i.e. get their money back)
- to be provided with a replacement item
- to keep the product and receive compensation from the seller for the drop in value.

Alternatively, if a consumer buys a product and later discovers it has a 'minor' problem (i.e. a problem that can be easily fixed within a reasonable time), the supplier (or the store that sold the product) can decide which one of the following remedies they will provide:

- provide an identical replacement product (or product of similar value)
- repair the product within a reasonable time
- provide a refund (i.e. give the consumer their money back)

In a situation where the supplier refuses to provide one of the above remedies, the consumer may take the product elsewhere to be fixed and claim a reasonable cost from the supplier, or insist on a refund or replacement item.

There are, of course, exceptions and exclusions in the ACL, so consumers must be aware of their rights before they purchase a product or service. For example, while consumers who purchase products online from an Australian business are protected by the ACL, the ACL protections and guarantees do not apply to overseas businesses that do not directly offer their products and services to consumers in Australia. An example of this is if the consumer has the products sent by the business to an overseas address, and then arranges for them to be sent to Australia. ACL protections also do not apply if the consumer is overseas when they purchase the product.

Similarly, many of the guarantees provided under the ACL do not apply when consumers buy a product or service from a private individual (i.e. a person who is not operating a business) through an online marketplace (e.g. Facebook Marketplace, eBay or Gumtree) or online platform (e.g. Airbnb or Airtasker).

The scenario below is an example of VCAT resolving a dispute about an online purchase.

Did you know?

It is estimated that, on average, 20 per cent of all online purchases are returned. The rate of return on online clothing purchases is approximately 30 per cent. Alarmingly, many clothing returns are not resold and end up in landfill.

Actual scenario

Dog food dispute

In 2020, a woman bought a 20-kilogram bag of 'Turkey Dry Food with Hemp Oil' dog food from a pet food company that makes dog food and sells it online. The total cost of the purchase, including postage, was $179.50.

The woman purchased the dog food for her older dog, which had a skin condition causing it to itch and scratch excessively. While the company did not make any claims on its website that the dog food was 'medicinal' or could cure skin conditions, the woman

thought it would be healthy and might improve her dog's skin condition because it contained hemp oil. The first page of the company's website also included the statement: 'Try Our Dry Food Today 100% Money Back Guarantee. Over 20 Years of Love & Care For All Dogs.'

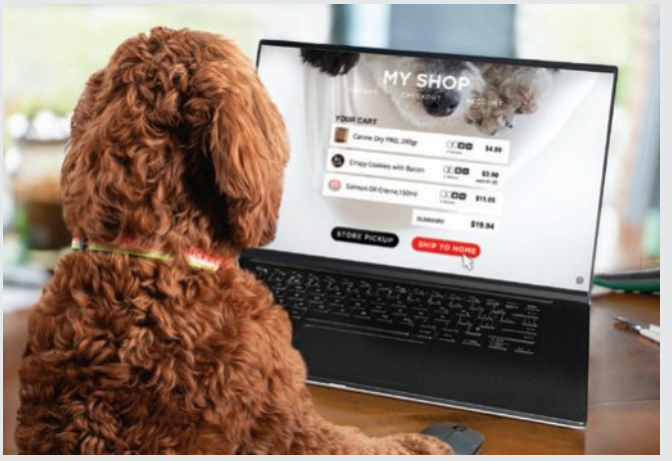
After giving the food to her dogs, the woman noticed that the older dog's skin condition did not improve and that her younger dog did not like it. She requested a refund. The company responded by claiming that its guarantee only applied to 4-kilogram bags of dog food (which cost $39.95 plus postage).

The woman felt deceived and initiated a civil action against the company at VCAT. She sought $2000 damages to compensate for the cost of the dog food and the inconvenience, stress and disappointment caused by the company's failure to supply the refund.

When deciding the case, the VCAT member examined the company's website and found that while it did contain the 'Money Back Guarantee' statement on the first page, as claimed by the applicant, it also contained a statement on a subsequent page that limited the guarantee to a maximum of 4 kilograms – '(Max 4KG's)'.

In his ruling, the VCAT member stated that the guarantee was not a term of the contract between the woman and the dog food company, but rather a part of the product's advertising and 'invitation to treat' (i.e. an invitation to a potential customer to make an offer to buy a product, which a retailer may accept or reject). The member also ruled that the way the guarantee was stated on the website was not 'misleading or deceptive' under the ACL because the clarification on a subsequent page that the guarantee only applied up to 4 kilograms was clearly stated and prominently displayed. As such, the company did not breach the ACL.

Pead v Premium Pet Food Online Pty Ltd (Civil Claims) [2021] VCAT 771 (19 July 2021)



Source 6 A woman sued an online dog food company, claiming it failed to honour its '100% Money Back Guarantee'.

Possible impacts of a breach

Impacts on the consumer

Possible impacts of a breach of contract on the consumer are:

- financial loss – this could include the loss of money paid for the goods or services. The consumer may also indirectly suffer other financial loss. For example, if the consumer had bought various goods to make up a special hamper for a birthday present, and one of the key goods for the hamper does not arrive so the hamper cannot be made up, then the consumer may suffer loss beyond the goods not arriving (although it may not be possible for the consumer to seek compensation from the vendor for all of this loss)
- loss of confidence – this could include losing confidence in online shopping. For example, a person may have a bad experience with online shopping and this may deter them from shopping online in the future
- effect on mental health – this could include conditions such as stress or anxiety. For example, a consumer may suffer stress if the goods arrive late
- inconvenience – this could include the time and cost involved in making the claim. For example, a consumer may be inconvenienced by the time it takes for the dispute to be resolved
- personal injury or death – this could occur as a result of the breach of contract. For example, a consumer may buy a washing machine online that explodes, seriously injuring them.

Impacts on the vendor

Possible impacts of a breach of contract on the vendor are:

- financial loss – this could include loss of profit. For example, a vendor may suffer financially as a result of goods or services that have been delivered but for which payment has not been received
- loss of reputation – this could be as a result of bad reviews or negative feedback. For example, a vendor may receive adverse publicity as a result of failing to properly supply goods or services
- effect on mental health – this could include conditions such as stress or anxiety. For example, a vendor may suffer stress because a consumer has unreasonably withheld payment owing to them.

Source 7 summarises some of the possible impacts that a breach of contract can have on the consumer and on the vendor.

Impacts on the consumer	Impacts on the vendor
• Financial loss • Loss of confidence • Effect on mental health • Inconvenience • Personal injury or death	• Financial loss • Loss of reputation • Effect on mental health

Source 7 A summary of the impacts of a breach of contract

The scenario below illustrates how a contract claim can financially impact a vendor.

Actual scenario

Jeweller forced to sell $34 000 diamond ring for $1100

John Rolfe, *The Daily Telegraph*, 9 November 2016

Nicholas Buttle bought his fiancée a two-carat diamond engagement ring online for $1100 but the retailer wouldn't deliver it, saying the price was wrong. It should have been $34 000.

Mr Buttle took the matter to court and won. The retailer, Sydney-based Royal Diamonds Pty Ltd, appealed but lost again and must deliver a 'substitute ring' with a 'diamond of similar or higher grade' – plus pay Mr Buttle's legal costs as well as its own solicitor's bill of $15 000.

'This company is going to be closing down because of this', said a Royal Diamonds director, who asked not to be named.

'We are going to make the ring and close the company.'

The director said any person on the street would know a two-carat diamond ring does not cost $1100: 'I can't believe how the tribunal allowed for that.'

The director said he believed the NSW Civil and Administrative Tribunal (NCAT) was not aware Royal Diamonds does not sell 'off the shelf' products but custom-made rings, where a purchaser selects a setting then a diamond from a list based on size, clarity, cut – and price.

He said the NCAT decision would 'open the door – it will set the precedent' for other consumers to buy valuable goods advertised at incorrect prices.

Both sides in the case relied on contract law, not the Australian Consumer Law (ACL). The tribunal found there was an 'absolute contract of sale made between the parties ... that payment for the ring had been accepted' and the retailer 'was unable to avoid the agreement by virtue of its claimed mistake'.

The NCAT appeal panel was told that previous cases had found one party is entitled 'to an order rescinding the contract' if the other party 'is aware that circumstances exist that indicate that the first party is entering the contract under some serious mistake'.

'(But) in this appeal there is simply no evidence to support the application of such principles.

'The only matters ... justifying a finding that the respondent knew or must have known of the mistake lies in the fact that he was a mathematician, that he

conducted a web search at some unspecified time and located the ring on the cheapdiamonds.com website that advertised a 2.15 carat ring for the price of US$4499.99 ($5844) and in his application to the tribunal, the respondent (Mr Buttle) stated that the value of a similar ring is $34 429', NCAT said.

11.2 Check your learning

Remember and understand

1 In terms of entering into a contract, **explain** why purchasing goods online is no different to purchasing goods in a store.
2 **Describe** the two main areas of law that govern online shopping purchases.
3 Using an online shopping example, **distinguish** between an express term and an implied term.
4 **Identify** and **describe** the elements that a plaintiff needs to establish to prove a breach of contract claim.

Examine and apply

5 Access an online shopping website. Go through the steps to select and purchase an item (but do not complete the purchase!).
   a **Who** is making the offer?
   b **Who** is accepting the offer?
   c **What** is the consideration passing between you and the vendor?
   d **Describe** three terms and conditions that apply to the purchase.
   e **State** whether the vendor based in Australia. If so, **identify** three bodies that could resolve, or assist the resolution of any dispute that may arise involving the purchase. If not, **what** problems might arise if a remedy is sought?
6 For each of the following scenarios, **identify** the element the plaintiff might have difficulty proving. **Justify** your answers.
   a Bernadette is Joshua's mother. Joshua purchased some golf clubs for Bernadette online that never showed up. Bernadette is intending to sue the supplier for loss and damage.
   b Theo purchased a toy online for his grandson some weeks ago. In the past week, the toy has stopped working. Theo does not know that his grandson squished banana inside the toy's battery part. Theo is intending to make a claim on the basis that the toy is not of good quality.
   c Taras purchased some underwear online. Months later, the underwear arrived. Taras plans to make a claim because of how long it took for his goods to arrive.
   d In 2019, James bought a ring online. A few months after they bought it, it started fading in colour and the engraving on the side of the ring started to wear out. James is now very angry about the ring and wants a refund from the supplier.
7 Read the scenarios 'No refund for cancelled online booking' and 'Dog food dispute'. Answer the following questions in relation to each.
   a **What** was purchased online?
   b **Outline** the main issue in dispute and **identify** the remedies being sought by the applicant.
   c **State** VCAT's decision and **explain** whether you agree with it.
8 Jamal used an online service to find and hire a builder to paint four rooms in his house. The painter provided a written quote, based on images Jamal uploaded to the website. The quote stated that the total cost of painting the rooms, including the paint, would be $3500. After the painter finished painting two rooms, he informed Jamal that the job was bigger than he estimated and that it would cost $5000. Jamal said he could not afford to pay any more than the original quote and the painter refused to complete the job. Two months later, the paint started to flake off the walls in the two rooms that had been painted. **Describe** the possible types of remedies Jamal may seek.

Reflect and evaluate

9 Read the scenario 'Jeweller forced to sell $34 000 diamond ring for $1100'. **Discuss** the extent to which you think this outcome was fair.
10 As a class, discuss what you think should occur to ensure a vendor and a consumer are protected in an online purchase.

11.3 Workplace pay and conditions

Key knowledge

In this topic, you will learn about:

- **the civil law in relation to workplace pay and conditions, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies, and the impact of the breach on the parties.**

Workplace laws are essential to employers and to the operation of businesses. These laws protect the rights of employees in the workplace. The legal issues that can arise from employment include:

- the underpayment of workers
- workplace safety
- bullying
- discrimination and harassment.

The workplace is governed by various federal and state laws, which are designed to ensure the safety of employees and to promote harmonious and cooperative work environments. Many of these laws establish minimum requirements that employers must abide by in relation to an employee's pay and work conditions.

award
a legal document that sets out minimum pay rates and work conditions for employees who work in a particular occupation or industry

In Australia, the main law that governs pay and work conditions is the *Fair Work Act 2009* (Cth). This and associated laws set out what employees should be paid, and what work conditions they are entitled to (e.g. in relation to annual leave, sick leave, working hours and breaks). Most employees are covered by the *Fair Work Act*. One exception is employees of a state body (e.g. one of Victoria's state-owned water companies).



Source 1 Young workers often need greater protection because they are underpaid more often than older workers.

Pay rates and work conditions in Australia

Under current laws, an employee's pay rates and work conditions can be determined by an award or an agreement.

Award

An **award** legal is a legal document that sets out the minimum pay rates for employees who work in a particular occupation or industry. An award also sets out other employee entitlements, such as:

- overtime – additional payments that must be made to employees when they work outside their ordinary hours. Overtime is usually paid at a higher hourly rate than the worker's ordinary (or standard) hourly rate

- penalty rates – higher pay rates that must be paid to employees when they work particular hours or days, such as late-night shifts, weekends and public holidays (e.g. a fast food cashier who works from midnight to 6 am must be paid a higher hourly rate for working those hours)
- allowances – additional payments that must be made to employees when they undertake certain tasks, use their own tools, or work in specific locations or under unpleasant conditions and the like (e.g. a fast food cashier may be entitled to a laundry allowance to compensate for the cost of cleaning their work uniform, and a meal allowance when they work overtime).

An award is often seen as a 'safety net' because an employer cannot pay less than the amount set out in the award. The **Fair Work Ombudsman** is a statutory government body that promotes harmonious, productive and cooperative workplaces, investigates workplace complaints, and ensures compliance with Australia's workplace laws. Through this body, people can find out if they are covered by an award and the minimum pay rates and entitlements that apply to their particular job.

Fair Work Ombudsman
a statutory body that promotes harmonious, productive and cooperative workplaces, investigates workplace complaints and ensures compliance with Australia's workplace laws

Minimum pay rates are reviewed annually by an expert panel of the **Fair Work Commission**. This commission is an independent national tribunal that has the power to establish minimum pay rates and employment conditions for particular jobs and industries.

Fair Work Commission
an independent national tribunal that has the power to establish the minimum pay rates and employment conditions for a particular occupation or industry

The underpayment of staff can significantly affect employer–employee relationships as well as the reputation of a business or organisation.

The hypothetical scenario below provides an example of an employee discovering they are being underpaid by accessing the information for employees provided online by the Fair Work Ombudsman.

Hypothetical scenario

Fast-food award

Dory, aged 16 years, has started working at a local fish and chip shop as a casual worker. She is paid $10.00 an hour. She wants to know whether she is being paid at the correct rate. Dory accesses the Fair Work Ombudsman website and works out she is covered by the Fast Food Industry Award 2020. She then discovers that she should actually be paid $14.61 per hour, which increases for evening work (e.g. when she works from 10 pm to 6 am), weekend work and public holiday work.

Agreement

It is possible for an employee to be covered not by an award, but by an agreement. Two types of agreements are:

- enterprise agreements
- individual employment contracts.

Enterprise agreements

An **enterprise agreement** is a legal agreement that sets out pay rates and work conditions between two or more employees and their employer. For this reason, enterprise agreements are sometimes known as *collective agreements*. Enterprise agreements effectively replace an existing award, and create an enforceable set of terms and conditions of employment that cover particular employees. The base (or minimum) pay rates set out in enterprise agreements must not be below those set out in the award, and are usually higher. An enterprise agreement must be approved by, and registered with, the Fair Work Commission so that it is publicly available. All enterprise agreements can be found on the Fair Work Commission website (a link is provided on your obook pro).

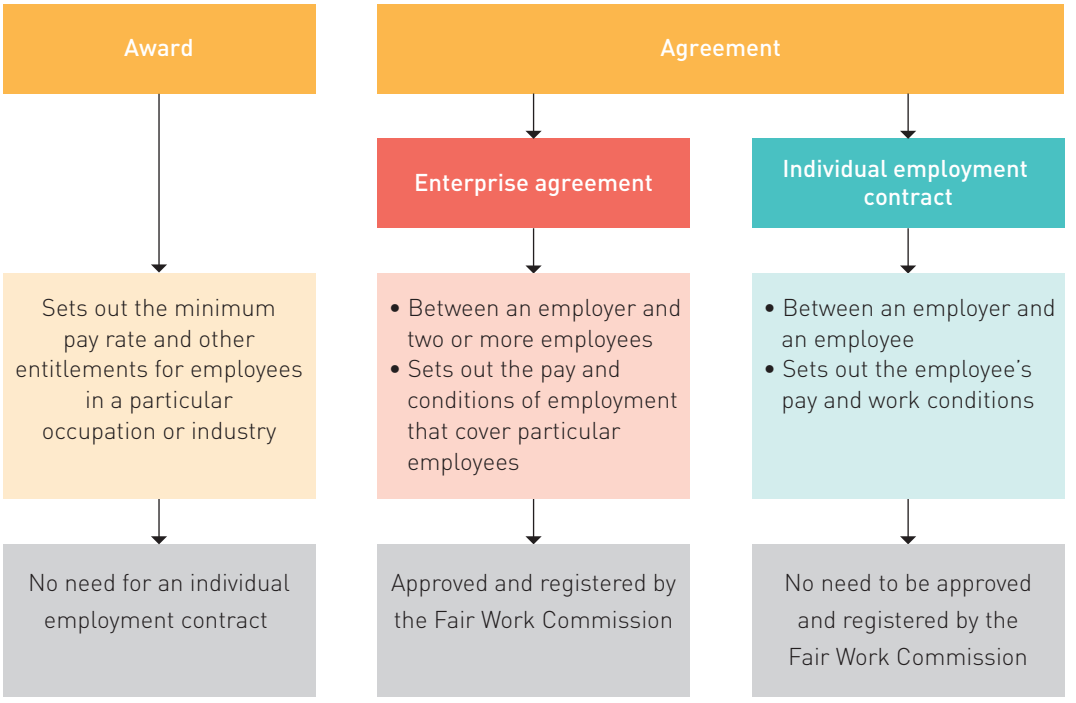
enterprise agreement
a legal agreement that sets out pay rates and work conditions between two or more employees and their employer

Weblink
Fair Work Commission: Enterprise agreements

Individual employment contracts

individual employment contract
an agreement between an employee and their employer that sets out pay rates and work conditions (which is legally binding and enforceable at law)

An **individual employment contract** is an agreement directly between an employee and their employer. Each contract is negotiated between the two parties and sets out the pay rates and work conditions of the employee. As with enterprise agreements, the base pay rates set out in an individual employment contract must not be below those set out in the award. The contract, however, does not need to be approved by, or registered with, the Fair Work Commission. Individual employment contracts are popular with private sector companies such as accountancy and law firms.



Source 2 The main ways in which employee pay rates and work conditions are determined

Work conditions

National Employment Standards (NES)
a set of 12 conditions (i.e. minimum entitlements) of all workers (i.e. employees) protected by Commonwealth legislation

The *Fair Work Act* established a set of **National Employment Standards (NES)**, which are the minimum employment entitlements of all employees in Australia. The NES are considered to be an employee 'safety net' because no award or agreement can include employee conditions that are lesser than those in the NES. This aims to protect all Australian workers from exploitation.

The NES sets out 12 minimum employment entitlements, which can be found in section 61 of the *Fair Work Act*:

- maximum weekly hours of work – 38 hours per week for a full-time employee, plus reasonable additional hours
- requests for flexible working arrangements – an entitlement for certain employees to request flexible working arrangements such as changes to hours, patterns or locations of work (e.g. changes to start and finish times, job sharing or working from home)
- offers and requests for casual conversion – providing casual employees who have worked for the employer for 12 months with a pathway to become a permanent full-time or part-time employee in certain circumstances
- parental leave and related entitlements – up to 12 months of unpaid leave per employee, plus a right to request an additional 12 months of unpaid leave, plus other forms of parental and adoption-related leave
- superannuation – a right to superannuation (being payments made to a fund for the employee's future pension)

- annual leave – four weeks of paid leave per year, plus an additional week for certain shift workers
- personal or carer's leave, compassionate leave and paid family and domestic violence leave – 10 days of paid personal or carer's leave, two days of unpaid carer's leave as required, and two days of compassionate leave (unpaid for casuals) as required and 10 days of paid family domestic violence leave
- community service leave – unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service
- long service leave – a transitional entitlement for employees that comes from an applicable pre-modernised award, pending the development of a uniform national long service leave standard
- public holidays – a paid day off on a public holiday, except where reasonably requested to work
- notice of termination and redundancy pay – up to five weeks of pay in lieu of notice of termination and up to 16 weeks of redundancy pay, both based on length of service
- Fair Work Information Statement – must be provided by employers to all new employees before, or as soon as possible after, they start work. It contains information about the NES, the right to request flexible working arrangements, modern awards, agreement-making, the right to freedom of association and workplace rights, termination of employment, individual flexibility arrangements, union rights of entry and the roles of the Fair Work Commission and the Fair Work Ombudsman.

In addition to the NES, an enterprise agreement or individual employment contract may list further employee conditions and entitlements, such as extra leave, a company car, shares in the company, incentives or extra breaks.

Rights protected by the law

Laws governing workplace pay rates and conditions mainly aim to protect the rights of employees. In particular, these laws protect the following rights:

- the right to fair and equitable pay rates and conditions, and in particular the right to be treated fairly
- the right to be compensated for work performed
- the right to a safe, productive, harmonious and cooperative workplace
- the right to be able to balance work and family responsibilities by ensuring appropriate conditions are put in place
- the right to seek compensation if an employee has not received the correct pay and conditions.

The scenario below is an example of staff being underpaid.

Actual scenario

Dinner by Heston at Melbourne's Crown Casino underpaid staff by more than $4 million

Nicole Asher, *ABC News*, 4 February 2020

A Melbourne restaurant linked to celebrity chef Heston Blumenthal cheated workers out of $4.5 million, according to a leaked administrator's report.

Dinner by Heston, which operates out of Melbourne's Crown Resort, charged up to $295 per head for its 'immersive experience' degustation meals.

The leaked creditors' report, compiled by provisional liquidators BRI Ferrier, details debts of nearly $8 million, the majority of which is owed to workers.

'The major financial issue confronting the company is the underpayment of employee entitlements over a period of four years from commencement of business until circa June 2019, when the employment arrangements were changed to comply with employment legislation', the report said.

Employees of Dinner by Heston were underpaid more than $4 million in wages and another $435 000 in entitlements.

'We have been informed that the blueprint for the retainer of the majority of staff was initially established by a Crown employee', it read.

'The blueprint was applied over several years and resulted in the underpayment of employee wages.

'The company self-reported the under-payments to the Fair Work Ombudsman.'

The United Workers Union (UWU) has slammed the restaurant and Crown for ripping off workers and demanded the resort take on the responsibility for the wage-theft debt.

'We have requested that Crown repay all unpaid wages and entitlements owed to our members – and offer employment to these members as well as sponsoring those who are on temporary visas', UWU national president Jo-anne Schofield said.

BRI Ferrier reported Dinner by Heston was 'best described as a joint venture' between Crown and the restaurant's parent company Tipsy Cake, registered in Saint Kitts and Nevis in the Caribbean.

...



Source 3 Crown Casino's Dinner by Heston, linked to Heston Blumenthal, was found to have underpaid its workers before closing its doors in February 2020.

Elements required to establish liability

If an employee has not been paid the right amount, or has not been provided with appropriate or minimum work conditions, they can take action against their employer. An employee can issue a small claim in the Magistrates' Court if the claim is less than $20 000.

To establish the claim, the employee must demonstrate the following elements:

- the plaintiff was an employee of the employer
- the plaintiff received less than their entitlement.

Element 1 – The plaintiff was an employee of the employer

The plaintiff must first establish that they were an employee of the employer, and not another type of worker, such as an independent contractor. Independent contractors are not employed by a business, but run their own business, providing a service to other businesses. They normally negotiate their own fees and working arrangements, and have different obligations and rights because they run their own businesses.

There are no set criteria that establish whether a person is an employee or an independent contractor, but usually a person is an employee if they are paid regularly, are entitled to paid leave and sick leave, work set or standard hours, have an ongoing expectation of work, and their work is directed and controlled by their employer.

By contrast, an independent contractor generally controls the work they will perform, provides an invoice (or account) to receive payment after work has been completed, provides their own tools and equipment, wears their own clothing or uniform, and is not entitled to paid leave or sick leave. For example, a truck owner who runs their own business making deliveries for other businesses, for an agreed fee, would be considered an independent contractor.



Source 4 Independent contractors are not employees and do not receive employee entitlements such as paid leave and sick leave.

Element 2 – The plaintiff received less than their entitlement

The main element that the employee needs to demonstrate is that they were paid (or received work conditions) less than their entitlement. To establish this, the employee needs to show that:

- a particular award or agreement applied to them
- they were classified under the award or agreement as casual, part-time or full-time, and classified as a certain type of employee (e.g. a 'Level 3 employee')
- they received less than their specified entitlement at any particular point in time.

To prove this, the employee needs to have details about the relevant award or agreement, details about the type of work they performed, and details about what they were paid.

Limitation of actions

Under section 545(5) of the *Fair Work Act*, a court cannot make an order about the underpayment of an employee if the underpayment occurred more than six years before the court proceedings were commenced.

If an action is commenced because of a breach of contract (i.e. the employee is on an individual employment contract), then under the *Limitation of Actions Act 1958* (Vic), the employee also has six years to recover the underpayment.

Defences to a workplace pay and conditions claim

There are no defences to a claim that an employer underpaid an employee. The minimum pay rates and conditions established under statute law mean that an employer must pay the minimum amount, even if they believe that the minimum amount does not apply (e.g. the employer thought they could contract with the employee to pay them less).

The only way in which an employer can defend a claim of underpaying an employee is by arguing that one of the elements is not satisfied. The defendant could argue that:

- the plaintiff was not an employee – this could mean that the person was an independent contractor rather than an employee
- the employee had received their entitlement – this means the employee received their entitlement under the relevant award or agreement.

In the following scenario, a flight attendant undertook action against an airline company claiming she was unfairly dismissed. In its defence, the airline claimed there were valid reasons for the dismissal related to the employee's conduct and that the dismissal was fair and reasonable.

Actual scenario

Flight attendant claims unfair dismissal

In July 2022, a flight attendant who claimed she had been unfairly dismissed by an airline company won her case at the Fair Work Commission. The flight attendant, who had worked at the airline as a cabin crew supervisor for 14 years, was dismissed for allegedly behaving in a way that breached the airline company's employee Code of Conduct and the conditions of her employment. For example, the airline company claimed that, in addition to watching a movie on her iPad and falling asleep on a flight, the flight attendant had also breached its grooming policies by not wearing any makeup, and having 'messy hair' and visibly chipped nail polish. The airline company also claimed she had stolen food from the airline and had arrived late to work on a number of occasions. In contrast, the flight attendant denied the allegations and claimed that she had been unfairly dismissed. She also raised concerns about the way the airline had investigated the allegations made against her.

After considering the claim, the Fair Work Commission found that the flight attendant's dismissal was 'harsh, unjust and unreasonable', and ordered the airline to reinstate her. The airline lodged an appeal against the findings, claiming it had followed correct procedures when dismissing the flight attendant. This included providing the flight attendant with multiple warnings, over the years, that she had breached its policies and conditions of employment.

In January 2023, the Full Bench of the Fair Work Commission, which consists of at least three Commission members, found in favour of the airline and the previous ruling was cancelled.



Source 5 The Fair Work Commission provides assistance to people who feel they have treated unfairly in their workplace. In 2023, the Commission ultimately ruled that a flight attendant was not unfairly dismissed by an airline company.

Possible remedies

While many employers have their own processes to resolve workplace disputes (which are generally stated in relevant awards or agreements), sometimes the parties are unable to reach an agreement within the workplace. In these circumstances, an employee and their employer (or their representatives) may take their dispute to one of a number of bodies for resolution. Depending on the type and nature of the conflict, workplace disputes may be resolved by organisations that include the Fair Work Commission, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and the courts.

A brief description of the main types of remedies that may be sought by employees who have been underpaid or not provided with appropriate or minimum work conditions is provided in Source 6.

Remedy	Description
Damages	Requires the employer to pay an amount of money to compensate an employee for the breach of their employment rights and any injury, loss or harm suffered
Injunction	Requires the employer either to undertake a specific action, or not to undertake a specific action to stop and prevent a further breach of the employee's rights. For example, an employer can be required to take action to address (or resolve) the breach of the *Fair Work Act* (e.g. be forced to address a certain workplace condition)

Source 6 Some of the remedies that may be sought by employees to resolve disputes concerning pay rates and work conditions

Bodies that have the power to resolve workplace disputes may also order that the employer is not required to take any further action, and, where the employee is unsuccessful, dismiss their claim.

Possible impacts of a breach

Impacts on the employee

The impacts of a breach of workplace pay rates and conditions on an employee can be significant, particularly if the employee relies heavily on their pay. Possible impacts on an employee are:

- effect on mental health – this could include conditions such as depression or anxiety. For example, a person may develop anxiety as a result of not being paid enough
- loss of income – this could occur as a direct result of underpayment. For example, young students may struggle to afford their everyday living expenses
- vulnerability – this could include workers who do not know their rights. For example, young workers or migrants whose first language is not English may struggle with the idea of having to raise a dispute with their employer.



Source 7 Possible impacts on an employee may include depression or anxiety.

Impacts on the employer

The possible impacts of a breach of workplace pay rates and conditions on an employer are:

- financial loss – this could occur when the employer loses the case. For example, the employer might be ordered to pay penalties as a result of underpaying their workers, causing financial hardship
- loss of reputation – this could be a consequence of the publicity of the claim. For example, the employer might suffer public humiliation as a result of an adverse finding in court, and may also not be seen as an 'employer of choice' because people do not want to work for them

Source 8 summarises some of the possible impacts that a breach of workplace laws can have on the employee and on the employer.

Impacts on the employee	Impacts on the employer
• Effect on mental health • Loss of income • Vulnerability	• Financial loss • Loss of reputation

Source 8 A summary of the impacts of a breach of workplace pay and conditions

11.3 Check your learning

Remember and understand

1 Using an example of each, **define** the following terms:
   - **a** award
   - **b** enterprise agreement
   - **c** National Employment Standards.

2 **Explain** how establishing minimum wages protects the rights of workers.

3 **Describe** two remedies that can be imposed by the Fair Work Commission to resolve a workplace dispute.

Examine and apply

4 Read the scenario 'Dinner by Heston at Melbourne's Crown Casino underpaid staff by more than $4 million'.
   - **a** **Why** do you think so many staff members did not know they were being underpaid?
   - **b** **Outline** the remedies suggested by the United Workers Union (UWU).
   - **c** **Describe** two possible impacts of the breach on these staff members.
   - **d** **Describe** two possible impacts of the breach on the employer.

5 Imagine that you are an employment lawyer and a man called Ozem comes to see you. He tells you that he thinks he is being underpaid after having a chat to a colleague at work. Ozem tells you that:
   - he is 22 years of age
   - his business does not have a registered enterprise agreement and he is covered by the award, but does not know what it is called
   - he works full-time as a help desk operator in the graphic arts industry
   - he is not a trainee, not eligible for a supported wage, and not an apprentice
   - he does not work in a place that publishes newspapers
   - he believes he is a Level 5 worker
   - he gets paid $16.50 an hour.

   Access the Fair Work Ombudsman website. A link is provided on your obook pro. Research and prepare a summary for Ozem that:

   Weblink
   Fair Work Ombudsman

   - **a** **states** Ozem's correct hourly pay rate
   - **b** **identifies** any other possible entitlements Ozem may be able to claim
   - **c** **explains** why Ozem has a claim for underpayment and **describes** the possible:
     - **i** defences or arguments that could be raised by his employer
     - **ii** remedies he might seek to resolve the underpayment.

Reflect and evaluate

6 **Explain** whether you think there should be a limitation period for bringing a claim seeking recovery of unpaid wages.

7 Read the scenario 'Flight attendant claims unfair dismissal'.
   - **a** **Explain** why the flight attendant commenced an action against the airline and **identify** the remedy ordered by the Fair Work Commission prior to the appeal.
   - **b** **Explain** why the airline lodged an appeal and **outline** the outcome of the appeal case.
   - **c** **Describe** the possible impacts of this civil action on the flight attendant and the airline.

Chapter

11

Review

Top assessment tips from Chapter 11

1 In Unit 2 – Area of Study 1, you look at two areas of civil law. For these two areas, make sure you know each of the six key knowledge points in the Study Design (rights, elements, limitation of actions, possible defences, possible remedies, and impact of the breaches on the parties).

2 Use visual maps or drawings to summarise your two areas of civil law. Try to find an example for each of the points you make.

3 One of the best ways to absorb information is by teaching it to someone else. Find someone who is prepared to be taught by you about one of these areas of civil law – and think about an innovative way to teach it. It might be somebody in your class, someone at home, or someone else in your school.

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 assessment tasks are composed of a variety of questions. A great way to identify the difficulty of the question is to look at the command term (or terms) used in the question and the mark allocation. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 For each of the areas of law that you have studied, identify the time period within which a claim must be brought.

(2 marks)

Difficulty: medium

2 Choose **one** of the following inaccurate statements and rewrite it so it is correct.

- **a** The principles of contract law are set out in the Australian Consumer Law, which outlines the rights available to a person when their express rights have been breached.
- **b** The *Equal Opportunity Act 2010* (Vic) is the main statute in Victoria that governs discrimination claims. The role of the courts is to modify the *Equal Opportunity Act*, which includes expanding the attributes for which a person may be discriminated against.
- **c** The Commonwealth Government establishes the minimum pay rate for each job within each industry. It is the role of the Fair Work Commission to determine whether a person has been underpaid.

(4 marks)

Difficulty: high

3 Choose **one** case study in **one** of the areas of law you have studied. Choose which party you would represent. If you chose the plaintiff, prepare a written statement for the court about why the defendant should be found liable. If you chose the defendant, prepare a written statement for the court about why they should not be found liable.

(8 marks)

Practice assessment task

Before attempting this practice assessment task, re-read the information at the beginning of this chapter about the learning outcome, key knowledge and key skills.

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

A series of disputes

Note that only 'Dispute one: Consumer rights' and 'Dispute two: Workplace pay and conditions' are given below. The other dispute is available on your obook pro:

- 'Dispute three: Discrimination'.

Additional resource
Dispute three: Discrimination

Dispute one: Consumer rights

Imagine you are a lawyer. On Monday morning, you receive an email from Justine Belieber, a female musician who lives in an outer Melbourne suburb. She has asked you for advice.

The email reads as follows:

'I need your help in suing an online retailer. A few years ago, I purchased a fair amount of musical instruments online. Recently, most of them stopped working. I know that my little bro was fiddling around a bit with the equipment, but I'm pretty sure that's not the reason why the instruments are broken. I've always had problems with the equipment, particularly the guitar, and I think they are faulty. The equipment cost me so much money, and I've suffered a lot of pain because I haven't been able to produce music as good as I used to. I want to sue them for the cost of the equipment, plus the pain and humiliation that I have suffered because I haven't been able to get a record deal. I checked out the terms and conditions that I agreed to online, but I reckon I didn't read them at the time and so I can say that I didn't actually agree to them. Plus, I'm told that there's some consumer law that protects me anyway.'

Dispute two: Workplace pay and conditions

Eight years ago, Sofia started working at Hairball Choppers as a hairdresser. When she was first employed, Sofia signed a contract that set out her wages and conditions. She understands that it is an individual contract. Sofia works at the salon from 8 am to 5 pm every day from Monday to Saturday. She receives annual leave and her wages are paid on a fortnightly basis.

A week ago, Sofia was talking with her colleague, who is also a hairdresser, and they happened to talk about the amount of pay they receive. Sofia's colleague is also employed full-time and has the same qualifications and level of experience as Sofia. Her colleague mentions that her hourly pay rate is $25. Sofia is horrified. She is being paid $20 per hour. After some searching, Sofia finds out that her pay is below the award wage.

Sofia raises this with her boss, Gerard, one afternoon. Gerard assures Sofia that he will look into it. Two days later, Gerard approaches Sofia and says that he cannot do anything because Sofia's contract says she is a contractor and not an employee, and that she is too late to make a claim anyway.

Imagine you are a lawyer. Sofia comes to see you to help her out.

Practice assessment task questions

Choose one of the disputes above or the dispute on your obook pro.

1 Consider the facts of the case and advise whether, in your view, and on the balance of probabilities, the plaintiff has a claim. In your answer:
   - **a** identify the relevant law in question (1 mark)
   - **b** summarise the rights that are protected by the relevant law (3 marks)
   - **c** explain whether each of the elements is likely to be established by the plaintiff (8 marks)
   - **d** identify the defences that might be able to be used by the defendant, and advise on the likelihood of those defences succeeding (8 marks)
   - **e** explain whether the plaintiff will be successful. (5 marks)

2 Assuming the plaintiff's rights have been infringed, describe **two** remedies that could address the breach. (5 marks)

Total: 30 marks

Chapter checklist

Now that you have completed this chapter, reflect on your ability to understand the key knowledge from the Study Design. If you feel you need some more practice, use the revision links to revisit the key knowledge.

Remember that you will also need to be able to draw on and understand the key skills outlined in the Study Design.

Key knowledge	I understand this	I need some more practice to understand this	Revision link
• The civil law in relation to discrimination, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies and the impact of the breach on the parties	☐	☐	Go back to Topic 11.1.
• The civil law in relation to consumer rights, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies and the impact of the breach on the parties	☐	☐	Go back to Topic 11.2.
• The civil law in relation to workplace pay and conditions, including the rights protected by the law, the elements required to establish liability, the limitation of actions, possible defences, possible remedies and the impact of the breach on the parties	☐	☐	Go back to Topic 11.3.

Check your Student obook pro for these additional resources and more:

- **Chapter 11** Chapter review quiz
- **Revision notes** Chapter 11
- **Chapter summary** Chapter 11
- **Quizlet** Revise key legal terms from this chapter

Chapter

12

Remedies



Source 1 In this chapter, you will consider dispute resolution processes and methods, difficulties faced by certain groups in the civil justice system, and remedies. A remedy is an order made by a court (or tribunal) to address a civil wrong. The most common remedy is damages (an amount of money that a court or tribunal orders one party to pay to another). Another type of remedy is an injunction, which is an order requiring a person to do, or not do, something. In 2022, an injunction in Victoria was awarded to protect the greater glider (pictured), an endangered species.

Photo: Doug Gimsey

Outcome

By the end of **Unit 2 – Area of Study 2** (i.e. Chapter 12), you should be able to explain the key concepts in the resolution of a civil dispute, discuss the principles of justice in relation to experiences of the civil justice system, and discuss the ability of remedies to achieve their purposes.

Key knowledge

In the chapter, you will learn about:

The principles of justice and experiences of the civil justice system

- the principles of justice: fairness, equality and access
- methods used to resolve a civil dispute such as mediation, conciliation and arbitration
- institutions that resolve civil disputes such as tribunals, ombudsmen and complaints bodies
- an overview of the role and civil jurisdictions of the Victorian courts
- the role of the jury in a civil trial
- the difficulties faced by different groups in the civil justice system, such as First Nations people, people of low socioeconomic status, young people, and people in regional, rural and remote areas

Remedies

- the purposes of remedies
- types of remedies, such as damages and injunctions.

Key skills

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

- define and use legal terminology
- research and analyse relevant information about civil law and recent civil cases
- describe the institutions that resolve civil disputes
- explain the role of the Victorian courts and juries in civil disputes
- discuss the principles of justice in relation to experiences of the civil justice system
- discuss the ability of remedies to achieve their purposes
- synthesise and apply legal information to actual and/or hypothetical scenarios.

Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

Key legal terms

access one of the principles of justice; in VCE Legal Studies, access means that all people should be able to engage with the justice system and its processes on an informed basis

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

conciliation a method of dispute resolution that uses an independent third party (i.e. a conciliator) to help the disputing parties reach a resolution

damages an amount of money that one party is ordered to pay to another party for loss or harm suffered. It is the most common remedy in a civil claim

equality one of the principles of justice; in VCE Legal Studies, equality means people should be treated in the same way, but if the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage

fairness one of the principles of justice; in VCE Legal Studies, fairness means all people can participate in the justice system and its processes should be impartial and open

injunction a remedy in the form of a court order requiring the defendant 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

jury an independent group of people chosen at random to determine questions of fact in a trial and reach a decision (i.e. a verdict)

mediation a method of dispute resolution that uses an independent third party (the mediator) to help the disputing parties reach a resolution

remedy any order made by a court (or a tribunal) designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant

Key legal cases

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

Extracts from the *VCE Legal Studies Study Design* (2024–2028) reproduced by permission, © VCAA

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



Warm up!
Check what you know about remedies before you start.

Quizlet
Test your knowledge of the key legal terms in this chapter by working individually or in teams.

12.1 Introduction to remedies

In society, disputes are common. The interaction between different people, groups and organisations can lead to civil law being broken, or rights being infringed. These everyday events often result in civil disputes that need to be resolved.

If a person's rights have been infringed, that person may be able to take action against the person they believe has harmed them.

In civil disputes, generally:

- the plaintiff is the person who commences a civil action
- the defendant is the person who is being sued.

The plaintiff has the burden of proof. The plaintiff may be able to use a variety of dispute resolution bodies to seek a remedy for a breach of civil law.

Plaintiffs and defendants can be individuals, companies or associations. That is, companies and associations are entitled to certain rights, and owe certain obligations, and so can sue and be sued. An example of a company suing and being sued is provided in the scenario below.

Actual scenario

Chatime reusable cups binned after KeepCup sues for trademark infringement

Jessica Yun, *The Sydney Morning Herald*, 10 February 2023

Hundreds of reusable cups have ended up in landfill after KeepCup launched legal action against Chatime Australia, accusing the bubble tea chain of selling unlawful products and profiting off the use of its brand name without permission.

KeepCup instituted proceedings in the Federal Circuit Court against Chatime in late January after discovering it was marketing and selling a reusable cup packaged with the words 'KEEP CUP' in its bubble tea stores and on Woolworths' shelves. The image, logo and name of KeepCup are registered trademarks.

KeepCup managing director Abigail Forsyth said she was taking Chatime to court to protect the business' reputation and that Chatime's products were an infringement of intellectual property.

'There's an onus on bigger businesses and people who have brands to respect the brands of other people,' she said.

'When we see people who are using our trademark, we have to take steps to enforce that they recognise it. For the most part, no one hears about it.'

...

Forsyth co-founded KeepCup in 2009 with her brother Jamie after opening a cafe and wanting to reduce the amount of disposable coffee cups they saw ending up in landfill. KeepCup now employs more than 50 people, and the cups are used in 65 countries, generating $11.4 million in profits in the 2019 financial year, according to the company's most recent financial report filed to ASIC.



Source 1 A dispute has arisen about Chatime's use of the name 'Keep Cup' for its reusable cups.

In documents filed to court, Forsyth stated she became aware of Chatime selling the reusable cups around October last year. On November 15, she instructed law firm Marque Lawyers to demand the bubble tea chain stop selling the products and to recall about 900 cups that remained on sale in Woolworths stores nationally. KeepCup launched proceedings on January 20 after Chatime failed to provide evidence of doing so.

When a civil dispute is resolved, people expect that justice will have been achieved. The principles of justice, which you will learn about in Topic 12.2, also apply to civil disputes and can be used to determine whether justice has been achieved in the civil justice system, or in the resolution of a civil dispute.

In this chapter, you will look at the ways that civil disputes are resolved. You will explore:

- the methods used to resolve civil disputes
- the role of tribunals, ombudsmen and complaints bodies in resolving disputes
- the role and civil jurisdictions of the Victorian courts
- the role of the jury in a civil trial
- the difficulties faced by certain groups in dealing with the civil justice system, such as young people, and people in regional, rural and remote areas
- remedies and their purposes.

The purpose of these topics is to help you develop an understanding of how civil disputes can be resolved, and the effectiveness of dispute resolution bodies and methods, and remedies.



Source 2 Sometimes the rights and best interests of children can be at the centre of a civil dispute.

Did you know?

A child under the age of 18 can sue another person through a litigation guardian, often called a 'next friend'. This person is usually a parent or guardian. Children can also be sued.

12.1 Check your learning

Remember and understand

1 **What** are the names generally given to the two parties in a civil dispute?

2 **What** does it mean to sue somebody?

Examine and apply

3 Read the scenario 'Chatime reusable cups binned after KeepCup sues for trademark infringement'.

- **a** **Who** is the plaintiff and **who** is the defendant in this case?
- **b** **What** is the nature of the claim made by the plaintiff?
- **c** **What** loss or harm does the plaintiff claim it has suffered?
- **d** Conduct some research on this case and **summarise** whether there has been any progress.

Reflect and evaluate

4 You are on the train on your way home from school and you hear two people talking about civil disputes.

The two people both work at the same company, which is being sued by a colleague of theirs. This colleague is suing for being discriminated against, based on their religious preferences.

You hear the two people agreeing that a company should not be able to be sued, and that people with claims against companies should not be able to take action against those companies, as it can affect business and other colleagues.

As a class, discuss the benefits and downsides of people being able to sue companies.

12.2 The principles of justice

Key knowledge

In this topic, you will learn about:

- **the principles of justice: fairness, equality and access.**

In civil cases, the parties and the community expect that justice will be achieved. However, whether justice has or has not been achieved is difficult to measure, and often depends on the perspectives and views of the person who is making that assessment.

In VCE Legal Studies, to assess whether justice has been achieved, you should consider the principles of justice: fairness, equality and access.

A summary of the principles of justice, and how they apply to civil disputes, is provided in this topic.

Fairness

fairness
one of the principles of justice; in VCE Legal Studies, fairness means all people can participate in the justice system and its processes should be impartial and open

In the *VCE Legal Studies Study Design*, **fairness** means that 'all people can participate in the justice system, and its processes should be impartial and open'; that is:

- people should be treated impartially
- there should be open justice
- people should have the opportunity to participate in the civil justice system.

These features are explored further below.

Impartial processes

bias
a prejudice or lack of objectivity in relation to one person or group

apprehended bias
a situation in which a fair-minded lay observer might reasonably believe that the person hearing or deciding a case (e.g. a judge or magistrate) might not bring an impartial mind to the case

All people involved in the civil justice system, including judges, magistrates, jury members, mediators and conciliators, must be independent and impartial (i.e. not **biased**). This means they must decide the case based on facts and legal principles, and not on their own preconceived views or prejudices. They must not favour either party.

The requirement for impartiality extends to ensuring there is no **apprehended bias**. This means that a person involved in deciding the case (e.g. a judge) may need to remove themselves from the case if there is an apprehension (belief or suspicion) that they might not have an impartial and unprejudiced mind. For example, in the civil justice system, there may be apprehended bias in relation to a jury member sitting on a defamation trial who has also been a successful plaintiff in a defamation case. The defendant may argue that the jury member cannot bring an independent and impartial mind to the case because of their previous experience, and that they may unduly influence other jury members because of that experience. In this case, the defendant may ask for the jury member to be removed.

Open processes

court judgment
a statement by the judge that outlines the decision of the court and the legal reasoning behind the decision

mediation
a method of dispute resolution that uses an independent third party (the mediator) to help the disputing parties reach a resolution

To ensure fairness, the civil justice system is open to the public, so that decisions and processes can be scrutinised. That is, justice is seen to be done. Civil trials and hearings and tribunal hearings are generally open to the public and to the media, and **court judgments** are made available to the public (including online).

However, because of the private nature of civil disputes, sometimes they are resolved in private, out of the public eye. This is particularly so because parties in civil disputes, as you will learn, have some level of control over how their dispute is heard and determined. For example, less than 5 per cent of civil claims go to trial, because they are often resolved before trial such as through **mediation**. In addition, given that there are so many civil claims (hundreds of thousands each year), it is impossible for

the courts and tribunals to publicise and hand down written judgments for every single one. Therefore, there are many more instances when civil claims and decisions are not known to the public.

Participation

Finally, fairness requires parties in a civil dispute to be able to participate in the civil justice system. This means that the plaintiff and the defendant – and, at times, ordinary members of the community – should be able to be involved in the case. Participation includes the following:

- the opportunity to know and understand the case that is put against them – before trial, the plaintiff is required to disclose their claims, the basis for their claims, their relevant documents and the **evidence** they rely on. This allows the defendant to understand why the plaintiff alleges the defendant is liable. Similarly, the defendant is required to disclose why they are defending the case. This includes disclosing the nature of the defence (e.g. do they claim there was no contract at all, or that they did not breach the contract?), their relevant documents and their evidence. This ensures that both parties can meaningfully participate in the case and that there are 'no surprises' at trial
- the opportunity to present their version of the case – this means both parties should be able to make submissions to the judge or magistrate (e.g. submit that there is 'no case to answer' or that certain evidence should be excluded), call their witnesses, ask questions of the other side's witness (known as **cross-examination**) and make opening and closing addresses. If the parties are prevented from fully participating, then there may be grounds for an appeal
- no delays – a fair trial or hearing is one where there are no unreasonable delays. Delays can lead to unfair outcomes, such as witnesses forgetting what happened, or the plaintiff being so elderly that they cannot 'enjoy' any remedy awarded to them. It also can be prejudicial to a defendant, such as one who has 'moved on' from the case.

evidence
information, documents and other material used to prove the facts in a legal case

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

In this chapter, you will consider whether the civil justice system achieves fairness. When considering the issue of fairness, refer to the above features and characteristics to determine whether fairness is being upheld.



Source 1 Documents that may be relevant to a civil dispute include emails. Fairness requires relevant documents to be disclosed to the other side.

equality
one of the principles of justice; in VCE Legal Studies, equality means people should be treated in the same way, but if the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage

Equality

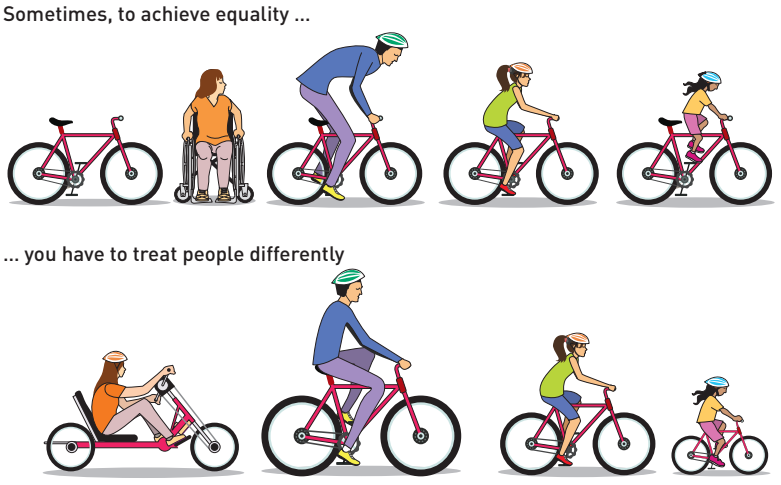
The second principle of justice is **equality**. In the *VCE Legal Studies Study Design*, equality means that 'all people engaging with the justice system and its processes should be treated in the same way. If the same treatment creates **disparity** or disadvantage, adequate measures should be implemented to allow all people to engage with the justice system without disparity or disadvantage.'

While fairness is largely about processes, equality is about how the parties are treated in the proceeding, which could involve the same treatment, or different treatment.

Same treatment

In the civil justice system, the plaintiff and the defendant should be treated the same. This is sometimes referred to as formal equality. No changes are made to the court or tribunal's processes or systems, and people are afforded the same level of support or treatment.

For example, imagine a teenager is suing their large employer for sexual harassment, and the teenager is not represented by a lawyer. If there was formal equality, the court would not make any changes to the proceeding. The judge or magistrate would use the same language they would in any other case (including using complex legal terminology), would not explain processes or rights to the teenager, and not make any alterations to the processes or allow for any flexibility in how the teenager presented their case. This may result in disparity or disadvantage, which is why sometimes there may need to be different treatment.



Source 2 Equality means that all people should be treated equally before the law, with an equal opportunity to present their case. But this does not mean that everyone should be treated the same. Sometimes, to treat people equally you have to treat them differently.

disparity
a situation in which two or more things or people are not equal, and the inequality causes unfairness

attribute
a quality, feature or characteristic of a person, such as race, gender identity, physical features or disability

Different treatment

Sometimes, in a case, people need to be treated differently. This is known as substantive equality. As shown in the example above involving a teenager, treating people the same can result in a disadvantage to one of the parties because of who they are (i.e. because of their personal **attributes** or characteristics). In these situations, adjustments are made to the processes to ensure that this disadvantage is avoided or reduced.

For example, in the above example, the judge or magistrate may change the use of their language so that they speak as simply as possible. They may also talk more slowly. If the teenager has not correctly filled out documents, the documents may be accepted anyway, given the teenager may not have the skills or experience to know how to fill them in correctly. In addition, the judge or magistrate may take the time to explain the teenager's rights to them, or clarify the processes involved in the hearing, so that they can participate as much as possible.

While it is not possible to list all of the changes that may be made in a civil case to avoid disadvantage, some of the people who may need to be treated differently and the measures that may help to achieve equality are as follows:

- people who do not understand or communicate in English – to assist a person who does not understand or communicate in English, the judge or magistrate may simplify their language and try not to use complex legal terminology, and may provide opportunities for the person to engage an interpreter
- young people – as noted above, young people may not have the skills and experience to conduct their own case. So the judge or magistrate may speak as plainly as possible, allow for some

flexibility in the way the young person conducts their case, and give as much assistance as possible so that they can understand what is happening

- people with religious or cultural differences – adjustments may need to be made for people with religious or cultural differences. For example, people who do not practise a religion should not have to swear to tell the truth 'before God' or use the Bible to swear to tell the truth. Cultural differences may also need to be considered. For example, as you will learn later in this chapter, adjustments may need to be made for cultural reasons, such as making a hearing room more culturally accessible and less intimidating
- people who do not have a lawyer – self-represented parties suffer a significant disadvantage because they have to run and present their own case. In some situations, self-represented parties may be against a party who has legal representation. A person who is representing themselves may not have sufficient skills, experience or objectivity to run their case, and therefore measures may need to be put in place to assist them. For example, the judge or magistrate may need to go to great lengths to ensure that the self-represented party understands processes and procedures, has enough time to consider documents or issues, and understands their rights.

Study tip

Make a note when you come across something in this chapter that relates to one of the principles of justice. For example, when you look at the role of the courts in resolving civil disputes, identify how the courts can achieve fairness, equality and access.

Access

Finally, justice means that **access** should be achieved. In the *VCE Legal Studies Study Design*, access means that 'all people should be able to engage with the justice system and its processes on an informed basis'.

access
one of the principles of justice; in VCE Legal Studies, access means that all people should be able to engage with the justice system and its processes on an informed basis

There are two features of access:

- people should be able to engage with the justice system
- people should be able to engage on an informed basis.

Engagement

People should be able to engage with the civil justice system. This includes the following:

- a range of dispute resolution bodies – if there were only courts, then this would significantly limit the ability of people to engage with the civil justice system, as courts are known to be expensive, there are often delays in hearing cases, and for some people courts are very intimidating. Therefore, the civil justice system seeks to achieve access by providing a range of dispute resolution bodies, such as tribunals, complaints bodies and ombudsmen
- physical access – people should be able to physically access courts, tribunals, services and legal representation. To help achieve this, there are a number of court and tribunal venues outside Melbourne. However, some people – such as people with physical or intellectual disability, or people in remote areas – may still struggle to physically engage with the civil justice system
- technological access – if virtual or online methods are used to provide services or conduct hearings, people should be able to engage with those methods. This may be more difficult for those with special needs, those who are not able to use technology, or those who cannot access computers (such as people in jail, or elderly people living in aged-care facilities)
- financial access – people should not be prevented from using the civil justice system simply because they do not have the money. However, the system has been criticised for being inaccessible for many people, particularly those who cannot afford legal representation. The provision of legal aid through **Victoria Legal Aid** is limited for civil disputes because of the significant number of people seeking **legal aid**, and the large amount of funding that goes towards criminal cases and family law matters
- no delays – the civil justice system should resolve cases without unreasonable delay. Delay impacts on access as it limits the ability of the system to achieve a just outcome, particularly if it affects people's memories about what happened.

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

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

Informed basis

To be able to engage with the civil justice system, people need to be informed. This means that people should have the knowledge and information they need to be able to pursue their case, and know what their rights are. It includes knowing a dispute exists or that there may be a remedy available.

The following can help a person be more informed:

- education – education helps people be more informed about their rights or the avenues that may be available to them to resolve their dispute.
- information – people should have access to information about the civil justice system, how to resolve disputes, and their rights. This information may be available from legal services such as Victoria Legal Aid and **community legal centres**, as well as from courts, tribunals and other dispute resolution bodies. For example, all of the courts have basic information on their websites about how to resolve civil disputes
- legal representation – being represented by a lawyer allows a person to be more informed, as lawyers will explain the processes involved, their rights, what steps they should take in the proceeding, and their chances of success. Legal practitioners are skilled and experienced, and can help parties navigate the civil justice system more easily.

community legal centre (CLC) an independent community 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

In this chapter, you will learn about the civil justice system and examine whether it provides access to all parties in civil disputes. Try to look for the above features to determine whether there has been access.

12.2 Check your learning

Remember and understand

1 **Identify** and briefly **describe** the three principles of justice.

2 **Identify** two ways in which the principles of justice are upheld when resolving a civil dispute.

Examine and apply

3 In your class, form groups of three or four. Each group is to be allocated one of the following people (your teacher will decide which person to allocate if there are too many):

- a newly arrived migrant
- a person with an acquired brain injury
- a 15-year-old person
- a person who lives in rural Victoria
- a person with little money.

For your allocated person, brainstorm the following:

- the issues that the person may face if they are involved in a civil dispute
- where the person can access information about their legal rights and about how civil disputes can be resolved
- how the civil justice system can ensure that the principles of justice are achieved for that person.

Share your ideas with the rest of the class.

4 Look at Source 2 on page 412. As a class:

- Talk about how the image shows both formal equality and substantive equality.
- Discuss the disadvantage that was suffered by some of the people in the first picture.
- Discuss the measures that were put in place to address that disadvantage.

As an extension activity, you may wish to be creative and draw other images that show both formal equality and substantive equality, or search online for images.

Reflect and evaluate

5 Form small groups and conduct a debate about the following statement: 'It is not the role of government to provide free legal aid or assistance. It should be a "user-pays system".'

12.3 Dispute resolution methods

Key knowledge

In this topic, you will learn about:

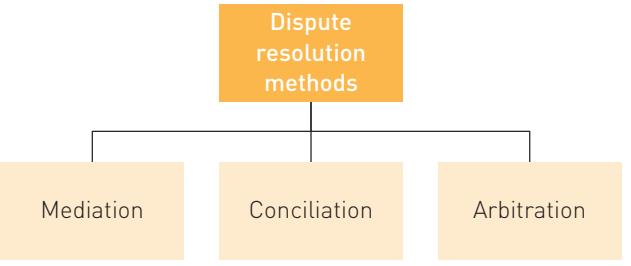
- **methods used to resolve a civil dispute such as mediation, conciliation and arbitration.**

Parties to a civil dispute can use various methods to reach an agreement and settle the dispute without going to court. These methods are called dispute resolution methods. They are a way to obtain an outcome in a civil dispute that does not involve a court or tribunal making a binding decision on the parties. Dispute resolution methods are also known as **alternative dispute resolution methods**, but these methods are now so often used to resolve disputes that the word 'alternative' is becoming less appropriate to describe them.

alternative dispute resolution methods ways of resolving or settling civil disputes without having a court or tribunal hearing (e.g. mediation, conciliation and arbitration; also known as appropriate dispute resolution

Dispute resolution methods include:

- mediation
- conciliation
- arbitration.



Source 1 Mediation, conciliation and arbitration are ways to resolve a civil dispute without a court or tribunal making a binding decision on the parties.

The legal system encourages parties to use mediation, conciliation and arbitration to resolve disputes because these dispute resolution methods are often less stressful and less expensive than court action. In some situations, these methods are even less stressful and less expensive than issuing a claim through a tribunal.

In this topic, you will explore mediation, arbitration and conciliation, and their ability to resolve civil disputes.

Study tip

Save articles that you come across about the resolution of civil disputes. This will help you to apply your knowledge to actual cases, and you will be able to use these real cases in your assessment tasks to demonstrate understanding of civil disputes.

Mediation

Mediation is a method of resolving disputes that is widely used by courts, tribunals and other dispute resolution bodies. It is a joint problem-solving process in which the parties in dispute sit down and discuss the issues they disagree on, present their side of the case, and try to reach an agreement through negotiation. The parties do this with the help of a **mediator**, who is neutral and impartial.

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

Mediators are trained to assist parties in dispute to reach a decision. A mediator tries to 'empower' both parties. That is, the mediator helps the parties feel more in control of the situation and more confident during negotiations. The mediator discusses the issues with the parties and tries to even out any imbalance between them, while providing them with support. The mediator does not necessarily need to be an expert in the area of law that is the subject of the dispute, but they do need to have good people skills and excellent conflict resolution skills. Their job is to help people come to a decision, not make the decision for them. Mediators do not make decisions about whether there has been a breach of the law, or offer legal advice.



Source 2 Political staffer Sally Rugg (centre) filed a lawsuit against federal 'teal' member of parliament Monique Ryan for unfair dismissal, alleging 'hostile workplace conduct'. It was reported in early 2023 that the dispute could not be resolved at mediation. The matter ultimately settled.

Any discussions during mediation are normally 'without prejudice'. This means that the parties are free to openly discuss their dispute, and possibly the weaknesses of their own case, as these discussions cannot be used against them at a later date. This allows the parties to speak freely and without fear of their openness being detrimental to their case if the matter does not settle at mediation.

If the parties resolve the case through mediation, they normally enter into a legally binding contract known as **terms of settlement**, or a deed of settlement. This means that the parties are bound by the promises they make at mediation. This agreement may be enforceable through the courts. The terms are normally confidential to the parties, which means they cannot be disclosed to the public.

terms of settlement a document that sets out the terms on which the parties agree to resolve their dispute

Mediation is available to the parties in a civil dispute in the following ways:

- Parties can organise a private mediation between them. Mediators can be accessed through the Victorian Bar website, and through organisations such as the Dispute Settlement Centre of Victoria. There are many organisations that offer free or low-cost mediation services.
- Parties in a court case are often referred to mediation by a court before the final trial or hearing, to see if a resolution can be reached. The Magistrates' Court, County Court and Supreme Court actively order parties to attend mediation before a matter is set down for hearing or trial.
- Parties in a case heard by a tribunal are also often referred to mediation to try to resolve the dispute before the hearing.

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

Conciliation

Conciliation is also a process of dispute resolution involving the assistance of an independent third party that aims to enable parties to reach a decision. In many ways, conciliation operates the same way as mediation, but the role of the third party is different.

In conciliation, the third party, known as the **conciliator**, listens to both sides of the dispute and makes suggestions about appropriate ways of resolving the matter. The conciliator assists the parties by exploring solutions to the dispute. The conciliator is usually someone with specialist knowledge about

the subject matter of the dispute; for example, if a dispute is an issue about a worker's pay, the conciliator is likely to be skilled in employee–employer relations.

In conciliation, the final decision is made by the parties and is not binding. However, like mediation, the parties often enter into terms of settlement, which can be legally enforceable. Like mediation, any discussions during conciliation are on a 'without prejudice' basis, meaning that those discussions cannot be used against either party if the matter does not settle at conciliation.

Conciliation is used to resolve civil disputes in the following ways:

- Many dispute resolution bodies (e.g. the Victorian Equal Opportunity and Human Rights Commission and Consumer Affairs Victoria) use a form of conciliation to resolve disputes (you will explore dispute resolution bodies in more detail in Topics 12.4 to 12.6).
- Parties in a dispute at the Victorian Civil and Administrative Tribunal (VCAT) are often sent to what is called a **compulsory conference**. The compulsory conference uses conciliation to help the parties come to a resolution.
- Some of the more specialised courts use a form of conciliation. For example, for cases relating to family disputes that are before the Federal Circuit Court and Family Court of Australia, a conciliation conference is organised between the parties to try to reach an agreement about financial or parenting issues.



Source 3 Both mediation and conciliation seek to achieve a 'win-win' situation.

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 and explore possible resolutions

Strengths and weaknesses of mediation and conciliation

Because conciliation is similar to mediation in many ways, the strengths and weaknesses of these methods are similar. A summary of the strengths and weaknesses of both methods is provided in Source 4. Try to link at least two strengths and two weaknesses to one or more of the principles of justice.

Strengths of mediation and conciliation	Weaknesses of mediation and conciliation
A decision made by the parties during mediation and conciliation is more likely to be acceptable to the parties, as they have reached a decision themselves rather than it being imposed on them by a third party	Unless the parties enter into terms of settlement, decisions reached during mediation and conciliation are not binding on the parties or enforceable
Mediation and conciliation are held in a less formal setting than a courtroom, and are far less confrontational, which can help alleviate any stress felt by the parties	One party may dominate the other party and may influence either the third party or the other party, particularly if the other party does not have legal representation
The parties are assisted by an unbiased third party who will not take sides but instead will help facilitate discussion and assist the parties reach a resolution	Mediators and conciliators have no power to order parties to come to a decision, or even attend
Issues can be discussed confidentially, without publicity and without the discussions being held against a party if the matter does not settle as part of the process	Mediation and conciliation are not appropriate for some disputes, such as where one party has an unfair advantage or more bargaining power, or where an urgent injunction is required
Mediation and conciliation save time and money. This is because they avoid the need for the dispute to be determined at a final hearing or trial, which can cost a lot of money	Both parties must be willing to participate in mediation or conciliation for it to be successful; if one or both parties are unwilling to cooperate, it will be a waste of time and money

Source 4 The strengths and weaknesses of mediation and conciliation

Arbitration

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 appointed to settle a dispute during arbitration. Arbitrators have specialised expertise in particular kinds of disputes and make decisions that are legally binding. The decision is known as an arbitral award

arbitral award
a legally binding decision made in arbitration by an arbitrator

Arbitration involves an independent third party (the **arbitrator**) who listens to the parties and makes a binding decision on the parties. The decision is known as an **arbitral award** and is fully enforceable if the parties do not comply with it. When parties take their dispute to arbitration, they agree to abide by the arbitrator's decision. The Victorian Bar has trained arbitrators available to assist parties in a dispute.

Professional arbitrators charge the parties a fee for acting as an arbitrator in a dispute. The arbitrator will generally have knowledge of the subject matter of the dispute and will also have expertise in the applicable law. Arbitration is often used in commercial situations and in international disputes. Legal representation is usually allowed during the arbitration process. Therefore, arbitration can be an expensive process.

As a general rule, arbitration is more formal than mediation and conciliation, but can still be less formal than a court process. However, the way arbitration is conducted often depends on what has been agreed. That is, the parties can choose how evidence is presented, how formal the arbitration is, and what procedural rules will apply.

There are generally two situations in which arbitration is conducted in Victoria:

- where the parties have previously agreed (normally in a contract) that any dispute that arises between them will be resolved by arbitration – in this situation, the parties normally arrange the arbitration between themselves and decide how it is to be conducted. This includes choosing an arbitrator and agreeing on the rules of the arbitration
- in the Magistrates' Court, which uses arbitration to resolve civil claims of less than $10 000 – the Court initially attempts to facilitate an agreement between the parties, but if this is unsuccessful, a magistrate or registrar can make a binding decision. The arbitration can be conducted informally.

Strengths and weaknesses of arbitration

A summary of the strengths and weaknesses of arbitration is provided in Source 5. Try to link at least two of each strength and weakness to one or more of the principles of justice.

Strengths of arbitration	Weaknesses of arbitration
Because arbitration is often conducted privately, there is flexibility in the way it can be conducted, allowing parties to decide the best way to resolve the dispute	Arbitration is not as flexible as mediation and conciliation; this means the parties are normally limited to particular remedies or outcomes
Arbitration is less formal than court processes, which allows the parties to feel more at ease (although, for private arbitrations, the degree of formality of the arbitration depends on what the parties have agreed to in terms of how it is to be conducted)	Arbitration can be as formal as a court process, depending on how the parties have agreed to conduct the arbitration
It can be cheaper to resolve a dispute using arbitration than going to court (although, for private arbitrations, this depends on how the parties have agreed to conduct the arbitration)	Arbitration is more expensive than mediation and conciliation because evidence is often gathered and put before the arbitrator, and legal representation is normally used; using arbitration can be as expensive as going to court, depending on how the arbitration is conducted
The arbitral award (the decision made by the arbitrator) is legally binding on the parties, which ensures that the parties will most likely follow it	The parties have no control over the outcome imposed on them by the arbitrator
The arbitrator will have expertise in the subject matter of the dispute and will use that expertise when making a binding decision	It can take a long time for a decision to be reached if the parties go through several stages, such as producing evidence
Arbitration is private and confidential, so it is attractive for parties who wish to avoid the publicity of a trial	Arbitration is not always available to the parties in dispute; it is generally only available where the parties have agreed on arbitration, or for claims for less than $10 000 in the Magistrates' Court

Source 5 The strengths and weaknesses of arbitration

12.3 Check your learning

Remember and understand

1 **Define** the term 'arbitration'.

2 **Describe** two differences between conciliation and mediation.

3 Copy the table below into your notebook. Fill in the six rows for each column, so you have a summary of each of these three methods of dispute resolution.

	Mediation	Conciliation	Arbitration
Description			
Name of the third party			
Role of the third party			
Who makes the decision?			
Is it available for all disputes?			
Do any courts use it?			

Examine and apply

4 For each of the scenarios below, **identify**:

- one dispute resolution method that may be used
- two advantages and two disadvantages of using this dispute resolution method.

a Jacqi, who is from Nigeria, wants to rent a house. The real estate agent keeps telling her that the house she wants is not available, even though it is empty and available for rent. Jacqi thinks she is being discriminated against.

b Jock and Jack are neighbours who are constantly arguing. Jock decides to put garden lattice on the fence between their properties. Jack doesn't like the lattice. He says it's an eyesore. He wants it removed but Jock refuses to take it down. Jack asks Jock to attend the Dispute Settlement Centre so they can discuss the issue on neutral ground.

c Uma has separated from Elijah. They cannot agree on custody arrangements for their children, but they do not want to take their dispute to court.

d Hye and Brody entered into a building contract that sets out how disputes are to be resolved if they arise. The contract states that the parties must first try to mediate and then they must arbitrate to resolve any dispute. Hye refuses to attend mediation after a dispute arises about the quality of Brody's building work.

5 Access the Supreme Court's website. A link is provided on your obook pro. Read the information about the mediation offered as a means of settling disputes, then answer the following questions.

a When is mediation used?

b **What** are the benefits of mediation?

c **Who** can act as a mediator?

d **Who** pays for mediation?

Weblink
Supreme Court of Victoria: Mediation

6 **Compare** mediation and arbitration as methods of dispute resolution.

7 Conduct some research and find two civil disputes that have recently (in the past four years) been resolved through mediation. Prepare a summary about the cases that addresses the benefits and downsides of using mediation to resolve each of the disputes.

Reflect and evaluate

8 In your view, which method do you think is the best way to resolve disputes? Give reasons for your answer.

9 **How** do each of the dispute resolution methods achieve each of the principles of justice?

12.4 Tribunals

Key knowledge

In this topic, you will learn about:

- institutions that resolve civil disputes, such as tribunals.

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

ombudsman
an office holder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities and bodies

complaints body
an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

If parties to a civil dispute are unable to reach a resolution between themselves, the parties can take the matter to court. However, courts are not the only dispute resolution bodies. There are three other types of bodies in Victoria that can help the parties resolve their dispute:

- **tribunals**
- **ombudsmen**
- **complaints bodies**.

In 2014, the Australian Government's Productivity Commission (an independent research and advisory body) published a report that included the number of matters heard by ombudsmen and complaints bodies, tribunals and civil courts between 2011 and 2013. The report found that there were a significant number of matters and complaints that these bodies dealt with each year: see Source 1. While the data in Source 1 was collected some time ago, and some of the data in relation to the number of providers will be out of date, it gives an indication of the volume of matters dealt with by those bodies in Australia.

Number of matters heard by ombudsmen, complaints bodies, tribunals and civil courts (2011–2013)

	Ombudsmen and complaints bodies	Tribunals	Civil courts
Number of institutions/ providers	**71 ombudsmen and complaints bodies** • National: 22 • States/territories: 49	**58 tribunals** • Commonwealth: 22 • States/territories general: 4 • States/territories specialist: 43	**43 courts** • Commonwealth: 4 • States/territories general: 21 • States/territories specialist: 18
Nature of service	• Receive and resolve complaints • Conduct inquiries into individual or systemic cases	• Administrative review • Civil dispute resolution • Binding decision	• Judicial dispute resolution • Binding decision • Some courts provide 'in-house' alternative dispute resolution services
Volume of matters	**Total 542 000 complaints** arising from 3 709 000 contacts • National: 277 000 • States/territories: 265 000	**Total 395 000** • Commonwealth: 71 000 • States/territories general: 194 000 • States/territories specialist: 130 000	**Total 673 393** • Magistrates: 420 144 • District: 28 214 • Supreme: 28 309 • Probate: 65 787 • Federal: 5 277 • Family: 33 120 • Federal Circuit: 92 542
Cost for disputants	No cost	• Tribunal fees • Expert fees • Cost of attendance • If represented – lawyers' fees	• Court fees • Lawyers' fees • Counsel fees • Expert fees • Cost of attendance • Risk of adverse cost award

Source: Australian Productivity Commission report, 2014

Source 1 This table shows data for ombudsmen, complaints bodies and tribunals from 2011 to 2012, and data for courts from 2012 to 2013.

This topic will examine the role of tribunals in resolving civil disputes, and the next two topics will examine ombudsmen and complaints bodies.

The role of tribunals in resolving disputes

Tribunals are dispute resolution bodies that obtain their power to resolve certain types of disputes from parliament. That is, parliament will pass a statute giving a tribunal the authority to hear and determine certain types of matters and applications. For example, the *Mental Health Act 2014* (Vic), a statute passed by the Victorian Parliament, established the Mental Health Tribunal and gave it certain powers, including the power to hear an application to determine whether a person should be compulsorily taken and treated in a mental health service. Tribunals develop expertise in particular types of disputes and can make decisions that are binding.

The purpose of tribunals is to provide individuals with a low-cost, efficient and speedy method of dispute resolution. Therefore, tribunals increase the community's access to justice by providing Australians with an alternative to court, which can be a more formal, costly, stressful and lengthy way of resolving disputes (particularly for small disputes that may be best dealt with in a less intensive way).

Tribunals cannot hear every type of dispute. For example, tribunals have no power to hear **class actions** (also known as group proceedings or representative proceedings).

class action
a legal proceeding in which a group of seven or more people who have a claim against the same person 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

Some tribunals have similar characteristics to courts. For example, as in a court, an independent third party will hear the dispute and make a binding decision on the parties. Also, the parties are often referred to a form of dispute resolution method (e.g. mediation) to try to resolve the dispute before the final hearing.

However, there are significant differences between tribunals and courts. For example, the cost of having a dispute resolved at a tribunal can often be much less than the cost of resolving the dispute in court.



Source 2 The Fair Work Commission is a national tribunal that can hear certain workplace disputes.

Tribunals in Australia

In Australia, there are both Commonwealth and state tribunals. Some of the Commonwealth and Victorian tribunals are listed in Sources 3 and 4.

Commonwealth tribunal	Description
National Sports Tribunal	The National Sports Tribunal provides dispute resolution services to sporting bodies, athletes and support personnel. These include disputes where alleged bullying and harassment has occurred in sport, disciplinary issues, and selection issues (e.g. whether a person has been selected to participate in a certain event).
Fair Work Commission (FWC)	The FWC is the national workplace relations tribunal. It has the power to carry out a range of functions, including resolving workplace disputes through mediation and/or conciliation and, in some cases, through public hearings.
National Native Title Tribunal	The National Native Title Tribunal can hear and determine native title claims, which are applications in relation to the recognition of land title unique to First Nations people.

Source 3 Types of Commonwealth tribunals

Victorian tribunal	Description
Victorian Civil and Administrative Tribunal (VCAT)	VCAT is a 'one-stop shop' for parties and deals with a broad range of civil disputes, including small civil claims, residential tenancy disputes, discrimination claims and guardianship issues.
Mental Health Tribunal	The Mental Health Tribunal seeks to protect people with mental illness. One of its functions is to hear applications made by mental health patients who wish to challenge a treatment order that has been made against them or who wish to be transferred to another designated mental health service.

Source 4 Types of Victorian tribunals

Example: Victorian Civil and Administrative Tribunal

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

The **Victorian Civil and Administrative Tribunal (VCAT)** deals with a large number, and a large variety, of civil disputes. VCAT is made up of five divisions:

- Administrative Division
- Civil Division
- Human Rights Division
- Planning and Environment Division
- Residential Tenancies Division.

Each division is divided into one or more 'lists' (or sections) that hears particular types of disputes. For example, the Residential Tenancies Division has one list, the Residential Tenancies List, which hears disputes between tenants and landlords about claims related to renting a property (e.g. where the tenant has failed to pay rent, or where the landlord has failed or refused to repair the property).

VCAT's President (who must be a sitting Supreme Court judge) and vice-presidents (who must be sitting County Court judges) are responsible for the management of VCAT. It is one of Australia's busiest tribunals, receiving over 85 000 claims per year, the majority of which are lodged in the Residential Tenancies List.

VCAT's purpose is to provide Victorians with a low-cost, accessible, efficient and independent tribunal that delivers high-quality dispute resolution. VCAT does this by:

- generally charging low fees for a person to file their claim and have their matter heard, and by disallowing legal representation except in certain circumstances
- having a variety of locations in Victoria. While VCAT's main centre is in Melbourne, it has several venues across the state, some of which are in regional areas
- aiming to have cases heard within weeks of the application being filed. The Residential Tenancies List generally has a median wait time of around three to four weeks to have an application determined (and can resolve disputes about urgent repairs within two business days)
- having cases heard and determined by an independent third party, known as a VCAT **member**, who has no affiliation with either party to the dispute
- providing a less formal setting than courts. VCAT is required to conduct cases with as little formality and technicality as possible, thus ensuring it is accessible to ordinary Victorians with limited or no experience of the legal system
- offering dispute resolution methods – such as mediation and compulsory conferences (which use a conciliation process) – before making a binding decision on the parties.

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

The person who makes an application to VCAT is known as the applicant. The other party is known as the respondent (being the person who is responding to the claim or application). If one of the parties is not satisfied with the decision, they can appeal to the Supreme Court of Victoria (or to the Court of Appeal in some instances).

In the scenario below, a civil dispute involving sexual harassment was heard at VCAT. The applicant appealed the decision to the Supreme Court on the basis that the damages awarded were inadequate, and was successful. You will explore the different types of damages in Topic 12.10.



Source 5 VCAT is a Victorian tribunal that deals with a large range of civil disputes.

Actual scenario

Sexual harassment claim

In this case, the applicant (a woman) commenced employment at a company in August 2019. The respondent (a man) was the production manager of the company and the applicant's direct manager. The applicant alleged that she was subjected to several instances of sexual harassment. She alleged that on three occasions, the respondent touched her and slapped her on the buttocks. She also claimed that he made comments about her body shape, put his arm around her shoulders and drew her to him, tickling her waist, and gave her a shoulder massage. The applicant complained, and the respondent was terminated from his employment. The applicant then resigned as she felt it was not a safe place for her to be. Shortly afterwards, the respondent got his old job back at the company.

In the VCAT application, the respondent claimed that the conduct was not unwelcome and that it showed the supporting and caring nature of the relationship.

The VCAT case took three days and the applicant gave evidence. The tribunal held in favour of the applicant, noting that some of the comments made by the respondent were 'vulgar' and 'inappropriate'. The applicant sought over $220 000 in damages. These included $110 000 for **general damages** (pain and suffering), $20 000 for **aggravated damages** (a type of damages awarded when a person has been humiliated), and **special damages** to compensate her for medical expenses and loss of income. The tribunal awarded her $10 000 for general damages (pain and suffering) but dismissed her claims for special and aggravated damages.

The applicant appealed to the Supreme Court of Victoria. She claimed that the award of damages was manifestly inadequate, which meant it did not adequately compensate her for pain, suffering and loss of enjoyment of life.

The Supreme Court judge said that he had no hesitation in concluding that the award of $10 000 in damages was inadequate in the extreme. However, he also noted that general damages for pain and suffering are incapable of mathematical calculation, and ordered that the proceeding be sent back to VCAT to be heard by a different member, who would decide on the most appropriate amount of damages. The new member was also required to consider whether the applicant will be entitled to additional types of damages, such as special damages for lost earnings, and aggravated damages for hurt and humiliation.

Leung v Chung [2023] VSC 38 (10 February 2023)

general damages
a type of remedy that requires the payment of a sum of money to compensate for loss that cannot easily be quantified (e.g. pain and suffering)

aggravated damages
an amount of money that a defendant may be ordered to pay when a plaintiff has suffered extreme humiliation, embarrassment or insult because of the defendant's conduct

special damages
an amount of money that one party is ordered to pay to another party to compensate for losses that are easily quantifiable (e.g. medical expenses or loss of wages)

While it is generally quicker and less expensive to resolve a dispute by taking it to VCAT than to a court, in recent times VCAT's fees have increased, particularly in relation to disputes where a party challenges a planning decision made by a local council. Also, in some of its lists, it can now take up to six months (or more) for a matter to be heard and determined. Issues such as these have caused some people to question whether VCAT is still accessible to all individuals in all of its lists.

12.4 Check your learning

Remember and understand

1 **Identify** four types of dispute resolution bodies.
2 **What** are tribunals?
3 **What** is the purpose of VCAT?
4 **Outline** two reasons why tribunals are an important means by which people can resolve their disputes.
5 **Describe** one way that VCAT aims to be accessible to all Victorians.

Examine and apply

6 Using the data provided in Source 1 on page 420, create a pie graph that shows the percentage of matters or complaints that ombudsmen and complaints bodies, tribunals and courts hear per year.
7 For each of the following scenarios, **identify** the most appropriate tribunal to hear the dispute or claim. **Justify** your response.
   a Janie has failed to pay rent for her property in West Footscray for the past four months despite constant demands by her landlord.
   b Osama works for a government agency and has recently become aware that he is not being paid the minimum award wage.
   c Thierry is an athlete. He has not been chosen to participate in the upcoming Olympics.
   d Eduardo has been suffering discrimination in the workplace for some time and has been called various names that make him feel vilified.
   e Yolanda has suffered from a mental illness for some time. An order has just been made in relation to her treatment, and her mother believes it is not the right order.
8 Read the scenario 'Sexual harassment claim'.
   a **What** happened in this case?
   b **Who** applied to VCAT and who was the respondent?
   c Which VCAT list would have heard this case?
   d **Describe** two advantages of VCAT hearing and determining this case.
   e **What** types of damages did the applicant seek, and **what** was she awarded?
   f **Explain** why the Supreme Court was involved in this case, and why the Supreme Court sent the matter back to VCAT.

Reflect and evaluate

9 In class, form pairs or small groups and complete the following tasks.
   a Choose one Commonwealth tribunal or one Victorian tribunal (other than VCAT). Make sure every pair or group has chosen a different tribunal.
   b Conduct some research on the tribunal to find the following information:
      i which statute the tribunal gets its powers from
      ii the tribunal's role and purpose
      iii what dispute resolution methods the tribunal uses
      iv whether the tribunal has online services (e.g. if application forms can be lodged online)
      v one recent case that the tribunal has heard or determined, or an article about a claim that has recently been made to the tribunal
      vi the benefits of having this tribunal in Australia
      vii any disadvantages or weaknesses of this tribunal.
   c Prepare a presentation summarising your findings for the rest of the class.
   d Prepare a quiz or assessment for your classmates about your chosen tribunal. Include the information discussed in your presentation.

12.5 Ombudsmen

Key knowledge

In this topic, you will learn about:

- institutions that resolve civil disputes, such as ombudsmen.

An ombudsman is an official appointed by the government to investigate complaints made by individuals against certain bodies or institutions. Like tribunals, an ombudsman obtains the power to hear and determine complaints through parliament; that is, the parliament grants the ombudsman powers by passing a statute. For example, the Victorian Ombudsman was established by the *Ombudsman Act 1973* (Vic).

Role of an ombudsman

The role of an ombudsman is to provide individuals and small businesses with an independent, timely and accessible dispute resolution service to resolve disputes in relation to certain agencies and industries. Ombudsmen provide a fair, free and independent way of handling complaints and resolving disputes. There are two types of ombudsmen:

- a government ombudsman, who deals with disputes or complaints about government agencies
- an industry ombudsman, who deals with disputes between consumers and businesses in particular industries, such as telecommunications, financial services, public transport, and energy and water.

An ombudsman is not a court or a tribunal. Therefore, the power of the office is often limited to the government agencies or businesses over which the ombudsman has power to hear complaints. In many instances, an ombudsman will not hear a complaint unless the individual has first tried to resolve the complaint directly with the government agency or business.

Unlike courts and tribunals, an ombudsman's services are free. Further, unlike courts and tribunals, most ombudsmen hear complaints from individuals against government agencies and businesses (and not vice versa). That is, ombudsmen are set up to provide individuals and small businesses with a dispute resolution service to hear and determine complaints about services that have been provided to them. This helps to overcome the power imbalance of individuals dealing with government agencies or large service providers.



Source 1 Cynthia Gebert is currently the Telecommunications Industry Ombudsman, which provides dispute resolution services for complaints about a phone or internet service provider.

An ombudsman will first try to resolve the complaint by working with the two parties. Where an agreement cannot be reached, the ombudsman *may* have the power to make a binding decision on the parties (not every ombudsman has this power).

Although every ombudsman is appointed by government, they act impartially and independently of government when handling claims. One of the key features of ombudsmen is that they ensure procedural fairness by giving parties an opportunity to respond to a complaint, and by giving reasons for any decision that is made.

Ombudsmen in Australia

In Australia, there are ombudsmen at both federal and state levels. Some of the ombudsmen at a federal level are listed in Source 2, and some of the ombudsmen that exist at a Victorian level are listed in Source 3.

Ombudsman at the federal level	Description of the ombudsman's role
Commonwealth Ombudsman	The Commonwealth Ombudsman investigates complaints made about the actions of federal government departments. The Commonwealth Ombudsman has different specialist roles, e.g. they are also the ombudsman for the private health insurance industry, overseas students, the postal industry, the defence force, immigration and law enforcement.
Telecommunications Industry Ombudsman	The Telecommunications Industry Ombudsman provides individuals with a dispute resolution service to help them resolve their complaints about their telephone or internet service in Australia.
Fair Work Ombudsman	The Fair Work Ombudsman provides services to workers and employers. This ombudsman assesses complaints, investigates suspected breaches of workplace laws and, in some instances, enforces workplace laws (including those related to pay rates and work conditions).
Australian Small Business and Family Enterprise Ombudsman (ASBFEO)	The ASBFEO supports small businesses and family enterprises by providing dispute resolution services to them when they are involved in a disagreement. For example, a small business operating a franchise that has a dispute with the franchisor may be able to use the ASBFEO's services.

Source 2 Ombudsmen at the federal level

Ombudsman in Victoria	Description of the ombudsman's role
Victorian Ombudsman	The Victorian Ombudsman has the power to inquire into or investigate any administrative action (i.e. decisions made) by any Victorian Government department or administrative office. The Victorian Ombudsman does not have the power to investigate actions taken by certain people, such as police personnel, judges, magistrates or officers of the Governor of Victoria.
Energy and Water Ombudsman Victoria	The Energy and Water Ombudsman hears complaints about energy and water companies operating in Victoria. Complaints may be about high bills or billing mistakes, energy disconnections, outages, power surges or water meters.
Public Transport Ombudsman	The Public Transport Ombudsman investigates and resolves complaints about certain public transport operators, including Public Transport Victoria, Metro Trains Melbourne, V/Line and Yarra Trams. This ombudsman considers issues such as ticketing, penalties, customer service and the conduct of public transport staff.

Source 3 Ombudsmen in Victoria

Example: Public Transport Ombudsman

The Victorian Public Transport Ombudsman (PTO) investigates and resolves complaints about Victorian public transport operators. To be able to investigate a complaint, the public transport operator needs to be a member of the PTO scheme. Members include Rail Projects Victoria, Metro Trains Melbourne, Public Transport Victoria, Southern Cross Station, V/Line and Yarra Trams.

The PTO's jurisdiction is set out in its Charter. The PTO can investigate and facilitate the resolution of complaints that relate to:

- the supply of (or the failure to supply) public transport
- the sale of tickets, including ticketing machines and ticket refunds

- infrastructure, vandalism (including graffiti) and the cleanliness of the transport
- the conduct or behaviour of staff members
- the use by the public transport operator of land or premises, or its impact on that land or premises.

The PTO only has jurisdiction to review a complaint if the public transport operator has first investigated and considered the complaint, and it remains unresolved. That is, the public transport operator must first have the opportunity to resolve the dispute before the PTO hears it.

The PTO does not have jurisdiction to hear certain complaints, including complaints about the setting of prices for public transport, the routes of operation, the frequency of services, or complaints that have already been heard and determined by a court or tribunal.

The PTO's Charter states that the PTO must handle complaints in a 'fair, reasonable, just, informal and expeditious manner'. The PTO is independent and unbiased, has the power to gather documents from the parties (so that it can make a fair decision), and aims to conduct dispute resolution in an informal way.

The PTO can require the individual making the complaint (known as the complainant) and the public transport operator to attend conciliation. If the matter cannot be resolved between the parties through conciliation, the PTO has the power to make a determination, including that:

- the public transport operator pay compensation or provide a service to the complainant
- corrective or other work be undertaken to resolve the complaint
- the operator does not do a certain act.

The PTO does not have authority to order compensation beyond $10 000.

The determination of the PTO is binding on the public transport operator, but the complainant can choose whether to accept the decision of the PTO within 21 days of the decision being made. If the decision is accepted, it is binding on the parties and the complainant cannot make any further claims against the operator in relation to that complaint. However, if the complainant does not accept the decision, they may choose to pursue remedies in any other forum (e.g. through a court or tribunal).

Did you know?

The word 'ombudsman' has been borrowed from the Swedish language and has been used in English since 1959. The word in Swedish literally means 'commission man' and refers to a complaints office called the *justitieombudsmannen*, which hears and investigates complaints made by individuals about abuses of the state. The office of ombudsman is always held by a single person. Because the word is a direct borrowing from another language, it is not turned into 'ombudsperson' in English.



Source 4 Conduct on trains can be the subject of a complaint to the PTO.

The scenario below highlights one type of complaint that may be lodged with the PTO.

Hypothetical scenario

An unfortunate experience

Mustafa lives in Altona, a suburb of Melbourne. He had tickets to see a popular football game one Saturday night at the MCG. He left his house mid-afternoon and walked to the train station. He 'touched on' his train card (which is a condition of using public transport in Melbourne), but he did not realise that the machine was not working.

The next two scheduled trains were cancelled, so Mustafa had to wait over 30 minutes for a train. When he jumped on the train, he noticed there was rubbish and vomit in the corner of one of the carriages. Mustafa moved to another carriage.

While he was sitting in the carriage, two public transport officers got on the train. They sat down and started speaking disrespectfully and in a vulgar manner about some teenage girls that were in the carriage. When the officers looked at Mustafa, they started making racial comments about him. Mustafa was embarrassed and horrified. When he tried to go to another carriage, the door would not open. The officers started laughing.

Mustafa exited the train at Flinders Street Station. When tried to 'touch off', the machine rejected his ticket. Another officer said that Mustafa had not properly tapped on. Mustafa got an 'on the spot' fine. Mustafa was angry by this stage, as he was late for the game. Two police officers approached him, and apprehended Mustafa because they believed he was creating a disturbance. Mustafa ended up missing the football game.

12.5 Check your learning

Remember and understand

1 **What** is an ombudsman?
2 **Describe** two similarities and two differences between an ombudsman and a tribunal.
3 **How** might ordinary Victorians benefit from the existence of an ombudsman?
4 **What** sorts of complaints does the Public Transport Ombudsman hear?

Examine and apply

5 For each of the following scenarios, **identify** the ombudsman that is most likely to have jurisdiction to hear the complaint.
   - **a** Bernie has been waiting seven months to receive a copy of her child's birth certificate from the Victorian Registry of Births, Deaths and Marriages.
   - **b** Aiden has realised that he has been overcharged for his internet for the past six months. His service provider is refusing to refund him the money.
   - **c** Bella owns and operates a small ice-cream business. She has entered into a franchise agreement. She has a dispute about the marketing costs charged to her by the franchisor.
   - **d** Oren is an overseas student. He has been suffering discrimination from one of his teachers.

6 Read the scenario 'An unfortunate experience'.
   - **a** **Identify** all the complaints that could be made by Mustafa to the PTO.
   - **b** Are there any other persons or bodies that Mustafa may have a complaint against? **Explain**.
   - **c** If you had a complaint with a public transport operator, would you lodge it with the PTO? Be prepared to discuss your views with your classmates.

Reflect and evaluate

7 **Provide** two strengths and two weaknesses of the office of an ombudsman as a dispute resolution body.
8 Conduct some research into one ombudsman other than the Public Transport Ombudsman.
   - **a** Find an article or report about one type of complaint that the ombudsman has heard.
   - **b** **Provide** a summary of this matter.
   - **c** In your view, is the ombudsman an effective dispute resolution body? Give reasons for your answer, making reference to the complaint that you have identified.

12.6 Complaints bodies

Key knowledge

In this topic, you will learn about:

- institutions that resolve civil disputes, such as complaints bodies.

Other than tribunals, courts and ombudsmen, there are a number of complaints bodies that can help individuals who have a complaint about goods, services or a particular industry body. Similar to a tribunal or an ombudsman, complaints bodies obtain their power through parliament.

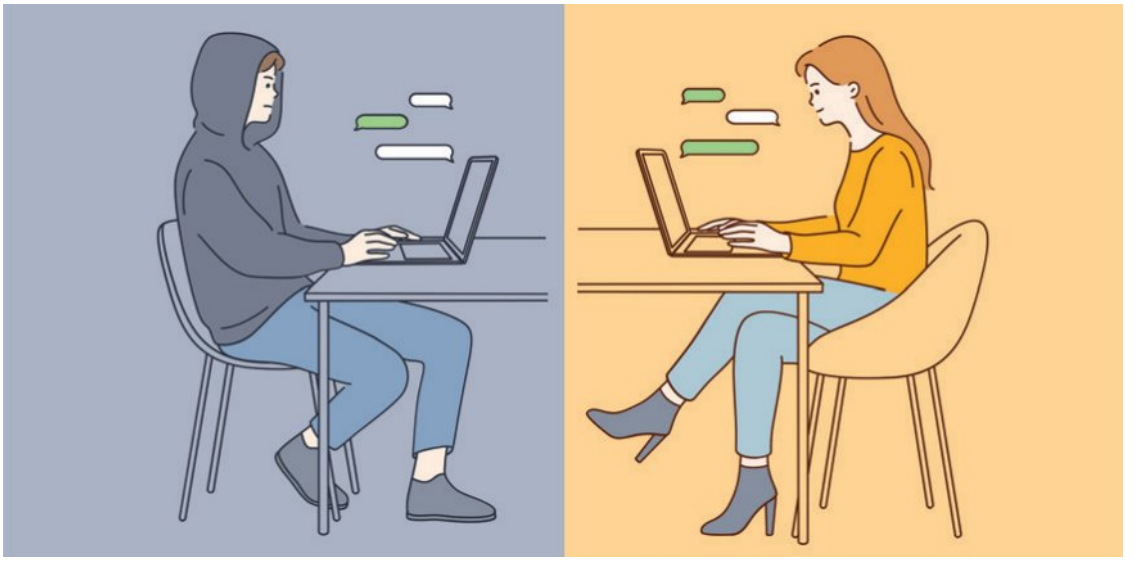
The role of a complaints body

Complaints bodies deal with complaints about the provision of goods and services, or decisions made by certain bodies or authorities. They are intended to provide a free complaints and dispute resolution service so that many ordinary Victorians can access dispute resolution services.

Most dispute resolution services focus on a particular industry or service. For example, the Disability Services Commissioner can hear complaints about disability service providers but cannot hear and determine disputes about legal services.

Like an ombudsman, complaints bodies are designed to hear complaints from individuals and small businesses about services or goods provided to them. Complaints bodies usually do not hear disputes about individuals. However, complaints bodies generally do not have the power to conduct a hearing or make binding decisions on the parties. They are limited to offering free or low-cost dispute resolution services where the parties agree to settle the dispute between them. Complaints bodies do not use formal procedures to resolve disputes, and most offer flexible services so that they are accessible to everyone. For example, many complaints bodies allow people to make complaints online or over the phone.

Some complaints bodies can investigate a complaint and take enforcement action against individuals or companies that do not comply with certain laws. For example, the eSafety Commissioner can investigate complaints about child cyberbullying, image-based abuse, online content, and adult cyber-abuse, as explored in the scenario on the following page.



Source 1 There are increasing concerns about the safety of Australians using online services. These includes concerns about 'catfishing', which involves a person talking to someone who is not who they say they are.

Actual scenario

Cyberbullying investigations

The Officer of the eSafety Commissioner was first established in 2015. It is Australia's regulator for online safety, seeking to protect Australian children and adults from online harm and to promote safer, more positive online experiences. It researches and advises on online safety issues, publishes information about online safety, and monitors and promotes compliance with laws relating to online safety.

The eSafety Commissioner operates four reporting schemes that allow people to make complaints about their online experiences. These are:

- a cyberbullying scheme for Australian children (which deals with complaints from Australians under 18 who experience bullying or seriously threatening, intimidating or humiliating online behaviour)
- an image-based abuse scheme (which deals with complaints when someone posts intimate images of a person online without the person's consent)
- an online content scheme for illegal and restricted content
- a new adult cyber-abuse scheme (for adults who are the subject of online abuse).

The Commissioner has a number of powers, including the power to investigate a complaint about cyberbullying material targeted towards a child on the internet, such as on social media. In conducting the investigation, the Commissioner can obtain information from people, and can order a service provider (such as Facebook) to remove the material. The Commissioner can also notify the police of any material that is of a sufficiently serious nature.

Complaints bodies in Australia

In Australia, there are both Commonwealth and state complaints bodies. Some of the Commonwealth complaints bodies are listed in Source 2. Other Commonwealth complaints bodies include the Australian Human Rights Commission and Airservices Australia (which hears aviation complaints).

Commonwealth complaints body	Description
Office of the eSafety Commissioner	The Office of the eSafety Commissioner was established to, among other things, provide education to people about online safety, and to provide a complaints service for people who have suffered serious cyberbullying. Applications can be made online.
Inspector-General of Taxation	The Inspector-General of Taxation can hear complaints about the Australian Taxation Office (ATO). This includes complaints about administrative actions taken by the ATO, such as the timeliness of responses to requests made to the ATO. Complaints can also be made about the conduct of ATO officers.
Inspector-General of Intelligence and Security (IGIS)	Members of the public can make complaints to the IGIS about certain Australian security agencies, including the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS).

Source 2 Commonwealth complaints bodies

Some of the complaints bodies in Victoria are listed in Source 3. Other Victorian complaints bodies include the Victorian Information Commissioner, the Legal Services Commissioner and the Mental Health Complaints Commissioner.

Victorian complaints body	Description
Consumer Affairs Victoria (CAV)	CAV may conciliate disputes between consumers and traders, and tenants and landlords, about the provision of goods and services, and about rental properties. CAV can also seek to help with disputes in relation to retirement villages.
Disability Services Commissioner (DSC)	The DSC helps people with disability resolve their complaints about disability service providers. The DSC offers conciliation services to parties, and has the power to investigate complaints where conciliation has failed or is not suitable. Where a complaint is justified, the DSC has the power to issue an action to remedy the situation.
Health Complaints Commissioner (HCC)	The HCC helps to resolve complaints about health service providers (e.g. doctors, dentists and surgeons) if the complaint has not been resolved directly with the health service provider.
Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	The VEOHRC helps with disputes in relation to equal opportunity, discrimination and any infringement of human rights.

Source 3 Victorian complaints bodies

Example: Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is an independent body. It offers a free, fair and timely dispute resolution service.

Various Victorian statutes give the VEOHRC the power to help individuals resolve their complaints about discrimination, sexual harassment, victimisation and vilification. The two main statutes that confer power on the VEOHRC are the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic). Each of these statutes, in various ways, seeks to protect human rights and to prevent people from being discriminated against, harassed or vilified.



Source 4 In September 2017, VCAT ruled that a Sikh boy had been discriminated against because he was unable to wear his patka to school. The VEOHRC intervened in the family's case to VCAT. The case was seen as a win for the VEOHRC and the position it took.

The *Equal Opportunity Act* is the main statute in Victoria that makes it unlawful for a person to be discriminated against. The Act sets out the attributes for which a person cannot be discriminated against (e.g. age, breastfeeding, gender identity, parental status, physical features and disability), and the areas or activities in which a person cannot be discriminated against (e.g. in employment, education, sport, or the provision of goods or services).

The *Racial and Religious Tolerance Act* makes it unlawful for a person to incite hatred against, or to ridicule, a person or a group of people based on race or religion. This Act also makes it unlawful for one person to victimise another person.

The services provided by the VEOHRC include a free, fair and timely dispute resolution service for people who believe that they have been harassed, vilified, victimised or discriminated against.

The complaint process used by the VEOHRC is conciliation. A conciliator assists the parties in dispute to talk through the issues with the aim of reaching an agreement on how the dispute can be resolved. This can involve financial compensation, an apology, job reinstatement (where a person has lost their job on the basis of discrimination) or an agreement that the behaviour will stop.

The VEOHRC has no powers to make orders, award compensation or make binding decisions on the parties. If conciliation does not resolve a dispute, then the parties need to consider alternative options, such as issuing a claim at VCAT, or abandoning the claim.

The scenario below, from the VEOHRC's website, is an example of the type of discrimination claim that can be heard by the VEOHRC.

Actual scenario

Abeeku's story

VEOHRC: www.humanrights.vic.gov.au

Abeeku describes being discriminated against because of his race when booking gigs with his band. We explain how the Equal Opportunity Act relates to his situation, and how the [Victorian Equal Opportunity and Human Rights Commission] can help people who have a similar experience.

'I play drums in a band, and we have gigs at a few venues around town. Usually we attract a decent crowd, and the venues we play at are very supportive. Recently, one of our regular venues changed hands, and the new owners said they wouldn't be booking us anymore. I asked why, and the new owner said that our gigs attracted too many people from the African community and that he was worried about how their other patrons felt. I asked him if he was kidding. He said he wasn't.

'A friend had made a complaint to the Commission before, so I got in touch to find out if there was any way this kind of racial discrimination was allowed.

'The Commission accepted my complaint and followed up with the venue owner. He apologised and agreed to make sure all his staff understood that they couldn't discriminate like that.'

The incidents portrayed in this story are inspired by real complaints received by the Commission, but all names and other identifying details have been changed.

How does the law apply to Abeeku's situation?

In Victoria, it's against the law for you to be discriminated against, harassed or bullied because of your race.

Under the *Equal Opportunity Act*, race includes colour, descent or ancestry, nationality or ethnic background, or any characteristics people might associate with a particular race. The Act applies to many different parts of public life, including accommodation, provision of goods and services, and employment.

Strengths and weaknesses of tribunals, ombudsmen and complaints bodies

Now that you have considered three types of dispute resolution bodies (tribunals, ombudsmen and complaints bodies), it is useful to consider their strengths and weaknesses. Try to link at least two strengths and two weaknesses to one or more of the principles of justice. Note that some of the strengths and weaknesses are applicable to all three of these dispute resolution bodies, whereas some are applicable to one or two of them.

Strengths of tribunals, ombudsmen and complaints bodies	Weaknesses of tribunals, ombudsmen and complaints bodies
The cost of taking a dispute to a tribunal, ombudsman or complaints body is generally lower than taking a dispute to court. In fact, ombudsmen and complaints bodies often resolve disputes for free, which increases the availability of the civil justice system, and makes it accessible for people who cannot afford to take their matter to court	Some of the services are not free of charge. For example, while the standard application fee charged by VCAT in many matters is relatively low compared to the courts, for some matters, the hearing and application fees are high, and parties may still need to engage a lawyer to help them
Generally, complaints bodies resolve complaints and applications relatively quickly: complaints are usually resolved between one month and six months from a complaint or application being made	Given the large number of tribunals, complaints bodies and ombudsmen, some members of the public may find it difficult to find the right service to help them, or may not even know they exist
The services are freely available, which increases the accessibility of the services. This accessibility is enhanced by most of the bodies having websites, information online about the application process, and telephone and online services	An ombudsman or a complaints body has limited power to make binding decisions. In some instances the individual may choose not to follow the decision, thus meaning there is no certainty as to whether the dispute has been finally resolved
The informality of the processes enables parties to feel more at ease. Ombudsmen and complaints bodies provide an avenue for individuals to resolve disputes with large service providers and government agencies without fear of intimidation	Dispute resolution bodies are not appropriate for large, complex claims or where there are large sums of money involved. Some bodies have a limit on the amount of compensation they can award, and other bodies are unable to award compensation at all
All of the dispute resolution bodies ensure that whoever is assisting the parties is independent and impartial	Ombudsmen and complaints bodies, in particular, are specialised in particular areas or industries. This means that for certain types of complaints, there is no option but to issue a claim in a court
The dispute resolution bodies are often specialised in a particular industry or area of law	Certain bodies, such as some complaints bodies and ombudsmen, are not available for everyone. For example, Consumer Affairs Victoria can only receive complaints from consumers, not from vendors

Source 5 The strengths and weaknesses of tribunals, ombudsmen and complaints bodies

12.6 Check your learning

Remember and understand

1 **What** are complaints bodies?

2 **Describe** two ways that complaints bodies aim to help parties involved in a dispute.

3 **What** is the Victorian Equal Opportunity and Human Rights Commission (VEOHRC)? **What** sort of complaints does it hear?

4 **Describe** the dispute resolution method used by the VEOHRC.

5 Does the VEOHRC have the power to make a decision for the parties involved in a dispute? **What** other options do the parties have to reach an agreement?

6 **Identify** two statutes in Victoria that make it unlawful to discriminate against or to vilify people.

Examine and apply

7 For each of the following scenarios, **identify** a complaints body that could help resolve the dispute.

- **a** Magdeline has waited weeks for a response from the Australian Taxation Office about her taxes.
- **b** Randall believes that he is being spied on by a security intelligence officer.
- **c** Cassius believes that he was inappropriately treated by his physiotherapist.
- **d** Every time Zina goes to work, she hears the receptionist say 'monkey' under her breath. Zina believes it is because of her race.
- **e** Indiana recently bought a television from a store in the Melbourne suburb of Maribyrnong. The television is now no longer working and the store refuses to refund the amount Indiana paid for it.
- **f** Perez has been seriously bullied on Snapchat.

8 Conduct some research about the ruling VCAT made in September 2017 that a Sikh boy had been discriminated against because he was unable to wear his patka to school. **Describe** the position that the VEOHRC took on this case, and the reasons why the VEOHRC took this position.

Reflect and evaluate

9 **Discuss** the following statement, indicating whether you agree or disagree with it. In your discussion, refer to at least one complaints body, one tribunal and one ombudsman.

'Complaints bodies and ombudsmen are confusing and pointless. There should just be two dispute resolution bodies: courts and tribunals.'

10 **Evaluate** the ability of the civil justice system to achieve access to justice through the use of different dispute resolution bodies.

12.7 The Victorian courts

Key knowledge

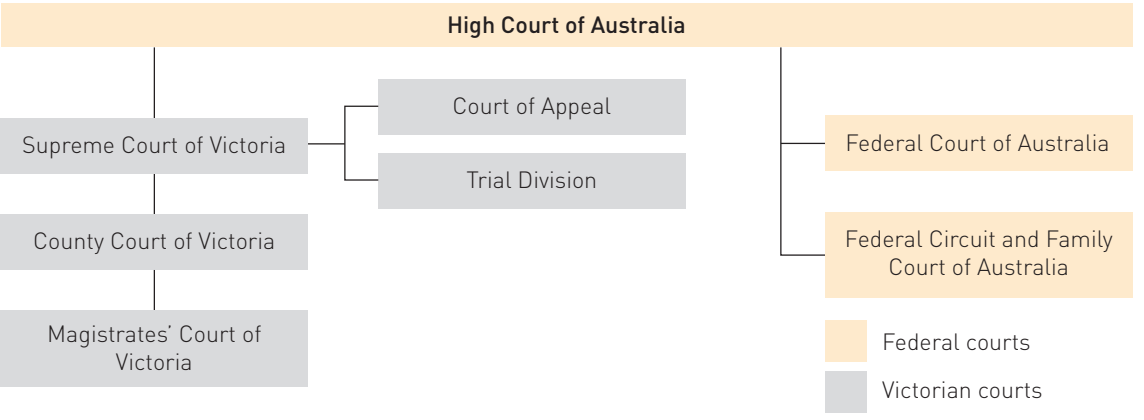
In this topic, you will learn about:

- an overview of the role and civil jurisdictions of the Victorian courts.

jurisdiction
the lawful authority (or power) of a court, tribunal or other dispute resolution body to decide legal cases

As you know, in Australia there are state courts and federal courts. Both state and federal courts have **jurisdiction** to hear certain types of civil disputes. Because civil disputes often involve a combination of both state and federal law, many of the state courts have jurisdiction to hear matters arising under federal law.

The courts in Victoria and Australia are arranged in a court hierarchy.



Source 1 The hierarchies of the Victorian and Commonwealth court systems

Study tip

Trials and hearings in Victorian courts are open to the public. Your teacher may arrange a visit to a court, or you could arrange your own visit. Visiting a court will help you to be more specific in your answers to questions in assessment tasks about the role of the courts.

The role of Victorian courts in civil disputes

Civil disputes often arise, even though there are laws that set down guidelines for acceptable behaviour. When they do arise, they need to be resolved.

The courts are the main dispute resolution body in Victoria. However, taking a civil dispute to court is often a last resort. This is due to the range of dispute resolution bodies and methods available to the parties to help them resolve a civil dispute, and the high costs involved in using the court system.

In general, there are two roles played by the Victorian courts in resolving disputes:

- determine the liability of a party
- decide on the remedy (if required).

Determine liability

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 claim is true

If a plaintiff sues a defendant in court, then it is the role of the court to determine whether the defendant is liable and, if so, to what extent. This means that the judge or magistrate (or jury, if there is one) will consider the evidence presented to the court during the trial or hearing. Then, they will determine whether the plaintiff, on the **balance of probabilities** (being the standard of proof in civil disputes), has established (or proven) that the defendant caused the loss or harm suffered by the plaintiff. This is often called *deciding the facts*, and the judge or magistrate (or jury) is the *decider of facts*.

The decider of facts may also have to determine whether the defendant is 100 per cent liable for the plaintiff's loss or harm. For example, if the defendant has claimed that the plaintiff is partly responsible for the loss or harm, this may reduce the defendant's liability. Similarly, if the plaintiff has sued more than one party, then the decider of facts may have to determine whether all of the defendants are liable and, if so, for what portion they are liable.

If the defendant has made a **counterclaim**, the judge or magistrate (or jury) also needs to determine whether the plaintiff is liable for that claim.

A court, in hearing a dispute, adopts formal rules of procedure. For example, there are rules governing which party presents their case first (generally, the plaintiff). However, a judge does have the power to change the rules of procedure. The *Evidence Act 2008* (Vic) also governs what evidence can be accepted by a court. For example, a witness cannot give evidence of an opinion to prove a fact. At a final hearing or trial, witnesses give evidence either orally or in writing.

As part of the court's role in determining liability, it will:

- provide specialisation and expertise in the type of dispute it is hearing – for example, the Supreme Court, being the highest court in the Victorian court hierarchy, deals with major complex cases such as large commercial disputes and class actions, whereas the Magistrates' Court deals with minor civil disputes
- manage the case – judges and magistrates have significant powers of **case management**, which means they can give orders and **directions** to the parties. That is, a judge or magistrate can assist the parties through the stages of the proceeding before it reaches the final hearing or trial. These stages may include requiring the parties to disclose relevant documents through the process of **discovery of documents**, or requiring the parties to attend mediation before the final hearing
- hear appeals – some of the courts in Victoria, including the Supreme Court, have the power to hear **appeals**. If a party is dissatisfied with a decision of the judge or magistrate, that party may be able to appeal the decision if there are grounds to do so. The higher court will then review the decision.

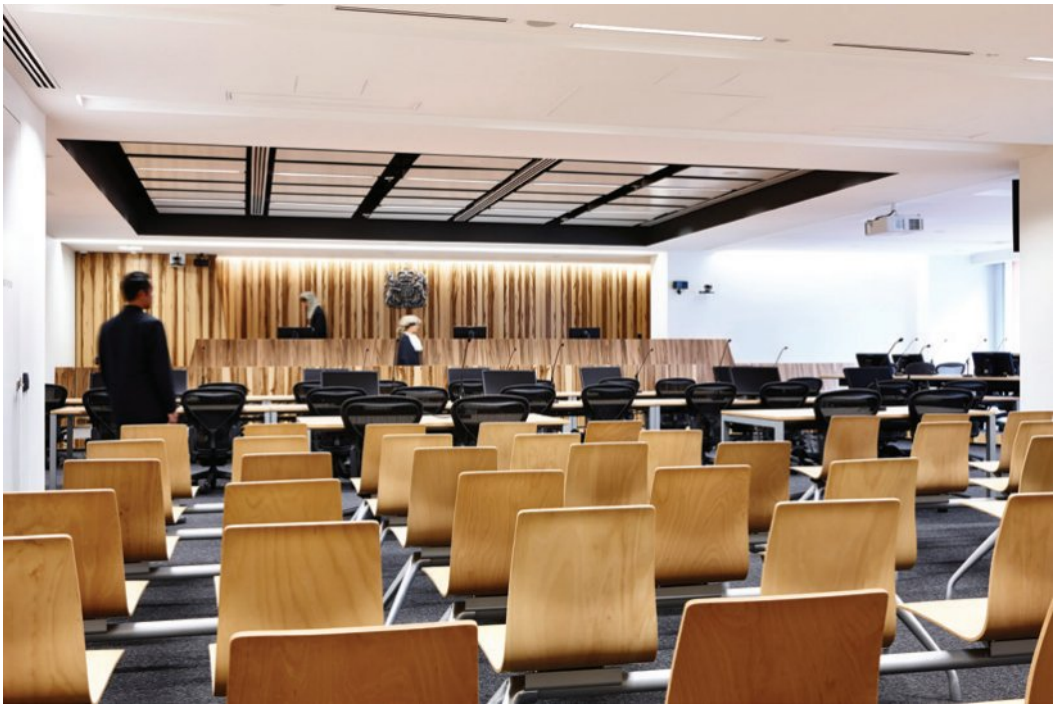
counterclaim
a separate claim made by the defendant in response to the plaintiff's claim (and usually heard at the same time by the court)

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)

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted; for example, to file documents with the court or tribunal by a particular date

discovery of documents
a pre-trial procedure which requires the parties to list their documents relevant to the issues in dispute. Copies of the documents are normally provided to the other party

appeal
an application to have a higher court review a ruling (decision)



Source 2 The Supreme Court can hear complex and large class actions. It has courtrooms (such as this one) that cater for e-trials and multiple parties.

Decide on the remedy

If the plaintiff establishes that the defendant is liable, or the defendant establishes that the plaintiff is liable on a counterclaim, then it is the role of the court to decide on the remedy. A remedy is a way in which a court can right the wrong that has occurred to the party who has suffered loss. The most common remedy is damages (an amount of money paid by one party to the other party – usually by the defendant to the plaintiff). You will explore remedies in Topic 12.10. The court can also award the successful party their costs (although, usually not all a party's costs are recoverable), and interest that might have accrued on the damages amount/loss suffered.

In a civil dispute, the judge, magistrate or jury may be required to assess damages. This means that they need to calculate the amount of damages to be paid. This amount is based on evidence that is presented by both parties about what would be a suitable damages amount. However, in **defamation** cases (where a plaintiff sues a defendant for publishing untrue statements about them that have lowered the plaintiff's standing in the community), only the judge or magistrate can assess damages.

defamation
a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

It is often the case that a court will provide a written judgment that outlines the reasons why it came to its decision. Many of these judgments are publicly available.

If the parties settle their dispute, they may either obtain an order from the court that dismisses or discontinues the case, or they may ask the judge or magistrate to make an order in the terms they have agreed (although the judge can refuse to make an order requested by the parties). In the case of a class action, the judge or magistrate must approve any terms of settlement.

The scenario below is an example of a class action dispute that reached a settlement agreement before a remedy was ordered by the court.

Actual scenario

Settlement after trial but before judgment

In 2010, a class action was commenced on behalf of a group of people who had invested in a scheme and lost money as a result of the investment. The trial commenced in the Supreme Court of Victoria on 29 October 2012 and concluded on 24 October 2013.

On 23 July 2014, Justice Croft of the Supreme Court notified the parties that he intended to deliver his judgment on 25 July 2014. However, within hours of that notification, the parties notified Justice Croft that they had entered into a settlement agreement.

Former Chief Justice Marilyn Warren, in a speech delivered at Monash University on 17 February 2016, commented on the magnitude of the case. The civil dispute had involved 10 million documents, 90 days of court hearings, 104 witnesses and, on average, 13 barristers and 15 solicitors in court each day.

Clarke v Great Southern Finance Pty Ltd (in liquidation) [2014] VSC 516 (11 December 2014)



Source 3 The Great Southern Finance class action is a good example of the size and magnitude of the cases the Supreme Court hears, and the way out-of-court settlements can resolve disputes.

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

The civil jurisdiction of Victorian courts

Each of the Victorian courts has specific jurisdiction or power (i.e. authority) to hear and determine civil disputes. There are two types of jurisdiction: **original jurisdiction** and **appellate jurisdiction**. When a court is hearing a dispute for the first time, it is operating in its original jurisdiction. When a court is hearing an appeal, it is operating in its appellate jurisdiction.

A summary of the civil jurisdiction of the Victorian courts is set out in Source 4.

Court	Original jurisdiction	Appellate jurisdiction
Magistrates' Court	Claims up to $100 000	No appellate jurisdiction
County Court	Unlimited	No appellate jurisdiction, unless given under a specific Act of Parliament
Supreme Court (Trial Division)	Unlimited	On a question of law from the Magistrates' Court (unless the Chief Magistrate made the order) and from VCAT (unless the President or a vice-president made the order)
Supreme Court (Court of Appeal)	No original jurisdiction	Appeals from the County Court, Supreme Court (Trial Division), VCAT (when the case was decided by VCAT's President or a vice-president) and the Magistrates' Court (when the case was decided by the Chief Magistrate)

Source 4 The civil jurisdiction of Victorian courts

Study tip

Think of a way that will help you remember which court hears appeals from which courts. For example, try to turn it into a song or a rhyme, or use a visual diagram. Alternatively, to help fix the information in your memory, you could access as many appeal cases as you can, taking particular note of which court heard the case first.

Magistrates' Court of Victoria

Original jurisdiction

The Magistrates' Court hears minor civil disputes of up to $100 000. This means that the Magistrates' Court cannot award damages greater than $100 000 to a plaintiff. If a plaintiff is seeking damages over $100 000, they have to file their claim in a higher court (the County Court or Supreme Court), or they can reduce their claim to $100 000 or less.

When the amount sought in civil damages is less than $10 000, the Magistrates' Court may refer the matter to arbitration (see Topic 12.3).

Appellate jurisdiction

As the Magistrates' Court is the lowest court in the Victorian court hierarchy, it has no appellate jurisdiction. This means it cannot hear any appeals from other courts.

County Court of Victoria

Original jurisdiction

The jurisdiction of the County Court for civil claims is unlimited. This means that there is no upper or lower limit to its jurisdiction, and it can hear cases involving claims of any amount.

Parties can choose to have their matter heard in either the County Court or the Supreme Court. In civil disputes, parties have a choice of trial by a judge alone, or trial by a judge and jury (six jurors). Many cases, particularly personal injury cases, are heard in the County Court because it is generally more expensive to take a case to the Supreme Court. Many of the more complex cases are heard in the Supreme Court.

Appellate jurisdiction

The County Court does not have the jurisdiction to hear appeals in civil matters except where an Act of Parliament specifically provides for appeals to be heard in the County Court. For example, certain appeals under the *Children, Youth and Families Act 2005* (Vic) can be made to the County Court (such as an appeal against an order made by the Children's Court in relation to a therapeutic treatment order, which requires a child to participate in a treatment program).

Supreme Court of Victoria (Trial Division)

Original jurisdiction

The Trial Division's jurisdiction for civil claims is unlimited. This means that, like the County Court, the Supreme Court can hear cases involving claims of any amount. As in the County Court, a jury of six is optional in civil cases.

The Supreme Court is used for many complex and large civil disputes, such as class actions, matters involving complex areas of law, and disputes between large corporations.

Appellate jurisdiction

In civil disputes, a single judge in the Supreme Court can hear appeals from the Magistrates' Court on a point of law (unless the Chief Magistrate heard the case, in which case the Court of Appeal will hear the appeal). A single judge can also hear appeals from VCAT (although when the President or vice-president made the order in the VCAT case an appeal from that order goes to the Court of Appeal).

Supreme Court of Victoria (Court of Appeal)

The Court of Appeal has no original jurisdiction. It hears appeals from the County Court and the Supreme Court (Trial Division) on questions of law, questions of fact, or the amount of damages awarded. It also hears appeals from decisions of the President and vice-presidents of VCAT and appeals from decisions in the Magistrates' Court when the Chief Magistrate made the decision.

In almost all civil disputes, leave (permission) of the Court of Appeal is required to appeal a decision. The Court of Appeal can hear and determine leave applications 'on the papers'; that is, without the need for an oral hearing.

An appeal on a question of fact in a civil dispute looks at whether the facts of the case had been applied appropriately to reach the decision that was given – either that the defendant was in the wrong or was not in the wrong. An appeal on a question of law looks at whether the law was appropriately applied to the case.

An example of a case heard by the Supreme Court Trial Division and the Court of Appeal, and ultimately by the High Court of Australia, is provided in the scenario below.

Did you know?

Gertie's Law is a podcast about the Supreme Court of Victoria. In one of the episodes, judges talk about the architecture and history of the Supreme Court building in Melbourne, including how some journalists used to engrave their name in seats in some of the courtrooms while hearing cases.

Actual scenario

Psychiatric injury claim

The plaintiff in this case began employment as a solicitor in 2018 in the Specialised Sexual Offences Unit (SSOU) in the **Office of Public Prosecutions (OPP)**. The OPP prosecutes **indictable offences** in Victoria, including serious sexual offences. In her role, the plaintiff worked on sexual abuse claims, including allegations involving child rape and gross depravity. She had to interact with survivors of trauma and was exposed to their traumatic experiences. The plaintiff started to become vocal about how work was affecting her daily life, including feeling paranoid when leaving her children with other adults. She also raised concerns about staff wellbeing.

The plaintiff was ultimately diagnosed with chronic post-traumatic stress disorder (PTSD) and major depressive disorder resulting from vicarious trauma (a type of trauma that may result when people, particularly in their workplace, are exposed to victims of trauma and violence). She took a period of leave and never returned to work.

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

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

negligence
a type of tort that involves a breach of a duty of care, causing loss or harm

duty of care
(in relation to negligence) the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

The plaintiff sued the state of Victoria as her ultimate employer for **negligence**. In the Trial Division of the Supreme Court of Victoria, Justice Dixon ruled in favour of the plaintiff, finding that the employer owed a **duty of care** to her, and breached that duty by failing to take reasonable steps to prevent psychological injuries. He awarded the plaintiff $435 000 in damages.

The state of Victoria appealed the decision to the Court of Appeal. The Court of Appeal in part allowed the appeal, finding that there was insufficient evidence that protective steps, such as putting the plaintiff in a different unit of the OPP, would have prevented her psychiatric injury.

The plaintiff appealed the Court of Appeal's decision to the High Court. The High Court found in her favour, reversing the Court of Appeal's decision. Ultimately, the High Court agreed with the views of Justice Dixon of the Trial Division.

This decision is seen by some as acting as a reminder to an employer to take precautions and put in place measures to take care of its employees, particularly when it is aware that its employees may be subjected to injuries, including psychiatric injuries.

Kozarov v Victoria [2022] HCA 12 (13 April 2022)

Did you know?

The first female High Court justice was Justice Mary Gaudron, who was appointed to the High Court in 1987.

Strengths and weaknesses of courts as dispute resolution bodies

Courts have both strengths and weaknesses as dispute resolution bodies. These are set out in Source 5. Try to link at least two strengths and two weaknesses to one or more of the principles of justice.

Strengths of courts	Weaknesses of courts
Judges are impartial referees who make decisions based on fact and law. That is, they do not make decisions based on what they think happened, or based on their own personal biases	The courts and the way they resolve disputes are difficult to understand for parties, particularly those who are from culturally and linguistically diverse backgrounds, those with a cognitive impairment, or those with little to no education
Courts aim to reduce delays and costs through active judicial case management and giving directions or orders to the parties	Courts are too expensive for many Australians, largely due to the need for legal representation and the costs involved in undertaking procedures such as discovery
Because of the court hierarchy, judges and court personnel are specialised, thus helping to ensure fairness and expertise in the way that proceedings are managed	Without legal representation, which can be expensive, a party may be at a disadvantage in presenting their case; this means they are not equal to a party who has legal representation
Many courts have adopted practices to reduce delays, such as hearing appeals 'on the papers' and reducing pre-trial procedures	Despite reforms to civil procedure in relation to case management, there can still be delays in a matter being resolved
Formal court processes, the way in which cases are managed and rules of evidence help to ensure procedural fairness by allowing a party to present their case and rebut the other party's case	The formalities of the court process can result in parties feeling stressed, intimidated or nervous
The court hierarchy allows for a party to appeal a case	The right to appeal is not automatic in many cases – for example, the Court of Appeal needs to give leave (permission) for a party to appeal a decision

Source 5 The strengths and weaknesses of courts as dispute resolution bodies

12.7 Check your learning

Remember and understand

1 **Identify** and **explain** the two main roles of Victorian courts in hearing civil disputes.
2 **Outline** the civil jurisdiction of the Magistrates' Court.
3 In which court can a civil matter be appealed from the Magistrates' Court?
4 Can a $50 000 claim be issued in more than one court? **Explain** your answer.

Examine and apply

5 **Identify** which court would be most likely to hear each of the following disputes. **Justify** your answers.
   a Joobin's fence has been damaged by a man who lives two houses down from him. Joobin has received a quote to fix the fence, which is $9900. The main dispute is liability, not the amount.
   b Noah has lost his case against his employer for damages for a serious injury suffered at work. He was seeking $3 million in the County Court. He wants to appeal the case.
   c Marianna was a defendant in an action in VCAT, which was heard by the President. She wants to appeal.
   d Andrew is looking to start a class action against a large corporation for misleading or deceptive conduct. He is seeking an unknown amount of damages.
   e Mohamed is seeking $6 million in damages for a breach of contract with a property developer.
6 Read the scenario 'Settlement after trial but before judgment'.
   a **Define** the term 'class action'.
   b **How** long did this trial go for?
   c **What** does 'deliver judgment' mean? **Why** was there a long period of time in between the trial concluding and the judgment being delivered?
   d **What** happened shortly before the judgment was due to be delivered? **How** and **why** do you think this happened?
   e Do you think it is beneficial to the parties and to the court that the parties entered into a settlement agreement? **Discuss**.
7 Read the scenario 'Psychiatric injury claim'.
   a **Describe** the key facts of the claim.
   b Where was the claim issued and **what** was the outcome?
   c **Explain** why there were two appeals, and who had appealed in each appeal.
   d **What** was the ultimate decision of the High Court?
   e **Explain** how appeals achieve the principle of fairness.

Reflect and evaluate

8 In your view, should the courts be treated as a last resort for resolving civil disputes? Give reasons for your answer, referring to the principles of justice.



Source 6 In 2023, the new Bendigo Law Courts opened. The building contains five levels and houses the Magistrates' Court and VCAT, among other courts and legal services.

12.8 The jury

Key knowledge

In this topic, you will learn about:

- the role of the jury in a civil trial.

jury
an independent group of people chosen at random to determine questions of fact in a trial and reach a decision (i.e. a verdict)

The jury system is a trial by peers. In a civil dispute, the **jury** considers the evidence – having regard to the law that is explained to them by the judge – and decides who is in the wrong.

When is a jury used in civil trials?

Unlike some criminal cases, there is no automatic right to a jury in a civil trial. In particular:

- in the Magistrates' Court, and in appeal cases, there is no jury
- in the County Court and the Supreme Court, a jury is optional. If either party wants a jury, they must request a jury trial. The party who has requested a jury trial must pay the fees associated with having a jury (although a judge can still order that the trial be by judge alone).

It is also possible for the judge to require a jury for a civil trial. If this is the case, the state pays for the jury. It is not common for a judge to request a jury trial.

Civil jury trials are rare, largely because of the fees involved, and often because civil trials are so complex that parties elect to have a trial by judge alone. Juries, however, are sometimes used in defamation cases.

Composition of a civil trial

There are six jurors in a civil jury in the County Court and the Supreme Court. Each juror is randomly selected from the Victorian electoral roll, and must fill out an eligibility form to determine whether they can sit on a jury. If eligible, they will be required to attend court on a particular day, and will form part of the 'jury pool' (from which potential jurors can be chosen to sit on a trial).

There are a number of rules regarding who can, and who cannot, sit on a jury panel in Victoria. For example:

remand
the situation where an accused is kept in custody until their criminal trial can take place

- Some people are *disqualified* from serving as jurors, which means they cannot serve on a jury because of something they have done. These include people who have been sentenced to a term of imprisonment for three years or more, people who are currently on bail or on **remand**, and people who are undischarged bankrupts (i.e. who have been declared bankrupt and remain bankrupt).
- Some people are *ineligible* to serve as jurors, which means they cannot serve on a jury because of a particular characteristic or because of their occupation. These include lawyers, judges, magistrates, police officers, members of parliament, people who cannot communicate in or understand the English language adequately, and people who have a physical disability or intellectual disability that means that they are incapable of performing jury service.
- Some people may ask to be *excused* from jury service because of circumstances that make it difficult for them. These include people who have poor health, people who live far from Melbourne (more than 50 kilometres), people who are of advanced age, people who would suffer inconvenience or substantial hardship if they attended (e.g. because they run their own business), or people who are carers for other people.

In addition, both parties have the right to challenge (i.e. object to) people on the jury panel. There are no limits to the number of challenges for good reason each party has (known as 'challenges for cause'). However, for each party there is a limit of two challenges for no reason (known as 'peremptory challenges').

Ultimately, six jurors will be chosen from the people who form part of the jury pool. Up to two extra jurors can be selected if the trial is expected to be lengthy, although two jurors will be discharged once it comes to deliberating. This means that only six jurors will be involved in deciding the verdict.

Role of a civil jury

The role of a civil jury is to consider the facts of the case and to decide who is most likely to be in the wrong. The jury's decision is made on the balance of probabilities. If a **unanimous verdict** cannot be reached (i.e. one on which all six jurors agree), then a **majority verdict** of five out of six jurors will be accepted. A civil jury may also be required to decide on the amount of damages to be awarded. However, in defamation cases, only a judge can decide the amount of damages.

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 agree

Jurors are not required to give reasons for their decision (unlike a judge or magistrate). Therefore, the parties will not know the basis upon which the jurors made their decision, or even know whether the jurors understood the evidence, the legal issues, or the submissions made by the parties.

Like criminal juries, there are obligations on civil juries in relation to gathering research and evidence. Penalties apply to jurors who make enquiries for the purposes of obtaining information about anything related to the trial (e.g. using the internet to search for information, or viewing or inspecting a place that is relevant to the trial).

In performing their role, juries are seen to ensure that justice is administered in line with community standards, rather than in line with the views of a small number of people (i.e. judges). The use of the jury system also enables the community to participate in the administration of justice, which can enhance the confidence of the community that justice is being achieved.

In addition, the jury system aims to uphold impartiality. It does this by seeking to ensure that jury members have no knowledge of a party or a witness, have no biases or preconceived notions, and make a decision based on facts.

The scenario below is an example of a case that was heard by a jury, which found in favour of the plaintiff.



Source 1 Juries deliberate in a separate room. No other persons are allowed in the jury deliberation room.

Actual scenario

Cleaning duties case

In this case, the plaintiff worked for the defendant, performing cleaning duties. She suffered a back injury and psychiatric illnesses, and sued the defendant, claiming the injuries were caused by the defendant's negligence. She sought damages from the defendant.

The defendant wanted a jury trial. The trial commenced in the County Court in December 2022. The jury found in favour of the plaintiff, finding that the defendant was negligent, and that its negligence caused injury, loss or damage to the plaintiff. The jury assessed damages at $125 000.

Even though the jury found in favour of the plaintiff, the defendant applied for judgment in its favour. This can happen in a civil trial if the defendant establishes that there was no evidence upon which a reasonable jury, properly directed, could return a verdict for the plaintiff. It is very rare for this to occur, and a judge will take great care not to overturn a jury's verdict, unless it is very clear that the jury verdict was wrong.

The County Court judge considered the evidence in the trial. This included evidence from the plaintiff, and from other witnesses, documents including medical expert reports, maps of the workplace and photos. After considering all the evidence, the judge decided that she was not satisfied that the defendant had established that the jury verdict was wrong. She dismissed the defendant's application.

Chol v Pickwick Group Pty Ltd [2023] VCC 66 (6 February 2023)

Strengths and weaknesses of the jury system

Some of the strengths and weaknesses of the jury system are listed in Source 2. Try to link at least two strengths and two weaknesses to one or more of the principles of justice.

Strengths of the jury system	Weaknesses of the jury system
Jurors are independent and impartial; in particular, they are independent of the legal and political systems, thus helping to ensure equality and fairness in their decision	Juries do not give reasons for their decisions, and deliberations occur behind closed doors, which can raise questions about whether there they have understood the evidence, or have made their decision based on bias or prejudice
The jury system allows the community to be involved in the legal system and in the administration of justice. This increases the community's confidence in the legal system	Not all members of the community can be on the jury, because of the laws around people who are disqualified or ineligible, and people who can be excused or challenged. Therefore, some may argue it is not a true cross-section of the community
The jury system spreads the responsibility for making a decision across several jurors	Jurors may have biases that may play a role in their deliberations, even if they are not aware of those biases
Research suggests that the professional training and expertise of judges does not give them an enhanced ability to determine whether a witness is telling the truth, and that jurors can effectively make this decision	Jurors may be unduly influenced by skilled lawyers or by the emotional elements of a trial and, although this is unlawful, may conduct their own online investigation into the facts and parties involved in case, which means they may be discharged and the trial has to restart
Jurors are selected at random and jurors with connections to the parties cannot participate, therefore helping to ensure impartiality	A jury trial may result in delays because legal terms have to be explained and the judge must give directions to the jury
Verdicts reached by juries reflect community values and not the values of a single judge, which may not represent those of the community	The task is difficult, particularly where there is complicated evidence or a significant amount of evidence. This raises the question of whether ordinary members of the public can understand this evidence and can arrive at the right decision based on the evidence

Source 2 The strengths and weaknesses of the jury system

12.8 Check your learning

Remember and understand

1 Does a jury always determine liability in civil disputes? **Explain** your answer, referring to each of the following courts: the Magistrates' Court, the County Court and the Supreme Court.

2 **Describe** the circumstances in which a civil trial may be heard by a jury.

3 If a jury cannot reach a unanimous decision, will the case be dismissed? **Explain** your answer.

4 **What** does a civil jury have to decide? **How** do they decide this?

Examine and apply

5 Read the scenario 'Cleaning duties case'.
   - **a** **Describe** the key facts of this case.
   - **b** **Who** requested the jury hear this case?
   - **c** **What** was the jury's decision?
   - **d** **Explain** what happened following the jury's decision.
   - **e** Do you think that a judge should have the power to overturn a jury's verdict in some circumstances? Discuss as a class.

6 Access the *Juries Act 2000* (Vic) (a link is provided on your obook pro). **State** whether each of the following persons are disqualified from serving as jurors, or ineligible to be on a jury, or whether they can ask to be excused. **Justify** your response with reference to the *Juries Act*.
   - **a** Verity, 85, served two years in prison when she was 43.
   - **b** Ursula is deaf and lives in Keilor East.
   - **c** Franco is a bail justice. He is also a full-time carer for his mother.
   - **d** Marcus lives in Shepparton and has been called to attend jury service in Melbourne.

Reflect and evaluate

7 'Jurors should not be able to deliberate behind closed doors. Deliberations should be made public so that the parties can feel confident that the decision has been properly made.' **Discuss** the extent to which you agree with this statement.

8 **Evaluate** the ability of the jury system to achieve fairness in a civil trial.

Weblink
Juries Act 2000 (Vic)

12.9 Difficulties faced in the civil justice system

Key knowledge

In this topic, you will learn about:

- the difficulties faced by different groups in the civil justice system, such as First Nations people, people of low socioeconomic status, young people, and people in regional, rural and remote areas.

As you have learnt, the civil justice system is made up of different methods, institutions, personnel and processes. For personnel such as judges and lawyers, the civil justice system is straightforward to navigate, as they are skilled and educated in understanding how the system works, and they regularly interact with it. However, for many members of the public, the civil justice system can be confusing, overwhelming and, for many, expensive.

Some groups of people may face more difficulties or issues than others when interacting with the civil justice system. They include people with mental health issues, people with disability, recently arrived migrants, and elderly people. They also include:

- First Nations people
- people of low socioeconomic status
- young people
- people in regional, rural and remote areas.

The difficulties faced by these four groups are explored below.

First Nations people

First Nations peoples are the first peoples of Australia, having lived here for at least 65 000 years. There are many different and diverse First Nations groups in Australia, connected to Country (which refers to land generally, or a place of belonging) through lines of descent and through different language groups.

The term 'First Nations people' is used to describe Aboriginal and Torres Strait Islander people, and recognises that they are the sovereign people of this land. Other acceptable terms include 'First Peoples' and 'Koori', the latter of which describes Aboriginal people of south-east Australia (New South Wales, Victoria and some parts of Tasmania).

In the 2021 Australian Bureau of Statistics national census, 66 000 people in Victoria identified as Aboriginal and/or Torres Strait Islander, representing 1 per cent of Victoria's population. First Nations Victorians include, among others, the Yorta Yorta people; the Wotjobalu, Jaadwa, Jadawadjali, Wergaia and Jupagulk peoples of the Wimmera; the Gunaikurnai people; and the Gunditjmara and Eastern Maar peoples.

In Victoria alone, it is estimated there are 39 Aboriginal and Torres Strait Islander languages and 11 language families. The 2021 census showed that of those who used Aboriginal and Torres Strait Islander languages, the most common language spoken was Yorta Yorta. Language is a large part of Aboriginal culture, connecting Elders and young people, and demonstrating knowledge and respect for matters such as history, family relationships and connection with the land.

The use of Aboriginal English is also part of Aboriginal history. Aboriginal English is a term used for the varieties (or dialects) of English used by First Nations people in Australia. Grammar, pronunciation and some words differ to Australian English. It is estimated that 80 per cent of First Nations people in Australia use Aboriginal English as their first language.



Source 1 Aboriginal language groups and Nations within the borders of Victoria

Difficulties faced by First Nations people in the civil justice system

First Nations Victorians may require access to the civil justice system for a variety of reasons, including to protect their consumer and tenancy rights, and to fight against injustices, discrimination and breaches of their human rights. For example, the Law Council of Australia's Justice Project report – a report finalised in 2018 about the difficulties associated with access to justice in both the criminal and civil justice systems – noted that First Nations children were being removed from their homes at highly disproportionate rates, and that some First Nations people experienced tenancy problems, such as disputes regarding rent and eviction. Many First Nations peoples also experience racism and discrimination, including in relation to rental accommodation and employment.

The difficulties faced by some First Nations people in the civil justice system include:

- distrust in the justice system
- language differences
- cultural differences.

Distrust in the justice system

One of the difficulties faced by some First Nations people is that some may distrust the justice system, or may not be prepared to engage with it. Issues experienced by First Nations people include a denial of rights, unfair policies and practices, cultural violations, and exclusion from economic, social and political life. This may, for some, result in an ongoing distrust and lack of confidence in the justice system.

Some First Nations people suffer from **intergenerational trauma** linked with the justice system. Intergenerational trauma is related to oppressive or traumatic effects of a historical event, such as war or significant injustices. Different First Nations people through different generations experience intergenerational trauma for reasons including the racism and discrimination caused by British colonisation, and being subjected to policies such as the compulsory removal of First Nations children from their families (referred to as the 'Stolen Generations'), and the dispossession of their land and culture. This has meant that some First Nations people do not view the courts or tribunals as a safe place to resolve their problems, and do not want contact with the justice system. This may result in legal problems remaining unresolved, and First Nations people may be left without a resolution or remedy for a wrong that has happened to them.

intergenerational trauma
a psychological response to highly distressing, stressful or oppressive historical events, such as war or significant injustices, which is passed on to future generations. First Nations people experience intergenerational trauma for many reasons, including being subjected to brutal and harmful government policies, racism and discrimination since the British colonisation of Australia

Language differences

As noted above, some First Nations people do not speak English as their first language. They may use either Aboriginal English or an Aboriginal language. First Nations people may also use different methods of communication. For example:

- First Nations people convey respect in different ways, such as referring to their Elders or older people they respect as 'Aunty' or 'Uncle' (including those people they have not met)
- listeners have the right to ignore who is speaking, silence is valued, and some First Nations people may not use eye contact (which some regard as threatening)
- some First Nations people may prefer to explain what happened through storytelling rather than in response to direct questioning
- generally, it is not appropriate to refer to people who have passed away or show their photo, as this can be distressing.

Language differences can be an issue if judges or magistrates are not culturally trained. It may also be an issue if the lawyers themselves do not understand what their clients are saying. In addition, interpreters are essential for some First Nations people, but there is sometimes limited access to adequately trained interpreters.

Cultural differences

Finally, Aboriginal customary law and how it resolves disputes is different to how the civil justice system resolves disputes. That is, the civil justice system may clash with customary law in terms of how issues are resolved, and what the outcomes may be – both in the criminal and civil justice system. Some First Nations people may view the civil justice system rules and processes as rigid and inflexible.

In addition, there are cultural differences that may not be factored into the civil justice system. For example:

- Aboriginal Elders are highly respected people within First Nations communities and play an important role in the maintenance of culture and traditions. They also demonstrate leadership and skills in resolving conflicts
- First Nations people have strong family and kinship ties, meaning that passings or illness in the family are of utmost priority, and nurturing of family and family networks is considered fundamental
- First Nations people have a strong connection to the land, and a strong respect for spirituality.

If cultural differences are not understood in the civil justice system, First Nations people may feel misunderstood, uncomfortable, resentful, scared or intimidated. This may discourage First Nations people from accessing the civil justice system, or may result in a difficult and negative experience for them if they do.

Addressing difficulties

Some of the ways in which the civil justice system seeks to address some of the above difficulties are as follows:

- There is dedicated funding for Aboriginal legal aid to ensure that professional and culturally appropriate legal services are available to First Nations people. The Victorian Aboriginal Legal Service (VALS) is a government-funded legal service organisation that provides First Nations people with legal services, such as legal advice for family, civil and criminal issues. However, VALS has indicated that its funding has not been able to keep up with demand, and that its services are stretched.
- The courts and tribunals provide their personnel with ongoing cultural competence training, informed and led by First Nations people, to ensure that First Nations people can engage with the

justice system and feel comfortable to do so. Training forms part of a larger plan by the courts and VCAT to demonstrate their commitment to an inclusive environment for First Nations people.

- VCAT has actively taken steps to make its tribunal more accessible to First Nations people. For example, it has increased the number of Koori staff at VCAT, has a Koori Support Team, and has made changes to some VCAT venues to include a Koori Hearing Room to hear claims. The Koori Hearing Room has been 'smoked' (an ancient ritual involving the smouldering of native plants). It has Aboriginal flags, artwork and possum-skin cloaks, and is a place where First Nations people can feel more comfortable.



Source 2 VALS has been operating since 1973 and provides information, assistance and advocacy work for its clients.

People of low socioeconomic status

Another group of people who experience difficulties with the civil justice system are people of low socioeconomic status (SES). This refers to people who are experiencing economic disadvantage, and have little income or wealth. They may include homeless people, long-term prisoners, unemployed people, young people, and people with a long-term health condition or disability who are not able to work.

Difficulties faced by people of low socioeconomic status in the civil justice system

People of low SES face similar legal problems to those who may not be suffering economic disadvantage. They may have issues relating to their rights, disputes with their neighbours or landlords, or disputes with their employer or a service provider. However, they may also experience problems relevant to their economic status, such as issues relating to credit or debt (e.g. failing to make a credit card payment), housing, homelessness or mental health. For some people, these issues often overlap with other needs or problems, such as those relating to health, substance use, and housing and employment.

When interacting with the civil justice system, people of low SES can experience difficulties, including:

- the inability to access legal services because of cost and lack of funding
- a lack of understanding about the law and the legal system.



Source 3 People experiencing homelessness can face difficulties in the civil justice system, including in accessing legal services.

Inability to access legal services

For people of low SES, their financial or economic situation may mean that they cannot afford to pursue or defend their claim. The primary cost that they would incur, which they would probably be unable to pay for, is the cost associated with engaging legal representation. Solicitors and barristers generally charge on an hourly basis, with fees ranging from about $150 per hour to more than $2000 per hour for the most experienced solicitors and barristers. For many people, this is out of reach. This means that people of low SES who face difficult legal situations are not able to obtain advice or information from someone with training or expertise, and they may have to represent themselves. In addition to legal fees, there are also other costs, such as court or tribunal filing fees, hearing fees, mediation fees and photocopy fees.

Victoria Legal Aid (VLA) and community legal centres (CLCs) are legal service providers that provide free legal advice, information and representation to people who cannot afford a lawyer and who are vulnerable. However, VLA and CLCs have limited funding, and their resources are stretched. In addition, a significant amount of legal aid funding is used for people involved in criminal and family law matters, as opposed to civil disputes. This therefore leaves a person in a position where they may have to represent themselves, or not pursue a claim or defence at all.

Lack of understanding

Another issue that people of low SES may face is a lack of sufficient understanding about the legal system and the law. While most Australians can find it difficult to understand the way the legal system operates and the complexities involved in the law, some people of low SES may find this particularly challenging if, for example, they have been denied the opportunity to develop their English or literacy skills, or have long-term intellectual disabilities.

This lack of understanding may make it difficult for people of low SES to pursue a legal claim or remedy. It may also bring about a distrust in the legal system and its ability to achieve justice. Similarly, having inadequate literacy skills will make it difficult for people who decide to self-represent to assert or defend their rights. It is also likely to make the entire 'court experience' very stressful.

Addressing difficulties

Some of the ways in which the civil justice system seeks to address the above difficulties are as follows:

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)

- *the provision of free legal services* – a number of ***pro bono*** organisations seek to help 'bridge the justice gap' and assist people who cannot pay for a lawyer, but who are also not eligible for legal aid. Justice Connect is one such organisation. It aims to help people solve legal problems, using member firms and barristers to deliver legal services for free. One of their members is the Victorian Bar, which has established a *pro bono* scheme, offering free legal services to people who reach out to Justice Connect
- *the provision of assistance to self-represented parties* – the courts and tribunals aim to offer self-represented parties as much assistance with processes and procedures as possible. For example, the County Court and the Supreme Court have a self-represented litigant section on their website to assist people in understanding what to do in a civil case. The Supreme Court also has a self-represented litigant coordinator to guide people through procedures. During a hearing or trial, judges and magistrates also have a duty to assist a self-represented party with understanding processes and their rights, though this does not extend to advocating for the party
- *the restricted use of lawyers at VCAT* – VCAT does not allow people to be represented by a lawyer unless they have permission. This allows for a more equal footing for parties, and avoids a situation where one party is represented and at a significant disadvantage, and the other is not

- *waiver of fees* – in all courts and tribunals, there is an opportunity for a party to apply for a fee waiver, which means that fees – such as hearing fees and filing fees – are not charged. For example, in VCAT, if a person is experiencing financial hardship, they may be eligible for a fee waiver, or a fee reduction.

Hypothetical scenario

Soula's story

Soula lives in a rented house with her five school-aged children. She works part time. She also relies on government payments, as she is a single parent and does not receive any assistance from her ex-husband.

Soula was given 120 days' notice by her landlord to vacate her rented home, because the landlord intended to demolish the home and build a new one. Soula started looking for a new rental home for her and her children, but was unable to find one that she could afford.

Soula was also not able to afford a lawyer. She contacted a *pro bono* organisation, which arranged a lawyer to make an urgent application to VCAT to challenge the notice to vacate. At the VCAT hearing, the *pro bono* lawyer made arguments on behalf of Soula, and emphasised the significant hardship that Soula and her children would face if they were required to vacate the property. In particular, the lawyer argued that Soula and her children would be homeless if they were not able to stay in the rented house.

The landlord also made arguments to the tribunal, arguing that Soula had not paid rent for the past four months, and that the landlord would suffer hardship if Soula remained in the property.

The tribunal member heard the evidence and decided to postpone the time by which Soula had to leave the property for 30 days. That is, the tribunal gave Soula more time to find a new rental property. Although the tribunal acknowledged the hardship on the landlord, it found that Soula's hardship was greater, given the risk of homelessness. Soula was able to find another rental property within the new time limit, and moved out of the house.

Young people

Another group of people who may find it difficult to engage with the civil justice system is young people. The term 'young people' is not defined in legislation, but is generally used to describe people who are less than 25 years of age, and includes children. A 'child' in Victoria is a person who is aged less than 18 years. 'Young people', therefore, can include young children and teenagers, as well as young adults who are no longer at school but are working or studying.

In Victoria, a child (under 18 years) can sue or be sued through a 'litigation guardian' or a 'next friend' (a person who represents them in the case). It is rare for a child to be a party in a civil proceeding, but it is more common for young adults to be involved in civil disputes.



Source 5 Young people includes people under the age of 25 years, such as these students at The University of Melbourne.

Difficulties faced by young people in the civil justice system

Young people are often confronted with civil law issues related to their age, such as contracts, debt, a breach of their rights, transport accidents, and tenancy or housing problems. Young people who are more at risk may face more difficult and complex issues, such as homelessness.

When interacting with the civil justice system, young people can be affected by:

- age-related communication barriers
- lack of knowledge about the legal system
- lack of resources.

Age-related communication barriers

Young people can experience difficulties participating in the civil justice system because they may not yet have developed the communication skills that are necessary to understand the legal processes involved in a civil action. For example, young people may be deterred from undertaking a civil action, or may risk losing a civil case, because they are not able to understand the legal processes, formal language and complex legal terminology used in the adult-oriented court environment. In addition, young people may not have developed the necessary language (oral) skills or confidence to discuss and present their case, give evidence or question witnesses – particularly if they are affected by stress and anxiety.

Lack of knowledge about the legal system

Young people may have little knowledge of:

- their legal rights and obligations
- whether there is in fact a dispute that has arisen
- the methods and institutions available to help
- possible remedies they may be able to seek, or that may be sought against them.

Often, young people do not take action for legal problems because they do not know or understand the processes involved in undertaking a case. This means that without guidance or support from a parent or guardian, or some other group or body representing them (such as a union, being a type of organisation that represents workers), legal problems may not be resolved.

In addition, free legal assistance to young people is limited, and therefore they may not be able to access legal advice and representation, or even specific legal assistance that addresses their needs. There are no specialist civil courts for young people; nor are there any complaints bodies or tribunals that are specifically designed to help young people with their civil disputes.

The scenario below provides an example of a case involving young people and the alleged underpayment of wages, a common problem that young people face.

Actual scenario

McDonald's Australia sued

In 2022, the Shop, Distributive and Allied Employees Association, a union that represents retail, fast food and warehousing workers, commenced a claim on behalf of current and former employees of McDonald's.

In its claim, the union alleges that McDonald's denied workers their legal entitlement to a 10-minute rest break. The claim has been made against McDonald's and 232 operators of McDonald's stores. It is alleged that the claim extends to more than



Source 6 Allegations have been made against McDonald's and various store operators in relation to alleged underpayments. McDonald's is defending the claim.

250 000 workers. McDonald's has said it will defend the claim.

McDonald's is the largest employer of young Australians. It is estimated that approximately 70 per cent of its store workers are secondary school students. For many teenagers, their first job is in a McDonald's restaurant.

Lack of resources

Young people often do not have the resources – especially financial resources – to enable them to pursue or defend a civil claim. Often they have to rely on free legal assistance or free dispute resolution bodies, or seek a loan from a friend or family member to pursue or defend their claim.

In addition, some young people may not have access to resources such as technology (to be able to research how to get assistance), family or friend support, or even personal resources such as life skills and experience, to be able to assist them in a civil claim.

Addressing difficulties

Some of the ways in which the civil justice system seeks to address the difficulties facing young people involved in a civil action are as follows:

- In Victoria, YouthLaw is a dedicated community legal centre for young people under the age of 25. It can assist young people with common issues such as complaints (e.g. that may arise from unfair treatment in the workplace or when renting), car accidents, debts and discrimination. The assistance includes legal advice and court representation for young people who are most in need.
- The courts and tribunals will generally use less formal and complex language when dealing with cases involving young people. They may also explain to the young person what is taking place during the legal process, and what their legal rights are. This may help young people feel less intimidated and enable them to participate in the civil processes.
- Various organisations provide young people with information and education about their legal rights and obligations. For example, the Victorian Equal Opportunity and Human Rights Commission has a webpage dedicated to young people, which explains their rights, including their right to be free from discrimination. A link is provided on your obook pro.



Weblink
Victorian Equal Opportunity and Human Rights Commission: Youth rights

People in regional, rural and remote areas

The Law Council of Australia estimates that approximately 7 million people, or around 29 per cent of the population, live outside major cities in Australia. The term 'regional, rural and remote', or RRR, refers to all areas of Australia outside the capital cities (known as 'metropolitan' areas). In particular:

- A regional area is a town, small city or area that is outside of Melbourne but still has a sizeable population. Examples in Victoria include Geelong, Ballarat, Bendigo and Shepparton and their surrounding suburbs.
- A rural area is outside of Melbourne and regional areas. Rurals areas generally have small towns or hubs, but are in the countryside. Examples in Victoria include Maryborough, Nagambie and Myrtleford.
- A remote area is a place that is far away from the closest town. Remote towns in Victoria include Dargo and Edenhope.

RRR areas of Victoria are diverse and dynamic. Agriculture and small businesses are common features. In some RRR areas, there is poor technological access, as well as declining populations.

Difficulties faced by people in regional, rural and remote areas in the civil justice system

People living in RRR areas may face legal issues similar to those living in metropolitan areas; for example, those relating to housing, debts, rights and discrimination. Some people in RRR areas may also face specific and complex civil disputes, such as in relation to water rights allocation, environment and planning restrictions, property laws, and laws in relation to agriculture and zoning.

Some of the difficulties faced by people in RRR areas (but more particularly, remote areas) when faced with the civil justice system include:

- lack of access to legal services
- lack of access to technology
- lack of access to courts.

Lack of access to legal services

One of the primary issues faced by people in RRR areas is the number of lawyers who practise in those areas. The Law Council of Australia, in its 2018 Justice Project report, indicated that in Australia, just 10.5 per cent of lawyers were practising in a 'country or rural area' in 2016. The lack of locally available lawyers means that:

- in some parts of Victoria, there may not be a lawyer practising in the area
- if there is a lawyer in the area, there may be conflict issues that mean they cannot act for one of the parties. For example, imagine there are two parties living in the same town involved in a dispute about water access. If there is only one local lawyer, that lawyer cannot act for both parties
- there may be lawyers practising in the local area, but they may not have the relevant expertise in the civil dispute that the person is facing.

These issues may mean that some people in RRR areas cannot access a lawyer within their area, and may either have to engage a lawyer that is far away from them, or not engage one at all.



Source 7 Dargo, Victoria, is one of the most remote towns in Victoria and is the gateway to the Alpine National Park. It has about 150 residents.

In addition, there are fewer physical legal services such as VLA and CLCs in RRR areas. It has been recognised that in certain remote communities, access to justice is inadequate and results in a lack of knowledge and awareness of rights, duties and available assistance. Some CLCs that operate in RRR areas are overburdened, and require additional staff and other resources to meet the demand for their services.

Lack of access to technology

While digital use and access is improving in Australia, there are still some people living in RRR areas, especially the more remote areas, who have limited access to technology such as phone and internet services. For example, the Justice Project report by the Law Council of Australia indicated that some people in remote areas have poor quality internet connections and limited telephone coverage. Some people in the most remote parts of Victoria may not have power or internet at all. This means that they may not be able to access legal information or advice online, or be able to attend virtual hearings or mediations.

If people in RRR areas cannot easily access online legal information and dispute resolution, they may have to revert to physical attendance or access. This means that people in remote areas may have to travel long distances to places such as courts or to legal service providers, and rely on 'paper mail' rather than email to communicate. This can add to costs and delays.

Lack of access to courts

Finally, people in RRR areas have more limited access to some of the courts and tribunals. While most courts have a venue in regional areas such as Geelong and Bendigo, they generally do not sit in rural or remote areas. That means that people in these areas have to travel long distances to attend a court or tribunal. Some people may not have cars and have to rely on public transport, which may not be readily accessible; others may have to spend money on overnight accommodation, petrol costs and even care for their children while they travel to and attend court.

In 2023, it was reported that some of Victoria's regional courts are in a state of disrepair. Some have been described as being 'unfit for purpose'. Run-down or poorly planned courts can impact on access to justice. For example, they may have limited technology to enable online hearings, there may be limited rooms or areas for court workers, and the layout of the court itself may result in inefficiencies and delays. Run-down courts can also impact on people's perceptions of the justice system.

Addressing difficulties

Some of the ways in which the civil justice system seeks to address the difficulties faced by people in RRR areas are as follows:

- Various organisations encourage lawyers and students to work in RRR areas to promote the important role of lawyers in these areas and the significant contributions they can make. For example, the Law Council of Australia now has a dedicated website, RRR Law, which is a central hub of information (a link is provided on your obook pro). The Castan Centre for Human Rights Law also encourages people to consider working in 'the bush'.
- There has been an increase in the availability of online information and online dispute resolution methods to help increase accessibility and avoid the need to physically attend tribunals or courts. For example, VCAT offers online mediations and hearings, as do many of the courts. VLA and many CLCs also provide online advice and assistance.
- Some court facilities and offices have been upgraded or improved to ensure greater access to justice. For example, in 2023, the new Bendigo Law Courts precinct was opened (see Source 6 on page 441). The building was designed to ensure operational excellence and advanced technological capabilities, as well as to increase the number of spaces available to hear cases. The new setup seeks to ensure that operations are efficient and effective, and that the space is culturally appropriate for First Nations people.



Weblink
Law Council of Australia: RRR Law

12.9 Check your learning

Remember and understand

1 **Identify** four groups of people that may face difficulties when dealing with the civil justice system.

2 **Define** the following terms:
- **a** young people
- **b** regional, rural and remote areas
- **c** low socioeconomic status
- **d** Aboriginal English.

3 **Describe** three different types of organisations or groups that help to overcome difficulties faced by certain groups in the civil justice system.

Examine and apply

4 For each of the following groups of people, **describe** one difficulty they may face when confronted with the legal system, and one measure that is in place to help overcome that difficulty. In your answer, refer to at least one of the principles of justice:
- **a** young people
- **b** people of low socioeconomic status
- **c** First Nations people
- **d** people in regional, rural and remote areas.

5 For each of the individuals listed below:
- **a** Write down on a sticky note or small piece of paper all the difficulties that the person may be confronted with in the civil justice system. You may have to conduct some more research, such as where the local court services are.
- **b** Once you have done this, come together as a class and have one classmate write each individual's name on the whiteboard or a poster. Stick the notes around the person's name. Group common notes together (e.g. 'no money to pay for a lawyer').
- **c** Discuss as a class what the outcome may be for the individual.

The individuals are:

- **i** Sandy, 65, lives in Casterton, Victoria. He lives on unemployment benefits and does not own a car. He does not have any internet. Sandy's mother has recently passed away. She had told Sandy that she had left all her assets to him. However, it has now been discovered that Sandy's mother was influenced by her carer to change her will just months before she died. The will leaves nothing to Sandy. Sandy wants to challenge the will.
- **ii** Marli, 20, is a First Nations woman living in Melbourne. She attends university and is studying law. Marli rents an apartment from Gerard. Gerard recently spotted Marli at a protest advocating for better human rights for First Nations people. Gerard has now decided to evict Marli and has given her notice to vacate. Marli cannot find any other rental accommodation and believes she is being discriminated against.

6 Read the scenario 'Soula's story'. Explain three ways that the Victorian Civil and Administrative Tribunal may have ensured that Soula could participate in her case.

Reflect and evaluate

7 Choose one of the organisations referred to in this topic (e.g. Justice Connect or YouthLaw). Access the organisation's website and answer the following questions.
- **a** **Who** are they?
- **b** **How** are they staffed?
- **c** **Who** do they help, and **what** sort of cases do they help with?
- **d** **Discuss** the ability of this organisation or group to help overcome difficulties in the civil justice system.

8 **Discuss** the ability of the civil justice system to address the needs of First Nations people in a civil dispute.

12.10 Remedies

Key knowledge

In this topic, you will learn about:

- the purposes of remedies
- types of remedies, such as damages and injunctions.

In a civil case, the plaintiff normally seeks a remedy. Put simply, a remedy is a way in which a court can right the wrong that has occurred to the plaintiff.

The purposes of remedies

The general purpose of civil remedies is to restore (as much as possible) the party who has suffered loss or injury to the position they were in before the loss or injury occurred. This is usually in the form of a payment of money, known as damages. If a person is owed an amount of money, they can make a claim through the courts. An injured person may claim a sum (amount) of money to compensate them for any pain or suffering they incurred as a result of the civil wrong.

Other purposes of civil remedies are:

- to make the point that the defendant's conduct is not acceptable – this may be a purpose in cases involving a breach of human rights, or in cases involving discrimination or defamation, in which the plaintiff wants to make a point about the defendant's conduct
- to stop the harm from happening any further – this may be a purpose in cases where the harm is continuing; for example, when someone is posting regularly on social media about a person and causing harm to that person's reputation, or when there is a risk to the environment or animals, such as through logging
- to force someone to do something that they are refusing to do – this may be a purpose in cases involving a contract, in which the defendant is refusing to perform their side of the contract.

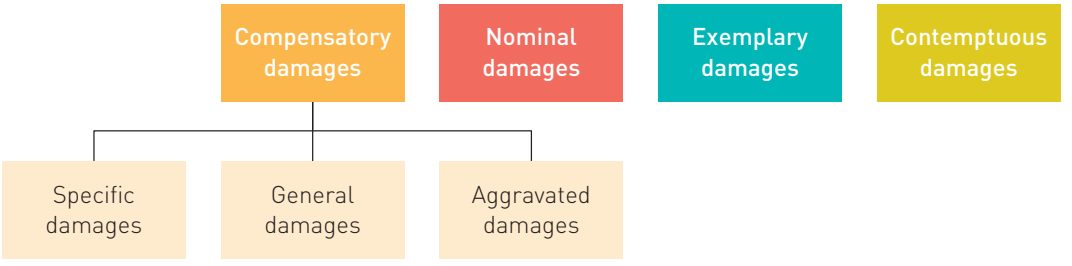
There are two main types of remedies: damages and injunctions. These are explored further below.

Damages

damages
an amount of money that one party is ordered to pay to another party for loss or harm suffered. It is the most common remedy in a civil claim

Damages is an amount of money to be paid by the defendant to the plaintiff, in satisfaction of a claim made by the plaintiff (damages can also be sought by a defendant who makes a counterclaim). The main purpose of damages is to restore the plaintiff to the position they were in before the wrong occurred. However, if there is any permanent damage (e.g. the loss of a limb) or a psychiatric injury, it may not be possible to physically restore the injured party to how they were before the injury. Therefore, damages try to make up for that loss by compensating the plaintiff with an amount of money that represents the actual loss suffered.

As shown in Source 1, there are four main types of damages.



Source 1 The four main types of damages are compensatory damages, nominal damages, exemplary damages and contemptuous damages.

Compensatory damages

compensatory damages
an amount of money awarded to a plaintiff for harm, injury, or other losses suffered. It includes general damages, special damages, and aggravated damages

Compensatory damages are the main type of damages usually sought. The main purpose of compensatory damages is to restore the plaintiff to the position they were in before the wrong occurred. There are three types of compensatory damages:

- special damages (also known as specific damages) – these are awarded to the plaintiff for loss that can be calculated objectively and exactly; for example, loss of wages, medical expenses and hospital expenses
- general damages – these are awarded to the plaintiff for pain and suffering. Such damages cannot be calculated objectively because they include consideration of the extent of the plaintiff's emotional suffering and loss of enjoyment of life. The plaintiff's counsel may make submissions about the appropriate amount
- aggravated damages – these are awarded to the plaintiff if the court believes that the defendant's conduct injured the plaintiff's feelings by causing humiliation and insult.

Nominal damages

nominal damages
a small amount of money awarded to confirm that a plaintiff's rights have been infringed even though the losses were not substantial

Nominal damages are awarded by a court if it believes that the defendant has infringed the rights of the plaintiff, but the plaintiff did not suffer any actual loss. Therefore, the court awards a very small amount of damages as compensation. The purpose of such damages is to recognise that there has been a breach, and that the plaintiff has been wronged.

In the scenario below, nominal damages were considered in a case involving two high-profile parties.

Actual scenario

Nominal damages considered

In a high-profile defamation case, both the plaintiff and the defendant were awarded a small amount of damages in the Federal Court in Western Australia.

The applicant (the term used to describe a plaintiff in a Federal Court proceeding) in this case was Clive Palmer, an Australian business owner and politician. He is well known in the mining industry and is a former member of the Commonwealth Parliament. He founded the United Australia Party (a political party). During the COVID-19 pandemic, Palmer was very vocal in opposing Western Australia's 'hard border', which refers to the closure of Western Australia's border to the rest of Australia to manage the pandemic.

The respondent (the term used to describe a defendant in a Federal Court proceeding) was Mark McGowan, the then Premier of Western Australia.

Palmer sued McGowan in the Federal Court in August 2020, claiming that McGowan had defamed him on six occasions, including in relation to Palmer's stance against the hard border.

In response, McGowan counterclaimed, suing Palmer for defamation in relation to nine publications.

In a decision handed down in August 2022, Justice Lee found in favour of *both* parties. In doing so, Justice Lee noted that 'the game has not been worth the candle', and that the parties had spent significant amounts of money on the proceeding, and had diverted the Court's time from resolving controversies of real importance.

Justice Lee gave some consideration to nominal damages. He noted that often $1 in nominal damages had been awarded, but that some nominal damages awards had reached $1000. He said:

> Given the way nominal damages have been awarded in some cases in recent times, the precise line between what is a nominal award and what is a modest award can be blurred. It seems to me, with respect, that awards of thousands of dollars are inconsistent with the fundamental nature of a *nominal* award.

Justice Lee awarded Palmer $5000. McGowan was awarded $20 000. In awarding these damages, Justice Lee said:

> … he is the Premier of Western Australia. Robust criticism is, and should be, part and parcel of the job … Weighing up all the factors, I have concluded that the appropriate amount for non-economic loss comprising general damages is an award of $20 000.

Palmer v McGowan (No 5) [2022] FCA 893 (2 August 2022)

Exemplary damages

An award of exemplary damages, sometimes known as punitive damages, is the only example in civil law of a court seeking to punish a defendant. Exemplary damages may be awarded if a defendant's action was so outrageous that the court wishes to deter others from similar action and to show disapproval of the defendant's action. Exemplary damages cannot be awarded in defamation cases.

A court may also decide to award exemplary damages if the defendant has shown total disrespect for the plaintiff's wishes.

The scenario below is an example of a **lead plaintiff** in a class action seeking damages, including exemplary damages, in relation to a protest where capsicum spray was used against protesters.

lead plaintiff the person named as the plaintiff in a class action and who represents the group members; also sometimes referred to as the representative plaintiff

Actual scenario

Exemplary damages claim in capsicum spray class action

Between 29 and 31 October 2019, the International Mining and Resources Conference was held at venues across Melbourne, including at the Melbourne Convention and Exhibition Centre in Southbank, Melbourne. It was anticipated that protesters would be outside, demonstrating against climate change, as protesters had done so every year the conference had been held. Victoria Police prepared for the protesters.

On the second day of the conference, altercations and incidences occurred that resulted in one protester being hospitalised, protesters being sprayed with capsicum spray, and dozens of protesters being arrested. Some activists had reportedly glued themselves to the ground. Victoria Police noted that while they respected the rights of people to peacefully protest, there was unlawful action that caused police resources to be drained across Melbourne.

In 2022, a class action was commenced on behalf of persons who were present at the protest and had suffered harm as a result of being sprayed with capsicum spray by police officers. The lead plaintiff, Jordan Brown, was one of the protesters and alleges that the conduct by police officers was unreasonable, unlawful and a disproportionate use of force. The plaintiff is seeking damages, including exemplary damages, on behalf of himself and all the people who were at the protest on the date between specified times, and allegedly suffered harm as a result of being sprayed with capsicum spray.



Source 2 The lead plaintiff in a class action is seeking exemplary damages after protesters at a conference allegedly suffered harm as a result of being sprayed with capsicum spray.

Study tip

Draw a table in your notebook that shows the four main types of damages, the purpose of each type, and an example of when each type might be awarded. This will help you distinguish between the different types of damages.

contemptuous damages
a very small amount of money awarded to show that even though the plaintiff's claim succeeded legally, the court disapproves of it in moral terms

Contemptuous damages

A court might think that a plaintiff has a legal right to damages but does not have a moral right; that is, the court may believe that the plaintiff does not deserve to be paid damages. In such a situation, a small sum of damages might be awarded to show contempt for the claim that is made, while admitting the plaintiff's legal right to make the claim. **Contemptuous damages** are rare.

Effectiveness of damages

As a remedy, are damages effective in achieving their purposes? This largely depends on the facts of each case, and the loss that a plaintiff has suffered. Some of the factors that can be considered are set out in Source 3.

Factor	Points
Whether any loss has been suffered, and, if there is loss, whether it is minor or significant	• If there has been no loss suffered, an award of nominal damages or even contemptuous damages may be more appropriate. • If there has been loss suffered, there may need to be a consideration of the type of loss (see below). • If the loss is minor, then nominal damages or a small amount of compensatory damages may be appropriate. Damages such as aggravated damages or exemplary damages are less appropriate. • If the loss is significant, there may be a need to award compensatory damages, or even exemplary damages if the court wishes to make a point about particular conduct of the defendant.
The type of loss that has been suffered	• Economic loss (such as loss for medical expenses, ongoing treatment, the cost of a carer, or past or future earnings) is easily quantifiable. The plaintiff will need to submit evidence to support the amounts. • Non-economic loss (such as pain and suffering, psychiatric injuries or humiliation) is more difficult to quantify. It may require the parties and the court to assess the loss, and determine a figure that reflects the plaintiff's loss. • Significant physical injuries such as disfigurement, loss of limbs or movement, or irreparable damage, can be more difficult to compensate for, and the plaintiff may not ever be able to be restored to their original position. • Where the plaintiff is seeking recovery for the loss of someone else's life, restoration can never be achieved.
Whether there is the potential for ongoing harm	• If there is potential for ongoing harm (e.g. ongoing publications about the plaintiff), then damages alone may not be enough to address the harm suffered. In this case, an injunction may also be required.
Time, cost, stress and inconvenience	• Damages cannot compensate a plaintiff in relation to the time, cost, stress and inconvenience involved in a civil dispute. Another remedy (such as costs) may compensate for some of that, but not all.
Whether the defendant will pay	• If the defendant cannot pay an award of damages, then the purposes of damages will not be achieved as the plaintiff will not receive the money.

Source 3 Factors that impact on the ability of damages to achieve their purposes

Injunctions

Injunctions are a type of civil remedy where the court makes an order for the defendant to undertake an action or do something (or refrain from undertaking an action or from doing something) in an attempt to restore the plaintiff to the position they were in prior to the loss or harm they suffered. Injunctions can be granted on a temporary or long-term basis. There are two types of injunction:

- restrictive injunction – this injunction stops someone from doing something; for example, a person could apply for a restrictive injunction to stop a building from being destroyed if it was in the interests of the nation to preserve it
- mandatory injunction – this injunction is sought when a person wishes to compel someone to do a particular act; for example, to remove something from their land.

The scenario below is an example of a court ordering an injunction in two separate cases, both related to environmental protection.

injunction
a remedy in the form of a court order requiring the defendant 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

Actual scenario

Injunctions granted in environment cases

In two 2022 cases, the Supreme Court of Victoria granted injunctions in an attempt to protect threatened species.

In the first case, Warburton Environment argued that VicForests had illegally logged in areas in Victoria's Central Highlands that were home to the endangered tree geebung. Tree geebung is a species of large shrub or small trees that are found in Victoria. They reach maturity after 100 years and can reach the age of 510 years. An injunction was granted to stop VicForests logging in wet forest areas unless, where reasonably practical, a survey was undertaken to identify tree geebung, and buffers were placed around mature ones to ensure that they were not damaged.

In the second case, two community groups brought an action against VicForests seeking to protect greater gliders and yellow-bellied gliders that live in areas harvested by VicForests. Greater gliders are an endangered species. Justice Richards found in favour of the plaintiffs and granted injunctions requiring areas to be surveyed first to detect any gliders before any timber harvesting operations occurred. If gliders were detected in the area, then certain measures must be undertaken by VicForests, including to exclude the greater gliders' home ranges from timber harvesting.



Source 4 Some species, including the yellow-bellied glider, are threatened by actions such as logging.

Effectiveness of injunctions

As a remedy, are injunctions effective in achieving their purposes? This largely depends on the facts of each case, and the loss that a plaintiff has suffered. Some of the factors that can be considered are set out in Source 5 on the following page.

Factor	Points
Whether the damage has already been caused	• If the damage is significant and cannot be repaired, an injunction alone may not be able to restore or compensate the plaintiff. In these cases, damages may also need to be awarded to compensate for the harm suffered. • If the damage has not yet been caused, a restrictive injunction may be a sufficient remedy.
Whether the defendant will comply with the order	• If the defendant does not comply with the order, the damage may happen anyway and the injunction will not be sufficient. • The court may also need to consider whether a mandatory injunction is appropriate. This type of injunction may require the court's supervision to determine whether the defendant has exactly complied with the terms of the order.
Time, cost, stress and inconvenience	• Damages cannot compensate or restore a plaintiff in relation to the time, cost, stress and inconvenience involved in a civil dispute. Another remedy (such as costs) may compensate for some of that, but not all.
The nature of the claim	• Defamation cases involving online publications may require additional remedies to address all of the harm caused. For example, there may be a need for a mandatory injunction (to force the defendant to take down the posts), a restrictive injunction (to prevent the defendant from posting again), and damages (to compensate the plaintiff for harm already suffered). • A breach of contract claim may also require both an injunction and damages.

Source 5 Factors that impact on the ability of injunctions to achieve their purposes

12.10 Check your learning

Remember and understand

1 **Describe** two purposes of remedies.
2 **Identify** and **describe** three types of damages.
3 **What** is a mandatory injunction? **How** is this different from a restrictive injunction?
4 **Distinguish** between specific damages and general damages.

Examine and apply

5 **Identify** two scenarios in which you think a mandatory injunction may be a useful remedy. Now **identify** scenarios for which you think damages is more appropriate.
6 Read the scenario 'Nominal damages considered'.
   a **Who** were the parties to this case?
   b **What** was the nature of both claims?
   c Were the awards of damages of $5000 and $20 000 nominal damages? **Justify** your response.
   d Do you think that high-profile people should be able to sue for defamation? Discuss as a class, referring to Justice Lee's comments in this case.
7 Read the scenario 'Exemplary damages claim in capsicum spray class action'.
   a **Explain** what a class action is.
   b **Describe** the basis for the claim.
   c The lead plaintiff has not specified how much he is seeking in exemplary damages. **Justify** why this may be so, giving two reasons.
   d Conduct some research and discuss as a class the current status of this particular claim.
8 Read the scenario 'Injunctions granted in environment cases'. Conduct some more research about the cases before answering the questions below.
   a **Who** were the parties in each case?
   b **What** did the plaintiffs want to stop from happening?
   c **Why** was an injunction (rather than damages) the appropriate remedy in these cases?

Reflect and evaluate

9 Do you think that damages will ever be able to be an adequate remedy? Give reasons for your answer, referencing at least two cases that you have studied or that you have identified through your studies.

Chapter

12

Review

Top assessment tips from Chapter 12

1 Tables and diagrams are a great way to show similarities and differences, and strengths and weaknesses. There is a lot to learn in this chapter, so try colour coding your tables or diagrams to distinguish what you are comparing or evaluating.

2 There are different types of damages. In Unit 2, you don't need to know the specifics of the different types of damages, but you will need to know this in Unit 3. It's a good idea to start working your way through each the different types of damages now so that you can be more familiar with them in your studies next year.

3 Many students get confused between dispute resolution methods (mediation, conciliation and arbitration) and dispute resolution bodies (ombudsmen, tribunals, complaints bodies and courts). It is a good idea to start distinguishing between the two now, as they come up again in Unit 3.

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 assessment tasks are composed of a variety of questions. A great way to identify the difficulty of the question is to look at the command term (or terms) used in the question and the mark allocation. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 Distinguish between the role of the jury and the role of the judge in a civil case.

(3 marks)

Difficulty: medium

2 For each of the following scenarios, identify the most appropriate remedy. Justify whether you think the remedy can achieve **one** of its purposes.

- **a** Jennifer is about to knock down her neighbour's fence.
- **b** Minami fell two storeys on a construction site and has suffered significant back pain ever since.
- **c** Ashika was recently offered a job by Firm 1, but two weeks later the employer withdrew the offer. A couple of days later, Ashika got a job at Firm 2, earning less than she would have earned at Firm 1.
- **d** Cindy has been waiting months for her employer to pay her the annual leave she is owed.
- **e** While Xavier was walking in a shopping mall, he slipped on a hot chip and suffered extensive injuries. Xavier has had to pay significant medical expenses and is expected to pay a lot more.

(15 marks)

Difficulty: high

3 'For young people, taking a matter to an ombudsman or to a complaints body is always a better way to resolve disputes than taking the matter to a court or a tribunal.' Do you agree with this statement? Justify your answer. In your answer, refer to **two** principles of justice.

(8 marks)

Practice assessment task

Before attempting this practice assessment task, re-read the information at the beginning of this chapter about the learning outcome, key knowledge and key skills.

Use the stimulus material to answer the questions in this section.

Dispute over jewellery designs

Haridini runs her own business selling homemade jewellery, including necklaces and earrings. In recent years, Haridini has had a lot of success selling her jewellery through social media. She has over 400 000 followers on Instagram and over 60 000 followers on Facebook. She also sells her jewellery at local markets on weekends.

Recently, at a rural market, Haridini had an argument with another jewellery business owner, Giulia. Giulia lives in the rural area. Giulia claimed that Haridini's jewellery was 'similar' to hers. Haridini denied that she was copying Guilia, as she had never met Giulia before.

A few days later, a number of posts were published on Haridini's Facebook page claiming that Haridini was a 'cheat' and a 'liar', and that she had 'stolen ideas off other people'. A few days later, a separate Facebook page was set up called 'Haridini steals other people's jewellery ideas'. The page has 30 followers.

Since these events, Haridini has noticed a drop in followers on her Facebook page. She has also noticed a decline in sales for her jewellery. Haridini's lawyer has sent a letter to Giulia demanding that she apologise. Giulia has refused. Haridini has lost sleep, and is suffering from anxiety and worry because of the posts and the new Facebook page.

Haridini wants to sue Giulia for $600 000, and wants to have a jury to determine liability. Giulia does not have a lawyer and plans to defend the claim herself. Giulia left school in Year 10, but believes she has enough information to be able to defend herself. She intends to go to a community legal centre to help her defend the case.

Practice assessment task questions

1 Describe **one** method that may be used to resolve Haridini and Giulia's dispute.

(3 marks)

2 Describe the relationship between the judge and the jury in this case.

(3 marks)

3 Explain **one** way in which courts are different to tribunals in resolving disputes.

(3 marks)

4 'This dispute could be resolved by more than one court.' Is this statement correct? Justify your response.

(4 marks)

5 Discuss the ability of damages alone to restore Haridini back to the position she was in before the harm occurred.

(6 marks)

6 Discuss the ability of the civil justice system to achieve the principle of access in this case.

(6 marks)

Total: 25 marks

Chapter checklist

Now that you have completed this chapter, reflect on your ability to understand the key knowledge from the Study Design. If you feel you need some more practice, use the revision links to revisit the key knowledge.

Remember that you will also need to be able to draw on and understand the key skills outlined in the Study Design.

Key knowledge	I understand this	I need some more practice to understand this	Revision link
• The principles of justice: fairness, equality and access	☐	☐	Go back to Topic 12.2.
• Methods used to resolve a civil dispute such as mediation, conciliation and arbitration	☐	☐	Go back to Topic 12.3.
• Institutions that resolve civil disputes, such as tribunals	☐	☐	Go back to Topic 12.4.
• Institutions that resolve civil disputes, such as ombudsmen	☐	☐	Go back to Topic 12.5.
• Institutions that resolve civil disputes, such as complaints bodies	☐	☐	Go back to Topic 12.6.
• An overview of the role and civil jurisdictions of the Victorian courts	☐	☐	Go back to Topic 12.7.
• The role of a jury in a civil trial	☐	☐	Go back to Topic 12.8.
• The difficulties faced by different groups in the civil justice system, such as First Nations people, people of low socioeconomic status, young people, and people in regional, rural and remote areas	☐	☐	Go back to Topic 12.9.
• The purposes of remedies	☐	☐	Go back to Topic 12.10.
• Types of remedies, such as damages and injunctions	☐	☐	Go back to Topic 12.10.

Check your Student obook pro for these additional resources and more:

Chapter 12
Chapter review quiz

Revision notes
Chapter 12

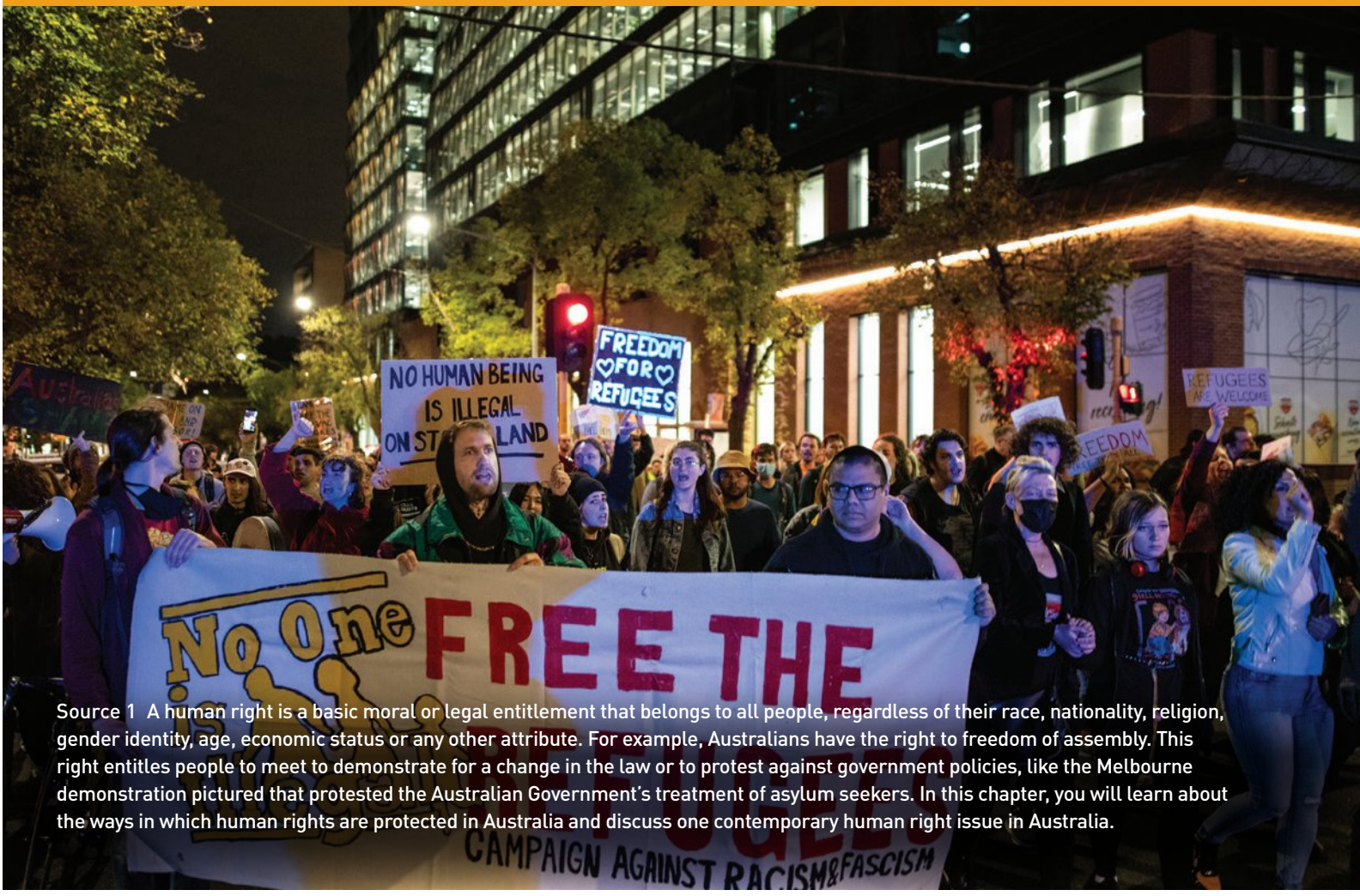
Chapter summary
Chapter 12

Quizlet
Revise key legal terms from this chapter.

Chapter

13

Human rights



Source 1 A human right is a basic moral or legal entitlement that belongs to all people, regardless of their race, nationality, religion, gender identity, age, economic status or any other attribute. For example, Australians have the right to freedom of assembly. This right entitles people to meet to demonstrate for a change in the law or to protest against government policies, like the Melbourne demonstration pictured that protested the Australian Government's treatment of asylum seekers. In this chapter, you will learn about the ways in which human rights are protected in Australia and discuss one contemporary human right issue in Australia.

Outcome

By the end of **Unit 2 – Area of Study 3** (i.e. Chapter 13), you should be able to explain one contemporary human rights issue in Australia, and evaluate the ways in which rights are protected in Australia.

Key knowledge

In the chapter, you will learn about:

- the meaning and development of human rights, including the significance of the *Universal Declaration of Human Rights*
- an overview of the ways in which human rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law
- one human rights issue in Australia and in relation to that human rights issue:
  - the nature and development of the human right
  - the laws that apply to the human right in Australia
  - possible conflicting attitudes
  - possible reforms to the protection of the human right in Australia
  - one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right.

Key skills

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

- define and use legal terminology
- research and analyse relevant information about the protection of rights
- describe the role of individuals in bringing about changes in the protection of rights through cases
- explain the meaning and development of human rights
- analyse the impact of a case study on the human rights of individuals and on the legal system
- discuss possible reforms to the protection of rights in Australia
- evaluate the ways in which rights are protected in Australia
- apply legal principles to actual and/or hypothetical scenarios.

Please note

First Nations readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of deceased people.

Key legal terms

Australian Constitution a set of rules and principles that guide the way Australia is governed. The Australian Constitution is set out in the *Commonwealth of Australia Constitution Act*

charter of human rights (or bill of rights) a document that sets out the basic human rights and/or freedoms of the citizens in a particular state or country

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)

express rights rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

human rights basic freedoms or standards that promote and uphold the dignity of all people, and are guaranteed by a moral sense of duty or by the law

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

implied rights rights that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

international declaration a non-binding agreement between countries that sets out the aspirations (i.e. 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)

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

Universal Declaration of Human Rights an international document that outlines basic rights and fundamental freedoms to which all human beings are entitled; the declaration was adopted by the General Assembly of the United Nations in 1948

Key legal cases

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

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

Warm up!
Check what you know about human rights before you start.

Quizlet!
Test your knowledge of the key legal terms in this chapter by working individually or in teams.

13.1 The meaning and development of human rights

Key knowledge

In this topic, you will learn about:

- the meaning and development of human rights, including the significance of the *Universal Declaration of Human Rights*.

human rights basic freedoms or standards that promote and uphold the dignity of all people, and are guaranteed by a moral sense of duty or by the law

One of the aims of the Australian legal system is to protect **human rights**. But what are human rights, and what types of human rights are maintained and guaranteed by law?

What are human rights?



Source 1 On 10 December 1948, 48 countries (including Australia) agreed to adopt the United Nations' *Universal Declaration of Human Rights* (1948), a document that sets out the basic human rights for all citizens. Each year on 10 December, many people around the world celebrate International Human Rights Day.

There is no single universally accepted definition of human rights. In broad terms, human rights are basic freedoms or standards that promote and uphold the dignity of all people, and are guaranteed by a moral sense of duty or by the law. In other words, human rights are basic moral or legal entitlements that belong to all people, regardless of their race, nationality, religion, gender identity, age, economic status or any other attribute.

The meaning of human rights can differ between people, depending on who they are, what they believe, and what country they live in. However, most definitions of human rights include some common themes, such as the promotion of respect, dignity, equality and justice. For example, the Australian Human Rights Commission provides a number of simple definitions of human rights including:

- 'a set of moral and legal guidelines that promote and protect a recognition of our values, our identity and ability to ensure an adequate standard of living'
- 'the basic standards by which we can identify and measure inequality and fairness'.

Similarly, UNICEF (the United Nations humanitarian organisation that works to protect the world's most vulnerable and disadvantaged children) defines human rights as 'standards that recognise and protect the dignity of all human beings'. UNICEF states: 'Human rights are universal and inalienable [absolute]. All people everywhere in the world are entitled to them. No one can voluntarily give them up. Nor can others take them away from him or her.'

Did you know?

Up until 1956, a woman employed as a teacher in a public school had to give up her job once she was married, forcing women to choose between their job and being married. In the 1950s, a movement began that ultimately led to this 'marriage bar' being repealed.

The development of human rights

Over the years, governments in Australia have been committed to developing, promoting and strengthening human rights both within Australia and around the world. However, the nature (e.g. the definition and characteristics) of human rights has developed over time. What are now considered to be universal human rights have not necessarily always been human rights available to all. For example:

- When Australia was first created as a nation in its current form (at Federation) in 1901, women did not have the right to vote in federal elections. That changed when they gained the right to vote in 1902. Women were also not allowed to drink in public bars until the 1970s.

- First Nations peoples have been denied rights and have suffered significant injustices since the colonisation of Australia (described by many as an invasion) in the late 1700s. For example, First Nations people were not technically recognised in the Australian population count until 1967, and for many years were denied basic rights, including the right to entitlements such as the age and disability support pensions. First Nations people have also been subject to government policies such as the forcible removal of First Nations children from their families. These children became known as the 'Stolen Generations', and their removal is one of the injustices that has resulted in **intergenerational trauma** – trauma that has passed from generation to generation.
- The White Australia Policy, implemented in 1901, was intended to limit non-British migration to Australia. An openly racist policy, it was based on the false idea that non-'white' groups were less advanced and would take employment opportunities from 'white' people. Once non-British migrants were accepted, they were expected to adopt the 'Australian' culture and language quickly, and they had limited access to benefit entitlements. The White Australia Policy was ultimately abandoned and was formally abolished in 1973, when the government established a policy of **multiculturalism**.
- Rights for LGBTQIA+ people in Australia have also developed over time. For example, same-sex sexual activity between men was considered a crime until it was decriminalised from the 1970s. The Tasmanian Government refused to repeal (cancel) its anti-homosexuality laws until 1997, becoming the last Australian jurisdiction to do so. Marriage equality was also not recognised in Australia until in 2017, when the law was changed to ensure that same-sex couples have the same right to marry as other Australians.

As you will learn later in this chapter, there are still human rights issues and injustices that need to be addressed. For example, there is a need to improve the human rights of women, who continue to experience human rights abuses and discrimination, including violence against women (a widespread global human rights abuse). There is also a need to achieve gender pay equality to ensure that women are paid the same amount as men for equal work. In 2022, Australian Government statistics indicated that Australian women were paid on average 13.3 per cent less than men for doing the same work. In 2023, statistics indicated that, globally, women were paid on average 17 per cent less than men for doing the same work.

intergenerational trauma
a psychological response to highly distressing, stressful or oppressive historical events, such as war or significant injustices, which is passed on to future generations. First Nations people experience intergenerational trauma for many reasons, including being subjected to brutal and harmful government policies, racism and discrimination since the British colonisation of Australia

multiculturalism
the idea that people with distinct cultures and ethnicity can coexist peacefully and equitably in a single country



Source 2 Human rights issues such as pay equality for women continue to be issues that need to be addressed in Australia and throughout the world.

The *Universal Declaration of Human Rights*

One of the ways that Australia has protected human rights – which has become an increasingly common method of addressing and developing human rights since the end of World War II – is to become a signatory to an **international treaty** (also sometimes called a convention or covenant). An international treaty is an agreement between two or more countries (or international organisations, such as the World Bank) that gives rise to legal rights and obligations, and is governed by international law.

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)

International law is separate from Australian or domestic law. It establishes rules, guidelines and responsibilities of countries and international organisations, and their relationships with each other. It establishes principles about how they should treat their citizens, but it generally does not govern the behaviour and conduct of citizens within Australia. That is the responsibility of Australian (or domestic) law.

Becoming a signatory to an international treaty demonstrates the intention of the signatory country to adopt the treaty and incorporate it into its domestic law at a later date. However, being a signatory to an international treaty is not enough to make Australia bound (under international law) to the treaty. For this to happen, Australia must specifically pass statute law (or legislation) to approve and adopt the various rights outlined in the international treaty. This is called **ratification** of the treaty. When a nation ratifies a treaty, it is legally bound to implement the rights contained in the treaty. In other words, the country becomes bound by the treaty under international law. For the obligations in the treaty to then be incorporated into Australian law, so that Australians can exercise their rights in relation to the terms of the treaty, Commonwealth Parliament must pass statutes to incorporate the rights and principles included in the treaty into Australia domestic law.

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

Another type of international agreement is an **international declaration**. This is a non-binding agreement that sets out the 'aspirations' or 'intentions' of the countries (or international organisations) who are parties to the declaration.

international declaration
a non-binding agreement between countries that sets out the aspirations (i.e. hopes) of the parties to the agreement

Australia is an active member of the international community and has supported many international treaties and declarations. For example, as one of the founding members of the **United Nations (UN)**, Australia was involved in drafting the ***Universal Declaration of Human Rights*** (1948) following the end of World War II. This international declaration sets out most of the basic human rights that all nations and governments, including Australia, should strive to promote and uphold. It is considered the basis of international human rights law.

United Nations (UN)
a major international organisation established after the Second World War to maintain international peace, security and cooperation among nations

Some of the rights in the *Universal Declaration of Human Rights* are:

- all people are born free and equal in dignity and rights
- everyone is entitled to the same rights and freedoms without discrimination of any kind, such as those based on race, colour, sex, language, religion, political or other opinion, nationality or other status
- everyone has the right to life, liberty and security of person
- no one should be subject to slavery, torture, or cruel or degrading treatment or punishment
- everyone is equal before the law and entitled without any discrimination to equal protection of the law
- no one should be subject to randomly being arrested, detained or exiled
- everyone is entitled to a fair and public hearing by an independent and impartial body in the determination of their rights and obligations and when they face any criminal charges
- everyone charged with a criminal offence has the right to be presumed innocent until proven guilty in a public trial.

Universal Declaration of Human Rights
an international document that outlines basic rights and fundamental freedoms to which all human beings are entitled; the declaration was adopted by the General Assembly of the United Nations in 1948

The *Universal Declaration of Human Rights* has now been adopted by each of the 192 members of the UN. It has inspired the creation of more than 80 international treaties, declarations and agreements,

and a number of international human rights organisations (which provide further recognition and protection of human rights).

Source 3 sets out some of the major international treaties and declarations that have been created over the years to protect the human rights of people who belong to potentially vulnerable groups, such as women, children, refugees and people with disability.

International treaty or declaration	Purpose of the declaration or treaty
Convention relating to the Status of Refugees (1950)	This treaty establishes a set of legal responsibilities for the treatment of refugees and asylum seekers that member nations agree to uphold. For example, refugees cannot be sent to a place where they will be exposed to persecution (e.g. maltreatment, harassment and torture). Further, refugees should have the same rights as citizens with respect to basic rights such as freedom of religion, the provision of basic education and social security, and access to the legal system. Refugees also have the right to be issued with identity and travel documents.
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	This treaty aims to abolish any laws that discriminate against people on the basis of their race, colour, descent or ethnicity. It also aims to introduce laws and policies that promote racial tolerance and understanding.
Convention on the Elimination of All Forms of Discrimination against Women (1979)	This treaty aims to protect the human rights of women. It promotes the implementation of laws and systems that ensure that women are equal under the law and not discriminated against on the basis of their sex.
Convention on the Rights of the Child (1989)	This treaty aims to protect the rights of all children by ensuring that children are protected against all forms of discrimination and punishment based on the status, activities, stated opinions or beliefs of the child's parents, legal guardians or family members. It also aims to ensure that the best interests of the child are the main consideration when children have dealings with the legal system or social welfare institutions.
Convention on the Rights of Persons with Disabilities (2006)	This treaty aims to promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all people with disability and promote respect for their inherent dignity.
Declaration on the Rights of Indigenous Peoples (2007)	This declaration aims to establish a universal framework of minimum standards for Indigenous peoples around the world. While Australia announced its support for the Declaration in 2009, it has not yet formally adopted the Declaration by passing law (i.e. statutes) to implement or recognise its standards in a broad and complete way.

Source 3 Some of the international treaties and declarations that protect the human rights of people who belong to potentially vulnerable groups. Each of these has been adopted or supported by Australia.

The principles contained in the *Universal Declaration of Human Rights* have also been incorporated into the national (or domestic) laws of most countries in the world. For example, as a member of the UN, Australia has a range of federal, state and territory laws that recognise and uphold the basic human rights and freedoms of all individuals. These include the *Racial Discrimination Act 1975* (Vic) and the *Equal Opportunity Act 2010* (Vic).

Weblink
The *Universal Declaration of Human Rights* (1948)

Study tip

In your responses to assessment task questions, you can use common abbreviations and acronyms, but make sure you first define what the letters stand for. You can do this by first writing out the full term, then putting the abbreviation or acronym in brackets, e.g. the *Universal Declaration of Human Rights* (UDHR).

Did you know?

In 2022, the UN made a formal statement (or expression of opinion) declaring that all people throughout the world have a right to a healthy environment, and made the right to a 'clean, healthy and sustainable environment' a human right.

How are human rights protected in Australia?

In Australia, human rights are protected in a number of ways, including through:

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

- **statute law** – the Commonwealth, state and territory parliaments have passed Acts of Parliament (legislation) to protect a wide range of human rights, including legislation to uphold international treaties and declarations that recognise and promote human rights. Victoria, the Australian Capital Territory and Queensland have also passed specific human rights legislation to ensure the protection of basic human rights within their state or territory. For example, the Victorian Parliament has passed the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which sets out the basic rights, freedoms and responsibilities of the Victorian people

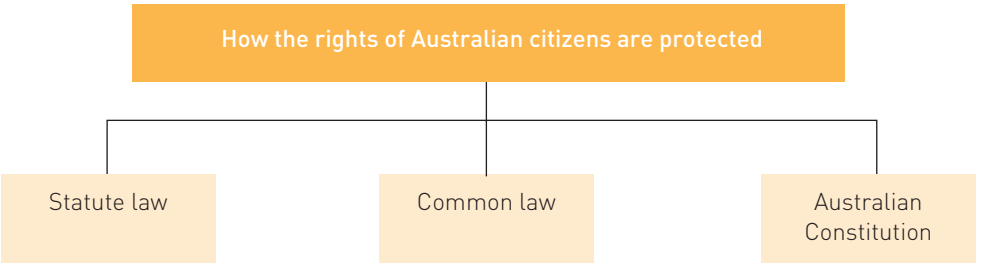
common law
law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

- **common law** – over the years, Australian courts have enforced various human rights in their judgments. These include the right to silence (the general right of an accused not to be required to answer police questions or give evidence at their trial) and the right to a fair trial

Australian Constitution
a set of rules and principles that guide the way Australia is governed. The Australian Constitution is set out in the *Commonwealth of Australia Constitution Act*

- the **Australian Constitution** – the Australian Constitution protects a limited number of human rights. For example, the Australian Constitution guarantees five express rights of the Australian people, which are specifically written in the Constitution (see Topic 13.4).

In Topics 13.2 to 13.4, you will examine in more detail the ways in which human rights are protected in Australia.



Source 4 There are three main ways in which the rights of Australian citizens are protected.

13.1 Check your learning

Remember and understand

1 **What** is a 'human right'?
2 Australian law protects a vast range of human rights. Working with a classmate, list as many of these human rights as you can in two minutes.
3 Watch the video 'Human rights' on your obook pro and briefly **explain** the significance of the *Universal Declaration of Human Rights*.
4 **Outline** the three main ways that rights are protected in Australia.

Examine and apply

5 Search online to find a definition and an example of each of the following types of rights:
   a political rights
   b economic rights
   c social rights.

Video
Human rights

13.2 Rights protection: statute law and the Victorian Charter

Key knowledge

In this topic, you will learn about:

- an overview of the ways in which human rights are protected in Australia through the Victorian Charter of Human Rights and Responsibilities and statute law.

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

As noted in the previous topic, there are three main ways that rights are protected in Australia: through statute law, through common law and through the Australian Constitution. In this topic, you will explore how statute law protects human rights in Australia, and how the *Charter of Human Rights and Responsibilities Act 2006* (Vic), also known as the **Human Rights Charter,** protects human rights in Victoria. In the next two topics, you will explore how common law and the Australian Constitution protect rights.

Protecting human rights through statute law

Most human rights in Australia are recognised in and protected by statute law (or Acts of Parliament or legislation) made by the Commonwealth Parliament and the state and territory parliaments. The Commonwealth Parliament has the power to pass legislation that applies to and protects the rights of all Australians. Each state and territory parliament has the power to pass legislation that applies to and protects the rights of the residents of that state or territory.



Source 1 The Victorian Human Rights Charter guarantees Victorians a number of rights, including freedom of movement. However, this right was temporarily suspended in 2020– 2021 when state borders were closed during the COVID-19 pandemic.

Source 2 provides some examples of human rights that are protected by legislation passed by the Commonwealth Parliament and the Victorian Parliament.

Human rights	Examples of legislation that protects this human right
• **The right to privacy** Various Acts regulate the use, storage and disclosure of private information by the government and by private organisations	• *Freedom of Information Act 1982* (Cth) • *Freedom of Information Act 1982* (Vic) • *Privacy Act 1988* (Cth) • *Privacy and Data Protection Act 2014* (Vic)
• **The right to security of person** Many Acts protect the right of Australian citizens to feel secure and safe. These Acts include legislation that defines and prohibits crime, outlines minimum and maximum sanctions for criminal offenders, and aims to prevent and reduce the risk of terrorism	• *Crimes Act 1914* (Cth) • *Crimes Act 1958* (Vic) • *Road Safety Act 1986* (Vic) • *Sentencing Act 1991* (Vic) • *Terrorism (Community Protection) Act 2003* (Vic) • *Child Wellbeing and Safety Act 2005* (Vic) • *Family Violence Protection Act 2008* (Vic)
• **The right to freedom from discrimination** A range of Acts protect individuals from being discriminated against on the basis of race, religion, ethnicity, sex, sexual orientation, gender identity, age, disability and other characteristics in various areas, including the workplace, schools, accommodation, and sporting and religious organisations	• *Racial Discrimination Act 1975* (Cth) • *Sex Discrimination Act 1984* (Cth) • *Australian Human Rights Commission Act 1986* (Cth) • *Disability Discrimination Act 1992* (Cth) • *Racial and Religious Tolerance Act 2001* (Vic) • *Age Discrimination Act 2004* (Cth) • *Equal Opportunity Act 2010* (Vic) • *National Disability Insurance Scheme Act 2013* (Cth)
• **The right to vote** One Commonwealth Act provides the rights of Australian citizens to vote in elections. One Victorian Act protects the rights of Victorians to vote in elections	• *Commonwealth Electoral Act 1918* (Cth) • *Electoral Act 2002* (Vic)

Source 2 Examples of the ways in which four human rights are protected by legislation passed by the Commonwealth Parliament and the Victorian Parliament

charter of human rights (or bill of rights) a document that sets out the basic human rights and/or freedoms of the citizens in a particular state or country

democracy a system of government in which members of parliament are elected by the people to represent the views and values of the people, and to make laws on their behalf

The Victorian Charter of Human Rights and Responsibilities

In addition to passing a range of individual Acts of Parliament to protect specific human rights, the Victorian, Australian Capital Territory and Queensland Parliaments have also each passed a single Act of Parliament – a **charter of human rights** – to promote and protect the basic human rights of the people who live in that state or territory. For example, the Victorian Parliament has passed the Human Rights Charter, to recognise and set out the basic rights, freedoms and responsibilities of the Victorian people.

Interestingly, by contrast, the Commonwealth Parliament has never passed a national charter of human rights to recognise and protect the basic rights of all Australians. This means Australia is the only Western **democracy** that does not have a national charter of human rights (or bill of rights). Previous attempts to put in place a national charter of human rights have failed.

What rights are protected in the Human Rights Charter?

The Victorian Human Rights Charter requires certain bodies – such as the Victorian Parliament, and state and local government departments and organisations (including the Victorian Department of Health, the Victorian Department of Education, VicRoads, Victoria Police and local councils) – and people delivering government services to act in a manner that complies with and upholds the basic human rights in the Human Rights Charter.



Source 3 The Human Rights Charter protects the rights of children and families.

The Human Rights Charter outlines 20 basic human rights that belong to the Victorian people, including:

- the right to life
- the right to protection from torture and cruel, inhuman or degrading treatment
- freedom of movement (e.g. people who live lawfully in Victoria have the right to leave and return to the state whenever they desire, and can choose where they live)
- freedom of thought, conscience, religion and belief (e.g. people are free to hold their own beliefs and practise a religion of their choice)
- the right to take part in public life (e.g. people have the right to vote or run as a candidate in state or local government elections).



Source 4 The right to take part in public life includes the right to vote or run as a candidate in state or local government elections.

Among the 20 human rights protected by the Human Rights Charter are rights that help to ensure our legal system achieves justice. For example, the Human Rights Charter protects:

- the right to recognition and equality before the law – every person must be regarded as equal before the law, is entitled to the equal protection of the law without discrimination, and has the right to equal and effective protection against discrimination
- the right to a fair hearing – a person charged with a criminal offence or a person who is a party to a civil proceeding has the right to have their case decided by a competent, independent and impartial court or tribunal. This includes having the right to a fair and public hearing, although in some circumstances a court or tribunal may lawfully exclude members of media organisations, other persons, or members of the general public
- the right to not be tried or punished more than once – a person must not be tried or punished more than once for an offence for which they have already been finally convicted or acquitted in accordance with the law, although a re-trial can be ordered in limited circumstances.

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

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

conviction
a finding of guilt made by a court, whether or not a conviction is recorded. Where a conviction is recorded, it will form part of the person's criminal record

The Human Rights Charter also sets out the rights of adults and children in criminal proceedings. For example, all Victorians are entitled to minimum guarantees once they have been charged with committing a criminal offence. These include:

- the right to be provided with **legal aid** if the denial of such assistance would lead to an unfair hearing or trial (provided the accused meets **Victoria Legal Aid's** eligibility criteria)
- the right to free assistance from an interpreter if necessary
- the right to not be compelled to give evidence against themselves (i.e. the right to silence) or to confess guilt.

In addition, any person convicted (found guilty) of committing a criminal offence has the right to have the **conviction** and any sentence imposed reviewed by a higher court (i.e. the right to appeal the decision).

Restriction of human rights

While the Human Rights Charter establishes 20 basic human rights that belong to the Victorian people, these rights are not absolute (or unrestricted). This is because the Human Rights Charter includes a section, referred to as a 'general limitations clause', which allows public authorities (including the Victorian Government and the Victorian Parliament) to restrict (or limit) human rights in situations where it is reasonable and justified in order to uphold a free and democratic society. For example, during the COVID-19 pandemic in 2020–2021, restrictions on human rights (such the restrictions imposed on freedom of movement) needed to be justified, necessary and in proportion to the threat posed by the spread of the deadly virus.

In the following scenario, the Victorian Government received criticism for imposing a strict lockdown of nine public residential housing towers, with some alleging that it breached the Human Rights Charter.

Actual scenario

Pandemic lockdowns and human rights

On 4 July 2020, during the COVID-19 pandemic, the Victorian Government ordered the lockdown of nine high-rise public housing towers in the Melbourne suburbs of North Melbourne and Flemington, in an attempt to prevent an outbreak of the COVID-19 virus spreading into the wider community. The lockdown was announced and implemented without warning or notice given to the 3000 residents of the towers. This meant the residents had no time to make necessary plans (e.g. purchase food, medical and personal supplies, and make personal arrangements) before being unable to leave the towers. It also meant that members of Victoria Police arrived to enforce the lockdown without the residents knowing or understanding why the lockdown was happening. The residents in eight towers were in lockdown for five days while the residents in one tower were unable to leave their tower for two weeks.

After receiving complaints, the Victorian Ombudsman, Deborah Glass, conducted an investigation into the lockdown. During the investigations, she heard personal accounts of the harm and distress suffered by many residents. For example, some residents who had lived through civil wars in other countries before settling in Australia were particularly traumatised by the 'overwhelming police presence'.

In her final report, published in December 2020, Ms Glass found that while a temporary lockdown was justified and did stop the spread of the virus, the implementation of the lockdown without any prior notice being given to the residents

was 'not compatible' with the residents' human rights. In particular, Ms Glass found that the lockdown was incompatible with the residents' right to humane treatment when deprived of liberty, as recognised and protected in the Human Rights Charter. She also recommended that the Victorian Government publicly apologise to the tower residents for the harm and distress they suffered as a result of the lockdown. She noted that 'in a just society, human rights are not a convention to be ignored during a crisis, but a framework for how we will treat and be treated as the crisis unfolds'.

In September 2022, over two years after the lockdown, the Victorian Ombudsman noted that the Victorian Government had not issued an apology to the residents, and emphasised that its unwillingness to do so was a 'barrier to rebuilding trust with the government'. In response, it was reported that the Victorian Premier, Daniel Andrews, said that none of the decisions made during the pandemic were 'made lightly' (i.e. without careful consideration) and that he would not 'apologise for doing everything possible to save lives. That's what we did.'



Source 5 In 2020, the Victorian Ombudsman found that the immediate lockdown of nine public housing towers was not compatible with the residents' human rights.

Strengths and weaknesses of protecting human rights through statute law

One main strength of protecting human rights through statute law is that it allows parliament to introduce new rights and amend existing rights as the need arises. This means that human rights can be modified to ensure that they reflect current community views and values. For example, as society becomes more knowledgeable or aware of the harm that can be caused by certain types of discrimination, parliament is able to expand human rights legislation to make such discrimination unlawful. In 2022, the Victorian Parliament passed an amendment to change the *Equal Opportunity Act* to make it generally unlawful for religious bodies and schools to discriminate against people based on their sex, sexual orientation, lawful sexual activity, marital status, parental status and gender identity.

In contrast, one weakness associated with protecting human rights through statute law is that these human rights are not permanently guaranteed. That is, as the supreme law-making body, parliament can pass legislation to change an existing right that is protected by statute law.

Study tip

The *VCE Legal Studies Study Design* requires you to evaluate the ways in which rights are protected. To do this, consider the strengths and weaknesses of the ways in which rights are protected. Then, provide a concluding judgment about the overall benefit or worth of each protection.

Some of the strengths and weaknesses of statute law (in particular, the Human Rights Charter) in protecting human rights are set out in Source 6.

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

Strengths of statute law in protecting human rights	Weaknesses of statute law in protecting human rights
Parliament can create new legislation and amend existing statutes to incorporate further human rights, particularly as the views and values of the community change	As the **supreme law-making body**, parliament can amend statutes to restrict or cancel existing human rights
Statutes are often detailed and precise, and protect human rights specifically, rather than being implied	Parliament can include exemptions, limitations or restrictions in statutes, so protected human rights are not always absolute
Human rights contained in statutes are generally enforceable and need to be recognised by government organisations	Statutes do not always enable a person to be awarded any damages if their human rights are breached
Parliament has the ability to pass laws quickly if there is a need to promptly protect additional human rights	The human rights protected in statute law are not as well protected as human rights contained in a constitution, as constitutional rights can only be altered or removed with public approval

Source 6 A summary of the strengths and weaknesses of statute law in protecting human rights

13.2 Check your learning

Remember and understand

1 **What** is statute law?

2 a **What** is the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Human Rights Charter)?

b **Identify** five rights protected by the Human Rights Charter.

c **Describe** two rights in the Human Rights Charter that help to ensure the justice system upholds the rights of individuals.

Examine and apply

3 Research two Victorian and two Commonwealth Acts that aim to protect human rights. For each Act, briefly **summarise** the human rights it aims to protect.

4 As a class, **identify** all the rights contained in the *Universal Declaration of Human Rights*. Conduct some research to find out whether all of the rights are protected in Victoria by statute law or by the Human Rights Charter. Come together as a class and incorporate the findings in a class poster or table.

Reflect and evaluate

5 Read the scenario 'Pandemic lockdowns and human rights'.

a **Why** did the Victorian Government order the immediate lockdown of the nine public housing towers on 4 July 2020?

b **Suggest** some of the ways the lockdown negatively affected the residents in the public housing towers.

c **Explain** the ways in which the lockdown was, or may have been, incompatible with the rights protected in the Human Rights Charter.

d In **what** circumstances can the human rights protected in the Human Rights Charter be restricted? Do you think these circumstances applied during the COVID-19 pandemic (before the vaccinations were available)? **Justify** your response.

6 **Evaluate** the ability of statute law to protect Australians from discrimination.

13.3 Rights protection: common law

Key knowledge

In this topic, you will learn about:

- an overview of the ways in which human rights are protected in Australia through common law.

In Australia, many human rights are protected by common law; that is, law that has been established and developed over the years through decisions made by judges in state and federal courts.

Judges can play a significant role in protecting rights when resolving disputes in which there has been an alleged breach of human rights. Judges also have an important role in interpreting the meaning of Commonwealth, state and territory legislation that protects human rights. When making their decisions to resolve human rights disputes (or possibly other kinds of disputes), judges may establish a legal principle (referred to as a **precedent**) that protects human rights. Legal rights that are established in this way are referred to as **common law rights**.

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

common law rights
freedoms established by judges when deciding on cases

Some of the human rights that have been established by the courts overlap with human rights contained in statute law. For example, the right to a fair trial is not only protected by statute law, but also by common law.

In this topic, you will explore three ways human rights can be protected through common law:

- through the courts establishing new human rights, independent of the human rights protected by statute law (i.e. common law rights)
- through the courts recognising and upholding human rights contained in statute law
- through the courts determining the validity of human rights legislation.

Establishing new human rights

As noted above, courts can establish human rights when resolving cases that involve the alleged breach of human rights (or possibly other kinds of disputes). When making their decisions, judges may establish a legal principle (or precedent) that protects human rights. Some examples of common law rights that have been established by the Australian courts include:

- the right to silence
- the right to a fair trial
- the right to legal representation
- the right of transgender people to marry.



Source 1 The right to silence was established through common law. It ensures that an accused cannot be forced to give evidence that may incriminate them.

The right to silence

The right to silence means that a person accused of committing a criminal offence does not need to answer any questions (other than providing their name and address in certain circumstances) and does not need to provide evidence in court. This right helps to protect them against self-incrimination. Over the years, a number of Australian cases have reinforced the common law right to silence. For example, in the 2000 High Court case *RPS v The Queen*, the High Court upheld the accused's right to silence and their right to not have their silence (i.e. their unwillingness to dispute or contradict evidence presented by the prosecution) interpreted as a partial admission of guilt.

The Court's ruling strengthened the common law right to silence. It also indirectly encouraged the Parliament of New South Wales to modify the *Evidence Act 1995* (NSW), which outlines the laws of evidence, including the right to silence in that state.

The right to a fair trial

The right to a fair trial is a human right that is protected by both statute law and common law. For example, the Victorian Human Rights Charter protects the right to a fair trial by providing a person who has been accused of a criminal offence with the right to have the charge against them decided by a competent, independent and impartial court after a fair and public hearing. The right to a fair trial is also protected by common law. A court may stay (stop) a trial from proceeding if it considers the trial to be unfair.

In the scenario below, the judge abandoned a 12-day trial after the actions of one of the jurors prevented the achievement of a fair trial.

Actual scenario

The right to a fair trial

In October 2022, the high-profile trial of a man who had pleaded not guilty to a sexual assault charge was abandoned after the judge decided that the 'misconduct' of a juror would prevent a fair trial.

At the start of the trial, and on at least 16 other occasions during the trial, the judge emphasised to the jurors the importance of not undertaking their own research into the case, so as to ensure that their verdict was based on the evidence presented by the parties (i.e. the prosecution and defence) in the courtroom. The trial was abandoned after it was discovered that, against these instructions, a juror had taken external material (i.e. academic articles on sexual assault, one of which included a discussion of the incidence of and reasons for false complaints) into the jury room. The discovery gave the judge no other choice but to dismiss the jury and abort the trial as it was unfair that the jury was able to consider external material (evidence) that the parties had no opportunity to address in the courtroom.

While a new trial was re-scheduled, the prosecution ultimately decided not to proceed with the re-trial in the interests of the alleged complainant's wellbeing. The charge against the accused was dropped, with no findings being made against him.

The right to legal representation

The right to legal representation is another human right that is protected by both statute law and common law. For example, the Victorian Human Rights Charter recognises that an accused must be given the opportunity to be represented by a lawyer (i.e. a legal representative). Similarly, many cases have also recognised the right of an accused to have legal representation for a criminal trial. In some instances, a judge has adjourned (i.e. paused) a trial to give an accused time to access legal representation.

The right of an accused to have legal representation was recognised by the High Court in *Dietrich v The Queen*. This case is discussed in the following scenario.

Actual scenario

The right to legal representation

In December 1986, a man was charged with smuggling 70 grams of heroin into Australia. Before his trial, the accused applied for legal assistance from Victoria Legal Aid but was told he would not receive legal assistance unless he agreed to plead guilty. The accused did not want to plead guilty and so his case went to trial without him having legal representation. The accused was found guilty of three charges and sentenced to a term of imprisonment.

After the verdict, the accused lodged an **appeal** in the Supreme Court. This was denied. Ultimately, the accused appealed to the High Court. The High Court ruled that the accused had a right to a fair trial and that this right was breached because he had no legal representation. In its ruling, the High Court upheld the principles outlined in the *International Covenant on Civil and Political Rights* (1966) and established a common law right (through its judgment) that an individual who is charged with a serious offence has a right to legal representation. The High Court also ruled that a trial judge can delay a trial until a person charged with a serious offence has a lawyer.

Interestingly, in 2009, 23 years after he was charged with importing heroin, the accused (who was by this time aged 52 years old and had changed his name) was sentenced to life imprisonment with a non-parole period of 30 years. The accused was found guilty of murdering a security guard during an armed robbery at Blackburn North Shopping Centre in Melbourne's eastern suburbs.

Dietrich v The Queen (1992) 177 CLR 262

appeal
an application to have a higher court review a ruling (decision)



Source 2 In 1992, the High Court ruled that a trial judge can delay a trial until a person charged with a serious offence has legal representation.

The right of transgender people to marry

In a 2003 case, the Family Court of Australia had to consider whether a person who was born as female, and who had full gender reassignment surgery to transition to male, was considered to be a man for the purposes of Australian marriage laws (which at the time banned same-sex marriage). The ruling in this case, explored in the following scenario, was important in relation to establishing the rights of transgender people to marry (prior to marriage equality laws being passed by the Commonwealth Parliament in 2017).

Actual scenario

The transgender marriage case

In this well-known case, the Full Court of the Family Court of Australia made a ruling that helped establish the rights of transgender people.

In 1999, two people, Kevin and Jennifer married. Kevin was registered at birth as female, although after identifying as male from an early age, Kevin underwent gender reassignment surgery to fully transition to a man in 1997. The Commonwealth Government (through the federal Attorney-General) challenged the validity of their marriage in 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). This would have made their marriage invalid as, at the time of the case, same-sex marriages were not recognised as valid marriages.

In October 1999, the couple had their marriage validated (confirmed) by the Family Court. The Commonwealth Government appealed the decision.

In 2003, the Full Court of the Family Court dismissed the Attorney-General's appeal and upheld the validity of the couple's marriage. The Court ruled that the meaning of the term 'man' for the purpose of the *Marriage Act* was a person who was a man at the time of the marriage, including a post-operative transgender person. In doing so, the Court established the right of post-operative transgender people to lawfully marry in Australia.

It was not until 2017 that the *Marriage Act* was changed to allow for marriage equality (i.e. to allow all people to marry, regardless of their sex, gender or gender identity).

Attorney-General for the Commonwealth v Kevin & Jennifer (2003) 172 FLR 300



Source 3 In 2003, a couple won a landmark case which expanded human rights for transgender people.

Many other common law rights have been established or strengthened by the Australian courts. Some of these rights are examined later in this chapter, including:

- the right to humane treatment when denied liberty (e.g. when in prison or in lockdown)
- the right to freedom of movement
- the right of First Nations people to not be denied their connection to their Country
- the right to freedom of thought, conscience and religion or belief (with lawful exceptions).

Recognising and upholding human rights contained in statutes

In addition to creating common law rights, the courts can also recognise, uphold and strengthen the various human rights protected under statute law, including the Human Rights Charter. These human rights include the right to equality before the law, the right to effective protection against discrimination and the right to humane treatment when deprived of liberty.

In the case explored in the scenario below, the Supreme Court of Victoria ruled that holding youth offenders at Barwon Prison (an adult prison) was a breach of several human rights, including the rights of children and the right to humane treatment when deprived of liberty, which are protected by various statutes, such as the Human Rights Charter.

Actual scenario

Holding children in an adult prison breaches human rights

In November 2016, a group of approximately 40 teenage offenders were transferred to Victoria's Barwon Prison (a maximum-security prison for adult men). This transfer occurred after a group of youth offenders held at the Melbourne Youth Justice Centre damaged sections of the facility during riots that took place over an 18-month period.

In December 2016, the Supreme Court of Victoria ruled that the Victorian Government's policy to detain children who had committed serious offences at Barwon Prison was a breach of the children's human rights.

During the case, the children's lawyers alleged that some of the children held at Barwon Prison were locked in their cells for up to 23 hours a day and were handcuffed during the one hour a day they were released from their cells. It was also alleged that some children suffered bruising from an overuse of force by the prison's security officers.

In contrast, the Victorian Government claimed it had no option other than to house some young offenders at Barwon Prison – in a section of the prison that is completely separate from the adult section of the prison – after the series of riots had left sections of the Melbourne Youth Justice Centre damaged, and because all other youth facilities were full.

In his judgment, Justice Garde ruled that the decision to transfer young offenders to Barwon Prison for 'emergency accommodation' did not take into account various rights of children as outlined in the *Children, Youth and Families Act 2005* (Vic) and the Human Rights Charter, and as such was unlawful.

In particular, the Court recognised that locking the children in their cells (referred to as solitary confinement) for very long periods breached, or may have breached, their right to humane treatment when deprived of liberty, as protected in the Human Rights Charter. The decision was upheld by the Court of Appeal.



Source 4 In 2016, a Supreme Court judge ruled that holding youth offenders at Barwon Prison (an adult prison) was a breach of their rights and was unlawful.

Interestingly, in 2020, the Victorian Ombudsman referred to the Supreme Court's remarks in this case when considering whether the lockdown of public housing tower residents during the COVID-19 pandemic breached their right to protection against cruel, inhuman and degrading treatment, and their right to humane treatment when deprived of liberty. In July 2020, over 400 residents in one public housing tower were unable to leave their apartments to access fresh air and outdoor exercise for the first 7 days of the two week lockdown (read more about the 'Pandemic lockdowns and human rights' in Topic 13.2 on page 476.)

Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families & Children (2016) 51 VR 473

Determining the validity of human rights legislation

The courts can protect the human rights of the Australian people by using their power to declare Acts of Parliament invalid if they are made outside or beyond parliament's law-making powers (i.e. made ***ultra vires***).

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

For example, if the Commonwealth Parliament passes legislation that is beyond its law-making powers (which are outlined in the Australian Constitution), the party who alleges their human rights have been breached may challenge the legislation in the High Court of Australia. The High Court can declare the legislation to be invalid if it considers the Act of Parliament to have been made outside the Commonwealth Parliament's law-making powers. Furthermore, parliament cannot override any ruling made by the High Court in relation to constitutional matters. As we examine in the next topic, the High Court can also declare legislation to be invalid if it breaches a right protected by the Australian Constitution.

In 2020, when the various parliaments in Australia passed laws restricting the movement of Australians to prevent the spread of COVID-19, questions were raised about whether any of the laws were beyond the law-making powers of parliament, or whether they were inconsistent with laws that protect human rights.

In the scenario below, the High Court was called on to determine whether the closure of state borders during the pandemic breached human rights.



Source 5 The High Court of Australia can declare legislation invalid if it breaches a right protected by the Australian Consitution.

Actual scenario

Border closures challenged in court

In May 2020, an Australian businessman and former member of the Commonwealth Parliament, Clive Palmer, challenged the decision of the Western Australian Government to close the Western Australian borders in an attempt to control the spread of the COVID-19 virus. Palmer claimed the closure breached section 92 of the Australian Constitution, which guarantees that 'trade, commerce, and intercourse' (travel) between the states shall be absolutely free. The Western Australian Government, on the other hand, claimed that it had the power, under the *Emergency Management Act 2005* (WA), to undertake emergency measures (such as closing the state borders) to respond to and control the spread of a 'plague or epidemic' (such as the COVID-19 pandemic).

Palmer lost his challenge after the High Court ruled, in simple terms, that the Western Australian Government had the authority to impose the border restrictions. Furthermore, the Court ruled that the burden on interstate movement, caused by closing the Western Australian borders, was 'suitable' or reasonably justified to prevent the spread of the virus into Western Australia and to protect health and life.

Palmer v Western Australia [2021] HCA 5 (24 February 2021)

Codification or abrogation of court decisions

Court judgments that establish, uphold or recognise human rights can be **codified** (i.e. confirmed) by parliament. This means that parliament passes legislation that reinforces and endorses the legal principles established by a court in its ruling.

codify (codification) to collect all law on one topic together into a single statute

For example, the Victorian Parliament has now passed legislation to reinforce and enshrine the principles established in the case of *Dietrich v The Queen*, described earlier, which recognised the need for legal representation for serious indictable offences. The *Criminal Procedure Act 2009* (Vic) now allows a court to stay (stop) a proceeding involving a serious criminal offence to allow the accused an opportunity to get legal representation. If the accused cannot afford legal representation, the court may order Victoria Legal Aid to provide legal representation if it is satisfied that a fair trial cannot occur without the accused being represented. The right to silence is also contained in part in statute law.

As the supreme law-making body, parliament may **abrogate** (cancel) human rights that have been established in common law, although it cannot override rights established in High Court judgments involving the interpretation of the Australian Constitution.

abrogate (abrogation) to abolish or cancel a law (e.g. the cancellation of common law by passing an Act of Parliament)

Strengths and weaknesses of protecting human rights through common law

Some of the strengths and weaknesses of common law in protecting human rights are summarised in Source 6.

Strengths of common law in protecting human rights	Weaknesses of common law in protecting human rights
Courts are independent of parliament and can establish precedent free from political pressures	Common law rights are not always easy to define or identify (as opposed to statutory rights)
Courts can make decisions to establish human rights in areas where parliament has not established human rights	Courts must wait for a case to come before them to be able to declare the existence of human rights
Courts can infer human rights without needing to consider how those rights may need to be limited	Parliament, as the supreme law-making body, can abrogate common law rights
Courts can highlight to parliament gaps in the law that protects human rights, which may encourage parliament to change the law to further protect rights	Often courts are reluctant to recognise certain human rights (e.g. the right to privacy), leaving it up to parliament to protect those rights
Historically, courts have been able to protect human rights and parliament has not overly interfered with common law rights by abrogating them	Judges are limited in applying the law to the case that is before them, and cannot extend their decision to human rights or issues that are not in dispute in the case

Source 6 A summary of the strengths and weaknesses of common law in protecting human rights

13.3 Check your learning

Remember and understand

1 **Define** the terms 'abrogate' and '*ultra vires*'.

2 Read the scenario 'The right to a fair trial'.
   - a **Explain** why the judge made the decision to abandon the trial in this case.
   - b **Suggest** some of the consequences associated with abandoning this trial. In your answer, consider both positive and negative possible consequences.

3 Read the scenario 'The right to legal representation'.
   - a **What** offence was the accused charged with in 1986?
   - b On **what** grounds did the accused lodge an appeal against his conviction?
   - c **What** was the High Court's ruling? **Identify** the international treaty the Court ruled had been infringed.

Examine and apply

4 Read the scenario 'Holding children in an adult prison breaches human rights'. **Outline** the basic facts of the case and identify the Acts that were allegedly infringed.

5 Read the scenario 'The transgender marriage case'.
   - a **Explain** why the couple believed their rights had been infringed.
   - b **Describe** the ruling of the Family Court.
   - c **Discuss** the Family Court's ability to establish the rights of people to marry.

6 Read the scenario 'Border closures challenged in court'.
   - a **Explain** why this case was initiated. In your answer, **describe** what human right was alleged to have been breached by the defendant.
   - b **Explain** why the case did not succeed.
   - c Do you agree with the outcome in this case? **Justify** your response.

Reflect and evaluate

7 **Analyse** two features of the relationship between the courts and parliament in relation to protecting rights.

8 **Evaluate** the ability of the courts to protect human rights in Australia.

13.4 Rights protection: the Australian Constitution

Did you know?

The iconic Australian film *The Castle* (1997) was a fictional story about the Kerrigan family's property, which was to be compulsory acquired by the Commonwealth to expand Melbourne's airport. The film provides a quirky and insightful look into the constitutional protection of the acquisition of property.

Key knowledge



In this topic, you will learn about:

- an overview of the ways in which human rights are protected in Australia through the Australian Constitution.

The Australian Constitution (contained in the *Commonwealth of Australia Constitution Act*) is an important document in Australia's legal system. In simple terms, it outlines how Australia is to be governed. For example, the Australian Constitution created the Commonwealth Parliament and outlines its structure and law-making powers. The Constitution also established the High Court of Australia to interpret and resolve disputes over its meaning. In addition, the Constitution establishes and protects some basic human rights that belong to all Australian citizens. However, as examined earlier in this chapter, the Australian Constitution does not contain a charter or bill of rights – that is, a comprehensive list of the basic rights of the Australian people.

The Australian Constitution protects the human rights of the Australian people in two main ways: through express rights and implied rights.

Express rights

express rights
rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

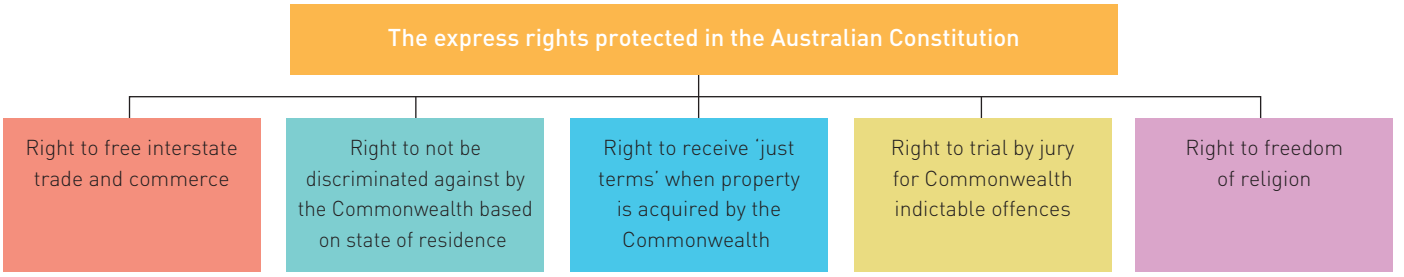
referendum
the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australian people in a public vote by a double majority

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. a majority of voters in 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

The Australian Constitution protects five **express rights** of the Australian people. An express right is explicitly stated (or entrenched) in the wording of the Constitution. It can only be removed or altered by changing the wording of the Constitution. In Australia, the Constitution can only be changed with the approval of the Australian people, through a successful **referendum**, which requires a **double majority**. By comparison, common law rights and human rights protected in statute law can be abolished or altered at any time by parliament passing an Act of Parliament to override or amend them.

The five express rights protected in the Australian Constitution are:

- the right to free interstate trade and commerce (section 92) – this right ensures that trade and commerce between the states and territories is free. For example, it restricts the imposition of taxes on goods moving from one state to another
- the right to not be discriminated against by the Commonwealth on the basis of the state where you reside (section 117) – this right makes it unlawful for the Commonwealth to discriminate against someone based on the state in which they live. This means, for example, that residents of Victoria cannot be subject to a Commonwealth law that would treat them less favourably than people living in New South Wales
- the right to receive 'just terms' when property is acquired by the Commonwealth (section 51(xxxi)) – this right ensures that the Commonwealth pays fair and reasonable compensation for any property that it compulsorily acquires (or gains). Also, the Commonwealth can only obtain property for a purpose or area for which it has the power to make laws (e.g. for airports)
- the right to a trial by jury for Commonwealth indictable offences (section 80) – this right ensures that people who are charged with Commonwealth indictable (serious) offences (e.g. terrorism offences, people smuggling, and importing illegal drugs) have a trial by jury
- the right to freedom of religion (section 116) – this right provides citizens with a limited right to freedom of religion. This right prohibits the Commonwealth from making laws that establish a religion or that ban people from practising their religion.



Source 1 The Australian Constitution protects five express rights.

Focus on the right to trial by jury

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

Section 80 of the Australian Constitution provides the Australian people with the right to trial by jury when charged with a Commonwealth **indictable offence**. This ensures that any person charged with such an offence has the right to have their guilt determined by a jury of their peers. Examples of Commonwealth indictable offences include terrorism, importing and exporting large quantities of unlawful drugs, people smuggling and fraud (including online fraud and identity theft).

This constitutional protection of the right to a jury trial is, however, limited because it only relates to Commonwealth indictable offences, and most indictable offences are crimes under state or territory law. However, each state and territory has its own law governing the right to trial by jury. For example, in Victoria the *Juries Act 2000* (Vic) requires people who plead not guilty to an indictable offence to have their guilt determined by a jury.

In the scenario below, the High Court was required to determine whether the express right to trial by jury for a Commonwealth indictable offence allowed a person accused of a terrorism-related offence to have a trial by judge alone. The request was denied.

Actual scenario

Challenge to the right to trial by jury

In 2016, the High Court was required to interpret the meaning of section 80 of the Australian Constitution, which protects the right of a person accused of a Commonwealth indictable offence to trial by jury. The case arose when a person who was charged with seven terrorism recruitment offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) requested to be tried by a judge alone.

After considerable deliberation and in a majority ruling, six of the seven High Court justices decided that, in accordance with section 80, the accused must have a jury trial. As such, the accused's application was dismissed.

Alqudsi v The Queen (2016) 258 CLR 203

The express right of the Australian people to a limited freedom of religion (as protected in section 116 of the Australian Constitution) is examined later in this chapter (in Topic 13.6). You can also revisit the scenario 'Border closures challenged in court' (on page 485), which examines the express right to 'freedom of trade, commerce and intercourse' (travel) between the states (as protected in section 92 of the Australian Constitution).

Implied rights

An **implied right** is a right that, while not explicitly stated in the wording of the Australian Constitution, is considered (or implied) to exist by the High Court's interpretation of the Constitution's meaning.

The High Court can imply the existence of human rights and other possible rights when resolving disputes between individuals and the state or Commonwealth governments over the meaning of the Australian Constitution. When resolving a dispute over whether or not the Constitution protects a particular right, the High Court justices can decide that a word or phrase within the Constitution implies that the right exists even though it might not be explicitly stated. For example, although the Constitution does not explicitly state that Australians have the right to freely discuss and debate political issues, referred to as the **freedom of political communication**, in various cases throughout the years, the High Court has decided that this freedom is implied to exist and protected in the Constitution.

implied rights
rights that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

freedom of political communication
the right of the Australian people to freely discuss and debate political issues, subject to certain restrictions

Focus on the freedom of political communication

The High Court has ruled that sections 7 and 24 of the Constitution, which expressly require the houses of the Commonwealth Parliament (i.e. the **Senate** and the **House of Representatives**) to be 'directly chosen by the people', indirectly implies the existence of the right to freedom of political communication. This is because, for citizens to make an informed decision to elect members of parliament, they must be able to obtain information about the political views and opinions of the candidates. In other words, both candidates and citizens must be able to discuss political statements and issues (i.e. freely communicate with one another about political issues).

Senate
the upper house of the Commonwealth Parliament

House of Representatives
the lower house of the Commonwealth Parliament



Source 2 The implied right to freedom of political communication protects the right of people to freely communicate with one another about political issues.

The first case to recognise the implied freedom of political communication was *Australian Capital Television Pty Ltd v Commonwealth*. This case is discussed below.

Actual scenario

High Court implies the right to freedom of political communication

In this case, the High Court was required to determine whether the Commonwealth Parliament's *Political Broadcasts and Political Disclosures Act 1991* (Cth) – which banned individuals and organisations from making political broadcasts and from advertising on radio and television during election campaigns – was unfair and in breach of the Australian Constitution.

The justices of the High Court ruled that while our Constitution does not expressly mention or protect the right to freedom of speech, it does (in sections 7 and 24) recognise that the Australian parliamentary system is based on the principle of **representative government**, which requires freedom of political communication. In accordance with the principle of representative government, the parliament must make laws that reflect the views and values of the people. This means that Australians should be able to advertise and discuss their views, policies and opinions in a public forum (e.g. on television or radio) prior to an election, so that voters can make an informed decision when electing the government.

Once a right is implied by the High Court, it may be made clearer or confirmed in later cases. For example, the right to freedom of political communication implied in the *Australian Capital Television* case was considered again in two later High Court cases: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96. These cases confirmed the existence of the right to political communication. The *Theophanous* case extended the implied right to allow comments about members of parliament and their suitability for office. The *Lange* case went further, stating that 'the right to freedom of political communication exists at all times, not just prior to an election'. This right is not a general right to free speech, but only a right to free communication on matters relating to political issues.



Source 3 Political parties and their candidates are allowed to advertise their views before an election so that voters can make informed decisions when voting.

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

representative government
a political system in which the people elect members of parliament to represent them in government

The High Court has ruled in various cases that Australians have the right to freedom of political communication. But should this right be unlimited (i.e. absolute)?

While we have a right to freely discuss and debate political issues, some people think that we should not have the right to make cruel or offensive public comments on political issues such as marriage equality, adoption, abortion or euthanasia. In other words, they believe the right to freedom of political communication should be restricted.

Other people believe the right to freedom of political communication should never be restricted. They generally argue that free speech has a higher value than people's hurt feelings.

In various cases, the High Court has decided that the implied right to freedom of political communication can be restricted when it is reasonable to do so (e.g. if it breaches a person's privacy, or if the communication ruins a person's reputation).

The scenario below is an example of the High Court making a ruling involving the right of an anti-abortion protester to protest outside a fertility clinic that performs, among other services, lawful pregnancy terminations.

Actual scenario

Anti-abortion protesters restricted

Fertility clinics provide health services, including lawful pregnancy terminations (i.e. abortions). In this 2019 case, the High Court had to decide whether laws that prevent anti-abortion protesters from demonstrating near fertility clinics were invalid because they breached the constitutionally protected and implied right to freedom of political communication.

The case arose after the Victorian and Tasmanian Governments passed legislation banning anti-abortion protesters from being (and/or demonstrating) within 150 metres of fertility clinics (these laws are known as the 'safe access zone' laws). These laws aim to protect clients and staff of fertility clinics from being intimidated and harassed by anti-abortion protesters, who regularly wait outside fertility clinics to urge women not to proceed with terminations.

After being charged and convicted under the state safe access zone laws, two anti-abortion protesters (one in Victoria and one in Tasmania) challenged the validity of the state legislation. Their challenge was based on the argument that the safe access zone laws breached the implied right to freedom of political communication by impeding their right to publicly express their views on a political issue (i.e. abortion).



Source 4 In 2019, the High Court upheld the validity of Victorian legislation that bans anti-abortion activists from protesting within 150 metres of fertility clinics.

In April 2019, the High Court rejected the appeal lodged by the anti-abortionists and ordered them to pay the opposing parties' costs. In making this ruling, the High Court confirmed that while Australians have the right to freedom of political communication, this does not give individuals and groups the right to force political messages on other people if that message is 'inconsistent with the human dignity of that person'. In particular, the High Court established a test to determine whether a statute impacted disproportionately on the implied right to freedom of communication.

Clubb v Edwards; Preston v Avery (2019) 366 ALR 1

Enforcement of constitutional rights

All rights protected by the Australian Constitution are fully enforceable by the High Court. If a party (e.g. an individual or a state government) believes the Commonwealth Parliament has passed legislation that infringes a constitutionally protected right, they can challenge the law in the High Court.

When resolving disputes about an alleged breach of a right protected by the Constitution (i.e. any express or implied right) the High Court can declare the Commonwealth's law unconstitutional and invalid.

If the High Court declares legislation to be invalid, the Commonwealth Parliament's options are to:

- amend the legislation to remove the unconstitutional provisions (or sections)
- try to change the Constitution by holding a referendum, which under section 128 of the Constitution is the only way the actual wording of the Constitution can be changed.

Strengths and weaknesses of protecting human rights through the Australian Constitution

Some of the strengths and weaknesses of protecting human rights through the Australian Constitution are set out in Source 5.

Strengths of the Australian Constitution in protecting human rights	Weaknesses of the Australian Constitution in protecting human rights
Express rights can only be abolished or changed through the referendum process; that is, via a compulsory public vote. This means express human rights cannot be changed by parliament without the support of the Australian people	Changing express rights through the referendum process is difficult for many reasons (e.g. a successful referendum requires a high degree of voter support, and voters can be reluctant and sceptical about voting for change). This means human rights may lag behind changes in community attitudes
The implied right to freedom of political communication shows that human rights can be implied or recognised by the High Court even though they may not be expressly written in the Constitution	Very few human rights are expressly protected by the Constitution. The human rights that are expressly protected are very limited in scope (e.g. the limited right to a trial by jury) and act more as a restriction on parliament's law-making than a positive right
All rights, including human rights, protected by the Constitution are fully enforceable through the High Court, and any statute found to breach those rights can be declared invalid	It is expensive and time-consuming to take a case to the High Court to challenge a statute that breaches any right contained in the Constitution
The High Court can interpret the meaning of the words and phrases in the Australian Constitution, so it can keep pace with changes in community values and remain relevant over time	The High Court cannot interpret the meaning of the Constitution and declare an infringement of rights until a relevant case is brought before it

Source 5 A summary of the strengths and weaknesses of the Australian Constitution in protecting human rights

13.4 Check your learning

Remember and understand

1 **Define** the following key terms and provide an example of each:
   - **a** express rights
   - **b** implied rights.

2 **Explain** how the High Court can protect the human rights of Australian people.

Examine and apply

3 Read the scenario 'Challenge to the right to trial by jury'.
   - **a** **Describe** the express right that was being challenged in this case.
   - **b** **Suggest** one reason why the accused may have wanted a judge-alone trial.
   - **c** **Identify** one other way this express human right might be altered.

4 Read the scenario 'High Court implies the right to freedom of political communication'.
   - **a** **Suggest** why, back in 1992, the Commonwealth Government may have wanted to ban political parties from placing political advertisements on television and radio during federal elections. Remember, this was a time before the internet and social media existed.
   - **b** **Explain** why the High Court ruled that the Constitution protected the right to implied freedom of political communication.
   - **c** Do you agree with the High Court's decision in this case? **Justify** your response.

5 Read the scenario 'Anti-abortion protesters restricted'.
   - **a** **Describe** the basic facts of this case. In your response, **explain** why the anti-abortionists pursued this High Court action.
   - **b** **Explain** whether the High Court ruling expanded or restricted the right to freedom of political communication.
   - **c** Do you think anti-abortion protesters should be allowed to protest outside fertility clinics? **Justify** your response.

Reflect and evaluate

6 **Evaluate** the express protection of human rights through the Australian Constitution.

7 'Statute law is a better way to protect rights than the Australian Constitution.' Do you agree with this statement? **Justify** your answer.



Source 6 Inside the High Court of Australia

13.5 The right to vote

Key knowledge

In this topic, you will learn about:

- the human rights issue of the right to vote in Australia, including the nature and development of the human right, the laws that apply to the human right in Australia, possible conflicting attitudes, possible reforms to the protection of the human right in Australia, and one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right.

In Australia, the right to vote is an important basic human right that is mainly protected through statute law (including the Victorian Human Rights Charter). The right to vote, sometimes called 'suffrage', is essentially the freedom or ability of the people to choose their leaders or representatives in an election. In most democracies, the people have the right to vote for their representatives; however, in many other countries, the right is non-existent, restricted, or impacted by issues such as corruption or lack of proper systems or processes to ensure accuracy in votes.

While the right to vote is not expressly stated in the Australian Constitution, there is a right to vote in Australia and in all states and territories. In this topic, you will examine how the right to vote is protected by Australian law, and consider possible reforms to improve this protection.



Source 1 In Australia, even the Prime Minister has the right to vote. In this image Anthony Albanese, who became the Prime Minister, had just voted in the May 2022 federal election.

The nature and development of the right

As mentioned in Topic 13.1, Australia was one of the original countries to support the *Universal Declaration of Human Rights* (1948) (UDHR). In doing so, Australia committed to respecting and promoting the achievement of the basic human rights and freedoms outlined in the UDHR.

The UDHR sets out a range of basic human rights and freedoms that broadly acknowledge the right to vote by recognising:

- the right of all people to take part in the government of their country, either directly or through freely chosen representatives
- that the will (or wishes) of the people shall be 'the basis of the authority of government', and that the people will have the opportunity to express these wishes through the right to vote.

This general right of all people to vote was later set out in two international treaties: the *International Covenant on the Elimination of All Forms of Racial Discrimination* (1965) and the *International Covenant on Civil and Political Rights* (1966) (ICCPR). Australia has adopted both international treaties and, as such, has committed to upholding the right to vote.

The laws that apply

In Australia, the right to vote is mainly protected by:

- statute law, including the Victorian Human Rights Charter
- the Australian Constitution
- common law.

More detail on each of these is provided below.

Statute law

Australia does not have a single national charter of human rights (or bill of rights) that recognises and protects the basic human rights of all Australians. However, the Commonwealth, state and territory parliaments have passed a number of Acts of Parliament (legislation) that recognise and protect basic human rights, including the right to vote. For example, the right to vote in Commonwealth (federal) elections is recognised in the *Commonwealth Electoral Act 1918* (Cth) – the main Act governing the way federal elections are conducted in Australia.

Under the *Commonwealth Electoral Act*, all Australian citizens (subject to certain disqualifications) who are aged 18 years and over have the right to vote in federal elections. In fact, since 1925, voting in federal elections has been compulsory – being considered a duty of Australian citizens. Some citizens are disqualified from voting based on 'objective and reasonable' criteria or grounds, including:

- people who are incapable of understanding the nature and significance of voting due to being of 'unsound mind'
- people who have been found guilty of the criminal offences of treason (e.g. by imprisoning or causing the death of the King, his heir, the Queen Consort, the Governor-General or the Prime Minister, or intentionally assisting an enemy at war with the Commonwealth) or treachery (i.e. using force or violence to overthrow the government)
- a person who is serving a prison sentence of three years or longer.

Each state and territory parliament has also passed its own legislation that sets out the voting rights in state and territory elections. The right to vote in Victoria is also protected in the Human Rights Charter. Section 18 guarantees the right of Victorians to take part in public life, including the right to vote in state and local council elections. A person can, however, be disqualified from voting provided the grounds for doing so are reasonable, necessary, justified and proportionate.

The Australian Constitution

While the right to vote is not expressly protected in the Australian Constitution (i.e. it is not one of the five express rights), the High Court has interpreted sections 7 and 24 of the Constitution as protecting a 'qualified' right to vote (i.e. the right to vote for eligible people).

More particularly, sections 7 and 24 of the Australian Constitution require the houses of the Commonwealth Parliament (i.e. the Senate and the House of Representatives) to be 'directly chosen by the people'. This establishes (or enshrines) in the Constitution the principle of representative government; that is, the idea that parliament is chosen by the people to make laws on their behalf. The Australian Constitution also enshrines the principle 'one person, one vote', meaning that each elector shall vote only once in an election.

Over the years, the High Court has been required to interpret the meaning of sections 7 and 24 of the Australian Constitution to resolve disputes brought before the Court. Some of these cases have required the Court to interpret the meaning of section 7 and 24 to determine who has the right to vote in general elections. In one case, *Roach v Electoral Commissioner* (referred to as the *Roach* case), the High Court ruled that the principle of representative government, as established by sections 7 and 24, protects the right of the Australian people to choose the members of the Commonwealth Parliament, and can only be restricted by parliament if it is reasonable and necessary to preserve the principle of representative government itself. In other words, parliament cannot unnecessarily or unreasonable deny people the right to vote. The *Roach* case is examined in greater detail on page 499.

Common law

Although the right to vote in Australia is mainly protected through statute law, the High Court has established some legal principles when resolving constitutional disputes that protect the right to vote. For example, as mentioned above, when interpreting the meaning of sections 7 and 24 of the Australian Constitution, the High Court has clarified the meaning of these sections and restricted the ability of the Commonwealth Parliament to unreasonably deny Australian citizens the right to vote. In the 2010 case *Rowe v Electoral Commissioner*, the High Court ruled that the Commonwealth Parliament had unnecessarily denied people access to voting (i.e. the ability to vote) in a federal election by passing legislation that reduced the time (i.e. the number of days) available for people to enrol (or register) to vote after a federal election had been called. People who have not enrolled to vote before a federal election are not eligible to vote.

Study tip

The *VCE Legal Studies Study Design* requires you to discuss possible reforms to the protection of rights in Australia. This means you need to be able to provide a reasoned argument as to why the possible reforms may or may not protect human rights, and provide strengths and weaknesses if applicable. You can also give your opinion, and should do so if the question asks.

Possible reforms and conflicting attitudes

The right to vote is an established human right in Australia that is widely accepted within the community. However, while it may appear that the right to vote is well protected by Australian law, some individuals and organisations believe this right could be strengthened in Australia by implementing a number of reforms, such as:

- lowering the voting age
- allowing all prisoners to vote.

Lowering the voting age

Over the years, many individuals and groups – including various community, legal and human rights organisations – have supported lowering the minimum voting age in Australia. Currently, only adults aged 18 years and over are permitted to vote in federal, state and territory elections, although there is growing pressure for this to change. For example, in 2023, independent member of parliament Monique

Ryan MP and the Australian Greens (a political party) confirmed their support for lowering the voting age. Ryan, who was elected as a member of the Federal Parliament in 2022, said that during her election campaign many young people who had views on issues that directly affected them, such as climate change, had expressed to her their desire to vote.

A number of options have been put forward in regard to lowering the voting age in Australia, including:

- allowing 16- and 17-year-olds to vote, but not making it compulsory for them to do so
- making it compulsory for 16- and 17-year-olds to vote, but without imposing fines on those who choose not to vote.

Some legal and human rights organisations, such as the Human Rights Law Centre, support lowering the voting age to 16 years to allow young people – who are 'most likely to feel the long-term effects of today's political decisions' – the opportunity to express their views and choose who governs the country. Many young people are educated and interested in a wide range of political issues that impact upon them and the broader community, such as housing affordability and homelessness, mental health care, and the human rights of First Nations people, people with disability and the LGBTQIA+ community. Lowering the voting age would also encourage young people to be involved in the political process, develop an interest in social and legal issues, and build confidence and trust in our democratic system of government.

Furthermore, some may argue that to deny the right to vote to young people may be in breach of their human rights. For example, in a November 2022 court case, New Zealand's highest court ruled that the minimum voting age of 18 years discriminated against young people and breached their human rights. Following the decision, the then New Zealand Prime Minister, Jacinda Ardern, announced that the government would introduce a bill to lower the voting age to 16 years, although there would be no guarantee it would be passed by parliament.

Did you know?

In 1973 the minimum voting age in Australia was lowered from 21 to 18 years.



Source 2 Over recent years, support has grown for lowering the voting age in Australia.

Those who oppose lowering the voting age often claim that young people lack the life experience, knowledge or maturity to cast an informed vote, although research indicates otherwise, and the same may be said for many adult voters. In contrast, those who support allowing 16- and 17-year-olds to vote argue that research indicates that young people are often well educated and have the maturity to vote. In addition, many young people have lived experience in, and views on, a range of social and legal issues. For example, they may have experienced discrimination in the workplace or when seeking accommodation on the basis of their attributes, including their race, disability, sexuality or gender identity.

Allowing all prisoners to vote

As examined earlier in this chapter, the Commonwealth Parliament can deny people the right to vote in certain circumstances, provided the denial is 'reasonable'. Several legal and human rights organisations, including the Australian Human Rights Commission, believe that current laws banning prisoners who are serving a prison sentence of three years or longer from voting in federal elections is not reasonable and should be abolished. In addition, denying prisoners the right to vote arguably breaches the ICCPR, which is one of the seven main international treaties adopted by the Australian Government. This treaty requires a country's prison system to treat prisoners in a way that will assist their social rehabilitation (i.e. help them change their ways and gain the skills to be integrated back into the community).

Denying prisoners the right to vote also disproportionately affects First Nations people, who account for 32 per cent of the adult prison population in Australia, despite only representing 3.8 per cent of the total Australian population.

In contrast, those who support the current law that bans certain prisoners from voting often claim that people who commit serious crimes should be denied the right to vote as part of their 'punishment'. However, this is not one of the lawful purposes of a **sanction** (or penalty) in any Australian jurisdiction (e.g. state or territory).

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

Source 2 sets out a summary of some of the points you can make when discussing the possible reforms to the protection of the right to vote in Australia. These are not the only points you can make; there may be other relevant points, depending on a particular reform.

Explanation points

- Lowering the voting age would allow young people, many of whom are educated and interested in a wide range of social, legal and political issues that directly impact upon them (or will impact upon them in the future), to express their views and choose who governs the country.
- Lowering the voting age encourages young people to be involved in the political process and develop an interest in social and legal issues, and builds confidence and trust in our democratic system of government.
- Denying all prisoners the right to vote disproportionately affects First Nations people and other vulnerable groups, such as people with mental health issues.
- To deny young people and prisoners the right to vote may be in breach of their human rights under international law.
- Strengthening the right to vote by lowering the voting age or allowing all prisoners to vote requires statutory change (i.e. parliament would need to pass an amending Act of Parliament to change existing legislation). At the federal level, this means the reform would need to be supported by a majority of members in both houses of parliament. The reform would also need to reflect the views of the majority of people in the community, as members of parliament are generally reluctant to support laws that do not reflect community values in fear they will lose electoral (voter) support.

Discussion points	
	• Those who oppose lowering the voting age often claim that young people lack the life experience, knowledge or maturity to cast an informed vote. • Those who oppose allowing all prisoners to vote often claim that people who commit serious crimes should be denied the right to vote as part of their 'punishment' – although this is not one of the lawful purposes of a sanction in any Australian jurisdiction. • Members of parliament can be reluctant to support controversial law reform (such as lowering the voting age or allowing all prisoners to vote) through fear of losing voter support. They may also be influenced by vocal minorities who are against change. • At the federal level, the government rarely holds a majority in the upper house of parliament. This means that any proposal to reform the right to vote would need the support of the opposition, minor parties or independent members of parliament – which could be difficult.

Source 2 Points to consider when discussing the possible reforms to the protection of the right to vote

The right to vote: a case study

The *Roach* case

In 2007, in the landmark case *Roach v Electoral Commissioner* (2007) 233 CLR 162 (referred to as the *Roach* case), the High Court of Australia was required to determine whether an Act of Parliament that banned prisoners from voting in federal elections breached the Australian Constitution.

In 2006, the Commonwealth Parliament passed the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) to change the *Commonwealth Electoral Act 1918* (Cth) so as to ban all prisoners from voting in federal elections. Prior to the 2006 Act, only prisoners who were serving a sentence longer than three years were banned from voting – a restriction that had been introduced by the Commonwealth Parliament in 2004.

In June 2006, there were more than 20 200 prisoners in Australia and 24 per cent of these were First Nations people. One of these prisoners was Vickie Lee Roach, a First Nations Yuin woman who was serving a six-year term of imprisonment for five offences.



Source 3 Vickie Lee Roach, a Yuin woman, is a poet, writer and activist who has shared her experiences and wisdom to raise awareness of the severe disadvantage facing First Nations Australians and to improve the criminal justice system.

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)

Roach believed that the Acts of Parliament that banned prisoners from voting were unfair and breached the principle of representative government as established by the Australian Constitution. With the assistance of the Australian Human Rights Commission, which provided ***pro bono*** (free) legal representation, Roach challenged the constitutional validity (lawfulness) of both Acts in the High Court. More specifically, she argued that the Acts banning prisoners from voting breached sections 7 and 24 of the Australian Constitution, which require the members of both houses of the Commonwealth Parliament to be 'directly chosen by the people'.

In 2007, four of the six High Court justices ruled that the 2006 Act (which banned all prisoners from voting) was inconsistent with the principle of representative government, and so declared the Act unconstitutional and invalid.

In simple terms, the High Court ruled that the principle of representative government, as established by sections 7 and 24, protects the right of the people to choose the members of the Commonwealth Parliament and gives people a right to vote for those who govern the country. The High Court also ruled that parliament should only be able to restrict this right to vote if it is reasonable and necessary to preserve representative government. For example, a 'reasonable' or 'necessary' reason might be banning people of 'unsound mind' from voting.

Accordingly, the High Court decided that it was reasonable for parliament to deny the right to vote to prisoners who had been sentenced for serious criminal offences (i.e. serving a sentence of more than three years), but it was not reasonable for parliament to deny the right to vote to prisoners who had been sentenced for less serious criminal offences (i.e. serving a sentence of three years or less). In summary, the High Court upheld the 2004 legislation (that bans prisoners serving a sentence of three years or more from voting), but declared invalid the 2006 Act that banned all prisoners from voting.

Interestingly, while the *Roach* case helped protect the right to vote by ensuring that prisoners who were serving a sentence of three years or less could vote, it did not give Roach herself the right to vote as she had been sentenced to a six-year term of imprisonment.

13.5 Check your learning

Remember and understand

1 According to the *Commonwealth Electoral Act 1918* (Cth), **who** is eligible to vote in federal elections?
2 **Outline** two reasons why a person may be denied the right to vote in a federal election.
3 **Explain** whether the Victorian Human Rights Charter protects the right to vote.

Examine and apply

4 Read the information about the *Roach* case.
   a **Explain** why the plaintiff initiated a High Court action in this case. In your answer, **describe** the significance of sections 7 and 24 of the Australian Constitution.
   b **What** did the High Court decide in this case?
   c **How** did the High Court's ruling affect the right to vote in federal elections? **Justify** your response.

Reflect and evaluate

5 **Discuss** whether the law that bans prisoners who are serving a sentence of three years or longer from voting in federal elections should be changed.
6 In small groups or as a whole class, discuss whether the voting age in Australia should be lowered.

13.6 The right to freedom of religion

Key knowledge

In this topic, you will learn about:

- the human rights issue of the right to freedom of religion in Australia, including the nature and development of the human right, the laws that apply to the human right in Australia, possible conflicting attitudes, possible reforms to the protection of the human right in Australia, and one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right.

In Australia, one of the essential human rights is the right to freedom of religion or belief. This right not only includes the right to be free to hold, practise and express religious beliefs, but also the right not to hold religious beliefs. In this topic you will examine how the human right to freedom of religion or belief is protected by Australian law and consider possible reforms to improve this protection.

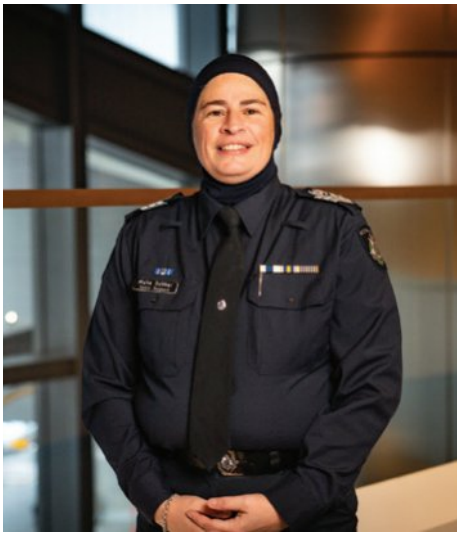
The nature and development of the right

As mentioned in Topic 13.1, Australia was one of the original countries to support the *Universal Declaration of Human Rights* (1948) (UDHR). In doing so, Australia committed to respecting and promoting the achievement of the basic human rights and freedoms outlined in the UDHR. One of the basic human rights and freedoms set out in the UDHR is the right to freedom of thought, conscience and religion. Specifically, Article 18 states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

In simple terms, this means all people have the right to be free to think and believe in what they want, and to adopt and practise any lawful religion or belief.

In 1966, the basic right to freedom of thought, conscience and religion, as stated in the UDHR, was included in the *International Covenant on Civil and Political Rights* (1966) (ICCPR) – one of the seven major international human rights treaties adopted by Australia and reflected in Australian domestic law. In fact, the right to freedom of thought, conscience and religion was strengthened in the ICCPR, which further recognised that no person should be forced to adopt or abandon a religion or belief.



Source 1 The right to freedom of religion relates to a wide range of religious practices, including the wearing of religious dress. In 2004, Senior Sergeant Maha Sukkar became the first member of Victoria Police, and the first police officer in Australia, to wear the hijab.

In accordance with Australia's commitment to the ICCPR and other international treaties, the Australian Government (including government departments such as the Department of Foreign Affairs and Trade) aims to recognise and promote the human right to freedom of religion or belief; that is, the right of all Australians to be free to adopt and practise any lawful religion or belief and to not have any religion or belief imposed by the government.

The laws that apply

In Australia, the right to freedom of religion or belief is protected in a number of ways, including through:

- statute law, including the Victorian Charter of Human Rights
- the Australian Constitution
- common law.

Statute law

Australia does not have a single national charter of human rights (or bill of rights) that recognises and protects the basic human rights of all Australians (including the right to freedom of religion). However, the Commonwealth, state and territory parliaments have passed Acts of Parliament (legislation) that protect the right to freedom of religion. For example, the following anti-discrimination laws make it unlawful to discriminate against a person on the basis of their religion or belief in a range of areas and activities including employment, education, accommodation, membership and sport:

- *Australian Human Rights Commission Act 1986* (Cth)
- *Racial and Religious Tolerance Act 2001* (Vic)
- *Equal Opportunity Act 2010* (Vic).

In addition, section 14 of the Victorian Human Rights Charter protects the right of the Victorian people to freedom of thought, conscience, religion and belief by requiring government authorities (e.g. state and local government departments and agencies, and Victoria Police), the Victorian Parliament and the Victorian courts and tribunals to act in a way that does not prevent people from practising their religion or belief. For example, a person who works in the Victorian public service cannot be prevented from wearing religious dress (e.g. a hijab or patka) or adhering to a particular diet or custom because of their religion or beliefs.

The Australian Constitution

Section 116 of the Australian Constitution provides the Australian people with a limited right to freedom of religion. This section prevents the Commonwealth Parliament from passing a law that:

- establishes a state religion (i.e. it cannot declare a particular religion as the official national religion)
- imposes any religious observance (i.e. requires people to recognise a religious ceremony or formality)
- prohibits the free exercise of any religion (i.e. prevents people from practising their religion, although this can be limited in situations where the practising of a religion may breach Australian law or threaten national security)
- requires a religious test as a requirement for holding any Commonwealth office (e.g. working as a member of the Australian Federal Police).

Section 116 of the Australian Constitution is provided in the extract below.

Extract

The Australian Constitution – 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 of the Australian Constitution only protects freedom of religion to a limited extent because it only applies to and restricts the powers of the Commonwealth Parliament with respect to religion. It does not apply to the parliaments of the states or territories. Section 116 also does not provide a way for people to seek a legal remedy (e.g. damages) in situations where their right to freedom of religion has been breached.



Source 2 The Australian Constitution protects the right of Australians to practise their religion.

Furthermore, when resolving disputes in which individuals or organisations have alleged that Commonwealth law breaches the express right to freedom of religion, the High Court has, at times, adopted a narrow interpretation of section 116 that has limited its scope. For example, this occurred in *Attorney-General (Vic); Ex Rel Black v Commonwealth*, where the High Court ruled that the Commonwealth Government can provide funding to religious schools, even though this could indirectly promote or assist the practice of religion. This case is explored further in the case study on page 507.

Common law

While the right to freedom of religion in Australia is mainly protected through statute law and the Australian Constitution, it is, to some extent, also protected through common law rights. For example, various Australian courts have stated the importance, and clarified the meaning, of freedom of religion or belief when resolving disputes. In particular, the High Court has been called on to interpret the meaning of section 116 of the Australian Constitution when resolving constitutional cases, and in doing so has clarified the meaning of the right to freedom of religion as protected under the Constitution. For example, in the 1943 case of *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* the High Court interpreted the term 'religion' to include non-believers, and provided for the right of a person 'to have no religion'.

In the scenario below, the Federal Court was required to resolve a dispute in which five former students alleged that their secondary school had breached Australia's anti-discrimination laws by failing to protect them from racial and religious discrimination and vilification.

Actual scenario

Racial and religious discrimination in school

In 2022, a group of five former students who had attended the same secondary school commenced a civil action against the state of Victoria (i.e. the Victorian Department of Education, which is responsible for the operation of government secondary schools in the state), and three other respondents, who were all members of the school's educational staff. The former students (the applicants) alleged that the respondents failed to protect them from racial and religious discrimination and vilification, and acted in a way that was contrary to Australia's anti-discrimination laws, such as the *Racial Discrimination Act 1975* (Cth) and the UN's *Conventions on the Rights of the Child* (1989). Australia adopted the *Conventions on the Rights of the Child* in 1990 and, in doing so, committed to protecting a range of human rights belonging to children, including:

- the right of children to be protected against all forms of discrimination on the basis of the status, activities, expressed opinions or beliefs of their parents, legal guardians or family members
- the right of children to freedom of thought, conscience and religion.

The applicants claimed that they had been subjected to antisemitic bullying (i.e. harassment and intimidation against members of the Jewish community because of their culture or religion) and discrimination over a seven-year period. In particular, the applicants claimed that they had been the victims of verbal and physical abuse, and online harassment and threats, both during and out of school hours.

In addition, the applicants alleged that the school failed to act on their complaints and take reasonable steps to prevent the ongoing harassment and racial discrimination, and protect them from harm.

The applicants further claimed that the school failed to appropriately discipline the students who allegedly carried out the threats and abuse, and educate those students about the harm and suffering that is caused by religious and racially based abuse.

The four respondents denied the claims made against them. For example, in response to allegations that one of the school staff members gave a speech that included a reference to Jewish people being 'subhuman', the respondents' legal representatives argued that the applicant who made the allegations had misinterpreted the meaning of the speech, which was given in 'reasonable and good faith' with the intention of promoting racial and religious tolerance.

During the Federal Court trial, the applicants called over 25 witnesses, including past and present students, to give evidence. Some recalled seeing hundreds of Nazi Hakenkreuz symbols (often referred to as Nazi swastikas) 'graffitied' around the school. These symbols are commonly accepted as highly offensive and harmful symbols of racism and hatred against the Jewish community. Others told the Court that they had seen, or were aware of, the applicants being subjected to verbal threats and physical abuse.

In March 2023, after the parties finished presenting their evidence to the court, the judge acknowledged that the complex and lengthy case was difficult for all parties and then adjourned to consider her decision. A summary of the outcome of this case is provided on your obook pro.

Kaplan v State of Victoria

Additional resource
A summary of the outcome of this case

Possible reforms and conflicting attitudes

Over recent years, there has been significant debate within the Australia community about the extent to which the right to freedom of religion should be protected by statute law. Some individuals, groups and political parties have supported the introduction of new laws to prevent religious organisations from discriminating against people on the basis of certain attributes (such as their sexuality, gender identity or marital status). Others have sought to protect the right of religious organisations to hold religious beliefs and promote or foster these beliefs within their organisations. In other words, some people support the ability of religious organisations (such as religious schools, hospitals and aged-care facilities) to refuse prospective customers or employees if their religious beliefs or ethos is not consistent with that of the organisation. For example, some people accept the view that if a religious organisation owns a conference centre, it should be able to refuse to allow members of the LGBTQIA+ community to hire the facility if it believes the conference attendees would discuss issues that were against its own religious beliefs or ethos.

The debate appeared to gain strength after the Commonwealth Parliament passed the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), which allowed for marriage equality (i.e. same-sex marriage) in Australia. While this law does not force religious organisations (e.g. churches) to marry same-sex couples, various social and media commentators argued that some religious organisations believed that it signalled the erosion of their right to hold certain religious views (e.g. to oppose same-sex marriage) and instil them within the organisations. In response, some individuals and religious organisations pressured the government to legislate for greater religious protection.

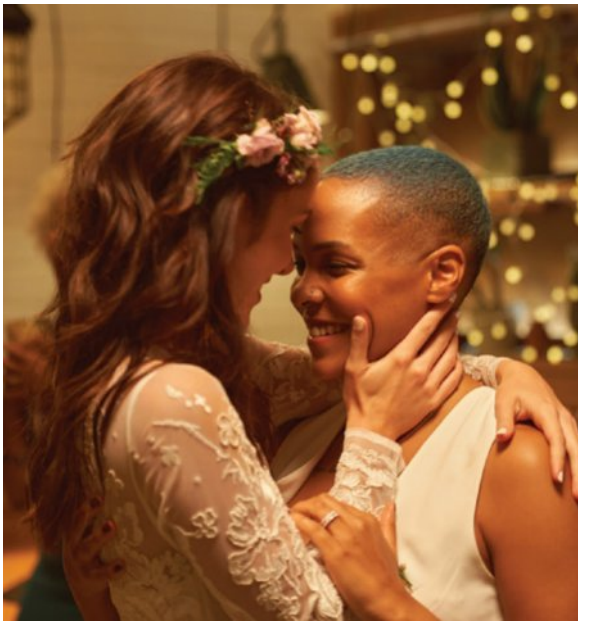
In 2019, the Commonwealth Government introduced a **bill** (the Religious Discrimination Bill 2019 (Cth)) into the Commonwealth Parliament to ban discrimination, in specified areas, on the grounds of religious belief or activity. One of the purposes of the Bill was to make it unlawful for an individual or organisation (e.g. an employer or a service provider such as a school or hospital) to discriminate against a person either for holding a religious belief or for not holding a religious belief. The Bill proposed to make it unlawful, for example, for an employer to dismiss an employee on the basis of their religious beliefs.

People who opposed the Bill claimed that the difficulty in defining 'religious beliefs' would lead to an increase in discrimination against individuals, particularly members of minority groups (e.g. LGBTQIA+ people, people with disability, and people from diverse cultural backgrounds). This increased discrimination would have occurred, as religious organisations would have been allowed to refuse to accept or employ people who did not uphold or adhere to the religious views or faith of the organisation. In contrast, those who supported the Bill claimed that religious organisations need more protection to enable them to uphold and instil their religious beliefs within the organisations.

After the Bill was strongly criticised by various human rights organisations, it was revised and reintroduced into Parliament in November 2021. The new version of the Bill, however, continued to create controversy by proposing to allow individuals to make 'statements of belief' that otherwise might breach anti-discrimination laws, provided the statements did not harass, threaten, intimidate or **vilify** a person or group. Once again, the Bill generated criticism and, while it was passed with amendments by the House of Representatives in February 2022, it failed to pass the Senate before the May 2022 federal election and it lapsed (i.e. the bill was not passed in time before the next election).

bill
a proposed law that has been presented to parliament to become law. A bill becomes an Act of Parliament once it has passed through all the formal stages of law-making (including royal assent)

vilify (vilification)
behaving in a way that encourages or provokes hatred, serious contempt or severe ridicule (teasing) of a person or group on the basis of their race or religion



Source 3 While the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) allows for marriage equality, it does not force religious organisations to marry same-sex couples.



Source 4 The Religious Discrimination Bill 2019 (Cth) proposed to make it unlawful to discriminate against a person for holding a religious belief.

In response to the Religious Discrimination Bill, the Victorian Government introduced the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic) to specifically prevent religious organisations and schools from refusing to hire people or terminating the employment of people based on protected attributes such as sexuality, gender identity or marital status. The Bill was passed by the Victorian Parliament in 2021. You can read more about this law in Chapter 11, Topic 11.1.

In June 2022, the Victorian Parliament also passed the *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* (Vic) to make it a criminal offence generally to display symbols of Nazi ideology, such as the Nazi Hakenkreuz.

In November 2022 the newly elected Federal Labor Government asked the **Australian Law Reform Commission** (a body that makes recommendations for law reform) to undertake an inquiry. The Commission was asked to review the religious exemptions for schools in Australia's Commonwealth anti-discrimination laws to ensure that they do not discriminate against a student or staff member on the basis of sexual orientation, gender identity, marital status or relationship status, or pregnancy – while still allowing religious schools to build a community of faith by 'giving preference, in good faith, to persons of the same religion' when selecting staff.

Australian Law Reform Commission an Australian Government agency that reviews, researches and makes recommendations to the Australian Parliament about possible changes to Commonwealth law

Regardless of the outcome of the review, the debate over the extent to which the right to freedom of religion or belief should be protected will no doubt remain a controversial issue.

Source 5 sets out a summary of some of the points you can make when discussing the possible reforms to the protection of the right to freedom of religion in Australia. These are not the only points you can make; there may be other relevant points, depending on a particular reform.

Explanation points

- Changing the law to provide greater protection of the right to freedom of religion is controversial because it involves opposing reforms. For example, it can involve changing the law to decrease the ability of religious organisations to discriminate against people on the basis of certain attributes (e.g. their sexuality, gender identity or marital status), or changing the law to promote the ability of religious organisations to hold their religious beliefs, and promote or foster these beliefs within the organisations (e.g. by allowing them to deny service or employment to people hold religious beliefs or ethos that are not consistent with their own).
- Law reform to strengthen the protection of freedom of religion requires statutory change (i.e. parliament would need to pass an amending Act of Parliament to change existing legislation). At federal level, this means any reform would need to be supported by a majority of members in both houses of parliament. Reform would also need to reflect the views of the majority of people in the community, as members of parliament are generally reluctant to support laws that do not reflect community values, through fear they will lose electoral (voter) support.
- At federal level, the government rarely holds a majority in the upper house of parliament. This means that any proposal by a more conservative government to strengthen the right to freedom of religion by softening anti-discrimination laws would need the support of the opposition, minor parties or independent members of parliament – which could be difficult.
- Section 116 of the Australian Constitution prevents the Commonwealth Parliament from passing any law reforms that impose or restrict religious practice. If parliament passes such law, the validity of the legislation may be challenged by an individual or group in the High Court.

Discussion points	
	• Strengthening the ability of religious groups to promote their religious beliefs within their organisations (e.g. schools and hospitals) could lead to greater discrimination against people, particularly members of minority groups (such as LGBTQIA+ people and people from diverse cultural backgrounds). It may also breach international anti-discrimination laws. • Members of parliament can be reluctant to support controversial law reform (such as increasing the ability of religious organisations to hold religious beliefs and promote or foster these beliefs within their organisations) through fear of losing voter support. In contrast, however, they may be influenced to support such change by influential or vocal minorities (including powerful religious organisations). • If the Commonwealth Parliament passes a law that potentially breaches the right to freedom of religion as protected in section 116 of the Australian Constitution, the validity of the legislation may be challenged by an individual or group in the High Court.

Source 5 Points to consider when discussing the possible reforms to the protection of the right to freedom of religion in Australia

The right to freedom of religion: a case study

Over the years, the High Court has been called on to resolve disputes in which individuals and organisations have alleged that a Commonwealth law has breached the express right to freedom as protected in the Australian Constitution. In doing so, the High Court has interpreted and clarified the meaning of 'freedom of religion', as protected by the Constitution, and established legal principles (precedents) to be followed in the future.

The *DOGS* case

In 1981, in the landmark case *Attorney-General (Vic); Ex Rel Black v Commonwealth* (1981) 146 CLR 559 (known as the *DOGS* case, referring to the advocacy group Defence of Government Schools, which brought the action), the High Court was required to determine whether legislation passed by the Commonwealth Parliament that allowed it to give financial assistance to non-government schools in Australia's states and territories was invalid. The plaintiffs claimed that giving money to independent schools (including religious schools) was in breach of section 116 of the Constitution, which bans the Commonwealth from establishing any religion or imposing any religious observance.

In its decision, the High Court reinforced the right to freedom of religion and confirmed that the Commonwealth cannot establish a religion. However, the High Court ruled that the legislation was valid, and that allowing the Commonwealth Government to give grants (money) to the states and territories to be used to provide financial assistance to non-government schools did not breach the right to freedom of religion as stated in section 116.

More precisely, the High Court ruled that there was no religious inequality, because the grants did not differentiate between different schools based on religion. The Court's decision, therefore, allowed the Commonwealth to give financial assistance to non-government schools, including religious schools.

The *School Chaplains* case

Three decades later, in the case of *Williams v Commonwealth* [2012] 248 CLR 156 (known as the *School Chaplains* case), the High Court was required to resolve another dispute involving school funding and the constitutionally protected right to freedom of religion. In this case, the plaintiff challenged the Commonwealth Government's power to fund a school chaplaincy service that was running in his children's government primary school in Queensland.

The dispute arose following the Commonwealth Government's decision to enter into a funding agreement with a Queensland religious organisation to provide chaplaincy services including 'general religious and personal advice to those seeking it' (e.g. students and staff) and pastoral care services to support the emotional wellbeing of the school community. The chaplain was not allowed to take advantage of their position to encourage or impose any religious beliefs.

The plaintiff argued that the funding agreement between the government and the religious organisation was invalid for two reasons – one being that it breached section 116 of the Australian Constitution, which states that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'. The plaintiff argued that the position of school chaplain is an 'office … under the Commonwealth' and a religious test is required to hold the office (or position) because school chaplains need recognised religious qualifications. The High Court, however, disagreed with this argument and unanimously dismissed the challenge under section 116 relating to a 'religious test' because the school chaplains were not employees of the Commonwealth.

Interestingly, the High Court did support the plaintiff's other claim – that the Commonwealth Government did not have the authority under another section of the Constitution (section 61) to enter into the funding agreement – and, as such, declared the funding agreement invalid.

Immediately after the High Court's decision, the Commonwealth Parliament passed an Act of Parliament (the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth)) to give the Commonwealth Government the power to fund the school chaplaincy program and other similar programs. Between 2012 and 2022, all schools had the option to participate in the Commonwealth-funded National Schools Chaplaincy Program. In 2023, that program was replaced with a broader National Student Wellbeing Program, which allows all government and non-government schools to engage a chaplain or student wellbeing officer to provide pastoral care services and strategies that support the wellbeing of the wider school community.

13.6 Check your learning

Reflect and explain

1 **Define** the right to freedom of religion or belief and **identify** one international treaty that protects this human right.

2 **Explain** how the Victorian Human Rights Charter promotes the right to freedom of religion.

Examine and apply

3 **Explain** why the express right to freedom of religion, as protected in the Australian Constitution, is said to be 'limited'.

4 Read the scenario 'Racial and religious discrimination in school'.
- **a** **Identify** the applicants and respondents in this case.
- **b** **Explain** why the applicants claimed the school had breached their human rights.
- **c** **Discuss** the ability of individuals to protect human rights by bringing a case to court. In your answer, refer to the outcome of this case.

5 Read the information about the *DOGS* case and the *School Chaplains* case.
- **a** **Explain** why the plaintiff initiated a High Court action in the *DOGS* case.
- **b** **What** did the High Court decide in the *DOGS* case?
- **c** **Explain** the impact of the High Court's ruling in the *DOGS* case on:
  - **i** the constitutional protection of the right to freedom of religion
  - **ii** the human rights of individuals.
- **d** **Explain** why the plaintiff in the *School Chaplains* case believed the Commonwealth Government had breached the express right to freedom of religion.
- **e** **What** did the High Court decide, in relation to the Commonwealth's alleged breach of section 116, in the *School Chaplains* case?
- **f** In a small group, discuss whether the Commonwealth Government should provide financial assistance to non-government schools so that they can engage a school chaplain or student wellbeing officer.

Reflect and evaluate

6 'Australia should strengthen the right to freedom of religion by offering greater protection to religious organisations.' **Discuss** the extent to which you agree with this statement. In your answer, refer to the Religious Discrimination Bill that was introduced into the Commonwealth Parliament in 2019 and 2021.

13.7 The rights of First Nations people

Key knowledge

In this topic, you will learn about:

- the human rights issue of the rights of First Nations people in Australia, including the nature and development of the human right, the laws that apply to the human right in Australia, possible conflicting attitudes, possible reforms to the protection of the human right in Australia, and one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right.

First Nations Australians are the first peoples of Australia, having lived on the continent for at least 65 000 years – long before the colonisation by the British in the 1700s. The term 'First Nations people' is used to describe Aboriginal and Torres Strait Islander people, and recognises that they are the sovereign people of this land. Other acceptable terms include 'First Peoples' and 'Koori', the latter of which describes Aboriginal people of south-east Australia (New South Wales, Victoria and some parts of Tasmania).

While some human rights of First Nations people have been recognised in Australia through statute law and common law, the extent and adequacy of this recognition and protection is limited. The clear difference in the standard of living and quality of life experienced by many First Nations people and non-Indigenous people in Australia shows that the human rights of First Nations people are not being fully observed or upheld. For example, the life expectancy of First Nations Australians is approximately 9–10 years lower than it is for non-Indigenous people, and First Nations people in Australia are 10 times more likely to be imprisoned and three times more likely to experience homelessness than non-Indigenous people. First Nations people also experience lower standards of physical and mental health, employment and education compared to non-Indigenous people.

In this topic you will examine to what extent the human rights of First Nations people are protected by Australian law, and consider possible reforms to improve the protection of these human rights.

The nature and development of the right

As mentioned in Topic 13.1, Australia was one of the original countries to support the *Universal Declaration of Human Rights* (1948) (UDHR). In doing so, Australia committed to respecting and promoting the achievement of the basic human rights and freedoms outlined in the UDHR. The UDHR sets out a range of basic human rights and freedoms that broadly recognise and promote the rights of Indigenous (or First Nations) peoples throughout the world, including the right of all people:

- to be equal before the law and entitled to equal protection of the law against discrimination of any kind, such as on the basis of race, colour, sex, language, religion, birth or other status
- to not be subjected to torture or cruel, inhuman or degrading treatment or punishment
- to a nationality and not to be arbitrarily (or randomly) deprived of their nationality
- to own property alone or with others and not to be arbitrarily deprived of their property.

In addition, the *International Convention on the Elimination of All Forms of Racial Discrimination* (1969) and the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) (UNDRIP) were established to more specifically protect the rights of First Nations peoples. The UNDRIP is the most significant international declaration on the rights of Indigenous peoples because it expands upon the existing human rights as outlined in the UDHR. For example, the UNDRIP specifically recognises that Indigenous peoples have the right to self-determination, including the right to self-government in matters relating to their own internal and local affairs, and the right to not be subjected to forced assimilation or destruction of their culture. Indigenous people, including First Nations Australians, were involved in the creation of the UNDRIP.

As we will examine later in this chapter, however, the Australian Government was one of the four (out of 158) countries that voted against the UNDRIP in 2007 and, as such, has not formally adopted the Declaration. Australia has also been regularly criticised by international organisations (including the UN) for its treatment of First Nations Australians. For example, in 2022, the UN Human Rights Committee criticised Australia for failing to address racism and the treatment of First Nations Australians in the criminal justice system (including the overrepresentation of First Nations adults and children in the prison system, and deaths in custody), and for its failure to adequately protect Torres Strait Islander peoples against the impacts of climate change (which interferes with their right to enjoy their culture and their private life, family and home).

The laws that apply

In Australia, the rights of First Nations people are protected to a varying, and often limited, extent in two main ways, namely through:

- statute law, including the Victorian Charter of Human Rights
- common law.

The Australian Constitution does not specifically protect the human rights of First Nations people. For example, it does not include any specific express rights of First Nations people. While the Constitution established the creation of Australia as a nation on the traditional land belonging to First Nation people, First Nations people were not included in the discussions or processes that took place to establish the Constitution; nor were they recognised in that document as being the traditional owners and custodians of the land.

On the contrary, the Australian Constitution discriminated against First Nations people by expressly preventing the Commonwealth Parliament from making any laws for First Nations people in the states, and excluding them from the national census. These discriminatory sections of the Constitution were, however, removed in 1967 after a successful referendum (supported by over 90 per cent of Australian voters).



Source 1 The 1967 referendum was successful in removing some sections of the Australian Constitution that discriminated against First Nations peoples. This picture shows Faith Bandler (right), a leading campaigner for the referendum, preparing to cast her vote.

As you will examine later in this topic, there has been increased support for altering the Australian Constitution to establish a **First Nations Voice** to Parliament in the Constitution and to acknowledge the First Nations peoples as the traditional owners and custodians of the land in the Constitution's preamble (or 'introduction').

First Nations Voice an independent advisory body for First Nations people to advise the Commonwealth Parliament and Government on the views of First Nations peoples on matters that affect them

Statute law

Australia does not have a single national charter of human rights (or bill of rights) that recognises and protects the basic rights of all Australians (including the human rights of First Nations peoples). However, the Commonwealth, state and territory parliaments have passed a number of Acts of Parliament (legislation) to protect the human right of all people, including First Nations people, to not be discriminated against on the basis of their race or subjected to racial vilification.

For example, the following anti-discrimination laws make it unlawful to discriminate against a person on the basis of their race, colour or national or ethnic origin in a range of areas and activities, including employment, education, accommodation, membership and sport:

- *Racial Discrimination Act 1975* (Cth)
- *Equal Opportunity Act 2010* (Vic).

In addition, the *Racial and Religious Tolerance Act 2001* (Vic) bans behaviour that encourages hatred, serious contempt, revulsion or severe ridicule against another person or group of people because of their race and/or religion.

Specific Commonwealth, state and territory legislation has also been created to protect the rights of First Nations peoples, including:

- the *Native Title Act 1993* (Cth), which recognises and protects of the right of First Nations peoples, in certain, limited circumstances, to have **native title** over their traditional lands, sets down some basic principles in relation to native title, and establishes a mechanism for determining claims to native title
- the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), which allows the Australian Government to preserve and protect places, areas (including Australian land and waters) and objects of particular significance to First Nations peoples, if state and territory laws fail to do so.

native title the legal recognition of the right of First Nations 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)

The extent to which these laws effectively address and protect the human rights of First Nations peoples is, however, debatable. For example, many conditions need to be met for native title to be granted, and the process for receiving compensation (i.e. money) for native title that has been compulsorily acquired (i.e. taken) by the government (e.g. for large infrastructure projects such as roads and railways) is slow and complex.

The Victorian Human Rights Charter sets out the basic rights and freedom that belong to all people in Victoria, including First Nations people. Unlike the Australian Constitution, it includes a specific acknowledgment, in its preamble, of the special importance of human rights to First Nations Victorians, as descendants of Australia's first people, who have a 'diverse spiritual, social, cultural and economic relationship with their traditional lands and waters'.

Section 19 of the Human Rights Charter, which protects the right to protection of cultural rights, also specifically recognises that First Nations peoples hold distinct cultural rights. These include the right:

- to enjoy their identify and culture, to maintain and use their language, and to maintain their kinship ties to members of their community, and
- to freely undertake cultural practices and to access cultural institutions, ancestral (traditional) lands, natural resources and traditional knowledge.

Common law

Over the years, there have been a number of court cases that have had a significant impact on the protection of human rights for First Nations peoples in Australia and have created common law rights. One of the most well-known and important cases to establish the rights of First Nations peoples is *Mabo v Queensland* (known as the *Mabo* case). In this case, the High Court made the historic decision to overrule the long-established false common law principle that Australia was ***terra nullius*** (i.e. an 'empty land') when it was colonised by the British in 1788. In doing so, the High Court recognised land rights for First Nations peoples.

terra nullius
a Latin term meaning 'empty'; 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

Since the *Mabo* case, a number of other court cases, such as the *Timber Creek* case (discussed in the scenario below), have clarified and acknowledged First Nations peoples' land rights in Australia.

Actual scenario

The *Timber Creek* case

In this 2019 case, known as the *Timber Creek* case, the High Court awarded the Ngaliwurru and Nungali peoples a considerable amount of damages as compensation for the loss of part of their land. This decision is regarded by many as the most significant decision about native title since the *Mabo* case.

In 2009, the Ngaliwurru and Nungali peoples had been recognised as the native title holders of the land in and surrounding the small town of Timber Creek in the Northern Territory (which is approximately 600 kilometres south of Darwin). Despite this, the Northern Territory Government constructed roads and other infrastructure there. This resulted in the Ngaliwurru and Nungali peoples losing approximately 1.2 square kilometres of their land.

In 2011, the Ngaliwurru and Nungali peoples applied for compensation for the loss of their land from the Northern Territory Government and the Commonwealth Government. This application included compensation for spiritual and cultural loss caused by being disconnected from their land, as well as economic loss.

In 2016, the Ngaliwurru and Nungali peoples won their Federal Court action and were awarded $3.3 million in compensation, including $1.3 million for spiritual and cultural loss. However, the Northern Territory and Commonwealth Governments challenged this ruling on the basis that the amount awarded for spiritual and cultural loss was excessive.

In 2019, the High Court ruled that the $1.3 million awarded by the Federal Court for spiritual and cultural loss was appropriate, but reduced the other compensation payable. The Ngaliwurru and Nungali peoples were ultimately awarded a total of $2.5 million.

This was an important decision because it further recognised the right of First Nations peoples to be compensated for the loss of their land, including for spiritual and cultural loss.

Northern Territory v Griffiths (deceased) & Jones on behalf of the Ngaliwurru & Nungali Peoples [2019] HCA 7 (13 March 2019)

Later in this topic you will also examine the common law right of First Nations people to not be denied their connection to Country, as established in the High Court case *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3 (known as the *Love* case).

Possible reforms and conflicting attitudes

Over recent years, research has shown that there has been a significant shift in the attitudes of non-Indigenous Australians in relation to the need to better protect the human rights of First Nations peoples. This has occurred as non-Indigenous people have become more aware of the extreme disadvantage, harm and trauma suffered by First Nations peoples as a result of being dispossessed of their land and severely discriminated against since British colonisation.

However, while there has been greater acknowledgment of the need to improve the rights and living standards of First Nations peoples, many significant social, legal and political changes are needed to address the many areas of disadvantage for First Nations peoples in Australia. Examples of possible reforms to improve the rights of First Nations peoples include:

- self-determination
- constitutional recognition
- addressing disadvantage in the criminal justice system.

Self-determination

The UNDRIP specifically recognises that Indigenous peoples have the right to **self-determination**, including the right to self-government in matters relating to their own internal and local affairs. However, historically, First Nations peoples in Australia have not had decision-making control over the issues that directly affect their lives. For example, Australian governments still create most laws and policies for First Nations peoples without adequately consulting First Nations communities.

self-determination the right of a group or race of people to make decisions about their own lives according to their own view, values and beliefs. This includes the right to self-government in matters relating to their own internal and local affairs

An example of this occurred in 2023 when the Commonwealth Government implemented a series of policies (including a restriction on the sale of alcohol) as an emergency response to address a number of social issues in the town of Alice Springs in the Northern Territory. These social issues included increased levels of violence and property theft and damage. A number of First Nations groups and respected community leaders noted that they were not involved in discussions about possible policy options, or adequately consulted prior to the policies being implemented. They also did not believe that imposing alcohol restrictions was the most effective way to address the many complex underlying causes behind the anti-social behaviour. For many, it was a clear example of discrimination.

For First Nations peoples, self-determination would give them the opportunity to have meaningful control over their lives, communities and matters that directly relate to their affairs and wellbeing. Self-determination can be achieved in many ways, including returning land – and the right to control the land – to First Nations peoples, and restoring the ability of First Nations peoples to control their own community services, including health, education, housing and legal services.



Source 2 In 2023, after policies were imposed on the town of Alice Springs to address social issues, many First Nations groups and leaders felt that they had not been adequately consulted about the changes.

Self-determination may also be partly achieved through the creation of the First Nations Voice, which would be a constitutionally recognised body chosen by and consisting of First Nations people, with the authority to provide advice on laws, policies and matters that affect the lives of First Nations peoples. Enshrining (or including) the Voice to Parliament within the Constitution would ensure that the Voice would be a permanent advisory body that could not be abolished by the Commonwealth Parliament. One reason why this is important is because each of the past three First Nations representative bodies that have been established through Commonwealth legislation (statute law) have been abolished.

The Voice to Parliament does, however, have critics, including some First Nations people who do not believe it will resolve the many problems facing First Nations peoples. In addition, some people are opposed to the Voice to Parliament on the basis that First Nations people should not be required to 'gain permission' or approval from the Australian people (96 per cent of whom are non-Indigenous) to form a body that provides advice on First Nations matters. Similarly, some critics argue that the establishment of an advisory body that can only provide non-binding advice and recommendations to the Commonwealth Parliament is not the same as having self-determination (as recognised by international law).



Source 3 In February 2023, Prime Minister Anthony Albanese announced that a referendum to enshrine a Voice to Parliament in the Australian Constitution would be held between October and December that year. In this image, the Prime Minister is shown at the 2022 Garma Festival in the Northern Territory, which celebrates the life and culture of the Yolngu people.

Constitutional recognition

Another possible reform to improve the protection of the human rights of First Nations peoples is to expressly recognise and acknowledge the First Nations peoples as the traditional owners and custodians of the land in the Australian Constitution. This reform, however, can only be achieved through a successful referendum, and so would need to be supported by a majority of the Australian people to succeed.

In 1999 a referendum was held to include the following statement in the preamble (or introduction) to the Australian Constitution, but the referendum failed:

> We the Australian people commit ourselves to this Constitution ... 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.

As mentioned earlier, however, the attitudes of non-Indigenous Australians in relation to the need to recognise and protect the rights of First Nations peoples has significantly changed over the past 25 years, and so there is an increased likelihood that a similar referendum would now be successful. Furthermore, while some individuals and groups believe recognition of First Nations peoples in the Constitution is purely symbolic and will not result in any tangible (or material) improvement in human rights, it could acknowledge the historical exclusion of First Nations peoples since British colonisation and, depending on the wording of the recognition, could enshrine or secure anti-discrimination principles in the Constitution.

Addressing disadvantage in the criminal justice system

As mentioned earlier in this chapter, the Australian Government has not formally adopted the UNDRIP, and has been criticised by international organisations (including the UN) for its treatment of First Nations Australians. Much of this criticism has been made in relation to the inequality and disadvantage suffered by First Nations people when they are dealing with the criminal justice system. As such, many human rights and legal organisations have suggested a vast range of reforms to improve the rights of First Nations peoples in this area. For example, the Human Rights Law Centre has suggested the following reforms:

- changing the criminal laws that discriminate against First Nations people and contribute to the overrepresentation of First Nations people in the Australian prison system, including abolishing mandatory (or compulsory) minimum sentencing laws and prison sentences for minor offending, and increasing the age of criminal responsibility from 10 years to at least 14 years
- introducing legislation to ensure an independent investigation into First Nations deaths in custody (i.e. in policy custody, adult prisons and youth detention centres) and to ensure that no First Nations person is subjected to inhumane treatment (including abuse, torture and solitary confinement) while being held in custody
- investing in family violence prevention and legal services to ensure that First Nations women who have survived family violence are not forced into the criminal justice system.



Source 4 Each year, governments throughout Australia face pressure from First Nations and non-Indigenous Australians to improve the recognition and promote of the human rights of First Nations people.

Source 5 sets out a summary of some of the points you can make when discussing the possible reforms to the protection of the rights of First Nations peoples in Australia. These are not the only points you can make; there may be other relevant points, depending on a particular reform.

Explanation points	• Over recent years there has been greater acknowledgment within the broader Australian community of the need to improve the rights and living standards of First Nations peoples. This may encourage a change in the law, as members of parliament are more likely to support law reform that reflects the views of the of the majority of people, as failure to do so may result in the loss of electoral (voter) support. • Changing the law to recognise the right of First Nations people to self-determination would enable First Nations people to have meaningful control over their lives, communities and matters that directly relate to their affairs. It would also ensure that Australia upholds the right to self-determination as recognised in international law. • Entrenching (or including) a First Nations Voice to Parliament in the Australian Constitution would prevent future Commonwealth Parliaments from abolishing this Voice (without the consent of a large majority of the Australian people at a referendum). • Changing the Australian Constitution to expressly recognise and acknowledge the First Nations peoples as the traditional owners and custodians of the land would acknowledge the historical exclusion of First Nations peoples since British colonisation and, depending on the wording of the recognition, could enshrine or secure anti-discrimination principles in the Constitution. • The courts are able to change the law to recognise the rights of First Nations peoples by establishing common law rights when resolving cases involving an alleged breach of the rights of First Nations peoples.
Discussion points	• While, over the years, statute law and common law have been changed a number of times to recognise and promote the rights of First Nations peoples, these rights are not fully observed or upheld, as evidenced by the clear differences in the standard of living and quality of life experienced by First Nations people and non-Indigenous people in Australia. • Changing statute law that discriminates against First Nations people requires the support of the broader community, because members of parliament can be reluctant to support controversial law reform (such as increasing the age of criminal responsibility and abolishing mandatory minimum sentencing laws) through fear of losing voter support. They may also be influenced by vocal minorities that oppose change. • At federal level, the government rarely holds a majority in the upper house of parliament. This means any proposal to strengthen the rights of First Nations peoples needs the support of the opposition, minor parties or independent members of parliament. • Protecting the rights of First Nations peoples through constitutional change is difficult because any change must be supported by a large majority of the Australian people at a referendum. This can be difficult to achieve because conservative voters can be reluctant to support any change to the Constitution, and some people may vote against change because they do not fully understand the proposal for change or are disinterested. • It can be argued that constitutional recognition and acknowledgment of First Nations peoples as the traditional owners and custodians of the land will not result in any tangible (or material) improvement in the human rights of First Nations peoples. • Reforms to improve the rights of First Nations peoples, such as investing in family violence prevention and legal services for First Nations people, require the government to be willing to increase vital funding in these areas. • The courts can only establish common law rights to protect First Nations peoples when a case is brought before them. This is reliant on people (usually First Nations people who are directly affected by the alleged breach) having the money and willingness to pursue costly and potentially stressful court action.

Source 5 Points to consider when discussing the possible reforms to the rights of First Nations peoples in Australia

The rights of First Nations peoples in Australia: a case study

The *Love* case

In the 2020 landmark case *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3 (11 February 2020) (referred to as the *Love* case), the High Court of Australia clarified and expanded the rights of First Nations peoples by ruling that they have a sense of identity and belonging in relation to Australia that cannot be changed or denied by the Commonwealth Parliament. In having such an undeniable connection to the land, First Nations people cannot be considered to belong to another place. Therefore, they cannot be subject to Commonwealth immigration laws and cannot be deported from Australia.

This case – which required the High Court to consider what it means to be a First Nations Australian – arose after two First Nations men, who had been convicted of serious (indictable) offences, faced being deported from Australia by the Australian Government. This was because, although they were First Nations Australians, they were both born overseas and only held permanent residency visas, despite having lived in Australia since they were children. After they had been found guilty of committing serious criminal offences, the Australian Government – relying on the Commonwealth's constitutional power to make laws relating to immigrants – commenced proceedings to cancel the two men's visas and deport them to their birth country.



Source 6 In the landmark *Love* case, the High Court reinforced the rights of First Nations Australians, by ruling that First Nations Australians who are born overseas cannot be considered to be immigrants (or 'aliens', being the term used in the Australian Constitution) and, therefore, cannot be subject to Commonwealth immigration laws and deported from Australia. Gunggari man Brendan Thoms, pictured above with his mother, Gungarri woman Jenny Thomas, was one of the men who faced deportation.

The two men challenged the Australian Government's decision to deport them on the basis that, despite being born overseas, they were First Nations Australians and therefore could not be considered immigrants (or 'aliens', which is the term used in the Australian Constitution). Therefore, they argued that they could not be deported.

A majority of the High Court ruled in favour of the two men. Four of the seven High Court justices agreed that First Nations Australians cannot be considered immigrants (or 'alien' to Australia) because they have an undeniable connection to the land, and a sense of 'kinship' and ancestry that cannot be extinguished or denied. As such, Commonwealth immigration laws, including deportation laws, cannot apply to First Nations Australians because they cannot be considered to belong to another place.

The *Montgomery* case

In 2021, however, the government attempted to have the High Court's ruling overruled by lodging an appeal against a decision made by the Federal Court of Australia in a similar but unrelated case: *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*. In this case, referred to as the *Montgomery* case, the Federal Court was required to decide whether the Australian Government's decision to cancel a man's visa, and hold him in immigration detention, after he was found guilty of an indictable criminal offence, was constitutionally valid.

The man involved challenged the government's cancellation of his visa and his detainment, claiming that despite being born in New Zealand and being a New Zealand citizen, he was a First Nations Australian because he had been 'culturally adopted' by a First Nations community (the Mununjali people of south-east Queensland) when he first moved to Australia at the age of 15 years.

The man argued that he self-identified as a First Nations Australian and was recognised as such by the Mununjali people, having been raised on Country (the traditional lands of the First Nations peoples) and in accordance with traditional laws and customs. By contrast, the Australian Government argued that he was not a First Nations Australian because he had no biological Aboriginal ancestry.

In simple terms, the Federal Court followed the legal reasoning (or precedent) set by the High Court in the *Love* case that First Nations Australians cannot be considered as immigrants and ruled against the Australian Government. The Court found that the government did not have the authority to cancel the man's visa or to hold him in immigration detention.

While the Federal Government was granted approval (referred to as 'special leave') to appeal the Federal Court's decision to the High Court, the Liberal–National Federal Government lost office in the May 2022 federal election and the newly elected Labor Federal Government abandoned the case two months later.

The *Love* and *Montgomery* cases demonstrate the ability of an individual to bring about a change in the law through the pursuit of a court action. They also demonstrate the ability of the courts to create and confirm common law rights when resolving cases brought before them.

13.7 Check your learning

Remember and understand

1 **Describe** three ways the human rights of First Nations peoples are protected by international law.

2 **Explain** how the Victorian Human Rights Charter promotes the right to freedom of religion.

Examine and apply

3 'The Australian Constitution provides adequate protection of the rights of First Nations peoples.' **To what extent** do you agree with this statement? Give reasons for your view.

4 Read the scenario 'The *Timber Creek* case'.
   - a **Explain** why the Ngaliwurru and Nungali peoples took legal action against the Northern Territory and Commonwealth Governments.
   - b **Outline** the High Court ruling in this case. **Explain** why this ruling is important for First Nations Australians.

5 Read the information about the *Love* case and the *Montgomery* case.
   - a **Explain** why the Commonwealth Government believed it had the right to deport the two First Nations men in the *Love* case.
   - b **Describe** the ruling of the High Court in the *Love* case and its impact on the rights of First Nations Australians.
   - c **Explain** why the government at the time initiated the *Montgomery* case.
   - d Briefly **explain** how the basic facts in the *Montgomery* case differed to those in the *Love* case.
   - e **Explain** why the *Montgomery* case was abandoned.

Reflect and evaluate

6 **Discuss** two reforms that could be implemented in Australia to improve the recognition and protection of the human rights of First Nations peoples.

Chapter

13

Review

Top assessment tips from Chapter 13

1 In this Area of Study, you are required to evaluate the ways in which rights are protected in Australia. This means you must identify the key strengths and weaknesses of each way rights are protected. You should also provide a concluding statement about the overall benefit of the way rights are protected in Australia. The command term 'evaluate' is used a lot in Units 3 and 4 – now is a good time to learn and practise this skill.

2 The *VCE Legal Studies Study Design* requires you to examine one human rights issue in Australia. You may wish to examine one of the human rights issues mentioned in this chapter (the right to vote, the right to freedom of religion or the rights of First Nations peoples) or another human rights issue. Other human rights issues include the rights of asylum seekers and refugees, the rights of people with disability, women's rights, LGBTQIA+ rights, children's rights and the right to freedom of speech.

3 The *VCE Legal Studies Study Design* requires you to discuss possible reforms to the protection of rights in Australia. You should do this in relation to the human rights issue you have chosen to study. A discussion requires you to go beyond an explanation of a reform and instead requires you to consider potential limitations, weaknesses or even conflicting attitudes in relation to 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 assessment tasks are composed of a variety of questions. A great way to identify the difficulty of the question is to look at the command term (or terms) used in the question and the mark allocation. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 Outline the purpose of the Victorian Human Rights Charter. Explain **one** way the Charter aims to protect the rights of an accused.

(4 marks)

Difficulty: medium

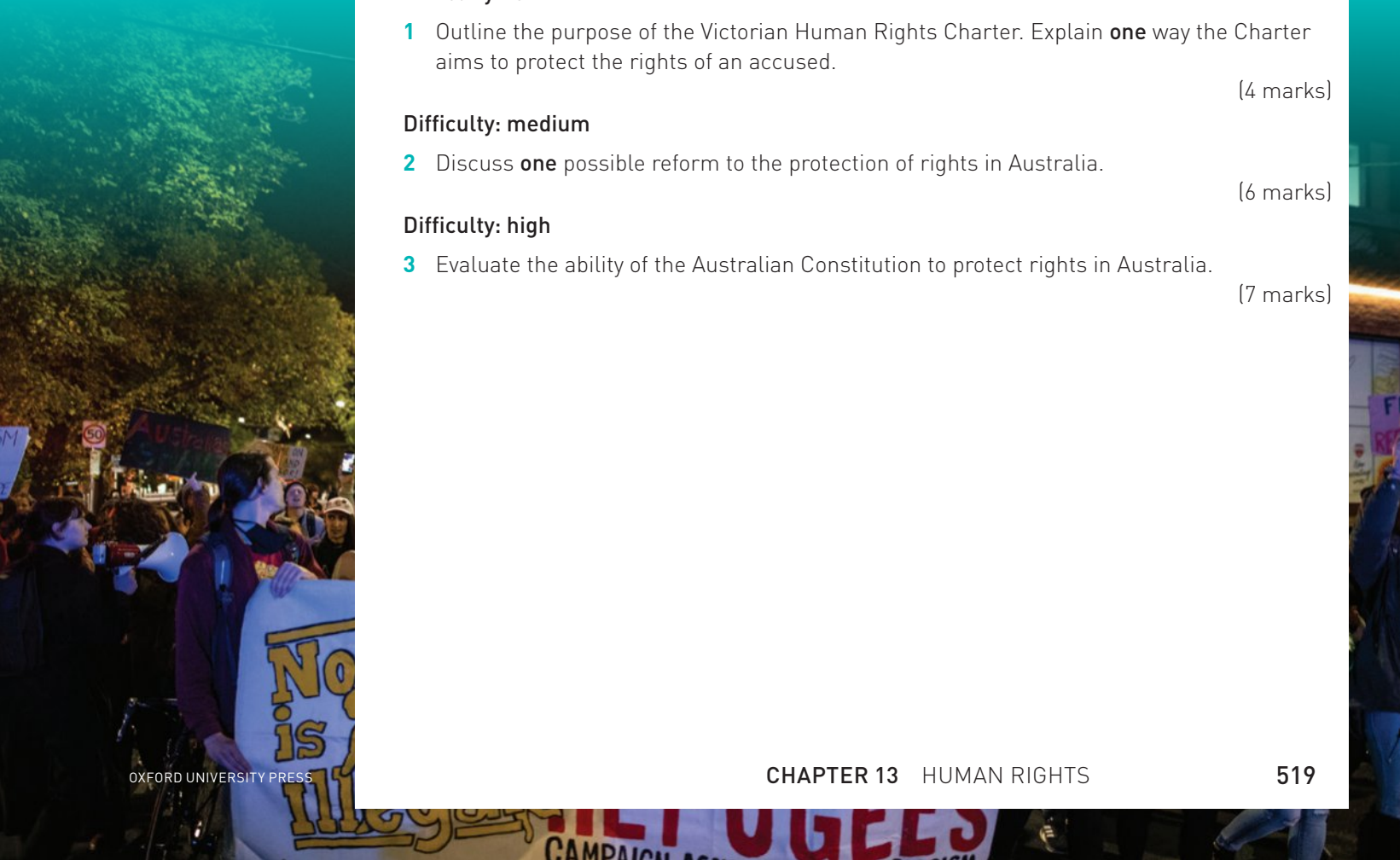
2 Discuss **one** possible reform to the protection of rights in Australia.

(6 marks)

Difficulty: high

3 Evaluate the ability of the Australian Constitution to protect rights in Australia.

(7 marks)



Practice assessment task

Before attempting this practice assessment task, re-read the information at the beginning of this chapter about the learning outcome, key knowledge and key skills.

Imagine you are an investigative journalist who works for an Australian media company. You have been asked by your editor to prepare a resource that examines the way human rights are protected in Australia, including one human rights issue. Your resource may be an oral or digital presentation (such as a podcast or video), a research report, an essay or a blog. Your editor has given you permission to prepare your resource individually or with one co-worker (i.e. classmate). Your resource must provide answers to the following questions.

Practice assessment task questions

1 What are human rights? Support your response with **two** examples.

(4 marks)

2 Describe the main ways in which human rights are protected in Australia.

(8 marks)

3 **a** Select and outline **one** human rights issue in Australia.

(4 marks)

b Identify **two** laws that apply to this human rights issue.

(2 marks)

c Discuss **two** changes that could be made to improve the protection of human rights in relation to your chosen issue.

(8 marks)

d Explain how individual citizens might be able to bring about the changes discussed in question 3c.

(4 marks)

Total: 30 marks



Source 1 Protesters in Sydney in 2021 demand action on the issue of First Nations deaths in custody.

Chapter checklist

Now that you have completed this chapter, reflect on your ability to understand the key knowledge from the Study Design. If you feel you need some more practice, use the revision links to revisit the key knowledge.

Remember that you will also need to be able to draw on and understand the key skills outlined in the Study Design.

Key knowledge	I understand this	I need some more practice to understand this	Revision link
• The meaning and development of human rights, including the significance of the *Universal Declaration of Human Rights*	☐	☐	Go back to Topic 13.1.
• An overview of the ways in which human rights are protected in Australia through the Victorian Charter of Human Rights and Responsibilities and statute law	☐	☐	Go back to Topic 13.2.
• An overview of the ways in which human rights are protected in Australia through common law	☐	☐	Go back to Topic 13.3.
• An overview of the ways in which human rights are protected in Australia through the Australian Constitution	☐	☐	Go back to Topic 13.4.
• The human rights issue of the right to vote, including the nature and development of the human right, the laws that apply to the human right in Australia, possible conflicting attitudes, possible reforms to the protection of the human right in Australia, and one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right	☐	☐	Go back to Topic 13.5.
• The human rights issue of the right to freedom of religion, including the nature and development of the human right, the laws that apply to the human right in Australia, possible conflicting attitudes, possible reforms to the protection of the human right in Australia, and one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right	☐	☐	Go back to Topic 13.6.
• The human rights issue of the rights of First Nations peoples, including the nature and development of the human right, the laws that apply to the human right in Australia, possible conflicting attitudes, possible reforms to the protection of the human right in Australia, and one case study in relation to the human rights issue, in which an individual or group has influences the protection of the right	☐	☐	Go back to Topic 13.7.

Check your Student obook pro for these additional resources and more: pro

- **Chapter 13** Chapter review quiz
- **Revision notes** Chapter 13
- **Chapter summary** Chapter 13
- **Quizlet** Revise key legal terms from this chapter.

Unit 2 Review

Part A Assessment essentials

Now that you have completed your revision for Unit 2, it is time to put your skills into practice so that you can answer assessment questions with confidence. Our expert authors have created the following advice and tips to help you maximise your results in your assessment tasks.

Tip 1: Become familiar with the structure of Legal Studies questions

- Legal Studies questions typically contain a defined set of items (or components) arranged in different orders.
- These items include the command terms, the content or subject matter of the question, and the mark allocation. A question may also include stimulus material, and limiting or qualifying words. See Tip 3 in Chapter 1 on page 17 for more information.
- Make sure you understand each item (or component) of the question, as this will make answering the question much simpler.

See it in action

Read the question below and see how the different items appear in the question, and how they are responded to in the sample response.

Jamie lives in a small apartment block. Jamie is in dispute with her neighbour, Benito, because she believes Benito makes too much noise. Benito often plays loud music in the early hours of the morning, and has a small dog that barks whenever he leaves the apartment.[1]

Other than a court trial or hearing,[2] describe[3] **one**[2] method that Jamie and Benito could use to resolve their dispute.[4]

[3 marks][5]

[1] Stimulus material
[2] Limiting phrase/word
[3] Command term
[4] Content
[5] Mark allocation

A sample response

Jamie and Benito[1] may be able to use mediation to resolve their dispute. This would involve attempting to resolve their dispute between themselves through discussion and compromise, with the assistance of an independent third party (called a mediator).[2] Instead of making a decision to resolve the dispute for[2] Jamie and Benito,[1] the impartial mediator would assist them with their discussions and help them feel confident during negotiations so that they may reach their own mutually acceptable agreement about the issue around the noise that Benito is making, and whether they can agree on a resolution to address any harm that Jamie is suffering as a result.[2]

[1] This question requires reference to the stimulus material given the question is about Jamie and Benito's dispute.

[2] The student has provided a detailed description of mediation as their chosen method of dispute resolution. Conciliation would also be an appropriate choice.

Tip 2: Show the reader that you understand both knowledge and skills

- When answering questions in Legal Studies, you are not just expected to recite or write down what you have learnt. You are also expected to demonstrate a skill you have learnt, such as the skill of evaluating, discussing or explaining.
- When looking at a question, make sure you understand the content you are expected to know, and the skill you are expected to demonstrate.
- The skill may also include the synthesis, analysis and application of stimulus material (such as an actual or hypothetical scenario).
- Use 'signposts' to show the skill that you are expected to demonstrate. For example, for an **evaluate** question, use words such as 'one strength', 'one weakness' and 'to conclude'. For an **analyse** question, use words such as 'moreover', 'this is significant because' and 'in particular'. For a **discuss** question, use words such as 'however', 'on the other hand' and 'although'.

See it in action

Read the question below and then look at the sample response to see what skills you are expected to demonstrate, and what content the question is asking about.

Alana, aged 29, is suing a chairlift operator for damages after she was seriously injured when a chairlift malfunctioned at a ski resort. Just as Alana was getting off the chairlift, it stopped abruptly, causing her to fall awkwardly onto the hard ice. Because of the incident, Alana needed to have knee replacement surgery and three months of rehabilitation. In addition to the physical pain suffered, Alana lost four months' income because she could not work while she was recovering.

Discuss[1] the extent to which the remedy being sought by Alana would be able to achieve its purpose.

[5 marks]

[1] Command term

A sample response

Depending on a number of factors, such as the severity of Alana's injuries,[1] it is likely that the awarding of damages will only be able to restore her to the position she was in prior to being injured to a moderate extent.[2] For example, while[3] Alana could be awarded special damages to compensate for the medical costs of her knee replacement and rehabilitation,[1] this will not fully restore her to the position she was in prior to the incident if she has suffered any permanent or irreversible injury that cannot be totally fixed by surgery and rehabilitation.

Alana may also[3] be awarded general damages to compensate for the physical pain and harm she has suffered,[1] although[3] it is difficult to precisely calculate an amount of money that can reimburse for suffering this type of intangible harm and any pain she may suffer in the future. For example, Alana may experience long-term complications as a result of the surgery, such as impaired mobility, muscle pain and arthritis, which may cause her further pain and impede her ability to work and engage in various recreational pursuits in the future.[1] The awarding of special damages will, however,[3] be able to compensate for the loss of income she suffered while recovering from surgery and undergoing rehabilitation.[1]

Finally,[3] the awarding of damages will not be able to compensate Alana for the stress, cost and inconvenience involved in taking legal action against the chairlift operator.[1]

[1] The student has made meaningful use of the stimulus material (i.e. they have analysed the information and used it to support their contention).

[2] The student has clearly established their contention, stating to what extent damages can restore Alana to the position she was in prior to being injured.

[3] As the student contends (or argues) that the awarding of damages can only restore Alana to the position she was in prior to the infringement of her rights 'to a moderate extent', they need to provide at least one reason why damages may restore Alana and one reason why they may not. The student has used 'signposting' to emphasise opposing points of view, such as the inability of damages to fully restore the plaintiff. See Tip 3 below for more information about 'signposting'.

Tip 3: Structure your responses

- When answering questions in Legal Studies, it is important to structure your responses according to the question.
- Use paragraphs if you are making multiple points in your response. As a general rule, if you are asked to discuss, analyse, evaluate or compare, you should use paragraphs. You should also use paragraphs if you are asked to identify, outline, describe or explain more than one point or feature.
- Each paragraph should start with a topic sentence that clearly states the main point or topic that you are going to write about in that paragraph.
- You should also ensure you signpost your responses. This means you should use key words or phrases at the beginning of each paragraph that help guide the reader (or the assessor) to the key points you are making in your response. For example, you may use words and phrases such as 'however', 'on the other hand' or 'in contrast' to show (or signpost) a limitation, weakness or difference. The signpost words you use depend on the skill you are expected to show.

See it in action

Read the question below and then look at the sample response to see how you might structure your response.

Evaluate[1] the way the Australian Constitution protects the human rights of the Australian people.

[8 marks]

[1] Command term

A sample response

While the Australian Constitution establishes and protects some basic human rights that belong to the Australian people, the number of rights that are protected, and their scope, are limited. One of the main ways the Australian Constitution protects human rights in Australia is through the inclusion of express rights that are explicitly stated or entrenched in the Constitution.[1] *For example, the Constitution expressly protects the right to freedom of religion in that the Commonwealth Parliament cannot establish and impose or prohibit religion (section 116). The advantage*[2] *of protecting rights in this way is that express rights can only be altered or removed by changing the Constitution via a referendum (or compulsory public vote). This means that express human rights cannot be changed by the parliament or the government to suit its own agenda without the support of the Australian people.*

While[2] *requiring the support of the Australian people to alter, add or remove an express right from the Constitution is a*[1] *strength*[2] *of the way the Constitution protects rights, it is also a weakness because achieving a successful referendum is difficult for many reasons.*[1]

[1] This answer uses paragraphs to address the command term *evaluate*. Each paragraph commences with a topic sentence that clearly states the main point being made in that paragraph.

For example, a successful referendum requires a high degree of voter support, and voters can be reluctant and skeptical about voting for change. This means human rights may lag behind change in community attitudes.

Furthermore,[2] the Constitution does not contain a charter or bill of rights that protects a comprehensive list of the basic human rights of the Australian people.[1] In fact, the Constitution only protects five express rights, and they are relatively limited in scope. For example, the express right to trial by jury only applies for individuals who commit Commonwealth indictable offences (section 80).

In addition to the five express rights, the Australian Constitution also protects implied rights.[1] Implied rights are rights that are considered to exist by the High Court's interpretation of the Constitution's meaning. The ability of the High Court to imply the existence of human rights is a strength[2] because it allows the Court to recognise constitutionally protected human rights even though they may not explicitly be stated in the wording of the Constitution. For example, although the Constitution does not explicitly state that Australians have the right to freely discuss and debate political issues (referred to as the freedom of political communication), the High Court has, in a number of cases throughout the years, decided that this freedom is implied to exist and be protected in the Constitution.

Another advantage[2] associated with the High Court's ability to imply constitutional rights is that it can enable the protection of human rights to expand over time and allow the Constitution to keep pace with changes in community values.[1] However,[2] the Court can only create an implied right when a relevant case is brought before it, and undertaking High Court action is expensive and time consuming. Similarly,[2] while all rights, including human rights, that are protected by the Constitution are fully enforceable through the High Court, and any statute found to be in breach of those rights can be declared invalid, the Court cannot resolve constitutional disputes and declare that an infringement of constitutionally protected rights has occurred until a relevant case is brought before it.

In conclusion,[2] while the Australian Constitution protects some human rights of the Australian people through the provision of fully enforceable express and implied rights, it does not contain a charter of rights that protects a comprehensive list of human rights, and the number of protected rights, and their scope, are limited.[3]

[2] Signposts or key words and phrases have been used throughout this answer to help guide the reader (or the assessor) to the key points being made. throughout this answer to help guide the reader (or the assessor) to the key points being made. For example, as the command term requires an **evaluation** of the way in which the Australian Constitution protects the human rights of the Australian people, terms such as 'one strength', 'another advantage', 'a weakness' and 'however' have been used throughout the answer.

[3] As the command term in this question is *evaluate*, the answer must include a concluding judgment about the (overall) benefit or worth of the way the Australian Constitution protects the human rights of the Australia people.

Think like an assessor

To maximise your marks in an assessment task, it can help to think like an assessor. Carefully read the following two assessment task questions and think about what might constitute a high-scoring response. Consider all the items (or components) in each question, including the command terms, content or subject matter, mark allocation and any stimulus material.

After you have carefully considered each question, read the sample response. Imagine you are an assessor, and use the marking guide checklist to mark the response.

Assessment task question

Question 1

Marla works at Star Appliances, a retail shop that specialises in selling electronic appliances. She is suing her employer after suffering a broken arm and wrist when a large television fell on her. Marla claims the television fell because it was not correctly mounted (secured) to its display stand. In contrast, the owner of Star Appliances claims that Marla bumped into the television, and caused it to fall, when she was rushing to serve a customer.

With reference to this case, distinguish between the burden of proof and the standard of proof.

[4 marks]

A sample response

The difference between the burden and the standard of proof is that the burden of proof refers to the party who has the responsibility of proving the case, while the standard of proof relates to level of proof or certainty that needs to be established to win the case. For example, to win this case Marla has to prove that the owner of Star Appliances did not make sure the television was correctly mounted to the display stand and so is guilty of breaching her rights beyond reasonable doubt.

Marking guide checklist

To get full marks, check whether the response has all the following features. Identify any features that are missing in the response and decide what mark you award.

Features for a full-mark response
☐ The command word has been addressed (i.e. the response shows the clear differences between the concepts of the burden of proof and the standard of proof).
☐ The response demonstrates a good understanding of the burden and standard of proof.
☐ The response makes meaningful and accurate use of the stimulus material.
☐ Legal terminology has been correctly used.
☐ There are no significant errors.

Fix the response

Consider where you did not award marks in the above response. How could the response be improved? Write a response to the same question that you believe would achieve full marks from the assessor.

Assessment task question

Question 2

Describe the role of individuals in bringing about changes in the protection of rights through cases. Use **one** case study in relation to a human rights issue to support your response.

[5 marks]

A sample response

Individuals can bring about a change in the protection of rights by taking a case to court. For example, if an individual thinks that their human rights have been breached in some way, they can take their case to court and see if a judge agrees with them. If the judge agrees with them, they can make a decision to uphold their rights. If the court is high enough, then its decision will need to be followed by all lower courts if they are required to decide a similar case. This happened in the famous Mabo case about the land rights of First Nations people.

Marking guide

To get full marks, check whether the response has all the following features. Identify any features that are missing in the response and decide what mark you award.

Features for a full-mark response
☐ The command word has been addressed (i.e. the response contains a detailed account of the role of individuals in bringing about changes in the protection of rights through cases).
☐ The response demonstrates a good understanding of one case study in relation to a human rights issue.
☐ The response provides a comprehensive explanation of how the case study demonstrates the ability of individuals to bring about a change in the protection of rights.
☐ Legal terminology has been correctly used.
☐ There are no significant errors.

Fix the response

Consider where you did not award marks in the above response. How could the response be improved? Write a response to the same question that you believe would achieve full marks from the assessor.

Part B Practice assessment tasks

For Unit 2 – Area of Study 1

Students should read the information at the beginning of Chapter 9 (page 315) 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.

Imagine you are a Melbourne barrister. You work in the areas of tort (including negligence, nuisance and defamation), contract law, discrimination and employment law. You have been approached by a producer at a prominent news channel who wishes to arrange an interview between you and a reporter about one of these areas of law (you can choose which area). The producer has given you a set of questions that the reporter is likely to ask you during the interview.

The interview will be live on television and will take only three minutes. The producer has suggested that you prepare answers to the questions, and that your answers be as clear and concise as possible. The producer asks you to not use any complex legal terminology, but that if you do, then the legal terminology needs to be explained.

Choose one of these areas of law; then answer the following questions.

Practice assessment task questions

The questions that the producer has given you are:

1 Is the area of law criminal law or civil law? Why?
(3 marks)

2 What is the main purpose of civil law?
(3 marks)

3 What are the rights that are protected by this area of law?
(4 marks)

4 What do the terms 'burden of proof' and 'standard of proof' mean? How are they relevant to a civil claim that can be made in this area of law?
(5 marks)

5 What do the terms 'remoteness' and 'break in the chain of causation' mean?
(2 marks)

6 Who are the potential parties to a claim in this area of law?
(4 marks)

7 If somebody wanted to bring a claim in relation to this area of law, what do they need to prove?
(6 marks)

8 Is there any time limit for making a claim? If so, why is there a time limit? Shouldn't people be able to decide when they want to make a claim?
(7 marks)

9 Provide a hypothetical example of somebody who has a claim in this area of law, and then explain:

- the elements the person/plaintiff needs to establish and whether there are any weak elements in their case
(6 marks)
- the likely defences the defendant would raise, and whether one or more will succeed
(6 marks)
- whether the plaintiff is likely to be successful in establishing liability, and why.
(4 marks)

Total: 50 marks

Practice assessment task

For Unit 2 – Area of Study 2

Read the information at the beginning of Chapter 12 (page 407) 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.

Horror trip away for Angela and Manny

Angela, aged 21, works for a local supermarket on Wednesday evenings and on weekends. She has been working at the supermarket for over four years on a casual basis, and gets paid by the hour.

On Thursday, Angela left for a cruise with her best friend, Manny. While they were chatting on the first night of the cruise, Manny mentioned that her cousin, Mia, who works at another supermarket, had recently found out that she was being underpaid. When Angela heard Mia's hourly pay rate, she was shocked because it was more than her own pay rate, even though Angela is two years older than Mia.

During the cruise, Angela often felt she was being poorly treated by a particular crew member, Keanu. Keanu ignored Angela whenever she asked for advice or assistance, and would stare at her in an intimidating and threatening way. One evening, he also refused to let Angela into a theatre room to watch a movie, saying the movie theatre was 'full'. Angela later found out this was not true.

Four days into the cruise, Manny started feeling unwell. Two days later, Angela started vomiting. It was later discovered that more than 80 per cent of the cruise passengers had been struck by the same illness, or a similar one. Angela overheard a crew member saying that they had discovered some of the seafood that had been served at dinner one night was not good quality.

When the cruise ended, Angela tried to disembark (i.e. leave this ship) but kept being pushed back to the end of the queue by Keanu, the crew member. Keanu said: 'You just need to wait your turn. Go back to the end of the line.' After Angela challenged him, Keanu called her a racist name and then said: 'Go back to where you came from. Aussies first.' Angela thinks that Keanu said this because she remembers telling him on the first day of the cruise that she was part Italian.

Practice assessment task questions

1 Identify **three** civil disputes that could arise from the above case study. Identify the likely plaintiff and defendant in each dispute.

(6 marks)

2 Identify the type of claim that Angela is likely to have for each dispute.

(3 marks)

3 For each of Angela's disputes, identify which dispute resolution body listed below is the best body to hear it. Justify your answers.

- the Supreme Court of Victoria
- the Victorian Civil and Administrative Tribunal (VCAT)
- Fair Work Ombudsman

(6 marks)

questions continued on next page

4 'There are two possible avenues of appeal from VCAT, depending on who heard the case.' Explain this statement.

(3 marks)

5 In your view, which of Angela's disputes is best suited to mediation, and which is not appropriate for mediation? Give reasons for your response.

(4 marks)

6 Describe the role of the jury in a civil trial. Explain **two** circumstances that need to exist for a jury to be used in a civil trial.

(6 marks)

7 Explain whether an injunction is an appropriate remedy for any of Angela's cases.

(3 marks)

8 Evaluate the ability of damages to achieve **one** of its purposes in **one** of these disputes.

(5 marks)

9 Angela is worried that even if she pursues one or more of these disputes, justice is unlikely to be achieved.

a Describe to Angela the **three** principles of justice.

(6 marks)

b Discuss the ability of the civil justice system to achieve justice in **two** of these disputes.

(8 marks)

Total: 50 marks

Practice assessment task

For Unit 2 – Area of Study 3

Read the information at the beginning of Chapter 13 (page 467) 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.

A case of human rights

Source 1

In 2019, a prisoner who is serving a sentence of life imprisonment in prison was ordered to undertake two random drug and alcohol tests. The tests required him to submit to a strip search and then provide a urine sample. The prisoner believed the orders breached his human rights, including his right to privacy and right to be treated with dignity while being deprived of liberty, which are rights protected under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Human Rights Charter). He initiated a civil action against three defendants who were responsible for the management of the prison, including prisoner safety and wellbeing. In contrast, the defendants argued that random drug and alcohol tests were necessary to prevent and deter drug use in the prison, and maintain a safe and secure prison environment.

In February 2021, the Victorian Supreme Court ruled in favour of the self-represented prisoner. The Court found that ordering the prisoner to undergo strip searches and provide urine tests was not necessary for the security and good order of the prison, and unjustifiably limited his right to privacy and dignity.

In December 2021, however, on appeal, the Victorian Court of Appeal overturned part of the Supreme Court's ruling. While the Court of Appeal agreed with the Supreme Court that requiring the prisoner to be strip-searched as part of the drug and alcohol tests breached his human rights, it did not agree that requiring him to undergo the drug and alcohol tests in itself was unreasonable or resulted in a breach of his rights. As such, the Victorian Court of appeal reversed the Supreme Court's decision in respect to this issue.

Source 2

The following is an extract from section 13 of the Human Rights Charter:

> **Privacy and reputation**
>
> A person has the right –
>
> (a) not to have that person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; …

Practice assessment task questions

1 Define the term 'human right'. In your answer, identify **two** human rights that have allegedly been breached in this case.

(3 marks)

2 Is the Human Rights Charter an example of statute law or common law? Justify your response.

(3 marks)

3 Explain how the decision of the Victorian Court of Appeal might impact on the human rights of individuals and on the legal system.

(4 marks)

4 Evaluate the ability of statute law and common law to protect human rights in Australia. In your answer, refer to both Sources 1 and 2.

(10 marks)

Total: 20 marks

Glossary

A

abrogate (abrogation)
to abolish or cancel a law (e.g. the cancellation of common law by passing an Act of Parliament)

acceptance
(in relation to contract law) the act of a person (by statement or otherwise) agreeing to an offer

access
one of the principles of justice; in VCE Legal Studies, access means that all people should be able to engage with the justice system and its processes on an informed basis

accessorial liability
the responsibility imposed on one person for the wrongdoing of another, where there is a connection to the wrongdoing (e.g. where the first person encourages the other person to cause harm)

accessory
a person who does an act to help another person who has committed a serious indictable offence (called the principal offender) to avoid being apprehended, prosecuted, convicted or punished

accused
a person charged with a criminal offence but who has not been found guilty or pleaded guilty

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)

actus reus
a Latin term meaning 'a guilty act': the physical element of a crime (i.e. the act itself). See also *mens rea*

aggravated damages
an amount of money that a defendant may be ordered to pay when a plaintiff has suffered extreme humiliation, embarrassment or insult because of the defendant's conduct

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

alternative arrangements
measures that can be put in place for witnesses in certain criminal cases (e.g. sexual offence cases) to give evidence in a different way (e.g. via video link)

alternative dispute resolution methods
ways of resolving or settling civil disputes without having 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)

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

apprehended bias
a situation in which a fair-minded lay observer might reasonably believe that the person hearing or deciding a case (e.g. a judge or magistrate) might not bring an impartial mind to the case

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 make a decision that is legally binding on the parties. The decision is known as an arbitral award

arbitrator
an independent third party (i.e. person) appointed to settle a dispute during arbitration. Arbitrators have specialised expertise in particular kinds of disputes and make decisions that are legally binding. The decision is known as an arbitral award

arson
the intentional and unlawful use of fire to destroy or damage another person's property

arson causing death
the intentional and unlawful use of fire which causes the death of another person

assault
the intentional or reckless use of force against another person without a lawful excuse (also extends to other types of assault-related offences)

attribute
a quality, feature or characteristic of a person, such as race, gender identity, physical features or disability

Australian Constitution
a set of rules and principles that guide the way Australia is governed. The Australian Constitution is set out in the *Commonwealth of Australia Constitution Act*

Australian Law Reform Commission
an Australian Government agency that reviews, researches and makes recommendations to the Australian Parliament about possible changes to Commonwealth law

automatism
a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

award
a legal document that sets out minimum pay rates and work conditions for employees who work in a particular occupation or industry

B

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

bail justice
a volunteer who works within the justice system, generally outside normal court operating hours, to hear applications in relation to bail or remand

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 claim is true

barrister
an independent lawyer with specialist skills in dispute resolution and advocacy who is engaged on behalf of a party (usually by the solicitor). In Victoria, the legal profession is divided into two branches: solicitors and barristers

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
a prejudice or lack of objectivity in relation to one person or group

bicameral parliament
a parliament with two houses (also called chambers). In the Commonwealth 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 proposed law that has been presented to parliament to become law. A bill becomes an Act of Parliament once it has passed through all the formal stages of law-making (including royal assent)

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

breach
the breaking of or failure to fulfil or comply with a duty or obligation

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)

by-laws
local laws or regulations made by local councils that apply to residents in local areas

C

Cabinet
the group of senior ministers in a government made up of the Prime Minister (or the Premier at a state level) and senior government ministers who are in charge of a range of portfolios. 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)

causation
the direct relationship between one event (Event 1) and another event (Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

charter of human rights (or bill of rights)
a document that sets out the basic human rights and/or freedoms of the citizens in a particular state or country

child homicide
the killing of a child under six years of age in circumstances that would normally be manslaughter

civil dispute
a 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

civil liability
the legal responsibility of a party for loss or harm caused to another party because of a breach of civil law

class action
a legal proceeding in which a group of seven or more people who have a claim against the same person 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 or joining together of two or more political parties, usually to form government

codify (codification)
to collect all law on one topic together into a single statute

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

committal proceeding
the pre-trial hearings and processes held in the Magistrates' Court for indictable offences

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)

common law rights
freedoms established by judges when deciding on cases

community correction order (CCO)
a flexible, 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 community 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

compensatory damages
an amount of money awarded to a plaintiff for harm, injury, or other losses suffered. It includes general damages, special damages, and aggravated damages

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 and explore possible resolutions

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

consideration
(in relation to contract law) something of value that passes from one party to the other, at which time a contract is complete. Consideration can also be a promise to pay

contemptuous damages
a very small amount of money awarded to show that even though the plaintiff's claim succeeded legally, the court disapproves of it in moral terms

contract
an agreement or promise (or set of promises) between two or more individuals or groups that is intended to be legally binding and can be enforced

contract law
an area of civil law governing the validity and enforceability of agreements made between two or more parties

contributory negligence
a defence that can be used by a defendant who alleges that the plaintiff contributed to the harm caused by the defendant. If proved, this reduces the damages the defendant has to pay

conviction
a finding of guilt made by a court, whether or not a conviction is recorded. Where a conviction is recorded, it will form part of the person's criminal record

counterclaim
a separate claim made by the defendant in response to the plaintiff's claim (and usually heard at the same time by the court)

court hierarchy
the ranking of courts from lowest to highest according to the seriousness and complexity of the matters they deal with

court judgment
a statement by the judge that outlines the decision of the court and the legal reasoning behind the decision

crime
an act (i.e. undertaking an action) or omission (i.e. failing to undertake an action) that is against an existing law, harmful both to an individual and to society, and punishable by law (by the state)

crime statistics
information (i.e. data) collected by authorities (e.g. the police) and analysed to track the level of crime or offending in the community. Crime statistics also track the types and levels of sentences given to convicted offenders

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

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

culpable driving causing death
the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner, or while under the influence of drugs or alcohol

customary law
a body of norms, practices and beliefs that a local community or group of people accept as legal requirements or rules of conduct

cyber-crime
a criminal offence in which the use of computers or information communication technologies (ICT) is an essential and central part of the offending

D

damages
an amount of money that one party is ordered to pay to another party for loss or harm suffered. It is the most common remedy in a civil claim

dangerous driving causing death
the act of causing the death of another person while driving a motor vehicle at a speed or in a way that is dangerous to the public, having regard to all the circumstances of the case

dangerous driving causing serious injury
the act of causing serious injury (i.e. life-threatening injury or substantial and long-lasting injury) to another person while driving a motor vehicle at a speed or in way that is dangerous to the public, having regard to all the circumstances of the case

defamation
a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

defence to a crime
a justification or lawful 'reason' given by an accused person as to why they are not guilty of 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

delegated body
an authority or agency given power by parliament to make and/or enforce laws

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

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

direct discrimination
a type of discrimination; when an assumption is made about what a person can or cannot do because of a personal characteristic or attribute

directions
instructions given by the court or tribunal to the parties about time limits and the way a civil proceeding is to be conducted; for example, to file documents with the court or tribunal by a particular date

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

discovery of documents
a pre-trial procedure which requires the parties to list their documents relevant to the issues in dispute. 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

disparity
a situation in which two or more things or people are not equal, and the inequality causes unfairness

diversion program
a method used in the Magistrates' Court and Children's Court to 'redirect' offenders away from the court and avoid a criminal record by placing them on a plan

doctrine of precedent
the rule that 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

doli incapax
a Latin term meaning 'incapable of evil'. Refers to the principle in Victoria that a child aged between 10 and 13 years is presumed to be incapable of forming *mens rea* (a guilty mind) because they do not have the intellectual or moral capacity to know the difference between right and wrong

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. a majority of voters in 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

drug and alcohol treatment order
a type of sanction imposed by the Drug Court that aims to treat the underlying causes of offending, and includes both the treatment and custody of the offender

Drug Court
a specialist court that is able to impose a drug treatment order on an offender where drugs or alcohol contributed to the commission of the offence

duress
strong mental pressure on someone to overcome their independent will and force them to do something

duty of care
(in relation to negligence) the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

E

election
the process whereby eligible people vote to choose a person to hold a position in a body or organisation (e.g. a member of a house of parliament)

enterprise agreement
a legal agreement that sets out pay rates and work conditions between two or more employees and their employer

equality
one of the principles of justice; in VCE Legal Studies, equality means people should be treated in the same way, but if the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage

evidence
information, documents and other material used to prove the facts in a legal case

express rights
rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

express terms
(in relation to contract law) provisions or conditions that are written in the contract or are clearly stated or discussed between the parties as forming part of the contract

F

Fair Work Commission
an independent national tribunal that has the power to establish the minimum pay rates and employment conditions for a particular occupation or industry

Fair Work Ombudsman
a statutory body that promotes harmonious, productive and cooperative workplaces, investigates workplace complaints and ensures compliance with Australia's workplace laws

fairness
one of the principles of justice; in VCE Legal Studies, fairness means all people can participate in the justice system and its processes should be impartial and open

Federation
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

First Nations Voice
an independent advisory body for First Nations people to advise the Commonwealth Parliament and Government on the views of First Nations people on matters that affect them

freedom of political communication
the right of the Australian people to freely discuss and debate political issues, subject to certain restrictions

G

general damages
a type of remedy that requires the payment of a sum of money to compensate for loss that cannot easily be quantified (e.g. pain and suffering)

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

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

governor
the King's representative at the state level

Governor-General
the King's representative at the Commonwealth level

group member
(in relation to class actions) a member of a group of people who is part of a class action

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

H

homicide
the killing of another person without legal justification. Murder, manslaughter, infanticide (i.e. killing a baby), child homicide and culpable driving causing death are homicide offences

homicide by firearm
the killing of a person by discharging a firearm (gun) in circumstances that would normally be manslaughter (e.g. unintentionally killing a person by recklessly or negligently firing a gun)

House of Representatives
the lower house of the Commonwealth Parliament

human rights
basic freedoms or standards that promote and uphold the dignity of all people, and are guaranteed by a moral sense of duty or by the law

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

I

implied rights
rights that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

implied terms
(in relation to contract law) provisions or conditions that are not expressed or written down, but are assumed and intended to be included in the contract

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

independents
individuals who stand as candidates in an election or are elected to parliament 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 is dealt with as a summary offence if the court and the accused agree

indirect discrimination
a type of discrimination; when there is a rule or policy that is the same for everyone, but it has an unfair effect on some people who share a particular attribute

individual employment contract
an agreement between an employee and their employer that sets out pay rates and work conditions (which is legally binding and enforceable at law)

infanticide
the killing by a mother of a child under two years of age while suffering a mental condition caused by the effects of that child's birth

injunction
a remedy in the form of a court order requiring the defendant 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

institutional powers
the authority (i.e. power) given to bodies (i.e. institutions) such as Victoria Police to undertake certain actions

intentional
something deliberate; not an accident

intentionally or recklessly causing a bushfire
intentionally or recklessly causing a fire that spreads to vegetation on property belonging to another person

intergenerational trauma
a psychological response to highly distressing, stressful or oppressive historical events, such as war or significant injustices, which is passed on to future generations. First Nations people experience intergenerational trauma for many reasons, including being subjected to brutal and harmful government policies, racism and discrimination since the British colonisation of Australia

international declaration
a non-binding agreement between countries that sets out the aspirations (i.e. 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)

intervention order
a court order that is designed to protect a person, their children and their property from another person

J

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 determine questions of fact in a trial and reach a decision (i.e. a verdict)

jury directions
instructions given by a judge to a jury either during or at the end of a trial

juvenile crime
a criminal offence undertaken by a young person aged between 10 and 18 years

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 First Nations people

L

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

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

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

lead plaintiff
the person named as the plaintiff in a class action and who represents the group members; also sometimes referred to as the representative plaintiff

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

Legislative Assembly
the lower house of the Victorian Parliament

Legislative Council
the upper house of the Victorian Parliament

limitation of actions
the restriction on bringing a civil law claim after the allowed time

loss
a type of harm or damage suffered by a person. It can involve both economic and non-economic loss

M

majority verdict
a decision where all but one of the members of the jury agree

manslaughter
the unlawful killing of a person due to a reckless, dangerous act or negligent behaviour

mediation
a method of dispute resolution that uses 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

mens rea
a Latin term meaning 'a guilty mind': the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

mental impairment
a condition of the mind that impacts on a person's ability to know the nature and quality of their conduct, or that the conduct was wrong

minister
a member of parliament who is a member of the party in government and who is in charge of a particular area of government (such as education)

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

multiculturalism
the idea that people with distinct cultures and ethnicity can coexist peacefully and equitably in a single country

murder
the unlawful and intentional killing of a human being by a person who acted voluntarily and without any lawful justification. Murder is the most serious homicide offence

N

National Employment Standards (NES)
a set of 12 conditions (i.e. minimum entitlements) of all workers (i.e. employees) protected by Commonwealth legislation

native title
the legal recognition of the right of First Nations 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)

negligence
a type of tort that involves a breach of a duty of care, causing loss or harm

nervous shock
a psychological reaction; psychological harm that is more serious than ordinary grief or stress

nominal damages
a small amount of money awarded to confirm that a plaintiff's rights have been infringed even though the losses were not substantial

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

nuisance
a type of tort that involves interference with a person's right to use and enjoy private and/or public property

O

oath
a solemn declaration by which a person swears the truth on a religious or spiritual belief. Without the religious or spiritual belief, it is called an affirmation

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)

offender
a person who has been found guilty of a criminal offence by a court

offensive behaviour
conduct that is calculated to wound feelings, or arouse anger, resentment, disgust or outrage in the mind of a reasonable person

offer
(in relation to contract law) the act of a person (by statement or otherwise) that indicates the person is willing to buy or sell goods or services

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

ombudsman
an office holder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities or bodies

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 the government to account

organised crime
a criminal offence undertaken in a planned and ongoing manner by organised syndicates or gangs

original jurisdiction
the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

P

parliament
a formal assembly of representatives of the people that is elected by the people and gathers 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

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

penalty unit
a measurement used to calculate the amount of a fine. The government can change the value of a penalty unit to increase the amount of a fine

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 (and therefore used as a source of influence or followed) even though it is not binding (see binding precedent)

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)

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

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

prejudice motivated crime
a criminal offence motivated by prejudice, intolerance and bias towards the victim (e.g. because of their race, religion, sex, age, or sexual or gender identity)

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

principal offender
a person who has carried out the *actus reus* (guilty act) and has therefore directly committed the offence

private member's bill
a bill introduced into parliament by a member of parliament who is not a government minister

private nuisance
a type of tort involving an act or omission that substantially and unreasonably interferes with the use and enjoyment of land

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)

prosecution
the party that institutes criminal proceedings against an accused on behalf of the state. The prosecution team includes the prosecutor

prosecutor
the representative of the prosecution who is responsible for conducting the criminal case and appearing in court

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)

public nuisance
a type of tort involving an act or omission that interferes with the comfort or convenience of a number of people to a considerable degree

public place
an area or location considered to be open to the public (i.e. anyone in the community has a right to go there)

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

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

reasonable belief
an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity), and in similar circumstances, to be sensible or correct

recidivism
re-offending; returning to crime after already having been convicted and sentenced

reckless
acting, or not acting, with conscious awareness of the potential harm that is likely to be suffered

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

remand
the situation where an accused is kept in custody until their criminal trial can take place

remedy
any order made by a court (or a tribunal) designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant

representative government
a political system in which the people elect members of parliament to represent them in government

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

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) that are given the power to do so by parliament (also called delegated legislation)

secure treatment order
a sanction that requires the offender to be compulsorily detained, and receive treatment, at a mental health service

self-determination
the right of a group or race of people to make decisions about their own lives according to their own view, values and

beliefs. This includes the right to self-government in matters relating to their own internal and local affairs

Senate
the upper house of the Commonwealth Parliament

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

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

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

special damages
an amount of money that one party is ordered to pay to another party to compensate for losses that are easily quantifiable (e.g. medical expenses or loss of wages)

specific deterrence
one purpose of a sanction, designed to discourage the offender from committing further offences

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

standard sentence
the sentence that should be imposed for 'middle of the range of seriousness' offending, before the judge takes into account any other relevant sentencing factors (such as the offender's personal circumstances or guilty plea). Standard sentences exist for 13 serious indictable offences (such as murder, culpable driving causing death and trafficking large quantities of unlawful drugs)

stare decisis
a Latin term meaning 'let the decision stand'. The basic principle underlying the doctrine of precedent

statute
a law made by parliament; a bill that 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

strict liability
where culpability or responsibility for committing a crime can be established without having to prove there was *mens rea* (i.e. a guilty mind)

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

supremacy of parliament
the concept that the final law-making power rests with parliament, which can repeal and amend its own statutes and pass legislation to override common law (also known as 'sovereignty of parliament')

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

T

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

theft
the act of dishonestly taking property belonging to another person (without their consent) with the intention of permanently depriving that person of it

tort
a term that literally means `wrong'; a wrong that interferes with a person's legally protected interests

trespass
a type of tort involving the interference with or intrusion upon a person's body, property or goods without the consent of that person

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)

United Nations (UN)
a major international organisation established after the Second World War to maintain international peace, security and cooperation among nations

Universal Declaration of Human Rights
an international document that outlines basic rights and fundamental freedoms to which all human beings are entitled; the declaration was adopted by the General Assembly of the United Nations in 1948

V

vicarious liability
the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

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

victimless crime
an offence that only involves the offender(s) and where no direct harm is suffered by a victim. The offence also goes against what society considers to be acceptable and can indirectly harm individuals and the wider community

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 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

vilify (vilification)
behaving in a way that encourages or provokes hatred, serious contempt or severe ridicule (teasing) of a person or group on the basis of their race or religion

volenti non fit injuria
a Latin term meaning 'to a willing person, injury is not done'. Refers to a defence in which the defendant claims that the plaintiff accepted the dangers of a known and understood risk, either expressly or by implication

W

warranty
a guarantee (or promise) provided by a business about the quality or standard of its products or services. Warranties often include actions the business will undertake, in addition to those required under consumer law, to address any faults or defects (e.g. offering a repair, replacement or refund)

white-collar crime
a criminal offence undertaken by people who work in government, in businesses or in the corporate world

will
a document that specifies how a person would like their assets to be distributed after they die, and who they would like to carry out their wishes

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Notes



In Legal Studies for VCE Units 1 & 2, you will study:

- Unit 1 The presumption of innocence
- Unit 2 Wrongs and rights.

You will look at the foundations of our legal system as well as key principles of criminal and civil law. One of the key concepts in criminal law is the age of criminal responsibility, which is the minimum age a person must be to be charged with committing a crime. This continues to be a matter of controversy in Australia, with governments facing increasing pressure from legal and human rights organisations to raise the age of criminal responsibility to 14 years.

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